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Miranda and the State Constitution: State Courts Take a Stand

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NOTES

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I. INTRODUCTION

Until the 1950s only state statutes and constitutions, as construed by state courts, protected citizens from unlawful state governmental interference with their rights and liberties.[1] During the 1950s, however, the United States Supreme Court, under the leadership of Chief Justice Earl Warren,[2] began to adopt an expansionist reading of the federal constitution. In the 1960s the Court selectively incorporated most of the provisions of the federal Bill of Rights into the fourteenth amendment's due process guarantees.[3] Thus, the Warren Court's increasingly broad view of constitutional standards and safeguards allowed Supreme Court review of executive and legislative action on the state level and, consequently, pressured state courts to apply these federal standards and safeguards to cases arising within their jurisdictions.[4]

As part of its expansionist reading of the Constitution, the Warren Court greatly broadened the scope of constitutional standards regulating law enforcement procedures and protecting the rights of criminal defendants.[5] *Miranda v. Arizona*,[6] which required state law enforcement officials to advise criminal suspects of their fifth amendment rights before subjecting them to custodial interrogation, was one of the Court's most controversial[7] criminal procedure decisions. As *Miranda* and other Warren Court decisions[8] increasingly required state courts to apply federal constitutional standards and to give criminal defendants more protection

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1. *See* Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 502 (1977); Newman, *The "Old Federalism": Protection of Individual Rights by State Courts in an Era of Federal Court Passivity*, 15 CONN. L. REV. 21, 22 (1982).
2. Earl Warren was Chief Justice of the U. S. Supreme Court from 1953 to 1969.
3. The fourteenth amendment prohibits *states* from denying an individual due process of law or equal protection of the laws. *See* Washington v. Texas, 388 U.S. 14 (1967) (recognizing right of compulsory process for obtaining witnesses); Klopfer v. North Carolina, 386 U.S. 213 (1967) (ensuring right to speedy and public trial); Parker v. Gladden, 385 U.S. 363 (1966) (granting right to trial by impartial jury); Pointer v. Texas, 380 U.S. 400 (1965) (granting right to confront witnesses); Malloy v. Hogan, 378 U.S. 1 (1964) (recognizing privilege against self-incrimination); Gideon v. Wainwright, 372 U.S. 335 (1963) (ensuring assistance of counsel); Robinson v. California, 370 U.S. 660 (1962) (prohibiting cruel and unusual punishment); Mapp v. Ohio, 367 U.S. 643 (1961) (adopting fourth amendment exclusionary rule); *see also* Swindler, *Minimum Standards of Constitutional Justice: Federal Floor and State Ceiling*, 49 MO. L. REV. 1, 4 (1984).
4. *Cf.* Brennan, *supra* note 1, at 490.
5. *See* Saltzburg, *Foreward: The Flow and Ebb of Constitutional Criminal Procedure in the Warren and Burger Courts*, 69 GEO. L.J. 151, 152 (1980).
6. 384 U.S. 436 (1966).
7. *See* Saltzburg, *supra* note 5, at 152.
8. For a list of these other decisions, see *supra* note 3.

than that provided by the state's constitution,[9] state courts considering individual liberties questions relied almost exclusively on federal law and ignored their state constitutions. Thus, the 1950s and early 1960s marked a period of dormancy for state constitutional jurisprudence.[10]

In the late 1960s a change in the composition of the United States Supreme Court[11] signalled an end to the activism of the Warren Court years. The Burger Court has played a more passive role in safeguarding the interests of criminal suspects.[12] In construing the scope of the fifth amendment's privilege against self-incrimination, Burger Court decisions have restricted the mandates of *Miranda* and have diluted substantially that decision's protection of criminal defendants. In response to federal court passivity and retrenchment in the 1970s and 1980s, some state courts are relying again on their state constitutions and are interpreting them as providing greater protection in many areas than the federal constitution.[13]

This Note examines how state courts have interpreted state constitutional guarantees of the privilege against self-incrimination independently of the Supreme Court's construction of the fifth amendment. Part II focuses on the historical and theoretical underpinnings of state constitutional law and examines state courts' renewed reliance on their state constitutions. Part III discusses the Supreme Court's interpretation of the fifth amendment in *Miranda* and its progeny. Part IV presents the states' response to Supreme Court holdings and surveys state court decisions interpreting state constitutions' self-incrimination provisions more broadly than the fifth amendment. Finally, Part V examines the potential for further growth in this area of state constitutional jurisprudence and encourages state courts to develop reasoned, independent interpretations of state self-incrimination provisions.

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9. *See* Brennan, *supra* note 1, at 493; *cf.* Pollack, *State Constitutions as Separate Sources of Fundamental Rights*, 35 RUTGERS L. REV. 707, 711 (1983) ("During [the 1950s and 1960s], state government was regarded sometimes not as part of the answer, but as part of the societal problem.").

10. *See* Comment, *Individual Rights and State Constitutional Interpretations: Putting First Things First*, 37 BAYLOR L. REV. 493, 493-94 (1985); Developments, *The Interpretation of State Constitutional Rights*, 95 HARV. L. REV. 1324, 1338-40 (1982).

11. *See infra* note 109 and accompanying text.

12. *See* Brennan, *supra* note 1, at 495-96; Newman, *supra* note 1, at 23; Comment, *supra* note 10, at 493.

13. *See* Brennan, *supra* note 1, at 495.

II. Resurgence of State Constitutional Law

A. *Historical Origins of State Law Primacy*

By 1776 most American citizens enjoyed guarantees against encroachment on their liberties by state governments because most of the original thirteen colonies had adopted constitutions with provisions protecting individual rights.[14] The framers of the federal Bill of Rights, which the states adopted in 1791, naturally relied on these state provisions as sources for their document. The federal document sought to provide citizens with protections against interference by the federal government analogous to existing state constitutional protections against interference by state governments.[15]

For the first one hundred and fifty years of our nation's existence, the origins of state constitutional provisions were of little import for federal constitutional jurisprudence. During this period the federal constitution and state constitutions operated independently in regulating the interaction between government and citizen.[16] The federal Bill of Rights protected citizens only from actions of the federal government,[17] while state constitutions limited only intrusive action by the states.[18] Because state governments affected individuals far more frequently during this period than did the federal government, state constitutions were the primary documents protecting the liberties of the people from governmental interference.[19]

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14. *See* Note, *Expanding State Constitutional Protections and the New Silver Platter: After They've Shut the Door, Can They Bar the Window?*, 8 Loy. U. Chi. L.J. 186, 196 n.60 (1976); *cf.* Developments, *supra* note 10, at 1326-27.

15. Comment, *supra* note 10, at 497; Note, *supra* note 14, at 196. This derivation of the Bill of Rights from preexisting state constitutional provisions indicates that states which adopted constitutions after 1791 and modelled their guarantees of individual liberties after the Bill of Rights also benefited from the various state constitutions drafted during the revolutionary period. *See* Brennan, *supra* note 1, at 501. For example, the individual rights provisions contained in the Illinois Constitution of 1818 reflect the wording of early state constitutions more closely than that of the Bill of Rights. Note, *supra* note 14, at 196 & n.63.

16. *Cf.* Developments, *supra* note 10, at 1327-28.

17. *See* Barron v. Mayor of Baltimore, 32 U.S. (7 Pet.) 242 (1833).

18. Brennan, *supra* note 1, at 502.

19. *See* Newman, *supra* note 1, at 22; *cf.* Swindler, *supra* note 3, at 2 (noting that during the nineteenth century, state constitutions "remained the seedbed for new ideas seeking to deal with changing national life").

B. *The Warren Court and Federal Expansion of Individual Rights*

Adoption of the fourteenth amendment[20] into the federal constitution in 1868 marked the beginning of the end of the state constitutions' primacy. The amendment allowed federal courts to review state legislative and executive actions.[21] In the first few decades following passage of the fourteenth amendment, several Supreme Court decisions[22] held that the amendment's guarantees of due process and equal protection did not incorporate any of the Bill of Rights' protections.[23] In 1925, however, the Court began to expand its construction of the fourteenth amendment and apply specific provisions of the Bill of Rights to the states.[24] During the 1950s and 1960s the Supreme Court, under Chief Justice Warren, "nationalized" federal constitutional rights by selectively incorporating most of the provisions in the Bill of Rights into the fourteenth amendment's prohibitions.[25] Federal constitutional law, therefore, became a frequent subject of consideration in state court cases for the first time.[26]

The Warren Court's activist stance regarding criminal procedure and individual liberties required state judges to apply federal law and, consequently, to restrict the exercise of state governmental power more tightly than had been required formerly by state constitutions.[27] Although state court judges remained free to inter-

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20. The fourteenth amendment provides in pertinent part: "No State shall . . . deprive any person of life, liberty, or property, without due process of law: nor deny to any person . . . the equal protection of the laws." U.S. CONST. amend XIV.

21. *Cf.* Schaefer, *Federalism and State Criminal Procedure*, 70 HARV. L. REV. 1, 3 (1956).

22. *See* O'Neil v. Vermont, 144 U.S. 323, 332 (1892); Presser v. Illinois, 116 U.S. 252, 263-68 (1886); United States v. Cruikshank, 92 U.S. 542, 552-56 (1875).

23. Brennan, *supra* note 1, at 493. In 1897, however, the Supreme Court did hold that the fourteenth amendment's due process clause required a state to compensate an individual whose property was taken for public use. Chicago B. & Q. R.R. v. Chicago, 166 U.S. 226, 241 (1897).

24. *See* Gitlow v. New York, 268 U.S. 652, 666 (1925) (holding that first amendment guarantees of freedom of speech and freedom of the press applied to states). Prior to this period, state court judges concerned themselves primarily with interpreting and applying state law; litigation of issues of federal law occurred mostly in federal courts. *See* Brennan, *supra* note 1, at 490.

25. *See* Swindler, *supra* note 3, at 4; *see also supra* note 3 and accompanying text. In addition to the federal courts' broadening interpretation of the fourteenth amendment as incorporating certain Bill of Rights protections, the importance of federal law increased because of the immense growth of the federal government beginning in the 1930s and 1940s. *See* Brennan, *supra* note 1, at 490.

26. *See* Brennan, *supra* note 1, at 490-91; *cf.* Developments, *supra* note 10, at 1340.

27. *Cf.* Pollack, *supra* note 9, at 711; Note, *supra* note 14, at 200.

pret their state constitutions independently,[28] the federal constitution's supremacy clause[29] mandated that evolving federal constitutional standards guaranteed to all citizens a minimal level of rights that state courts were required to protect under the fourteenth amendment.[30] Thus, the Warren Court's expansion of federal rights necessarily diminished those areas in which only state law governed the individual's relationship with the state.[31] By limiting the applicability of state constitutional principles, incorporation of the Bill of Rights into the fourteenth amendment tended to negate the functional independence of the individual liberties provisions in state constitutions.[32] As state court judges turned their attention from state constitutions to the federal constitution, state constitutional jurisprudence languished and federal law dominated in regulating the relationship between citizen and state.[33]

Notwithstanding the expansion of federal constitutional law, the nation's federal system of government continued to provide a framework for dual level protection of individual rights. Although Supreme Court decisions bind state courts resolving federal issues, state courts remain free to interpret their state constitutions in any way that does not conflict with federally guaranteed rights.[34] Furthermore, a state court decision is final if it is based on state law that is independent of federal law and adequate to support the decision because the Supreme Court cannot review decisions based on independent and adequate state grounds.[35] Rather, a state's authority to interpret its own laws finds its bounds only in the supremacy clause[36] and in the minimal level of rights guaranteed by the federal constitution.

During the Warren Court era, state courts addressing issues

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28. *See* Elison & NettikSimmons, *Federalism and State Constitutions: The New Doctrine of Independent and Adequate State Grounds*, 45 MONT. L. REV. 177, 178 (1984).

29. U.S. CONST. art VI, ¶ 2 provides:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof, . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

30. *See* Developments, *supra* note 10, at 1334.

31. *Id.* at 1337-38.

32. *See* Comment, *supra* note 10, at 493-94, 496.

33. *See* Developments, *supra* note 10, at 1338-40.

34. *See* Elison & NettikSimmons, *supra* note 28, at 179; Newman, *supra* note 1, at 25.

35. *See* Murdock v. City of Memphis, 87 U.S. (20 Wall) 590 (1875); Elison & NettikSimmons, *supra* note 28, at 180-93 (discussing the statutory basis and judicial development of the independent and adequate state grounds doctrine).

36. *See supra* note 29.

concerning individual liberties made little use of the independent and adequate state grounds doctrine. State courts constitutionally could not provide less protection for individual liberties than those required by the federal constitution, and most state courts had no desire to provide greater protections than those mandated by Warren Court decisions.[37] The resulting habitual application of federal law to individual liberties questions gave rise to what one judge characterized as "the pernicious notion that any practice that withstood constitutional challenge in the Supreme Court was fair game for state and local officials. The federal constitutional standard . . . became a dividing line between the forbidden and the common place."[38]

C. *Burger Court Passivity and State Court Activism*

The Warren Court era of Supreme Court activism came to an end in 1969. The addition of two Nixon appointees,[39] including Chief Justice Warren Burger, to the Bench foreshadowed a shift in the Court's vision of its judicial role and its attitude toward individual liberties. Commentators, however, disagree on the magnitude of the philosophical change that resulted from the Court's change in composition. While some commentators argue that the Burger Court has adhered to the basic principles and decisions of the Warren Court,[40] others vehemently charge that the current Supreme Court has grown disenchanted with the broad protections previously granted to individual liberties and has acted to narrow these protections substantially.[41] Few commentators, however, would disagree with charges that the Burger Court has not continued the expansion of federally guaranteed liberties initiated by the Warren Court or that the Court's holdings on the constitutionality of law enforcement practices have departed from the spirit, if not the letter, of Warren Court precedents.[42]

The Burger Court's rejection of the Warren Court's broad

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37. Elison & NettikSimmons, *supra* note 28, at 191.

38. Newman, *supra* note 1, at 25. Judge Newman sits on the United States Court of Appeals for the Second Circuit.

39. *See infra* note 109.

40. *See* Israel, *Criminal Procedure, the Burger Court, and the Legacy of the Warren Court*, 75 MICH. L. REV. 1319, 1324 (1977); Saltzhurg, *supra* note 5, at 153.

41. Elison & NettikSimmons, *supra* note 28, at 178 (declaring that the U.S. Supreme Court "is no longer the conscience of a nation"); *see also* Comment, *supra* note 10, at 493; Note, New York v. Quarles: *The Dissolution of* Miranda, 30 VILL. L. REV. 441, 441 (1985).

42. *See* Howard, *State Courts and Constitutional Rights in the Day of the Burger Court*, 62 VA. L. REV. 873, 874 (1976); Israel, *supra* note 40, at 1366.

readings of Bill of Rights guarantees in the criminal procedure context, coupled with its practice of vacating, as misinterpretations of federal precedent, state court decisions giving overbroad protections to individual liberties,[43] has caused a growing number of state courts[44] to turn to their state constitutions and give independent substance to the guarantees contained therein.[45] Thus, state courts

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43. The Burger Court also increased the number of writs it granted to state prosecutors complaining of state courts providing overbroad protection to defendants' rights. *See* Elison & NettikSimmons, *supra* note 28, at 192.

44. The majority of state courts continue either to consider only federal law in resolving constitutional claims or to interpret state constitutional guarantees of liberties as automatically identical to their federal counterparts. Note, *supra* note 14, at 195-96.

45. *See* Brennan, *supra* note 1, at 495. Scholars and judges have expressed a variety of viewpoints on the methodology of state constitutional interpretation. One commentator has identified three general approaches that courts may use in defining the relationship of state and federal constitutions. Under the "primacy" or "first things first" approach, the state court first decides, as a matter of state law, the individual liberty claim asserted. Only if the challenged activity is constitutional under state law does the court consider the federal constitution. By contrast, the "supplemental" or "interstitial" approach directs the state court to consider the constitutionality of the state's activity as a matter of federal law and then to look at the state constitution only if it finds the activity permissible under federal law. Finally, a state court may analyze relevant provisions of both state and federal constitutions whenever it considers fundamental liberties issues. *See* Pollack, *supra* note 9, at 717-18. For additional discussion of the above approaches, see Hill & Marks, *Foreward: Toward a Federalist System of Rights*, 1984 ANN. SURV. AM. L. 1, 10-11; Linde, *First Things First: Rediscovering the States' Bills of Rights*, 9 U. BALT. L. REV. 379 (1980).

Commentators disagree on what justification, if any, a state court need offer for diverging from a Supreme Court holding on a particular question. Arguably, state courts should not view United States Supreme Court holdings as presumptively valid because of the inherent institutional and functional differences between state courts and constitutions and the United States Supreme Court and Constitution. In addition, requiring a state to justify state law deviations from federal precedent may effectively stifle the growth of independent bodies of state constitutional law. *See* Williams, *In the Supreme Court's Shadow: Legitimacy of State Rejection of Supreme Court Reasoning and Result*, 35 S.C.L. REV. 353 (1984). Nonetheless, various pressures have led commentators, courts, and attorneys to develop objectively identifiable criteria to justify divergent state law interpretations. *See id.* at 356-57. Those who place a premium on federal supremacy and uniformity of law demand clear justifications from a state court forsaking those values. *See* Pollack, *supra* note 9, at 721 (asserting that South Dakota v. Neville, 459 U.S. 553 (1983), "requires [a] state court [to] carefully set forth the reasons that it believes the state constitution leads to a different result"); *cf.* Schaefer, *supra* note 21, at 6-7 (discussing the Supreme Court's advantages over state courts in the area of criminal procedure).

Charges that state judges are result-oriented, combined with fears that unjustified constitutional holdings might be overruled by constitutional amendment or that the Supreme Court might restrict its application of the independent and adequate state grounds doctrine have spurred state courts to articulate objective criteria in hopes of endowing their decisions with legitimacy. *See* Williams, *supra*, at 356-58, 385-87. Justice Handler's concurring opinion in State v. Hunt, 91 N.J. 338, 450 A.2d 952 (1982), lists the following criteria justifying a different interpretation: (1) textual differences in the constitutions; (2) legislative history showing that a broader meaning for the provision was intended; (3) state law predating a Supreme Court decision; (4) differences in the structure of federal and state constitutions;

are rediscovering their own constitutional jurisprudence.[46]

Recent state court decisions have relied on state constitutions to provide alternative grounds of decision in cases in which federal constitutional rights are asserted,[47] to create new law by resolving issues not yet conclusively resolved by the Supreme Court,[48] and to provide greater protections to individual liberties than those required by Supreme Court interpretations of the Bill of Rights.[49] Although the supremacy clause proscribes reliance on a state constitution as a way to cut back on federally guaranteed protections, the Supreme Court has recognized a state's authority to provide greater protections for the rights of its citizens.[50]

D. *Responses to State Court Activism*

The resurgence of state constitutional law in the area of fundamental liberties has generated a variety of critical responses. Some commentators laud the state courts' reassertion of their role as independent interpreters of state constitutions[51] and characterize their reliance on state constitutions as reflecting the basic principles of federalism on which our nation was founded.[52] Those scholars, judges, and attorneys who miss the expansive protections of individual liberties established by Warren Court decisions recognize state constitutional interpretation as a viable means of

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(5) a subject matter of particular state or local interest; (6) a particular state history or tradition; and (7) public attitudes in the state. *Id.* at 363-68, 450 A.2d at 965-67.

46. Commentators have dubbed the resurgence of state constitutional law "the most significant current development in our constitutional jurisprudence," Pollack, *supra* note 9, at 707 (Foreward by Justice Brennan), and "the dominant theme" in current constitutional doctrine, Swindler, *supra* note 3, at 15.

47. *See, e.g.*, State v. Campbell, 461 So. 2d 644 (La. Ct. App. 1984); State v. Munson, 126 N.H. 191, 489 A.2d 646 (1985).

48. *See, e.g.*, People v. Conte, 421 Mich. 704, 365 N.W.2d 648 (1984); People v. Gonyea, 421 Mich. 462, 365 N.W.2d 136 (1984).

49. *See, e.g.*, State v. Brackman, 178 Mont. 105, 582 P.2d 1216 (1978); Taylor v. State, 612 P.2d 851 (Wyo. 1980).

50. *See* Oregon v. Hass, 420 U.S. 714, 719 (1975) (recognizing 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") (emphasis added); Cooper v. California, 386 U.S. 58, 62 (1967).

51. *See* Brennan, *supra* note 1, at 503; Swindler, *supra* note 3, at 15; Note, *supra* note 14, at 195.

52. *See* Pollack, *supra* note 9, at 708. One judge writes: "The federal Constitution, whether construed narrowly or broadly, remains what it was always intended to be: the outer limits of permissible governmental action. But within those limits, there remain vast responsibilities for striking the appropriate balance between order and liberty." Newman, *supra* note 1, at 25.

renewing those protections.[53] Indeed, Justice William Brennan has applauded state decisions that go beyond federal requirements in safeguarding liberties.[54]

Not everyone, however, sees the growth of an independent body of state constitutional law as a positive step. Some judges and commentators claim that the development robs constitutional interpretation of consistency and uniformity[55] and argue that the regulation of law enforcement investigatory practices demands those qualities.[56] Other commentators assert that state court decisions diverging from Supreme Court holdings often are unprincipled "evasions" of Supreme Court decisions that state court judges find unpersuasive or ideologically distasteful.[57] Former Chief Justice Warren Burger's reaction to independent state interpretations stands in marked contrast to Justice Brennan's.[58] In his concurring opinion in *Florida v. Casals*,[59] Chief Justice Burger applauded an amendment to the Florida Constitution that required Florida's state courts to interpret the state constitution's search and seizure provisions as coextensive with federal fourth amendment rights.[60] Burger urged state citizens to be aware of their "power to amend state law to insure rational law enforcement."[61]

The Supreme Court's distrust of state court decisions that

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53. *See* Brennan, *supra* note 1, at 503.

54. *See* Brennan, *supra* note 1; Howard, *supra* note 42, at 874. In his dissent in Michigan v. Mosley, Justice Brennan reminded states of their ability to assume an independent role in protecting their citizens:

> In light of today's erosion of *Miranda* standards as a matter of federal constitutional law, it is appropriate to observe that no State is precluded by the decision from adhering to higher standards under state law . . . . Understandably, state courts and legislatures are, as matters of state law, increasingly according protections once provided as federal rights but now increasingly depreciated by decisions of this Court.

Michigan v. Mosley, 423 U.S. 96, 120-21 (1975) (Brennan, J., dissenting).

55. *See, e.g.*, Bice, *Anderson and the Adequate State Ground*, 45 S. CAL. L. REV. 750 (1972); Note, *State Constitutional Guarantees as Adequate State Ground: Supreme Court Review and Problems of Federalism*, 13 AM. CRIM. L. REV. 737 (1976).

56. *See* People v. Disbrow, 16 Cal. 3d 101, 119, 545 P.2d 272, 284, 127 Cal. Rptr. 360, 372 (1976) (Richardson, J., dissenting).

57. *See* Wilkes, *The New Federalism in Criminal Procedure: State Court Evasion of the Burger Court*, 62 KY. L.J. 421 (1974).

58. *See supra* note 54 and accompanying text.

59. 462 U.S. 637 (1983).

60. FLA. CONST. art. 1, § 12, as popularly amended in 1982, provides:

> This right shall be construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court. Articles or information obtained in violation of this right shall not be admissible in evidence if such articles or information would be inadmissible under decisions of the United States Supreme Court construing the 4th Amendment to the United States Constitution.

61. 462 U.S. at 639.

diverge from prior Supreme Court holdings is illustrated in the Court's 1983 decision in *Michigan v. Long*.[62] Prior to *Long*, the Burger Court, in a series of cases, had interpreted the independent and adequate state grounds doctrine restrictively so that it could review an increasing number of state court constitutional decisions.[63] In *Long*, however, the Court went beyond narrowing its construction of "independent" and established a new test for the reviewability of state court decisions. The Court held that a state court's mere reference to its state constitution no longer establishes independent and adequate state grounds if the state court also relies on federal law.[64] Instead, the Court indicated that if the independence and adequacy of the state grounds are not made clear in the state court's opinion, the Supreme Court will presume that the state court decided the case as it did because it believed that it was required to do so by federal precedent.[65] Thus, under *Long* a state court that considers federal precedent still may preclude Supreme Court review, but only by making explicit the state grounds for the decision.[66]

The *Long* decision attempts to achieve doctrinal consistency and to balance due respect for state court autonomy with the goal of uniform application of federal law.[67] Critics of *Long*, however, agree that the decision stifles the system of dual protections envisioned by the federal system.[68] Furthermore, the Court's greater willingness to review state court cases that discuss federal precedent may lead state courts, fearing review, to develop a state constitutional jurisprudence that totally ignores the reasoned body of federal constitutional law.[69]

Both a majority of the United States Supreme Court and vari-

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62. 463 U.S. 1032 (1983).

63. *See* South Dakota v. Neville, 459 U.S. 553 (1983); Delaware v. Prouse, 440 U.S. 648 (1979); Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562 (1977). *See generally* Elison & NettikSimmons, *supra* note 28, at 193-95. The Burger Court indicated that it would view a state court's reliance on federal decisions and reasoning as a sign of nonindependent state grounds. No longer could a state court escape review merely by identifying and relying on an adequate state ground. *See* Delaware v. Prouse, 440 U.S. at 652-53.

64. 463 U.S. at 1044.

65. *Id.* at 1040-41.

66. *Id.*

67. *Id.* at 1039-40.

68. *See* Collins, *Plain Statements: The Supreme Court's New Requirement*, 70 A.B.A. J., March 1984, at 92, 94.

69. *See* Hill & Marks, *supra* note 45, at 10-11; Developments, *supra* note 10, at 1342-45 (suggesting a test for reviewability that focuses on the adequacy of state grounds and the presence of countervailing federal interests).

ous commentators continue to view with suspicion a state court decision that relies on its state constitution as grounds for rejecting a Supreme Court holding. Nonetheless, the high courts of some states continue to assert their autonomy. One area of constitutional law in which state courts have developed independent interpretations is the criminal defendant's privilege against self-incrimination. Examining the Supreme Court's evolving reading of the fifth amendment over the past twenty years and the corresponding response of dissenting state courts to these readings provides an apt illustration of the broader trend toward state constitutional independence as a reaction to federal court passivity.

III. The Privilege Against Self-Incrimination—The Federal Course

A. *Life Before* Miranda

Although one commentator has characterized *Miranda*[70] as an "abrupt departure from precedent,"[71] a body of federal constitutional law regarding the inadmissibility of confessions had previously developed over the course of the twentieth century.[72] Drawing on the historical common-law exclusion of physically coerced, and hence untrustworthy, confessions, the United States Supreme Court held in 1936 that the government's physical coercion of a suspect to obtain a confession violated the due process clause of the fourteenth amendment and, therefore, that the confession was inadmissible.[73] Later decisions extended the rule to include admissions that were the involuntary result of psychological coercion.[74]

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70. Miranda v. Arizona, 384 U.S. 436 (1966).

71. Saltzburg, *supra* note 5, at 200.

72. *See generally* Sonenshein, Miranda *and the Burger Court: Trends and Countertrends*, 13 Loy. U. Chi. L.J. 405, 408-10 (1982); Casenote, *Is Michigan Out of "Focus" on* Miranda *Warnings?:* People v. Belanger, 1984 Det. C.L. Rev. 795, 799-802; Note, *supra* note 41, at 441-46.

73. Brown v. Mississippi, 297 U.S. 278 (1936). The confessions at issue in *Brown* were clearly untrustworthy. It is not altogether clear whether *Brown*'s holding would exclude physically coerced confessions bolstered by independent guarantees of trustworthiness. Note, *supra* note 41, at 443-44 & n.15. The Supreme Court discussed applying the fifth amendment to involuntary confessions in Bram v. United States, 168 U.S. 532 (1897), but later Supreme Court cases largely ignored *Bram*. Note, *supra* note 41, at 443 n.13. Of course, at the time the Court decided *Brown*, the fifth amendment privilege against self-incrimination applied only against the federal government, not against the state governments. *See* Twining v. New Jersey, 211 U.S. 78 (1908).

74. *See, e.g.*, Leyra v. Denno, 347 U.S. 556 (1954) (holding confession made to police psychiatrist posing as physician treating defendant to be inadmissible); Watts v. Indiana, 338 U.S. 49 (1949) (holding inadmissible a confession made after six days of incommunicado

By the mid-1950s federal courts were articulating two tests for excluding involuntary confessions.[75] The common-law "forced" confession exclusion deemed compelled confessions untrustworthy unless other evidence proved the confession's reliability.[76] By contrast, the "police methods" test evidenced judicial concern with the illegal methods that police used to compel confessions. This test excluded illegally compelled confessions as a form of illegally seized evidence.[77] The Court applied these tests in case-by-case determinations of the voluntariness of a confession after examining the totality of each case's circumstances.[78]

For a variety of reasons the Supreme Court experienced growing dissatisfaction with the voluntariness standard in the early 1960s. Aside from the difficulties inherent in defining "voluntary," the requirement of a case-by-case analysis created an ambiguous standard.[79] The resulting unpredictability of outcomes left police with no specific rules for interrogation practices.[80] In addition, the importance of factual determinations in applying the standard often required appellate courts to defer to trial court findings. Thus, the appellate courts left lower courts relatively free to admit confessions of questionable constitutionality.[81]

In order to combat the ambiguity of the voluntariness standard, the Supreme Court invoked a criminal defendant's sixth amendment right to counsel[82] as grounds for excluding confessions.

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confinement and interrogation).

75. *See* Schaefer, *supra* note 21, at 12-13; Casenote, *supra* note 72, at 800 n.28.

76. Schaefer, *supra* note 21, at 12.

77. *See id.* at 12-13. Justice Frankfurter's statement in Rochin v. California, 342 U.S. 165 (1952), reflects this concern: "Use of involuntary verhal confessions in State criminal trials is constitutionally obnoxious not only because of their unreliability. They are inadmissible under the Due Process Clause even though statements contained in them may be independently estahlished as true. Coerced confessions offend the community's sense of fair play and decency." *Id.* at 173.

78. *See* Note, *supra* note 41, at 445 & n.26. The Court considered such circumstances as age and intelligence of the defendant, unlawful arrest, delay in arraignment or lengthy interrogation, and deception by police. *See* Culombe v. Connecticut, 367 U.S. 568 (1961) (lengthy interrogation); Spano v. New York, 360 U.S. 315 (1959) (same); Payne v. Arkansas, 356 U.S. 560 (1958) (unlawful arrest and defendant's intelligence); Leyra v. Denno, 347 U.S. 556 (1954) (police deception); Gallegos v. Nebraska, 342 U.S. 55 (1951) (delay in arraignment); Hailey v. Ohio, 332 U.S. 596 (1948) (suspect's age).

79. *See* Note, *supra* note 41, at 445-46.

80. *See* Sonenshein, *supra* note 72, at 413-14.

81. *Id.* at 413; *cf.* Schaefer, *supra* note 21, at 14.

82. The sixth amendment provides in pertinent part that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." U.S. CONST. amend. VI.

The Court's 1964 decision in *Massiah v. United States*[83] held that a defendant has a right to the assistance of counsel during any interrogation following his indictment. The Court declared that a post-indictment confession elicited in the absence of counsel was an inadmissible violation of the defendant's sixth amendment rights.[84] *Escobedo v. Illinois*[85] extended *Massiah* by holding that the right to counsel arises as soon as a police investigation focuses on the accused and seeks to secure his confession.[86] *Escobedo*, however, failed to clarify when a suspect becomes the focus of a police investigation.[87] Therefore, the point at which the sixth amendment right to counsel arises remained unclear. In 1966 the Court shifted its consideration to the fifth amendment[88] and in *Miranda v. Arizona*[89] relied on the privilege against self-incrimination in setting forth a per se rule regarding the admissibility of confessions.

B. The Miranda *Decision*

In *Miranda* the United States Supreme Court considered the admissibility of confessions elicited from a criminal defendant during police interrogation.[90] The Court granted certiorari in the case with the express purpose of providing objective constitutional guidelines that courts and law enforcement agencies could follow.[91] Thus, the Court sought to replace the uncertainty of the voluntariness standard with a cut and dried, objective standard.[92]

The Court considered methods of police interrogation at length and found that the atmosphere and environment of custodial interrogation were designed to intimidate a suspect and make him submit to the interrogator's will.[93] The Court concluded that

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83. 377 U.S. 201 (1964).

84. *Id.* at 206.

85. 378 U.S. 478 (1964).

86. *Id.* at 492.

87. *See generally* Enker & Elsen, *Counsel for the Suspect:* Massiah v. United States *and* Escobedo v. Illinois, 49 MINN. L. REV. 47 (1964); Comment, *The Curious Confusion Surrounding* Escobedo v. Illinois, 32 U. CHI. L. REV. 560 (1965).

88. The fifth amendment to the United States Constitution provides in pertinent part: "No person shall be . . . compelled in any criminal case to be a witness against himself."

89. 384 U.S. 436 (1966).

90. *Id.* at 439.

91. *Id.* at 441-42.

92. The Court expressly rejected the totality of the circumstances test to determine voluntariness. "Assessments of the knowledge the defendant possessed, based on information as to his age, education, intelligence, or prior contact with authorities, can never be more than speculation; a warning is a clearcut fact." *Id.* at 468-69 (citations omitted).

93. *Id.* at 445-58.

no statement obtained from a defendant during custodial interrogation can be truly the product of the defendant's free choice unless he is adequately protected from the "compulsion inherent in custodial surroundings."[94] Furthermore, the Court held that the fifth amendment privilege against self-incrimination applied during the period of custodial interrogation[95] and mandated that a suspect be able to exercise his own free will in deciding whether to speak or remain silent. To combat the pressures of interrogation and to ensure that a criminal suspect has an opportunity to exercise his privilege against self-incrimination, the Court set forth procedural guidelines for informing the suspect of his rights.[96]

In establishing the procedure for warning a person in custody of his rights, the Court deemed the warning to be "an absolute prerequisite in overcoming the inherent pressures of the interrogation atmosphere."[97] The Court also held that an accused's assertion of his right to remain silent requires all interrogation to cease and that an assertion of the right to counsel should cut short any further interrogation until counsel is present.[98] If a suspect answers questions in the absence of counsel, *Miranda* imposes on the prosecution a heavy burden of proving that the accused knowingly and intelligently waived his rights.[99]

The Court held that, in the absence of other effective safeguards,[100] the warnings and waiver of rights prescribed in its opin-

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94. *Id.* at 458.

95. *Id.* at 461.

96. *Id.* at 467. The Court's opinion requires that police clearly inform a suspect, prior to interrogation, that he possesses the right to remain silent, that anything he says can and will be used against him in court, that he has the right to consult with counsel and have counsel with him during interrogation, and that, if he is indigent, a lawyer will be appointed to represent him. *Id.* at 467-73.

97. *Id.* at 468.

98. *Id.* at 473-74.

99. *Id.* at 475 (citing Escobedo v. Illinois, 378 U.S. 478, 490 n.14 (1964)).

100. The Court's discussion of alternative safeguards stated that

> [I]t is impossible for us to forsee the potential alternatives protecting the privilege which might be devised by Congress or the States in the exercise of their creative rule-making capacities. Therefore we cannot say that the Constitution necessarily requires adherence to any particular solution for the inherent compulsions of the interrogation process as it is presently conducted. Our decision in no way creates a constitutional straitjacket which will handicap sound efforts at reform, nor is it intended to have this effect. We encourage Congress and the States to continue their laudable search for increasingly effective ways of protecting the rights of the individual while promoting efficient enforcement of our criminal laws. However, unless we are shown other procedures which are at least as effective in apprising accused persons of their right of silence and in assuring a continuous opportunity to exercise it, the following safeguards must be observed.

ion are fundamental to protecting one's fifth amendment privilege against self-incrimination and that a failure to meet these requirements would result in the inadmissibility of all statements made by a defendant.[101] Thus, *Miranda* barred the prosecution from using any statement, whether inculpatory or exculpatory, obtained from a criminal defendant during custodial interrogation unless the prosecution could show it had complied with the procedural safeguards established in *Miranda*.[102]

The Supreme Court's division[103] in *Miranda* foreshadowed intense public and scholarly controversy over the decision.[104] *Miranda*'s impact lay in its discard of a case-by-case voluntariness analysis in favor of a "bright line" test of admissibility. By establishing a prophylactic rule requiring specific warnings, the Court hoped to mold police behavior.[105] By establishing the procedural safeguards as constitutional requirements, the Court made a violation of *Miranda*'s rule a violation of a fifth amendment right that, according to some commentators, gave *Miranda* a symbolic quality extending far beyond the decision's actual impact on police interrogation techniques.[106] The decision's critics, however, questioned the legitimacy of *Miranda*'s articulated historical and textual basis and predicted a severe deleterious effect on the ability of police to gather evidence.[107]

During the years following *Miranda* the Warren Court adhered to the principles it established in that decision.[108] Changes

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384 U.S. at 467; *see also id.* at 476.

101. *Id.* at 476.

102. *Id.* at 478-79.

103. *Miranda* was a five-four decision. Justices Clark, Harlan and White wrote dissenting opinions. *See id.* at 499 (Clark, J., dissenting); *id.* at 504 (Harlan, J., dissenting); *id.* at 526 (White, J., dissenting). Justices Stewart and White joined in Justice Harlan's dissent. Justices Harlan and Stewart joined in Justice White's dissent.

104. *See* Saltzburg, *supra* note 5, at 199.

105. *See id.*; Sonenshein, *supra* note 72, at 415; Note, *supra* note 41, at 447-48.

106. Israel, *supra* note 40, at 1374; *see* Sonenshein, *supra* note 72, at 415.

107. *See* 384 U.S. at 506-13, 516 (Harlan, J., dissenting). Two decades after its decision, *Miranda* continues to engender spirited debate. *See* Caplan, *Questioning* Miranda, 38 VAND. L. REV. 1417 (1985); White, *Defending* Miranda: *A Reply to Professor Caplan*, 39 VAND. L. REV. 1 (1986). For additional views, see Kamisar, *A Dissent from the* Miranda *Dissents: Some Comments on the "New" Fifth Amendment and the Old "Voluntariness" Test*, 65 MICH. L. REV. 59 (1966); *Interrogation of Criminal Defendant — Some Views on* Miranda v. Arizona, 35 FORDHAM L. REV. 169 (1966).

108. *See* Orozco v. Texas, 394 U.S. 324 (1969) (holding that a suspect is "in custody" for purposes of *Miranda* when "deprived of his freedom of action in any significant way"); Mathis v. United States, 391 U.S. 1 (1968) (declaring that *Miranda* applies to the interrogation of a suspect about an offense unrelated to the offense for which he was detained).

in the composition of the Court during the period from 1969 to 1972,[109] however, placed the continued force and longevity of *Miranda* in question. The replacement of three members of the *Miranda* majority with Nixon appointees signalled a potential change in constitutional interpretations.

C. *The Burger Court's Treatment of* Miranda.

Commentators have expressed mixed views on how far the Burger Court has retreated from the Warren Court's precedent in *Miranda.* Reactions to the Burger Court's treatment of *Miranda* range from one commentator's statement that Burger Court decisions have "misstated the meaning of *Miranda* by focusing on an unnecessary and arbitrary factual distinction" and are "diametrically opposed to the spirit of Miranda,"[110] to another's conclusion that the Court has "adhered to [*Miranda*'s] basic holding."[111] Unquestionably, however, the Burger Court quickly set clear limits on *Miranda*'s potentially far-reaching implications.

In the 1971 case of *Harris v. New York,*[112] the Court considered whether the prosecution could use a defendant's statement, made during a custodial interrogation not preceded by a warning regarding the accused's right to counsel, to impeach the defendant on the stand. The Court found that *Miranda* clearly proscribed use of the statement in the prosecution's case-in-chief, but that *Miranda* did not bar other uses of the statement.[113] Disregarding *Miranda*'s finding that all statements obtained without warnings were presumptively coerced, the Court held the incriminating statement admissible for impeachment purposes[114] because its trustworthiness satisfied traditional, pre-*Miranda* legal standards.[115]

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109. President Nixon appointed Warren Burger to the Supreme Court, as Chief Justice, in 1969 to replace Chief Justice Warren. The next year Nixon appointed Justice Blackmun to replace Justice Fortas. One commentator described the change in the composition of the Bench as follows: "Suddenly, the razor-thin majority for *Miranda* has heen transformed into a majority whicb was profoundly unsympathetic not only to *Miranda,* but also to much of the Warren Court's criminal procedure jurisprudence." Sonenshein, *supra* note 72, at 417. In 1972 President Nixon appointed Justice Rehnquist to fill the vacancy created by Justice Black's death.

110. *Id.* at 419, 429.

111. Saltzburg, *supra* note 5,at 202; *cf.* Israel, *supra* note 40, at 1375.

112. 401 U.S. 222 (1971).

113. *Id.* at 223-24.

114. *Id.* at 226.

115. *Id.* at 224. The defendant in *Harris* made no claun that his statements were involuntary or coerced. *Id.*

In refusing to exclude the incriminating statement, the Court reasoned that a rule disallowing the admission of evidence violating *Miranda* in the prosecution's case-in-chief would sufficiently deter impermissible police conduct.[116] This shift in the Court's focus, from the protection of individual liberties to the ascertainment of factual guilt, appears in Chief Justice Burger's opinion. The Chief Justice declared that "[t]he shield provided by *Miranda* cannot be perverted into a license to use perjury by way of a defense, free from the risk of confrontation with prior inconsistent utterances."[117]

Many commentators criticized *Harris* for limiting the precedential value of *Miranda*'s sweeping constitutional language to *Miranda*'s specific facts.[118] One commentator predicted that *Harris* would limit significantly the deterrent effect of *Miranda* because an incriminating statement available only for impeachment use would remain more attractive to police than no statement at all.[119] Furthermore, because an accused who took the stand would not be able to vary much from his original statement, taken in violation of *Miranda*, without suffering impeachment, applying *Harris*' holding would ensure that the prosecutor knows the content of the defense testimony in advance of trial.[120]

Burger Court decisions in the years following *Harris* generally continued a pattern of verbally reaffirming *Miranda*'s holding while limiting the decision's application and weakening its underlying assumptions.[121] The 1974 decision of *Michigan v. Tucker*[122]

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116. *Id.* at 225.

117. *Id.* at 226. Chief Justice Warren's language in *Miranda* expressed a different focus. "[T]he Constitution has prescribed the rights of the individual when confronted with the power of government when it provided in the Fifth Amendment that an individual cannot be compelled to be a witness against himself. That right cannot be abridged." 384 U.S. at 479.

118. *See* Israel, *supra* note 40, at 1378-79 & n.260; Sonenshein, *supra* note 72, at 420-21. Some commentators, however, merely deem *Harris* a reflection of the Court's emphasis on the truth-finding function of a trial. *See* Comment, *Impeachment, Use Immunity and the Perjurious Defendant*, 77 DICK. L. REV. 23, 34 (1972) (noting that "the Court is revitalizing the idea that where the impeachment is relevant and probative, it may be employed as a prosecutorial tactic when the defendant puts his credibility into issue").

119. Sonenshein, *supra* note 72, at 421.

120. *See* Israel, *supra* note 40, at 1379. For an in-depth discussion of *Harris*, see Dershowitz & Ely, Harris v. New York: *Some Anxious Observations on the Candor and Logic of the Emerging Nixon Majority*, 80 YALE L.J. 1198 (1971). In Oregon v. Hass, 420 U.S. 714 (1975), the Supreme Court extended the rationale of *Harris* to statements obtained after a suspect, having received his *Miranda* warnings, requested to consult with a lawyer.

121. *But see* Edwards v. Arizona, 451 U.S. 477 (1981) (holding that once an accused invokes his right to have counsel present during interrogation, he is not subject to further

dealt a severe blow to the constitutional nature of *Miranda*'s procedural requirements. In deciding on the admissibility of evidence given by a witness whose name the police obtained from an accused who had not received the *Miranda* warning, the Court considered whether *Miranda* rendered the evidence an inadmissible "fruit of the poisonous tree."[123] Justice Rehnquist, writing for the Court, concluded that *Miranda* did not bar the evidence.[124] Justice Rehnquist asserted that *Miranda*'s warnings are not themselves constitutionally protected rights, but instead are mere safeguards of a constitutional right. The failure to give a warning does not itself violate the fifth amendment.[125] Thus, the evidence in question was not the "fruit" of a constitutional violation. Because the Court found that the accused's statements to police were neither coerced nor involuntary under a traditional analysis[126] and that the need for all relevant evidence outweighed the deterrence value of exclusion,[127] the Court held the evidence admissible.

Unlike *Harris*, which strictly limited *Miranda* to its specific facts, *Tucker* denied the constitutional legitimacy of *Miranda*'s edict.[128] Justice Rehnquist's opinion impliedly rejected *Miranda*'s contention that the compulsion inherent in custodial interrogation makes all statements involuntary unless preceded by *Miranda* warnings. The warnings, therefore, according to *Tucker*, are not fundamental to the fifth amendment right. Instead, Justice Rehnquist looked to the voluntariness of the accused's statements and balanced the costs and benefits of exclusion, an approach antithetical to *Miranda*.[129]

In decisions addressing other implications of *Miranda*, the

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interrogation until counsel is made available); Estelle v. Smith, 451 U.S. 454 (1981) (excluding evidence from psychiatric examination of the defendant not preceded by *Miranda* warnings); Rhode Island v. Innis, 446 U.S. 291 (1980) (declaring tbat *Miranda*'s requirements come into play when a suspect in custody is subjected to express questioning or its functional equivalent); Doyle v. Ohio, 426 U.S. 610 (1976) (holding that once an accused receives *Miranda* warnings, his decision to remain silent cannot be used by the prosecution for impeachment purposes).

122. 417 U.S. 433 (1974).

123. The "fruit of the poisonous tree" doctrine excludes evidence obtained as the direct or indirect product of a constitutional violation. The exclusion encompasses both physical and verbal evidence tainted by the lawless conduct. *See* Wong Sun v. United States, 371 U.S. 471, 484-88 (1963).

124. 417 U.S. at 450.

125. *Id.* at 444.

126. *Id.* at 444-46.

127. *Id.* at 450-51.

128. Sonesheiu, *supra* note 72, at 428.

129. *See id.* at 428-29; Note, *supra* note 41, at 453.

Supreme Court continued to read *Miranda*'s language strictly and resolved ambiguities in a manner that limited the scope of the accused's fifth amendment rights. In *Michigan v. Mosley*[130] the Court considered whether, once a suspect has asserted his right to remain silent and interrogation ceases, the police may, after the passage of hours, reissue *Miranda* warnings and resume interrogation.[131] Although a reading of *Miranda* implies that police may not resume questioning,[132] the Court in *Mosley* held that *Miranda* cannot sensibly be read as requiring an absolute prohibition of indefinite duration upon further questioning.[133] Instead, as long as police "scrupulously honored"[134] the initial assertion of the right, they could later reissue warnings and resume questioning. The Court found that police met the "scrupulously honored" standard in *Mosley* and held the confession admissible under *Miranda*.[135]

Similarly, in *North Carolina v. Butler*[136] the Court refused to accept the implications of *Miranda* in determining the government's burden of proving a waiver of fifth amendment rights.[137] Although *Miranda* fails to specify the elements required to prove a waiver, the decision may be read as establishing that evidence of an express statement of waiver, followed closely by statements to police, is necessary to prove a waiver.[138] The *Butler* Court, however, found that *Miranda* established no per se rule requiring an express waiver and that less evidence could prove, in light of the circumstances, a valid waiver.[139] Butler had received *Miranda* warnings and indicated a willingness to talk to police, but refused to sign a waiver form. He then made incriminating statements.[140] The Court implied a waiver from these facts and held admissible

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130. 423 U.S. 96 (1975).

131. Police arrested the suspect in *Mosley* in connection with certain robberies and issued proper *Miranda* warnings to him. Mosley declined to answer questions about the robberies and the police terminated the interrogation. More than two hours later, a different officer repeated the *Miranda* warnings and questioned Mosley about an unrelated murder. In response to the questioning, Mosley implicated himself in the murder.

132. *See Miranda*, 348 U.S. at 474 (holding that "[i]f the individual states that he wants an attorney, the interrogation must cease until an attorney is present").

133. 423 U.S. at 102.

134. *Id.* at 104.

135. *Id.* at 106-07.

136. 441 U.S. 369 (1979).

137. *See* Sonenshein, *supra* note 72, at 432.

138. *See* 384 U.S. at 475 (recognizing that "[a]n express statement tbat the individual is willing to make a statement and does not want an attorney followed closely by a statement could constitute a waiver").

139. 441 U.S. at 373.

140. *Id.* at 370-71.

the incriminating statement made to police.[141]

The Supreme Court addressed the waiver question in a different context, but with a similar result, in *Fare v. Michael C.*[142] The issue in *Michael C.* was whether a juvenile suspect's request to speak with his probation officer before undergoing police questioning functioned as an invocation of the juvenile's fifth amendment rights.[143] The Court distinguished a suspect's request to speak with a lawyer, which under *Miranda* triggers the requirement that all interrogation cease until a lawyer is present,[144] from a suspect's request to speak with a probation officer or any other third party. The Court focused on the critical role of the attorney in the legal system[145] and rejected the idea that a juvenile's request for anyone other than his attorney, regardless of the trustworthiness or reliability of that person, would trigger the rigid *Miranda* requirements.[146] Instead, juvenile courts should consider the request as merely one factor in a totality of the circumstances determination of the waiver's validity.[147] In this case the Court found a voluntary and knowing waiver and held the juvenile's incriminating statements admissible.[148]

In contrast to its refusal in *Michael C.* to recognize an invocation of fifth amendment rights, the Court in *Jenkins v. Anderson*[149] limited the protections of defendants who exercised their right to remain silent.[150] The Court had previously held that a defendant's decision to remain silent after receiving *Miranda* warnings could not be used against the defendant in court.[151] In *Jenkins*, however, the Court distinguished the situation in which a defendant remains silent before arrest and the issuing of *Miranda* warnings. Because the government had not induced the accused's

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141. *Id.* at 376.

142. 442 U.S. 707 (1979).

143. The Supreme Court held in 1967 that when a juvenile proceeding is the functional equivalent of an adult criminal proceeding, the juvenile defendant should receive the same constitutional safeguards as a criminal defendant. *In re* Gault, 387 U.S. 1 (1967).

144. 384 U.S. at 774. *But see supra* text accompanying notes 136-141.

145. 442 U.S. at 719-22.

146. *Id.* at 723.

147. *Id.* at 724-25.

148. *Id.* at 727.

149. 447 U.S. 231 (1980).

150. *Cf.* Saltzburg, *supra* note 5, at 203-04.

151. Doyle v. Ohio, 426 U.S. 610 (1976). *Doyle*'s holding prevents a prosecutor from impeaching a defendant's exculpatory testimony by referring to the defendant's postarrest silence. The Court relied on *Doyle* in its 1986 decision in Wainwright v. Greenfield, 106 S. Ct. 634 (1986), to hold that the use of a defendant's postarrest, postwarnings silence as evidence of sanity violates due process.

silence by warning him of his rights, the Court reasoned that allowing the prosecution to impeach the accused with his prearrest silence would not be unfair.[152] The 1982 decision in *Fletcher v. Weir*[153] extended the rule in *Jenkins* to cover the prosecution's references to an accused's silence during the period after his arrest but before he received *Miranda* warnings.[154]

D. *Recent Decisions Interpreting* Miranda

The tendency of the Burger Court to limit *Miranda* and deny its constitutional basis emerged again in two recent decisions. In *New York v. Quarles*[155] the Court created a "public safety" exception to *Miranda*'s requirements. Focusing on the potential cost of a suspect's silence induced by *Miranda* warnings in cases in which the public safety is at risk,[156] the Court held that police "reasonably prompted by concern for public safety" could question an unwarned subject.[157]

In *Quarles* the Court balanced the police officer's need for answers[158] against the suspect's need for *Miranda* protections. Upon finding the police officer's needs to be greater, the Court admitted the incriminating statement of the unwarned defendant.[159] The *Quarles* holding allowed a prosecutor, for the first time since *Miranda*, to use in his case-in-chief a statement obtained from a criminal defendant in blatant violation of the *Miranda* requirements.[160] Some commentators have applauded *Quarles* as adopting

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152. 447 U.S. at 239-40.

153. 455 U.S. 603 (1982).

154. *Id.* at 606-07.

155. 104 S. Ct. 2626 (1984).

156. *Id.* at 2632.

157. *Id.* Justice O'Connor points out in her dissent that *Miranda* does not hold that police cannot ask questions necessary to secure the public safety. Instead, *Miranda* merely mandates that answers obtained pursuant to unwarned questioning are not admissible against a criminal defendant. *Id.* at 2636 (O'Connor, J., dissenting).

158. In *Quarles*, police apprehended a rape suspect, known to be armed, in a supermarket at 12:30 a.m. An officer chased the suspect to the rear of the store and ordered him to stop and place his hands over his head. By this time more than three other officers were on the scene. The officer frisked the suspect, but found no gun. After handcuffing the suspect, the officer asked him for the location of the gun and the suspect directed the police to some empty cartons where the police found the gun. Only tben did the police read the suspect his *Miranda* rights. *Id.* at 2629-30. According to the Court, the threat to public safety created by the rape suspect was the possibility that the suspect discarded his gun in the supermarket. The Court suggested that if the police did not locate tbe gun, an accomplice might use it or an employee or customer might come upon it later. *Id.* at 2632.

159. *Id.* at 2632-33.

160. *See* Note, *supra* note 41, at 458.

a common sense approach to the realities of law enforcement;[161] others have criticized the Court for failing to define the parameters of the public safety exception[162] and for leaving law enforcement officials with little guidance as to the circumstances in which they may disregard *Miranda*.[163]

While *Quarles* carved out an ambiguous exception of questionable necessity from *Miranda*'s rule of exclusion, *Oregon v. Elstad*[164] completed the task, begun in *Michigan v. Tucker*,[165] of disassociating *Miranda* warnings from constitutional rights. In *Elstad* the Court addressed the admissibility of a confession that was obtained in conformity with *Miranda*, but obtained after the accused had made a prior confession without being warned of his rights.[166] The Court, while recoguizing an unwarned statement as presumptively coerced, reasoned that the presumption "does not require that the statements or their fruits be disregarded as inherently tainted."[167] Instead, the Court again resurrected the voluntariness test to determine the admissibility of unwarned statements given in situations not specifically covered by *Miranda*.[168] The Court apparently considered complete the divorce of *Miranda* warnings from constitutional status: "If errors are made by law enforcement officers in administering the prophylactic *Miranda* pro-

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161. *See* Comment, New York v. Quarles: *The "Public Safety" Exception to* Miranda, 19 U. RICH. L. REV. 193, 193 (1984) (quoting Rogers, *Criminal Law Decisions of the 1983-84 Term: The Court Reaches Out to Adopt a "Common Sense" Approach,* 14 SUP. CT. RESEARCHER 115, 122 (1984)) (arguing that *Quarles* is "a legitimate effort . . . to reconcile the realities of effective law enforcement with the often hypertechnical rules of criminal justice").

162. The facts in *Quarles* itself provide an apt illustration of the unpredictability of a court's application of the public safety exception. In deciding the case, the New York Court of Appeals found "no exigent circumstances posing a threat to public safety." The United States Supreme Court reached the opposite conclusion on the same facts. *See* Note, *supra* note 41, at 459-60.

163. *Id.* at 458-59. This commentator notes that because *Quarles* may induce police to dispense with *Miranda* warnings in cases that a court might find outside the bounds of the public safety exception, the decision may, in some instances, hinder police attempts to obtain admissible evidence. *See also* 104 S. Ct. at 2636 (O'Connor, J., dissenting).

164. 105 S. Ct. 1285 (1985).

165. 417 U.S. 433 (1974). *See supra* text accompanying notes 121-29.

166. In *Elstad* police questioned an 18-year-old suspect at his home in connection with a robbery. The suspect implicated himself in the robbery before receiving any *Miranda* warnings. The police then took Elstad to the sheriff's headquarters and read him his *Miranda* rights for the first time. Elstad consented to speak with the officers and made a full confession. 105 S. Ct. at 1289. An especially troubling aspect of *Elstad* lies in the fact that the defendant did not know, when he confessed for the second time, that his first confession could not be used against him. *Id.* at 1297.

167. *Id.* at 1292.

168. *Id.* at 1293.

cedures, they should not breed the same irremediable consequences as police infringement of the Fifth Amendment itself."[169]

In *Moran v. Burbine*,[170] the Supreme Court's most recent decision delineating the scope of *Miranda*, the majority opinion reiterated *Elstad*'s conclusion that *Miranda* warnings are not themselves constitutionally protected rights.[171] In *Moran* the Court held that neither *Miranda* nor the sixth amendment requires police to inform a suspect of an attorney's attempts to consult with him and, therefore, that the police's failure to so inform the suspect did not render invalid his waiver of *Miranda* rights.[172] The Court characterized its decision as protecting "the ease and clarity of *Miranda*'s application"[173] and balancing the competing interests of the state, with its duty to convict criminals, and the individual suspect, with his right to be free from state-sanctioned coercion.[174]

As the preceding survey of fifth amendment self-incrimination cases illustrates, the Supreme Court's approach in the past fifteen years has displayed a definite tilt toward loosening some of the constitutional ropes with which the Warren Court's *Miranda* decision bound law enforcement officials. While the Burger Court has not ignored altogether the protections due a criminal defendant's fifth amendment rights,[175] one certainly could describe the Court's role in protecting individual rights as passive when compared to the Warren Court's activist stance.[176]

Commentators have advanced various reasons for the Burger Court's retrenchment. The political conservatism of the Nixon ap-

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169. *Id.*

170. 106 S. Ct. 1135 (1986).

171. *Id.* at 1143. The Court cited New York v. Quarles, 467 U.S. 649 (1984), and Michigan v. Tucker, 417 U.S. 433 (1974), for this proposition, which the Court deemed "well established."

172. 106 S. Ct. at 1142-43, 1146.

173. *Id.* at 1143.

174. *Id.* at 1144.

175. *See* Israel, *supra* note 40, at 1324; Saltzburg, *supra* note 5, at 202.

176. As one commentator put it, the Burger Court "seems content simply to provide a federal safety net to be used to catch only the most serious infringements upon individual rights." Comment, *supra* note 10, at 493.

The Rehnquist Court currently faces an opportunity to determine the stringency of *Miranda*'s requirements in the context of a defendant's invocation of the right to counsel. Connecticut v. Barrett, 197 Conn. 50, 495 A.2d 1044, *cert. granted*, 54 U.S.L.W. 3761 (May 19, 1986), has been appealed to the Supreme Court for a determination of what *Miranda* requires when an accused's reference to an attorney is equivocal. *See* Note, *The Right to Counsel During Custodial Interrogation: Equivocal References to an Attorney—Determining What Statements or Conduct Should Constitute an Accused's Invocation of the Right to Counsel*, 39 VAND. L. REV. 1159 (1986).

pointees to the Bench and the increasing popular demands for law and order are obvious causes for the change in attitude.[177] Less obvious, but perhaps more helpful in understanding the Court's decision in a particular case, are the pressures placed on the Burger Court, or any appellate court for that matter, when asked to overturn a criminal conviction because of a constitutionally prohibited procedural error.[178] When a defendant's factual guilt has been established, the reviewing court's inclination is to stretch or manipulate constitutional principles and precedent to uphold the conviction. The result is usually poorly reasoned opinions and "precedents that uphold police activity at the outer margin of permissibility."[179] Whatever the reasons for the Burger Court's retreat from *Miranda*'s requirements and principles and for the Court's narrow interpretation of the scope of the fifth amendment's privilege against self-incrimination, some state courts have viewed the Court's retreat as a call to carry *Miranda*'s torch on their own.

IV. The States' Responses

Over the past ten years a small but growing number of state courts[180] have given independent substance to their state constitutions' self-incrimination provisions.[181] Some of these cases have

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177. *See* Casenote, *supra* note 72, at 820-21.

178. *See* Saltzburg, *supra* note 5, at 154-55.

179. *Id.*

180. Despite a movement toward independent interpretations of state constitutional self-incrimination provisions, a majority of state courts continue to follow the Supreme Court's fifth amendment holdings. *See* Developments, *supra* note 10, at 1370. Some state courts do not even consider their state constitution when deciding self-incrimination issues, but instead rely solely on federal law for guidance. *See, e.g.*, People v. Walker, 487 N.Y.S.2d 613, 110 A.D.2d 730 (N.Y. App. Div. 1985); Commonwealth v. Ware, 446 Pa. 52, 284 A.2d 700 (1971). Other state courts may recognize their state constitution's self-incrimination clause, but assert that its substantive content is coextensive with the fifth amendment's guarantees as interpreted by the Supreme Court. *See, e.g.*, Newman v. Stinston, 489 S.W.2d 826 (Ky. 1972); Richardson v. State, 285 Md. 261, 401 A.2d 1021 (1979); State v. Smith, 70 Or. App. 675, 691 P.2d 484 (1984); State v. Wright, 691 S.W.2d 564 (Tenn. Crim. App. 1985). A third group of state court decisions cite the self-incrimination provision of both the state and federal constitution, but never indicate whether their interpretation of the state provision is independent of federal constitutional law. *See, e.g.*, State v. Campbell, 461 So. 2d 644 (La. App. 1984); State v. Munson, 489 A.2d 646 (N.H. 1985).

181. The state courts that to date have interpreted their state constitutions' self-incrimination provisions independently of the Supreme Court's fifth amendment holdings include Alaska, California, Georgia, Hawaii, Louisiana, Massachusetts, Michigan, New Hampshire, Pennsylvania, Vermont, and Wyoming. *See* Scott v. State, 519 P.2d 774 (Alaska 1974); *In re* Misener, 38 Cal. 3d 543, 698 P.2d 637, 213 Cal. Rptr. 569 (1985); People v. Barrios, 166 Cal. App. 3d 732, 212 Cal. Rptr. 644 (1985); People v. Pettingill, 21 Cal. 3d 231, 578 P.2d 108, 145 Cal. Rptr. 861 (1978); Allen v. Superior Court, 18 Cal. 3d 520, 557 P.2d 65,

held that the state provision provides more extensive protections than the fifth amendment.[182] This part of the Note will begin by examining state court decisions that have extended protections beyond those defined in Burger Court decisions interpreting *Miranda.* This part also will examine state court decisions relying on state constitutional grounds to decide issues relating to the scope of the privilege against self-incrimination.

A. *Rejection of* Harris v. New York

Burger Court decisions restricting the scope and strength of *Miranda's* holding have triggered many of the expansive, independent interpretations of state constitutional law.[183] For example, state courts, in several of the early decisions giving state self-incrimination provisions separate interpretations, rejected the Burger Court's first decision limiting *Miranda, Harris v. New York.*[184] In the same year that the *Harris* court held permissible the prosecution's impeachment use of a statement obtained in violation of *Miranda,* the Hawaii Supreme Court relied on Hawaii's constitution to reach the opposite conclusion in *State v. Santiago.*[185] After discussing *Miranda* and *Harris* and after quoting extensively from Justice Brennan's dissent in *Harris,* the Hawaii court noted its impotence to give the fifth amendment of the United States Constitution a different interpretation from that espoused by the Supreme Court.[186] The Hawaii court, however, did assert its position as "the final arbiter of the meaning of the provisions of the

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134 Cal. Rptr. 774 (1976); People v. Disbrow, 16 Cal. 3d 101, 545 P.2d 272, 127 Cal. Rptr. 360 (1976); State v. Armstead, 152 Ga. App. 56, 262 S.E.2d 233 (1979); State v. Miyaski, 62 Hawaii 269, 614 P.2d 915 (1980); State v. Santiago, 53 Hawaii 254, 492 P.2d 657 (1971); State *in re* Dino, 359 So. 2d 586 (La.), *cert. denied,* 439 U.S. 1047 (1978); Attorney Gen. v. Colleton, 387 Mass. 790, 444 N.E.2d 915 (1982); People v. Conte, 421 Mich. 704, 365 N.W.2d 648 (1984); State v. Benoit, 490 A.2d 295 (N.H. 1985); Commonwealth v. Bussey, 486 Pa. 221, 404 A.2d 1309 (1979); Commonwealth v. Triplett, 462 Pa. 244, 341 A.2d 62 (1975); State v. Badger, 141 Vt. 430, 450 A.2d 336 (1982); *In re* E.T.C., 141 Vt. 375, 449 A.2d 937 (1982); Westmark v. State, 693 P.2d 220 (Wyo. 1984). Courts in these states, however, may not interpret the self-incrimination provisions independently in each case raising self-incrimination issues. *See supra* note 180.

182. For a discussion of state courts' approaches toward and justifications for independent interpretations, see *supra* note 45.

183. *See* Michigan v. Mosley, 423 U.S. 96, 121 (1975) (Brennan, J., dissenting) (noting that "state courts and legislatures are, as matters of state law, increasingly according protections once provided as federal rights but now increasingly depreciated by decisions of this Court").

184. 401 U.S. 222 (1971); *see supra* notes 112-20 and accompanying text.

185. 53 Hawaii 254, 492 P.2d 657 (1971) (relying on HAWAII CONST. art. I, § 8).

186. *Id.* at 265, 492 P.2d at 664.

Hawaii Constitution."[187] The court also noted the ability of the state constitution's drafters to fashion "greater protections for criminal defendants than those given by the United States Constitution."[188] After quoting the self-incrimination clause in the Hawaii Constitution,[189] the court held that *Miranda*'s safeguards had an independent source in Hawaii's constitution and that unless those safeguards were followed, the prosecution could use an accused's statements neither in its case-in-chief nor for impeachment purposes. The court's articulated reasons for its decision were to encourage police to give *Miranda* warnings and to preserve the court's judicial integrity.[190] The court concluded that the interest in protecting an individual's privilege not to incriminate himself outweighed society's interest in convicting and punishing all criminals.[191]

Following the lead of *Santiago*, the high courts of Pennsylvania and California also held that their state constitutions' self-incrimination provisions prohibited the prosecution's impeachment use of statements violating *Miranda*.[192] In *Commonwealth v. Triplett*[193] the Pennsylvania Supreme Court issued an abbreviated opinion refusing to apply *Harris* as Pennsylvania law. The court based its decision on the state constitution.[194] In contrast to both *Santiago* and *Triplett*, neither of which cited authoritative state case law to support their state constitutional interpretations, the California court's opinion in *People v. Disbrow*[195] analyzed Califor-

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187. *Id.*

188. *Id.*

189. Hawaii's constitutional self-incrimination provision is textually identical to the fifth amendment of the federal constitution.

190. 53 Hawaii at 266, 492 P.2d at 664. The United States Supreme Court in Elkins v. United States, 364 U.S. 206 (1960), quoted Justice Brandeis in articulating the "judicial integrity" rationale for excluding evidence obtained in violation of a constitutional right: " 'To declare that in the administration of the criminal law the end justifies the means—to declare that the Government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution.' " *Id.* at 222-23 (quoting Olmstead v. United States, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting)).

191. 53 Hawaii at 266-67, 492 P.2d at 664-65.

192. Similarly, the Texas Court of Criminal Appeals held in 1973 that a provision of Texas' Code of Criminal Procedure made *Harris* inapplicable as a matter of state law. Butler v. State, 493 S.W.2d 190 (Tex. Crim. App. 1973).

193. 462 Pa. 244, 341 A.2d 62 (1975).

194. *Id.* at 249, 341 A.2d at 64. The Pennsylvania court merely noted *Harris*' holding and quoted from the concurring opinion in a 1973 Pennsylvania case before concluding: "Lastly, we must point out that our prohibition against the use of constitutionally infirm statements to impeach the credibility of a criminal defendant testifying in his own behalf is premised upon Pennsylvania Constitution, Article I, Section 9, P.S."

195. 16 Cal. 3d 101, 545 P.2d 272, 127 Cal. Rptr. 360 (1976).

nia precedent as a basis for rejecting *Harris*. *Disbrow* further differed from *Santiago* and *Triplett*, both of which were cases of first impression, because it overruled a prior California holding[196] that had adopted *Harris* as California law.

By overruling the adoption of *Harris* in *People v. Nudd*,[197] the California court rejected, as a matter of state law, the authority cited to support *Harris*.[198] The court focused on California courts' interpretation of *Miranda* and found that *Miranda* had established a single, clearcut standard for determining the voluntariness, and hence the admissibility, of a criminal defendant's confession.[199] *Harris* and *Nudd*, by contrast, represented a return to the old, ambiguous voluntariness test.[200] In addition, the court objected to *Harris* and *Nudd* on several policy grounds. The court's chief concern was the danger that a jury would view impeachment evidence as substantive evidence of guilt, a danger that might compel defendants to choose not to testify on their own behalf.[201] The court also relied on the deterrence and judicial integrity arguments articulated by the Hawaii court in *Santiago*.[202] Following this extensive analysis, the court held that the California Constitution proscribed the prosecution's impeachment use of any statement obtained in violation of *Miranda* and its California progeny.[203] The decision in *Disbrow* illustrates both the independent nature of the California Constitution and the California court's intent to interpret the state constitution and define the rights of California citizens to reflect exclusively state policies.[204]

196. People v. Nudd, 12 Cal. 3d 204, 524 P.2d 844, 115 Cal. Rptr. 372 (1974).

197. *Id.*

198. 16 Cal. 3d at 109-10, 524 P.2d at 277, 127 Cal. Rptr. at 365. The California court recognized that, as a matter of federal law, it could not rely on its own interpretation of federal decisions. The court looked to federal precedent only to determine its persuasiveness for interpreting California cases as a matter of state law. *Id.* at n.9.

199. *Id.* at 111, 545 P.2d at 278, 127 Cal. Rptr. at 366.

200. *Id.*

201. *Id.* at 112, 545 P.2d at 279, 127 Cal. Rptr. at 367. The court concluded that forcing the accused to make such a choice was "certainly not what *Miranda* envisaged."

202. *Id.* at 113, 545 P.2d at 279-80, 127 Cal. Rptr. at 367-68; *see supra* note 190 and accompanying text.

203. 16 Cal. 3d at 113, 545 P.2d at 280, 127 Cal. Rptr. at 268. Thus, the court overruled *Nudd* and rejected *Harris* as persuasive authority in California.

204. For further discussion of *Disbrow*, see 12 TULSA L.J. 412 (1976); 45 U. CIN. L. REV. 724 (1976).

The continued viability of the *Disbrow* court's interpretation of the California constitution is apparent in the 1985 California Court of Appeals decision in People v. Barrios, 166 Cal. App. 3d 732, 212 Cal. Rptr. 644 (1985). In *Barrios* the prosecution argued that the adoption of a constitutional provision ("Proposition 8"), CAL. CONST. art. I, § 28(d), which

B. Admissibility of Confessions in California and Vermont

The California Supreme Court also has diverged from the United States Supreme Court's holding in *Michigan v. Mosley*.[205] In *People v. Pettingill*[206] the California court addressed the admissibility of a confession obtained during an interrogation that police initiated after the defendant twice had refused to waive his privilege against self-incrimination.[207] The court discussed a line of California cases[208] that relied on *Miranda* and held that when police interrogate suspects who have refused to waive their *Miranda* rights, any resulting confessions are inadmissible. While recognizing that *Mosley* repudiated the California interpretation of *Miranda*, the court asserted that respect for the independence of the California Constitution forbade it to abandon settled applications of the state constitution every time the United States Supreme Court announces changes in its interpretation of the federal constitution.[209] Upon concluding that *Mosley*'s rule provided less

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permitted the admission in a criminal proceeding of all relevant evidence not excluded by a statutory evidentiary rule, made *Harris*' rule applicable in California. Tbe court, however, focused on § 940 of California's Evidence Code, whicb provides as follows: "To the extent that such privilege exists under the Constitution of the United States or the State of California, a person has a privilege to refuse to disclose any matter that may tend to incriminate him." The *Barrios* court concluded that § 940 encompases California precedent on the scope of the evidentiary rule dealing with the privilege against self-incrimination, 166 Cal. App. 3d at 743, 212 Cal. Rprt. at 650. Thus, tbe *Disbrow* holding stands undisturbed by the adoption of Proposition 8.

205. 423 U.S. 96 (1975). *See supra* notes 130-35 and accompanying text.

206. 21 Cal. 3d 231, 578 P.2d 108, 145 Cal. Rptr. 861 (1978).

207. The defendant in *Pettingill* was charged with four counts of burglary. During two separate attempts at questioning by police, the defendant claimed his rigbt to remain silent. On his third day in custody, a police detective informed the defendant that his accomplices in the burglary had confessed and implicated him. The detective then read Pettingill his *Miranda* rights and asked him if he wanted to talk. Pettingill's response of "I guess so, yeah," was taken by the detective as a valid waiver of the defendant's privilege against self-incrimination. *Id.* at 248, 578 P.2d at 118, 145 Cal. Rptr. at 871.

208. People v. Burton, 6 Cal. 3d 375, 491 P.2d 793, 99 Cal. Rptr. 1 (1971); People v. Randall, 1 Cal. 3d 948, 464 P.2d 114, 83 Cal. Rptr. 658 (1970); People v. Ireland, 70 Cal. 2d 522, 450 P.2d 580, 75 Cal. Rptr. 188 (1969); People v. Fioritto, 68 Cal. 2d 714, 441 P.2d 625, 68 Cal. Rptr. 817 (1968).

209. "Indeed our Constitution expressly declares that 'Rigbts guaranteed by this Constitution are not dependent on those guaranteed by the United States Constitution.'" 21 Cal. 3d at 248, 578 P.2d at 118, 145 Cal. Rptr. at 871 (citing CAL. CONST. art I, § 24). The California court further elaborated on the authority and role of United States Supreme Court decisions in state constitutional interpretation:

> In such constitutional adjudication, our first referent is California law and the full panoply of rights Californians have come to expect as their due. Accordingly, decisions of tbe United States Supreme Court defining fundamental civil rights are persuasive authority to be afforded respectful consideration, but are to be followed by California courts only when they provide no less individual protection than is guaranteed by Cali-

protection to California citizens than did the line of California cases culminating in *Disbrow*, the court refused to incorporate *Mosley* into California's constitutional law.[210]

The Vermont Supreme Court, in a 1982 case, analyzed its state constitution and the federal constitution separately in interpreting the implications of *Miranda*. *State v. Badger*[211] concerned the admissibility of a confession following *Miranda* warnings when police had obtained a prior confession from the accused in violation of *Miranda*. The Vermont court's holding under both constitutions gives the accused more protection than does the United States Supreme Court's holding on similar facts three years later.[212] The Vermont court held that because "[e]vidence obtained in violation of the Vermont constitution, or as a result of a violation, cannot be admitted at trial as a matter of state law," the involuntariness of the first confession "tainted" the second confession and rendered it inadmissible.[213] The court reviewed the history of Vermont law on the exclusion of illegally obtained evidence and its fruits and reached the conclusion that all such evidence must be suppressed.[214] By contrast, the United States Supreme Court in *Oregon v. Elstad*[215] found that neither statements obtained in violation of *Miranda* nor their fruits need be considered "inherently tainted" and admitted them for impeachment purposes.[216]

> fornia law . . . . The question is not . . . whether the *Mosley* test "adequately protects" the rights of California citizens, hut whether it provides *less* protection than has been guaranteed by the California Constitution [in California precedent].

Id. at 248, 578 P.2d at 118-19, 145 Cal. Rptr. at 871-72.

210. *Id.* at 249-52, 578 P.2d at 119-21, 145 Cal. Rptr. at 872-74.

211. 141 Vt. 430, 450 A.2d 336 (1982). The court's holding in *Badger* relied on VT. CONST. ch. I, art. 10. The defendant was a sixteen-year-old boy charged with second degree murder. On the evening of the murder police, without issuing *Miranda* warnings, interrogated the defendant intensely, in the presence of his father, for 50 minutes before the defendant confessed. After the defendant confessed, an officer read the defendant his rights, and hours later the defendant signed a waiver of his rights before confessing again.

212. *See* Oregon v. Elstad, 105 S. Ct. 1285 (1985).

213. 141 Vt. at 452-53, 450 A.2d at 349.

214. 141 Vt. at 451-53, 450 A.2d at 348-49. The Vermont court noted that one of its reasons for reviewing the defendant's rights under the Vermont Constitution was to

> yield adequate and independent state grounds to support our judgment, thereby giving a final disposition to some of the claims at issue in this appeal. If our state constitution is to mean anything, it must be enforced where it is the only law capable of providing a final answer to a claim, and a party . . . has invoked its protections.

Id. at 449, 450 A.2d at 347.

215. 105 S. Ct. 1285 (1985). *See supra* notes 164-69 and accompanying text.

216. *Id.* at 1292-93. Justice O'Connor's opinion in *Elstad* did distinguish, however, between second confessions that follow an initial unwarned statement obtained by "overtly

C. *Waiver Issues and Juveniles' Rights*

State courts also have diverged from Supreme Court holdings on waiver issues[217] in both the adult and juvenile context. In *Commonwealth v. Bussey*[218] a plurality of the Pennsylvania Supreme Court rejected the holding of *North Carolina v. Butler*[219] and held that the Pennsylvania Constitution[220] requires an explicit waiver of rights by a suspect in custody before his subsequent statements will be admissible into evidence. The Pennsylvania court reasoned that the requirement of an explicit waiver, in contrast to *Butler*'s holding, will provide certainty in identifying valid waivers and, thus, prevent litigation on the issue. Additionally, requiring an explicit waiver will "impress on an accused the importance of his decision" without placing any significant burden on police.[221] Thus, in *Commonwealth v. Bussey* a state's policy interests again shape state constitutional interpretation.

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or inherently coercive methods" and those that follow the "disclosure of a 'guilty secret' freely given in response to an unwarned but noncoercive question." Justice O'Connor placed the confession at question in *Badger* in the former category. *Id.* at 1295 & n.3. This distinction, however, implicitly rejects *Miranda*'s assertion that all custodial interrogation not proceeded by warnings is inherently coercive.

217. An issue related to waiver is the standard of proof that courts use to determine the voluntariness of a waiver. The Supreme Court held in Lego v. Twomey, 404 U.S. 477 (1972), that a court may use the preponderance-of-the-evidence standard, a relatively light burden of proof, in determining the voluntariness issue. In 1980 the Louisiana Supreme Court relied on Louisiana's constitutional self-incrimination provision to hold that voluntariness must be proved beyond a reasonable doubt. State v. Vernon, 385 So. 2d 200, 204 (La. 1980) (relying on LA. CONST. art. I, § 13). Other state courts have adopted the beyond-a-reasonable-doubt standard on evidentiary grounds. *See* Developments, *supra* note 10, at 1374 n.42. In a related vein, the Supreme Court of Alaska held in Stephan v. State, 711 P.2d 1156 (Alaska 1985), that the Alaska Constitution's due process clause requires electronic recording of all suspect interrogations conducted in a place of detention. The court characterized such recordings as "reasonable and necessary safeguard[s], essential to the adequate protection of the accused's right to counsel, his right against self-incrimination, and, ultimately, his right to a fair trial." *Id.* at 1159-60 (relying on ALASKA CONST. art. I, § 7).

218. 486 Pa. 221, 404 A.2d 1309 (1979).

219. 441 U.S. 369 (1979). *See supra* notes 136-41 and accompanying text.

220. The court did not specify which provision of the Pennsylvania Constitution compelled its holding, but presumably the court based its decision on the self-incrimination clause in article I, § 9.

221. 486 Pa. at 231, 404 A.2d at 1314-15. Police arrested the defendant in *Bussey* in connection with a murder and advised him of his rights as required by *Miranda*. Bussey, however, did not specifically acknowledge that he understood his rights and did not explicitly waive his rights. Fifteen minutes after the arrest, Bussey responded to questioning at the station house and implicated himself in the murder. For further discussion of *Commonwealth v. Bussey*, see generally Recent Development, *Criminal Law—Waiver—Pennsylvania Constitution Requires an Explicit Waiver of* Miranda *Rights:* Commonwealth v. Bussey, 26 VILL. L. REV. 205 (1980), which argues that the *Bussey* standard will provide neither greater certainty nor judicial convenience.

In the area of juvenile waivers,[222] the Louisiana Supreme Court interpreted the state's constitution to require special protections for juvenile suspects; these special protections were required even before the United States Supreme Court ever addressed the requirements for valid juvenile waivers in *Fare v. Michael C.*[223] In *State in re Dino*[224] the Louisiana court announced that the framers of the Louisiana Constitution, in adopting the state's constitutional self-incrimination provision,[225] "intended to adopt the *Miranda* edicts full-blown and unfettered . . . . in fact, there was an intention . . . to go beyond *Miranda* and to require more of the State."[226] After reflecting on Louisiana's policy of protecting minors from the consequences of their immaturity, the court found that "the concepts of fundamental fairness embodied in the Declaration of Rights of our constitution require that juveniles not be permitted to waive constitutional rights on their own."[227] Thus, the Louisiana court rejected the totality of the circumstances test that the United States Supreme Court later adopted in *Michael C.* Instead, Louisiana prosecutors must show that the juvenile actually consulted with an attorney or an interested and informed third party before waiving his right to counsel and privilege against self-incrimination.[228] The Louisiana court concluded that imposing an absolute, objective standard would further the goals of *Miranda* by saving courts from the "morass of speculation" that accompanies the totality of the circumstances test.[229]

222. For a discussion of the various standards of juvenile waiver, see generally Seman, *A Juvenile's Waiver of the Privilege Against Self-Incrimination—A Federal and State Comparison*, 10 AM. J. CRIM. L. 27 (1982).

223. 442 U.S. 707 (1979). *See supra* notes 142-48 and accompanying text.

224. 359 So. 2d 586 (La.), *cert. denied*, 439 U.S. 1047 (1978).

225. LA. CONST. art. I, § 13. This provision is part of the Louisiana Constitution adopted in 1974.

226. 359 So. 2d at 590.

227. *Id.* at 594.

228. *Id.* The court's analysis relied in part on § 3.2 of the IJA-ABA JUVENILE JUSTICE STANDARDS PROJECT, STANDARDS RELATING TO POLICE HANDLING OF JUVENILE PROBLEMS (1977), which states: "For some investigative procedures, greater constitutional safeguards are needed because of the vulnerability of juveniles. Juveniles should not be permitted to waive constitutional rights on their own." Rule 25 of the MODEL RULES FOR JUVENILE COURTS prepared by the COUNCIL OF JUDGES OF THE NATIONAL COUNCIL ON CRIME AND DELINQUENCY (1969), reaches a similar conclusion. *See* 359 So. 2d at 593 n.20.

229. 359 So. 2d at 591. *Cf.* Fare v. Michael C., 442 U.S. at 725 (describing totality of the circumstances test for juvenile waivers). Louisiana courts continue to apply *Dino*'s rule following the Supreme Court's holding in *Michael C.*. *See, e.g.*, State v. Stevenson, 447 So. 2d 1125, 1131 (La. Ct. App. 1984); State v. Rebstock, 418 So. 2d 1306, 1309 (La.), *cert. denied*, 459 U.S. 1190 (1982); State v. Hudson, 404 So. 2d 460 (La. 1981).

In 1982 the Vermont Supreme Court specifically rejected *Michael C.*[230] and reached a conclusion similar to that of the Louisiana court. In *In re E.T.C.*[231] the Vermont court recognized the difficulty a juvenile faces in choosing, without advice, among alternative courses of legal action and considered Vermont cases concerning a juvenile's waiver of rights in court.[232] The holding of *In re E.T.C.* requires, at minimum, a showing of consultation between "an independent, impartial, responsihle, interested adult" and the juvenile defendant before a court can find a valid waiver under the Vermont Constitution.[233]

Unlike the high courts of Louisiana and Vermont, the New Hampshire Supreme Court in *State v. Benoit*[234] adopted *Michael C.*'s totality of the circumstances test for juvenile waivers. The court considered adopting the "interested adult" rule espoused in Louisiana and Vermont, but dismissed that rule as overly burdensome and rigid.[235] Yet *State v. Benoit*'s description of the totality of the circumstances test required by the New Hampshire Constitution goes far beyond *Michael C.* in ensuring that only statements

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230. In a different context, the Supreme Court of Montana specifically rejected *Michael C.*'s holding that a suspect's request to speak with anyone other than a lawyer did not serve to invoke the suspect's fifth amendment rights. *See supra* text accompanying notes 142-48. Instead, the Montana court held that a suspect who, immediately after police read him his *Miranda* rights, asked if he had the right to speak with somebody and later told police he would like to talk to somebody had invoked his right to counsel under the Montana Constitution. State v. Johnson, 719 P.2d 1248, 1255 (Mont. 1986) (relying on MONT. CONST. art. II, § 24). The Montana court noted that it previously had interpreted the Montana Constitution's protections of criminal suspects as being coextensive with federal constitutional guarantees, but refused to "march lock-step" with the United States Supreme Court in this case. *Id.* at 1254-55.

231. 141 Vt. 375, 449 A.2d 937 (1982).

232. *Id.* at 378, 449 A.2d at 939; *see* State v. Crepeault, 126 Vt. 338, 341, 229 A.2d 245, 247, (summoning of a juvenile's representative prior to questioning) *cert. denied*, 389 U.S. 915 (1967); *In re* Dobson, 125 Vt. 165, 167, 212 A.2d 620, 621 (1965) (holding that minor accused of crime cannot waive counsel without a guardian or responsible advisor). These cases concern only in-court waivers, but the Vermont court applied the same principles to police interrogation of juvenile suspects.

233. 141 Vt. at 380, 449 A.2d at 940. The Supreme Court of Appeals of West Virginia reached a similar conclusion in a curiously-reasoned opinion concerning a juvenile's waiver of his right to counsel. State *ex rel.* J.M. v. Taylor, 276 S.E.2d 199 (W. Va. 1981). The court was inclined to interpret the West Virginia Constitution as not allowing the juvenile to waive his right to counsel. But because a state statute implied that the juvenile's right was indeed waivable, the court accommodated the legislative view by adopting the rule that a juvenile can waive his right to coimsel only upon the advice of counsel. *Id.* at 203-04.

234. 126 N.H. 6, 490 A.2d 295 (1985) (relying on N.H. CONST. pt. I, art. 15).

235. *Id.* at 15-16, 490 A.2d at 302-03. The court feared that a per se rule requiring consultation with an adult could both pose "onerous financial and administrative burdens" and "chill the rehabilitative function of the juvenile justice system by restricting the flexibility of action under the statute." *Id.*

that follow waivers made "voluntarily, knowingly and intelligently" will be admissible against a juvenile defendant. Under the *Benoit* standard, the juvenile court must make specific findings regarding fifteen listed factors in the totality of the circumstances calculus and must use the findings as a basis for determining the waiver's validity.[236]

In addition, the New Hampshire court set forth a "simplified juvenile rights form"[237] for police officers to use when dealing with juveniles. Although the failure to use such a form is not by itself fatal to admissibility, the court indicated that when making findings regarding the circumstances of a waiver, a court should presume a nonsimplified explanation of rights to be inadequate.[238] Finally, *Benoit*'s protections exceed *Michael C.*'s by requiring that a juvenile defendant be informed of any possibility of standing trial in criminal, rather than juvenile, court and the consequences thereof.[239] Thus, *Benoit* provides an excellent example of a case in which a state court interpreting a state constitution's self-incrimination provision expands rather than rejects a Supreme Court holding.

D. *Prosecutorial References to Silence*

State courts, relying on state constitutional provisions, have augmented federal law restrictions on a prosecutor's ability to refer at trial to an accused's exercise of his right to remain silent.

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236. *Id.* at 18-19, 490 A.2d. at 304. The court listed the following factors as relevant to determining the validity of a juvenile's waiver:

> (1) the chronological age of the juvenile; (2) the apparent mental age of the juvenile; (3) the educational level of the juvenile; (4) the juvenile's physical condition; (5) the juvenile's previous dealings with the police or court appearances; (6) the extent of the explanation of rights; (7) the language of the warnings given; (8) the methods of interrogation; (9) the length of interrogation; (10) the length of time the juvenile was in custody; (11) whether the juvenile was held incommunicado; (12) whether the juvenile was afforded the opportunity to consult with an adult; (13) the juvenile's understanding of the offense charged; (14) whether the juvenile was warned of possihle transfer to adult court; and (15) whether the juvenile later repudiated the statement.

Id. at 15, 490 A.2d at 302.

237. *Id.* at 18, 490 A.2d at 304. The New Hampshire court appended to its opinion a sample "Juvenile Rights Form" for police to use in interrogating juvenile suspects. The form directs police to read the suspect a series of simplified explanations of his constitutional rights, each of which is followed by the question, "Do you understand this right?" The form also provides separate spaces for a defendant to acknowledge his understanding of the explanation and to waive his rights. *Id.* at 22-24, 490 A.2d 306-07.

238. *Id.* at 18, 490 A.2d at 304.

239. *Id.*

Although the Supreme Court in *Fletcher v. Weir*[240] held that a prosecutor's reference to an unwarned criminal defendant's post-arrest silence was permissible, the Pennsylvania Supreme Court in *Commonwealth v. Turner*[241] held otherwise. The Pennsylvania court cited several Pennsylvania cases that noted the tendency of juries to equate a claim of silence with an admission of guilt and reasoned that the substantial prejudice to the defendant resulting from a reference to his silence far outweighed any probative value of the reference.[242] The *Turner* court rejected *Fletcher*, asserting that under the Pennsylvania Constitution *Miranda* warnings, whether given or not, do not affect "a person's legitimate expectation not to be penalized for exercising the right to remain silent."[243]

The Supreme Court of Wyoming reached the same conclusion in *Westmark v. State*.[244] Citations to Wyoming law supported the court's conclusion that "[i]n Wyoming, the question of whether or not the defendant was advised of his constitutional right to remain silent is not relevant to his assertion of this right." Thus, the court held that Wyoming's constitutional privilege against self-incrimination carries with it the "implicit assurance" that silence will not result in penalty.[245]

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240. 455 U.S. 603 (1982).

241. 499 Pa. 579, 454 A.2d 537 (1982).

242. *Id.* at 583, 454 A.2d at 539.

243. *Id.* at 584, 454 A.2d at 540 (relying on PA. CONST. art. 1, § 9). The court, however, held that the prosecution could impeach a defendant with his silence if the fact of silence was inconsistent with the defendant's testimony at trial. *Id.* at 583, 454 A.2d at 539-40.

244. 693 P.2d 220 (Wyo. 1984). The Supreme Court of West Virginia also seems to have reached this conclusion, but its holding is not entirely clear. In State v. Oxier, 338 S.E.2d 360 (W. Va. 1985), the court considered the constitutionality of a prosecutor's reference to both a suspect's prearrest silence and his postarrest, postwarnings silence. The court held that the prosecutor's reference to the defendant's pretrial silence was reversible error under the West Virginia Constitution's self-incrimination and due process provisions, *id.* at 360 (relying on W. VA. CONST. art. III, §§ 5, 10), but did not make clear whether its holding applied equally to both instances of pretrial silence. Although the court's opinion noted the holding of Jenkins v. Anderson, 447 U.S. 231 (1980), which allowed reference to prearrest silence, the court did not reject the federal decision explicitly in deciding the case on stato constitutional grounds. Indeed, the West Virginia court could have reached the same outcome in the case simply by relying on Doyle v. Ohio, 426 U.S. 61 (1976), which prohibited prosecutorial reference to the defendant's postarrest, postwarnings silence.

245. 693 P.2d at 222. *See* Clenin v. State, 573 P.2d 844 (Wyo. 1978), *overruled in* Richter v. State, 642 P.2d 1269 (Wyo. 1982); Jerskey v. State, 546 P.2d 173 (Wyo. 1976); Gabrielson v. State, 510 P.2d 534 (Wyo. 1973). In *Westmark* the Wyoming court overruled *Richter* and returned to the rule of *Clenin*.

E. Issues of Scope

The preceding cases illustrate the extent to which state courts, by relying on their state constitutions, have been able to expand the constitutionally protected privilege against self-incrimination that their citizens enjoy. These cases interpret the meanings and implications, as a matter of state constitutional law, of the *Miranda* decision. State courts, however, also have considered self-incrimination issues, such as the types of evidence encompassed by the privilege against self-incrimination, that are completely separate from the issues raised by *Miranda.* Cases resolving issues of scope differently from the Supreme Court's fifth amendment holdings are identified and discussed briefly below.

One question often litigated in state courts but seldom resolved differently from the federal rule concerns the admissibility of compelled real evidence, such as handwriting exemplars, blood tests, or breath tests. The United States Supreme Court held in *Schmerber v. California*[246] that the fifth amendment's privilege against self-incrimination extends only to evidence testimonial in nature and does not protect an accused from having to produce real evidence to be used against him.[247] In 1983 the Court resolved an issue left open in *Schmerber*, holding that an accused's refusal to take a blood-alcohol test was admissible under the fifth amendment.[248]

A few state courts have interpreted language in their state constitutions that differs from fifth amendment language as reflecting the drafters' intent to provide broader protection to an accused.[249] Nonetheless, state decisions holding that real evidence is covered by the state's privilege against self-incrimination have been short lived.[250] Only Georgia courts continue to hold that the

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246. 384 U.S. 757 (1966).

247. *Id.* at 765.

248. South Dakota v. Neville, 459 U.S. 553 (1983).

249. See *infra* note 270 and accompanying text for a breakdown of the wording of self-incrimination provisions in state constitutions. *Compare* Williams, *supra* note 45, at 369 (stating that "[a] substantial textual difference between the federal and state constitution is the most persuasive reason for a state court to reject a United States Supreme Court decision"), *with* Schmerber v. California, 384 U.S. at 761-62 n.6 (noting that a difference in phraseology does not change the scope of the privilege because "the manifest purpose of the constitutional provisions, both of the States and of the United States, is to prohibit the compelling of testimony of a self-incriminating kind").

250. *See* Trammell v. State, 162 Tex. Crim. 543, 287 S.W.2d 487 (1956) (holding blood sample taken without the defendant's consent inadmissable), *overruled in* Olson v. State, 484 S.W.2d 756 (Tex. Crim. App. 1972); Hansen v. Owens, 619 P.2d 315 (Utah 1980) (compelling the defendant to produce handwriting sample violates UTAH CONST. art. 1, § 12),

state constitution prohibits the state from forcing an accused to do any affirmative act to produce evidence against himself.[251] Furthermore, no state has interpreted its constitution as proscribing prosecutorial reference to a defendant's refusal to produce real evidence.[252]

The issue of what type of immunity is necessary to protect a compelled witness' constitutional privilege against self-incrimination also has provoked independent interpretations of the privilege under state constitutions. The 1972 United States Supreme Court case of *Kastigar v. United States*[253] held that an immunity statute prohibiting the use or derivative use[254] of a witness' compelled testimony in a criminal proceeding satisfies the requirements of the fifth amendment.[255] By contrast, the high courts of Hawaii and Massachusetts have held that their state constitutions' privilege against self-incrimination requires a grant of transactional immunity to a compelled witness.[256]

The permissible scope of prosecutorial discovery is the final area of independent state resolution of self-incrimination issues not related to *Miranda*. The 1970 United States Supreme Court case of *Williams v. Florida*[257] upheld the constitutionality of notice-of-alibi statutes[258] under the fifth amendment. The supreme courts of Alaska and California, however, have declared such statutes violative of state self-incrimination provisions.[259] The Alaska

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overruled in American Fork City v. Crosgrove, 701 P.2d 1069 (Utah 1985).

251. *See* State v. Armstead, 152 Ga. App. 56, 262 S.E.2d 233 (1979) ("forcing a defendant to produce . . . handwriting is not sanctioned" by GA. CONST. art. I, sec. I, para. XIII).

252. *Cf.* Brackin v. Boles, 452 So. 2d 540 (Fla. 1984); People v. Rolfingsmeyer, 101 Ill. 2d 137, 461 N.E.2d 410 (1984); State v. Wright, 691 S.W.2d 564 (Tenn. Crim. App. 1985).

253. 406 U.S. 441 (1972).

254. A grant of use and derivative use immunity to a witness prohibits the evidence he gives, or any leads directly or indirectly derived therefrom, from being used against him in a subsequent criminal proceeding. The grant, however, does not protect completely the witness from subsequent prosecution relating to the suhject matter of his testimony. By contrast, a grant of transactional immunity gives a witness an absolute shield against prosecution for any event or transaction about which he is compelled to furnish evidence.

255. 406 U.S. at 453.

256. *See* State v. Miyasaki, 62 Hawaii 269, 614 P.2d 915 (1980) (relying on HAWAII CONST. art. 1, § 10); Attorney Gen. v. Colleton, 387 Mass. 790, 444 N.E.2d 915 (1982).

257. 399 U.S. 78 (1970).

258. Notice-of-alibi rules require a defendant, upon demand of the prosecutor, to give notice before trial if the defendant plans to claim an alibi. In addition, a defendant is required to provide the prosecutor with the names and addresses of those he will call as alibi witnesses and with information about the location at which he claims to have been. *See id.* at 79.

259. *See* Scott v. State, 519 P.2d 774 (Alaska 1974) (relying on ALASKA CONST. art. I, § 9); Allen v. Superior Court, 18 Cal. 3d 520, 557 P.2d 65, 134 Cal. Rptr. 774 (1976) (relying on

court held unconstitutional any statute requiring disclosure of information, such as the names of witnesses, beyond mere notice of intent to present an alibi defense.[260] The California court interpreted the state constitution's self-incrimination clause to prohibit any compelled pretrial disclosure by the accused that might make it easier for the prosecution to prove its case-in-chief.[261]

The California Supreme Court applied this same standard in rejecting the United States Supreme Court's ruling in *United States v. Nobles*.[262] *Nobles* held that the fifth amendment privilege, because of its personal nature, did not prohibit compelling an accused to disclose, before trial, reports of the defense's conversations with defense witnesses.[263] In 1985 the California court reached an opposite conclusion in *In re Misener*.[264] In *Misener* the court held that a provision allowing the prosecution to discover prior statements by defense witnesses violated the California Constitution's self-incrimination provisions.[265]

V. Potential for Increased State Constitutional Independence

The majority of state courts deciding self-incrimination issues continue merely to track Supreme Court holdings.[266] Yet state law provides a fertile source that state courts may use to supplement, rather than mimic, federal law on the privilege against self-incrimination.[267] Forty-eight of the individual states have state constitutions containing self-incrimination provisions.[268] State courts may interpret these provisions as a matter of state law to provide pro-

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CAL. CONST. art. 1, § 15).

260. 519 P.2d at 785. The Alaska Supreme Court emphasized its ability to go beyond the United States Supreme Court's ruling and provide broad protections for the rights of Alaskan citizens. The court focused on whether such action was called for by "the intention and spirit of our local constitutional language and [is] necessary for the kind of civilized life and ordered liberty which is at the core of our constitutional heritage." (quoting Baker v. City of Fairbanks, 471 P.2d 386, 401-02 (Alaska 1970)).

261. 18 Cal. 3d at 525, 557 P.2d at 67, 134 Cal. Rptr. at 776.

262. 422 U.S. 225 (1975).

263. *Id.* at 234.

264. 38 Cal. 3d 543, 698 P.2d 637, 213 Cal. Rptr. 569 (1985).

265. *Id.* at 557-58, 698 P.2d at 647-48, 213 Cal. Rptr. at 579-80 (relying on CAL. CONST. art. 1, § 15).

266. *See, e.g.*, cases listed *supra* note 180.

267. Some state courts have assumed the responsibility of interpreting their state constitutions independently of federal law to protect the liberties of state citizens. These state court decisions stand as examples to other state courts that have not yet considered giving independent content to state self-incrimination provisions.

268. Iowa and New Jersey are the exceptions.

tections either coextensive with or broader than fifth amendment protections.[269] State constitutional provisions are variously worded, but a majority use language different from the fifth amendment.[270] Although the relevance of these differences in phrasing for purposes of constitutional interpretation is debatable,[271] textual differences are one of many factors that a state court may consider in interpreting its own constitutional provision.[272]

Several considerations may lead a state court to interpret the state's self-incrimination clause more broadly than the fifth amendment. Foremost among these considerations is tbe Burger Court's policy[273] of restrictively interpreting fifth amendment protections and diluting *Miranda*'s impact—a policy that is unlikely to change under the leadership of Chief Justice Rehnquist.[274] New Supreme Court holdings also may cause divergent interpretations in a different way. When a state court addresses an issue that is unsettled as a matter of federal constitutional law, the court may base its decision on parallel interpretations of the state and federal constitutions. If the United States Supreme Court subsequently addresses the issue and decides that the federal constitution compels a different conclusion, the state decision will be left standing solely on state grounds. When the state court faces the issue again

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269. *See supra* notes 50-51 and accompanying text.

270. According to State v. Picknell, 142 Vt. 215, 227, 454 A.2d 711, 716 (1982), the wording of self-incrimination provisions in state constitutions breaks down as follows: 21 use the phrase "to give evidence"; 15 use the phrase "witness against himself" (the phrase contained in the fifth amendment); 8 use the phrase "testify against himself"; and the remaining 4 states use miscellaneous wording.

271. *See supra* note 249 and accompanying text.

272. For one court's list of relevant factors, see *supra* note 45.

273. Justice Brennan suggests that the federalist principle that the states should independently protect the liberties of their citizens may have induced in part the Burger Court's retrenchment. *See* Brennan, *supra* note 1, at 502-03.

274. Many of the independent state court interpretations discussed in Part IV of this Note represent reactions to Burger Court holdings limiting the scope of the *Miranda* decision and the fifth amendment generally. Recent Burger Court decisions like New York v. Quarles, 104 S. Ct. 2626 (1984), *see supra* notes 155-63 and accompanying text, and Oregon v. Elstad, 105 S. Ct. 1285 (1985), *see supra* notes 164-69 and accompanying text, continue to dilute *Miranda*'s impact. As state courts confront the issues resolved as a matter of federal constitutional law in those and any other forthcoming Supreme Court cases, more state courts may wish to interpret their state constitutions as requiring different conclusions. Furthermore, any additional turnover on the Supreme Court during the Reagan administration may leave the Court even more decidedly conservative and more likely to reduce the current level of federal protection provided to criminal defendants under the fifth amendment. *See* Comment, *supra* note 10, at 495. Thus, the path of the Supreme Court may encourage states that have to date simply followed federal law in self-incrimination cases to hegin interpreting their state constitutions independently.

following the Supreme Court's holding, the court must decide whether to continue to interpret its constitution differently from the Supreme Court's interpretation of federal law. If the state court originally analyzed its state constitutional provision as logically independent of the fifth amendment, a subsequent Supreme Court decision is not likely to influence the state holding. When the original state decision makes no distinction between the state and federal constitutions, however, the independence of the state interpretation is less clear and its continued viability is less certain.

A timely example of this situation is not difficult to find. In 1979 the Oregon Supreme Court held that when an attorney seeks to consult with a suspect who is in custody and who has previously waived his general right to counsel, then unless the police inform the suspect of the availability of a specific attorney wishing to speak with him, any subsequent statement by the suspect and the fruits thereof will be inadmissible.[275] The Oregon court based its decision on the fifth amendment and the Oregon Constitution's self-incrimination provision.[276] In 1985 the United States Court of Appeals for the First Circuit relied on the fifth amendment to reach the same result on similar facts in *Moran v. Burbine*.[277] The United States Supreme Court, however, reversed the First Circuit in *Moran*[278] and held that the failure of police to inform a suspect of an attorney's attempts to reach him did not vitiate the suspect's waiver of his *Miranda* rights. Thus, the Court's ruling strips the Oregon decision of its federal grounds. If called on again to decide the issue, the Oregon Supreme Court will have to decide whether to stand firm behind its interpretation of the Oregon Constitution.

Cases raising self-incrimination issues on which the Supreme Court has not ruled also provide state courts with an opportunity

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275. State v. Haynes, 288 Or. 59, 602 P.2d 272 (1979), *cert. denied*, 446 U.S. 945 (1980).

276. *Id.* at 74, 602 P.2d at 279. The Oklahoma Court of Criminal Appeals, after quoting extensively from *Haynes*, reached the same conclusion in Lewis v. State, 695 P.2d 528 (Okla. Crim. App. 1984) (relying on U.S. CONST. amends. V, VI, VIV and OKLA. CONST. art. II, §§ 7, 20, 21). In State v. Matthews, 408 So. 2d 1274 (La. 1982), the Louisiana Supreme Court relied on Louisiana precedent and the Louisiana Constitution in holding that police failure to inform a suspect of an attorney's efforts to consult with bim rendered subsequent statements inadmissible. The Louisiana case on which *Matthews* relied most heavily, however, based its conclusion on the court's reading of *Miranda* and its progeny. *See* State v. Jackson, 303 So. 2d 734 (La. 1974).

277. 753 F.2d 178 (1st Cir. 1985), *rev'd*, 106 S. Ct. 1135 (1986).

278. *See supra* notes 170-174 and accompanying text; *see also* Browning, Moran v. Burbine: *The Magic of* Miranda, 72 A.B.A.J., Jan. 1986, at 58.

to give their state constitutions an independent reading. For example, in *People v. Conte*[279] the Michigan Supreme Court considered whether a confession induced by a law enforcement official's promise of leniency was involuntary and inadmissible as a violation of the defendant's privilege against self-incrimination. The court examined both Michigan law and federal law and found that neither had articulated a test for determining the admissibility of such a confession.[280] As a result, the court created its own constitutional test to "comport[ ] with the constitution, the common law, and public policy."[281] Thus, *Conte*'s independent interpretation of the Michigan Constitution filled a void in existing law.

VI. CONCLUSION

Clearly, the self-incrimination provisions in state constitutions present state courts with a rich opportunity to develop a constitutional jurisprudence reflecting state policies and legal traditions. The current failure of the majority of state courts to exploit this potential may reflect a genuine, considered concurrence with federal law.[282] The failure, however, also may result from lack of impetus.[283] In either case, state court mimicking of federal law leaves the state constitution's self-incrimination provision void of independent content and leaves the state's citizens dependent solely on federal law for protection of their fundamental liberties. This result is antithetical to the federal system of government.

The past decade has witnessed a resurgence in state constitutional jurisprudence. After languishing during the Warren Court's expansive reading of the federal constitution's guarantees of fundamental liberties, state courts now are reexamining and reinterpreting analogous state constitutional guarantees. Largely in reaction to federal court passivity, some state courts are interpreting

279. 421 Mich. 704, 365 N.W.2d 648 (1984).

280. *Id.* at 738-39, 365 N.W.2d at 662.

281. *Id.* at 749, 365 N.W.2d at 667 (relying on MICH. CONST. art 1, § 17) (holding confession inadmissible).

282. *See* Note, *supra* note 14, at 200.

283. For the most part courts rely on attorneys to raise and argue issues. Attorneys, therefore, have a large role to fill in the expansion of state constitutional interpretation. In a recent case the Vermont Supreme Court directed attorneys who raised a state constitutional law issue to file supplemental briefs addressing the issue; in doing so, the court emphasized the attorney's role in the development of state constitutional jurisprudence. Thus, the responsibility rests with the bar to raise self-incrimination arguments grounded in state constitutional law for state courts to decide. *See* State v. Jewett, 37 Crim. L. Rep. (BNA) 2409 (Vt. Aug. 9, 1985); *cf.* State v. Smith, 70 Or. App. 675, 680, 691 P.2d 484, 487 (1984) (warning that court will not decide state constitutional issue not raised by attorneys).

their state constitutions as exceeding the federal constitution in protecting individual liberties.

In *Miranda v. Arizona* the Warren Court read the fifth amendment privilege against self-incrimination as requiring strict procedural safeguards for the constitutional rights of a criminal defendant undergoing custodial interrogation. By contrast, subsequent Burger Court decisions have diluted the impact of *Miranda* by limiting *Miranda*'s broad language to the case's specific facts, by denying the constitutional nature of *Miranda*'s requirements, and by creating exceptions to *Miranda*'s exclusionary rule. In response to Burger Court decisions limiting *Miranda*, some state courts have interpreted the content of their state constitution's self-incrimination provisions as diverging from the fifth amendment. These state courts have concluded in a variety of situations that the state's constitutional history and policy concerns mandate that a criminal defendant's privilege against self-incrimination enjoy protections broader than those guaranteed by the fifth amendment.

State courts reading state self-incrimination clauses independently of the fifth amendment remain in the minority. Yet a dissatisfaction with the shrinking federal protection of the fifth amendment privilege and a need to resolve new issues that arise may prompt more state courts to give their state provisions independent meaning. Instead of continuing to settle self-incrimination issues solely by resort to federal constitutional law, state courts should look to their state constitutions as an additional source of authority. In some cases the court may find that the state provision compels the same result as the fifth amendment. In other cases the court may interpret the state's self-incrimination clause as providing state citizens with protections broader than those guaranteed by the federal constitution. Either result is as preferable as the other. Vital to federal theory, however, is state court recognition and independent, substantive interpretation of self-incrimination provisions in state constitutions.

State courts willing to rely on the state constitution and to take a stand on self-incrimination issues deserve praise. By guaranteeing that state citizens benefit from an additional layer of protection from governmental encroachment on their liberties, these state courts put into action the ideals of federalism. Only by giving content to all state constitutional provisions, not merely those without federal analogues, may state courts fulfill their role as the ultimate interpreters of the state constitutions.

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