ADVANCES AND DEPARTURES IN THE CRIMINAL LAW
OF THE STATES: A SELECTIVE CRITIQUE

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I. A BACKWARD GLANCE: THE WARREN COURT AND ITS LEGACY

The administration of the criminal law ranked high among the disputed areas of jurisprudence attributed to the activism of the Warren Court. Perhaps best known to the public were the *Miranda* warnings intended to protect the accused and to prevent acts of intimidation by police and prosecutors intent upon securing confessions from those unaware of their rights.¹ In addition to *Miranda* and other deterrents largely derived from the Fifth Amendment, the Warren Court majority completed much of the incorporation or absorption of the Bill of Rights, making most federal criminal safeguards applicable to the states. The process led to what has been termed the creation of a national criminal code heretofore unknown in a country where criminal law proceedings lay almost exclusively within the purview of the states.²

That many of the activities of the Warren Court were reviled, not only in the law enforcement community, but also elsewhere within the cadre of state and local officials, became evident as controversial decisions continued to emerge. A conference of the nation’s state chief justices took the unprecedented and extraordinary step of condemning a number of the initiatives of the United State Supreme Court as contrary to accepted principles of state autonomy.³ The conferees “urge[d] the desirability of self-restraint on the part of the Supreme Court in the exercise of the vast powers

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² See generally Henry J. Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 CAL. L. REV. 929, 930 (1965) (asserting that the Constitution does not compel the Supreme Court to create a national criminal code that is binding on the states).

committed to it."4 While the Court was not without its defenders,5
the persistence of decisional excesses elicited a rebuke from “literate critics.”6 The outcry among members of law enforcement dominated
the fray with claims that the actions of the Warren Court
threatened to undermine the social order.7

Less dramatic in its public impact, but equally if not more
rankling to those committed to vigorous enforcement of the criminal
law, was the earlier application of the exclusionary rule to the
states.8 The rule, long a buttress of the Fourth Amendment in
defense of individual rights, served to exclude evidence obtained by
way of an unlawful seizure from introduction at trial.9 In fact, the
rule had been subjected to intense criticism from its inception, in
part for want of a clearly specified objective.10 Was it intended to
discourage untoward police conduct, to maintain the integrity of the
courts, or to secure a combination of ends not clearly set forth? If
outright abandonment of the exclusionary rule was difficult to
justify, its extension to the states promised to add fuel to a law
enforcement community soon to be beset by other assaults on its
essential battery of weapons against the underworld. There
followed the inclusion of additional elements in the Warren Court’s
effort to contain prosecutorial excesses. Such cases as Gideon v.
Wainwright, ensuring indigent defendants counsel in state criminal
trials,11 Malloy v. Hogan, making the Fifth Amendment’s self-
incrimination clause binding upon the states,12 and Griffin v.

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4 Id.
6 See Philip B. Kurland, The Supreme Court and Its Literate Critics, 47 YALE REV. 596, 596–97 (1958) (book review); see also Francis A. Allen, The Supreme Court, Federalism, and State Systems of Criminal Justice, 8 DEPAUL L. REV. 213, 219 (1959) (“The complaint has been that the Court has frequently become so entangled in the great issues of personal liberty that it often has failed to see the concrete case before it.”).
9 Id. The source of the rule in the federal courts was Weeks v. United States, 232 U.S. 383, 391–93 (1914).
12 378 U.S. 1, 6 (1964).
California, forbidding adverse comments on a defendant’s refusal to testify in criminal cases, added to the series of rights made applicable. It remained for Miranda to supply the fervency for the tirades that ensued. If the public was not moved to react with unusual negativism to the safeguards afforded the accused at trial, Miranda served as an especially provocative irritant that, for some, seemed to exceed the bounds of propriety.

The succeeding Burger Court predictably should have reversed or at least modified many of the precedents established during the Warren Court years. To the surprise of many court watchers, no major turnover came to pass and dramatic changes were sparse. The Burger Court reflected a tribunal in perpetual transition, groping for issues of moment, not a Court committed to undoing the work of its predecessor. Even the attacks upon Miranda often were overstated and marginal rather than frontal assaults to eliminate its basic core. All the same, the Burger Court, led by the Chief Justice, did move to weaken the exclusionary rule by way of a good-faith exception that permitted the introduction of evidence derived from a warrant issued without probable cause. Thus, when a balance had to be struck, the Court’s treatment of the criminal law was mixed, not unqualifiedly sanctioning the intrusions of the Warren Court, but also not dedicated to setting aside established safeguards in truculent fashion. It remained for the Rehnquist Court to display a more aggressive, self-assertive posture and to proceed more decisively in attempts, not always successful, to undo precedents of the Warren era.

The turmoil that affected the changing status of the criminal law in the United States Supreme Court was partially responsible for a resort to a new judicial federalism. State courts began to assert an independence to which they had always been heir but which they had not pursued with unalloyed ardor on previous occasions. The decade of the 1970s was the first to reveal state court decisions replete with a spirited revitalization premised on independent and adequate state grounds. It was during this era that many of these

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15 See id. at 143–45.
16 See id.
18 See Mary Cornelia Porter & G. Alan Tarr, Introduction, in STATE SUPREME COURTS: POLICYMAKERS IN THE FEDERAL SYSTEM, xi–xii (Mary Cornelia Porter & G. Alan Tarr eds.,
decisions dealt increasingly with the criminal law, especially in such pioneering states as California. But precedents established by the U.S. Supreme Court neither were routinely ignored nor critically modified or reversed in cavalier fashion. Instead, state courts often engaged in a selective process that sustained and applied certain federal court opinions while digressing, at times minimally, from others. The choices and the findings prompted a dissenting member of the California Supreme Court to observe that deference toward the U.S. Supreme Court was “fast becoming a shell game.”

As the twentieth century drew to a close and state judicial activism became an accepted part of the dualism that marked the American adjudicatory system, discussion spread across the legal community concerning the ultimate effects of the increasingly widespread participation of state courts in framing the nation’s criminal law. Interestingly, a coalition of conservative and liberal justices began to encourage a turn to the state courts, the former as a part of a dedication to old-style federalism, the latter as a means of undoing what they perceived to be regressive decisions detrimental to the rights of the accused.

Among the most outspoken supporters of the “revitalization of state constitutional law” was Justice William Brennan, ordinarily a stalwart advocate of strong national control. Apart from the rhetoric associated with a revived state constitutional reading of the criminal law, the alterations more recently introduced have posited important changes at the margins, not the major transformations contemplated in an earlier era. Fewer unabashed clashes between nation and state have occurred, those in evidence at a diminished rate when compared with previous decades. Having established the basic right to add to the safeguards provided in the Federal Bill of Rights, state courts seem to have relented and abandoned the fervor that marked their initial

20 See Friedelbaum, supra note 19, at 32–34.
23 Id. at 552.
24 For a thoughtful essay, see Timothy Bakken, The Quest of Law Enforcement for the Principled Interpretation of State Constitutions, 5 ST. CONST. COMMENT. & NOTES 1, 6–8 (No. 2, 1994).
forays. The nationalization of a constitutionally protected bulwark secured the rights of criminal defendants by way of a minimal federal grounding below which states could not proceed. Consequently, the direction of the case law changed to embrace a less adversarial version of federalism, introducing reforms in a number of states but not attempts to refashion the fundamental corpus of the criminal law in its state applications.

That even these efforts became engulfed in controversy was evident in the debates that arose in several state appellate courts. In Texas, New York, and Pennsylvania, conflicts led to rancor not often encountered among state justices. Enhancement of Fourth Amendment rights in a Texas case involving inventory searches led to a major display of emotionalism. The Court of Criminal Appeals announced its intention to depart from federal standards to ensure against an “arbitrary invasion” of individual privacy and security rights. Among recurrent references to the state’s bill of rights, the court, with a turn to ill-considered chauvinism, declared that the state’s protective shield was afforded primacy in successive state constitutions while the Federal Bill of Rights was merely amendatory. To this resort to independent state grounds, a dissenter objected that the doctrine left lower courts bereft of guidance in applying the newfound formulation of state law.

In many ways paralleling the Texas court’s foray, a New York case, *People v. Harris*, resulted in the state court’s suppression of a station house statement admissible under federal standards. The court held the statement to be contrary to the state constitution’s prohibition of unreasonable searches and seizures and to its interplay with the state’s right to counsel rules. A majority cited historic origins “rooted in this State’s prerevolutionary constitutional law” and developed independently of federal counterparts despite identical federal and state constitutional language. The dissent, by contrast, took exception to what it

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25 See Brennan, supra note 22, at 550.
27 Id. at 682–83.
28 Id. at 690.
29 Id. at 691 (McCormick, J., dissenting).
31 Id. at 1054–55.
32 Id. at 1054; see also James A. Gardner, *State Constitutional Rights as Resistance to National Power: Toward a Functional Theory of State Constitutions*, 91 Geo. L.J. 1003, 1062 (2003) (discussing the interstitial approach to state constitutional interpretation, which requires “the state court to follow federal Fourth Amendment precedent unless some
termed an “astonishing” departure from accepted jurisprudential policy and a “dogged choice.”

Even more pointedly, the dissent condemned the majority’s efforts “to stretch precedent and twist logic in order to rescue this defendant from a United States Supreme Court decision against him.”

The Supreme Court of Pennsylvania, in *Commonwealth v. Lewis*, took pains to reaffirm a state-centered “no-adverse-inference” instruction that trial judges were required to provide when a defendant chose not to testify. Failure to do so in timely fashion, the majority declared, did not constitute harmless error and the oversight could not be ignored. Neither should it be necessary for “defense counsel to bite, scratch and plead” to ensure that the mandated jury instruction is given. To these warnings of state constitutional violations, the dissent objected vehemently, especially in a case based on a “nightmare murder” that proved persuasive in eliciting a conviction verdict from the jury. The dissent went on to censure the court for its unaccustomed journey to transcend doctrines approved by the U.S. Supreme Court through the discovery of a “treasure trove of yet undiscovered rights” drawn from the state constitution. Such journeys, the dissent warned, “may make Pennsylvania unique and stranded in unworkable locks in the search for the truth.”

If these state courts found themselves fraught with acrimony among the justices, voters in California went even further. The electorate approved a far-reaching initiative measure intended to amend the state constitution by eliminating judicial discretion in expanding the rights of the criminally accused. In explicit terms, the measure limited guarantees only to those provided by the U.S. Supreme Court as it construed the Federal Constitution. The Crime Victims Justice Reform Act, as it was called, could have led to ponderous altercations in the process of judicial decision-making.

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33 *Harris*, 570 N.E.2d at 1056 (Bellacosa, J., dissenting).
34 Id. at 1058.
36 Id. at 982–83.
37 Id. at 982.
38 Id. at 984 (McDermott, J., dissenting).
39 Id.
40 Id.
42 Id.
Yet a pointed reproof of direct democracy seemed forbidding and politically imprudent.

Challenges to the initiative measure shifted to the California Supreme Court which agreed to exercise its original jurisdiction in resolving the thorny issues raised. But the court had few viable alternatives within the prevailing constitutional structure. Foremost among these were violations of the single subject rule as well as the ban on informal constitutional revisions. A unanimous court opted to adopt the latter choice, prompted by the constitutional requirement that revisions be effected by more formal procedures than those applicable to the approval of “mere constitutional ‘amendments.’” Thus the court was able to avoid a decision on the merits by what seemed to be a technical correction of course. In any event, the California Supreme Court found that an invalid revision had been attempted—a revision that “substantially alters the preexisting constitutional scheme or framework heretofore extensively and repeatedly used by courts in interpreting and enforcing state constitutional protections.” While a separate opinion would have invalidated the entire initiative measure as contrary to the single subject rule, the court’s less sweeping treatment sufficed to prevent the electorate from binding the courts by way of an untoward effort.

II. SEARCH AND SEIZURE LAW AND RELATED DEVELOPMENTS

If the most conflicted phase in an ongoing debate has passed, what, then, emerges as significant changes in the criminal law of several states? The alterations introduced often have been ancillary, much in the nature of supplementary addenda to “perfect” traditional federal safeguards as construed by the United States Supreme Court. Central to state endeavors have been appendages to fundamental protective mechanisms long associated with Anglo-American jurisprudence and beliefs. The criteria have related principally to the several stages of the trial process in criminal cases. The overriding objective is to ensure the integrity and sanctity of a fair trial and individual rights as abiding features of the constitutional order. Abetting this goal is a cluster of revisionist
formulas designed to improve the status of the accused and to ameliorate the plight of those convicted and confined to state institutions.

Pleas centering about counterparts of the Fourth and Fifth Amendments have elicited a considerable body of precedents. Of particular interest has been search and seizure law, the subject of a number of cases that appeared in the fast vanishing shadow of the Warren Court. In fact, the treatment of this area of federal criminal law has revealed a greater tendency toward adversarial judicial federalism.\(^{49}\) Clashes have been sharper and moderation, if it continues to apply as a principal motif, has been seriously curtailed. On the one hand, state courts no longer rejected federal predicates in the aggregate.\(^{50}\) On the other hand, state court skirmishes occurred with greater frequency respecting the search and seizure rules to be applied, the rationale to be followed, and the content of the “plain statement” needed to meet federal standards of non-intervention.\(^{51}\) While a cavalier disregard of federal precedents no longer marked the new judicial federalism, significant alterations, at times decisive in their impact, doubtless were pursued in this area.

Among divergent cases was one from Pennsylvania, \textit{Commonwealth v. Kohl},\(^{52}\) that served to combat the wave of negativism that had become increasingly associated with the U.S. Supreme Court’s review of Fourth Amendment rights. At issue were “chemical tests of breath, blood, or urine” instituted under the implied consent provision of the Motor Vehicle Code.\(^{53}\) To the oft-cited constitutional ban on unreasonable searches and seizures, the state responded that the inquiry had been validly pursued by way of the “special needs” exception to the Fourth Amendment sanctioned by the Supreme Court.\(^{54}\)

The state court majority disagreed, holding that the tests violated both the Fourth Amendment and its more explicit state constitutional counterpart.\(^{55}\) In particular, the Pennsylvania court sought to distinguish a 1989 United States Supreme Court case,

\(^{49}\) See Friedelbaum, \textit{supra} note 19, at 34–42.
\(^{50}\) See id.
\(^{51}\) See id.
\(^{52}\) 615 A.2d 308 (Pa. 1992).
\(^{53}\) \textit{Id.} at 309.
\(^{54}\) \textit{Id.} at 313.
\(^{55}\) \textit{Id.} at 309–10, 314, 316.
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*Skinner v. Railway Labor Executives’ Ass’n*\(^{56}\) that, as a controlling precedent, could have led to a contrary conclusion sustaining the conviction without more.\(^{57}\) In fact, the Court in *Skinner* had noted that, in certain cases, “‘special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable.’”\(^{58}\)

That a close identity existed between the Fourth Amendment and its state constitutional counterpart was undeniable. Yet the state court moved to evade the special needs exception, holding instead that the Commonwealth’s interest did not justify a departure from probable cause requirements.\(^{59}\) It was only when probable cause had been demonstrated that the absence of a warrant requirement could be found acceptable and not render the tests unreasonable under the state constitutional counterpart “due to time’s dissipating effect on the evidence.”\(^{60}\) Without probable cause, the search or seizure was impermissible.\(^{61}\) While the state had a compelling interest in protecting its citizens against drunk drivers, it could not do so by permitting the use of illegally secured evidence.\(^ {62}\) The promotion of such interests by the imposition of stringent punishment and remedies, while permissible in themselves, did not suffice to override the diminution of constitutionally guaranteed individual rights.\(^ {63}\)

To the dissenters in *Kohl*, the rationale of *Skinner* should have applied and a finding of individualized suspicion ought not to have been necessary. Traditional, precisely correct law enforcement procedures were not always adequate to cope with the need to eradicate drunk driving and the evils associated with it.\(^ {64}\) According to one of the dissents, “less than probable cause,” predicated on a balancing of interests, had been sustained elsewhere.\(^ {65}\) A more exacting test was not prescribed by the terms of the state constitution.\(^ {66}\) Another dissent was even more vehement in

\(^{56}\) 489 U.S. 602 (1989).

\(^{57}\) *Kohl*, 615 A.2d at 313–14 (upholding regulations that “mandated blood and urine tests of [certain] employees”).

\(^{58}\) *Skinner*, 489 U.S. at 619 (quoting Griffin v. Wisconsin, 483 U.S. 868, 873 (1987)).

\(^{59}\) *Kohl*, 615 A.2d at 314.

\(^{60}\) *Id.* at 315.

\(^{61}\) *Id.* at 316.

\(^{62}\) *Id.*

\(^{63}\) See *id.*

\(^{64}\) See *id.* at 319 (Larsen, J., dissenting).

\(^{65}\) *Id.*

\(^{66}\) See *id.*
condemning the majority’s form of analysis. Not only did it reaffirm the applicability of federal case law and the special needs exception,67 it went on to chastise the court for resorting to independent state grounds and the state constitution as an “all-purpose surrogate for informed analysis.”68 To have done so contrary to an analytical paradigm adopted just a year earlier69 struck the dissenter as succumbing to the criticism of the courts as “being like little puppies who chase their own tails rather than run forward.”70

While the majority had cited the analytical model noted by the dissent, it is difficult to perceive why it had elected not to follow it more closely. Neither was it easy to acknowledge the rejection of a special need exception when a compelling public interest was so conspicuously present. It could be contended that the state constitution was not being treated as a principled charter of individual rights and procedures under the exceptional conditions known to exist. Plainly, independent state grounds ought not to be taken to serve as an “all-purpose surrogate.”71 Counterpart state provisions, as the dissent implied, are not always of such moment and intransigence as to countenance reversal of a legislatively enacted plan to ensure the maintenance of safe highways and to protect the lives of those who travel on them.72

A series of New York cases73 exhibited similar, if even more trenchant, signs of internal discord over judicial techniques and standards. Both cases revealed intense scrutiny of Fourth Amendment predicates and their state constitutional counterparts. It was neither accidental nor wholly unanticipated that the opinions in these cases made reference to colonial writs of assistance74 and claims of an “Articles of Confederation time warp.”75 The breadth of the shield against unreasonable searches and seizures long served as a guarantee closely associated with expectations of privacy.76

67 Id. at 319–20 (Papadakos, J., dissenting).
68 Id. at 320.
69 Id. The reference was to four factors set out in Commonwealth v. Edmunds: text of the Pennsylvania Constitution; Pennsylvania case law and the history of the provision; case law from other states; and policy considerations. 586 A.2d 887, 895 (Pa. 1991).
70 Kohl, 615 A.2d at 321 (Papadakos, J., dissenting).
71 Id. at 320.
72 Id. at 320–21.
73 See People v. Scott, 593 N.E.2d 1328 (N.Y. 1992). Two cases, People v. Scott and People v. Keta, were decided in a single opinion. Id.
74 Id. at 1343.
75 Id. at 1347 (Kaye, J., concurring).
76 See id. at 1334–37.
Whether these expectations would achieve fulfillment was dubious as equivocal precedents persisted. All the same, realization of the ultimate goal remained consistent and unchanging: to assure, as far as possible, against unwarranted state or federal intrusion into the private affairs of individuals.

The two cases, decided in successive, linked opinions, presented questions that provoked considerable disagreement and bitterness at the state’s highest court. The first, *People v. Scott*, dealt with an arguably protectible privacy interest in land (“open fields”) beyond the landowner’s curtilage, that is, outside the grounds immediately surrounding his mobile home. In decisive terms, the United States Supreme Court, in *Oliver v. United States*, had held that the Fourth Amendment did not apply in like circumstances. The opinion made clear that an owner of “open fields” could not claim protection. Since the issue in *Scott* was unmistakably similar, a reliance on federal case law doubtless would have led to the same result. Only a turn to a state constitutional route made possible a reversal of course. It was the latter path that the New York Court of Appeals elected to pursue. In doing so, it declined to adopt the U.S. Supreme Court’s resolution of the controversy because, as the majority stressed, “the *Oliver* ruling does not adequately protect fundamental constitutional rights.”

There was little doubt that the state court’s choice of a doctrinal basis for its holding was a tenuous one. In defense of its judgment, the lead opinion emphasized the state’s “tradition of tolerance of the unconventional and of what may appear bizarre or even offensive.” At the same time, the court reaffirmed its rejection of adherence to a lockstep model of analysis, requiring strict conformity to federal interpretive paradigms. Instead, it projected a flexible framework of decision-making that afforded citizens of the state a greater measure of protection than federal constitutional predicates offered. The doctrine of adequate state grounds may have served as a supportable tool for such rationalizations, but it did not necessarily provide a sound basis for an enduring precedent.

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77 See id. at 1332–34 (assessing U.S. Supreme Court precedents).
78 Id. at 1330–31.
80 Id.
81 *Scott*, 593 N.E.2d at 1336–37.
82 Id. at 1330.
83 Id. at 1337.
84 Id. at 1338 (citing Shirley S. Abrahamson, *Criminal Law and State Constitutions: The Emergence of State Constitutional Law*, 63 Tex. L. Rev. 1141, 1166–68 (1985)).
The second case, *People v. Keta*, raised questions concerning the activities of a vehicle dismantling establishment,\(^{85}\) referred to in the vernacular as a “chop shop.”\(^{86}\) Whether a cognizable right of privacy might be claimed in the course of a warrantless administrative search of the premises was not clear in view of varying results derived from previous holdings.\(^{87}\) The Fourth Amendment did not safeguard the sanctity of such businesses.\(^{88}\) And there was conflict in a closely divided court regarding reliance on equivalent protective language in the state constitution.\(^{89}\) In effect, the legislative will was being thwarted respecting the supervision and regulation necessary to control a crime-plagued industry.

As the New York Court of Appeals moved to apply the canons of the new judicial federalism, it found that the random warrantless searches at issue in *Keta* could not withstand challenge under the state constitution.\(^{90}\) State proscriptions against unreasonable searches and seizures, unlike their federal counterparts, could not be used to condone what the majority took to be practices comparable to the much-condemned colonial writs of assistance.\(^{91}\) Constitutional prohibitions were not to be compromised despite substantial governmental interests said to justify unannounced, warrantless inspections to advance regulatory and law enforcement interests.\(^{92}\) Individual rights, as the court construed them, must not be sacrificed on the basis of oft-asserted recounts of upsurges of criminal activities that ephemerally disturbed the social landscape.\(^{93}\) Since special factors previously recognized were not present to sustain dispensation with established constitutional norms, the chop shop search was held to have been impermissible.\(^{94}\) The judicial branch was obligated “to stand as a fixed citadel for constitutional rights, safeguarding them against those who would dismantle our system of ordered liberty.”\(^{95}\) Within this context, the requirement of probable cause and judicially sanctioned warrants

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85 Id. at 1339.
86 Id. at 1348 (Bellacosa, J., dissenting).
87 See id. at 1339–41.
89 See *Scott*, 593 N.E.2d at 1346–48 (Kaye, J., concurring) (“respond[ing] to the broader statements and implications of [Judge Bellacosa’s] dissent about State constitutional law”).
90 Id. at 1342.
91 Id. at 1343.
92 Id. at 1344.
93 Id. at 1345.
94 Id. (requiring “some additional particularized factor” such as an exigency or existence of a business that is closely regulated).
95 Id.
had to be maintained in the absence of narrowly drawn exceptions linked to unusual conditions.

In support of the court’s rejection of a U.S. Supreme Court precedent in the criminal law area, a concurrence directed attention to the need for and a reliance upon the expansive measure of protection afforded individual rights under the state constitution.\(^96\) There was no need to abjure more exacting safeguards when state standards had been “diluted” by federal decisions.\(^97\) Neither did the majority’s decision “signal a return to the Articles of Confederation” or an attempt to disdain rulings of the Supreme Court.\(^98\) Instead, the concurrence noted, the objective remained “the protection of fundamental rights, consistent with our Constitution, our precedents and own best human judgments in applying them.”\(^99\)

If the majority opinion and the concurrence revealed an unusually defensive tone, the combative nature of the dissent seemed to have promoted a counter-effort to interject an explanatory, if not a conciliatory, note into the ongoing debate. The dissent denied any intention to condemn a turn to state constitutional interpretation “where appropriate,”\(^100\) but it denounced what it took to be a “double-barreled declaration of peculiar New York-style separatism.”\(^101\) Nor was the intensity of the ensuing assault explainable solely by the unsavory nature of the defendants in these two cases. A return to basic principles, raising serious questions about the bases for a resort to independent state grounds and the departure from federal standards, appears to have been more deeply rooted. In fact, the sharply contrasting opinions, brought on by differences over search and seizure law, far exceeded what might have been expected of a court where consensus traditionally has served as a byword of the decision-making process.

In a number of states, search and seizure cases periodically have pointed to consideration of the validity of so-called no-knock warrants.\(^102\) Even assuming the statutory authority of the judge to issue such a warrant, the question remained whether exigent

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\(^{96}\) Id. at 1347 (Kaye, J., concurring).

\(^{97}\) Id.

\(^{98}\) Id.

\(^{99}\) Id. at 1348.

\(^{100}\) Id. at 1356 (Bellacosa, J., dissenting).

\(^{101}\) Id. at 1349.

\(^{102}\) See Davis v. State, 859 A.2d 1112, 1120–21 (Md. 2004) (citing and discussing cases from Nebraska, New York, North Dakota, Utah, and Wyoming that upheld the validity of the no-knock warrant).
circumstances could justify no-knock entry. In a Maryland case, there was reason to lay claim to the need for what was referred to as the “knock and announce rule” to ensure compliance with the prohibition of unlawful searches and seizures in the state’s declaration of rights. Though the U.S. Supreme Court never adhered to an all-encompassing, rigidly restrictive entry rule to safeguard Fourth Amendment privacy interests, Maryland’s high court declined to follow a similar, pliable course. Instead, the state court held that a judicial officer might not issue a no-knock warrant and that the propriety of no-knock entry “will be reviewed and determined on the basis of the facts known to the officers at the time of entry, rather than at the time of the application for the warrant.” To this end, the court refused to sustain any “predicate determination” on which the police might seek to rely.

The constitutionality of a dog sniff used to identify the presence of drugs in vehicles stopped for other lawful reasons has come to the fore both at the federal and state levels. In Illinois v. Caballes, the United States Supreme Court found no violation of the Fourth Amendment in relation to the practice. Contrarily, Justice Souter, one of two dissenters in a six to two decision, would have subjected dog sniffs to scrutiny as a Fourth Amendment search. Justice Ginsburg, dissenting, referred to fears that traffic stops might become occasions to “call in the dogs, to the distress and embarrassment of the law-abiding population.” An exception in support of sniff searches, as Justice Souter perceived it, touched upon “demonstrated risk” respecting national security and societal safety, especially as it affected the detection of “destructive or deadly material.” Justice Ginsburg also made reference to the special needs doctrine in her dissent.

A Wyoming case, Morgan v. State, was less permissive than

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103 Id. at 1117.  
104 Id. at 1122.  
106 See Davis, 859 A.2d at 1132.  
107 Id.  
108 Id. at 1138.  
110 Id. at 410.  
111 Id. at 417 (Souter, J., dissenting).  
112 Id. at 422 (Ginsburg, J., dissenting).  
113 Id. at 417 n.7 (Souter, J., dissenting).  
114 Id. at 425 (Ginsburg, J., dissenting).  
115 95 P.3d 802 (Wyo. 2004).
Caballes in describing the confines of canine sniffs in the search of vehicles. While the search at issue was not set aside,\textsuperscript{116} the court reserved the question of whether it might be characterized as unreasonable if challenged on independent state grounds.\textsuperscript{117} Like a number of other state courts, the Wyoming Supreme Court noted that it was open to an argument that the state constitution provided greater protection than the Fourth Amendment.\textsuperscript{118} No more than the absence of a “sufficient state constitutional analysis” seemed to prevent such a finding in Morgan.\textsuperscript{119}

In addition to cars and other motor vehicles, the validity of a canine sniff of an object and its status in relation to the contents of an apartment have been considered by many state courts. An oft-cited New York case, \textit{People v. Dunn}, held that the police needed neither a warrant nor probable cause if there was “reasonable suspicion that [the] residence contain[ed] illicit contraband.”\textsuperscript{120} The standard was said to apply to the sniff of an apartment door since there was no intrusion upon the occupant’s “reasonable expectation of privacy.”\textsuperscript{121} State courts throughout the nation have adhered to a reasonable suspicion standard even when state search and seizure constitutional provisions have been more rigorously protective than the Fourth Amendment.\textsuperscript{122} The standard’s origins are traceable to Justice Blackmun’s concurring opinion in \textit{United States v. Place},\textsuperscript{123} a federal case involving the warrantless dog sniff of an airline passenger’s luggage.\textsuperscript{124}

Maryland’s highest court weighed the \textit{Dunn} court’s reasoning at length and concluded that the dog sniff at the exterior of the defendant’s apartment ought not be a search under the Fourth Amendment.\textsuperscript{125} More contentious was the argument advanced by the defense that counterpart search and seizure provisions of the state's declaration of rights were more demanding than the Fourth Amendment.\textsuperscript{126} The defense stressed the “sanctity of the home” as

\begin{itemize}
  \item \textsuperscript{116} \textit{Id.} at 807–08.
  \item \textsuperscript{117} \textit{Id.} at 808.
  \item \textsuperscript{118} \textit{Id.}
  \item \textsuperscript{119} See \textit{id.}
  \item \textsuperscript{120} 564 N.E.2d 1054, 1058 (N.Y. 1990).
  \item \textsuperscript{121} \textit{Id.}
  \item \textsuperscript{123} 462 U.S. 696, 722 (1983) (Blackmun, J., concurring).
  \item \textsuperscript{124} \textit{Id.} at 699.
  \item \textsuperscript{125} \textit{Fitzgerald}, 864 A.2d at 1017.
  \item \textsuperscript{126} \textit{Id.} at 1019.
\end{itemize}
the paramount interest and a core value sought to be preserved in the state language.\textsuperscript{127} The Maryland court declined to determine whether, within this context, the dog sniff could be deemed a search.\textsuperscript{128} Instead, the majority opted to hold that no more than a reasonable suspicion standard would suffice even if a search had been found to have occurred.\textsuperscript{129}

By contrast, the dissent took issue with the court’s seemingly cavalier rejection of any possible findings on independent state grounds.\textsuperscript{130} Emphasis was placed upon the need to extend the greatest protection to the search of a home or person.\textsuperscript{131} Unlike luggage and other inanimate objects, a dwelling takes on a major place in the ranking of values and protections.\textsuperscript{132} The dissent went on to note that a warrant ought to be required before a home is subjected to a search.\textsuperscript{133} Neither should a canine sniff be undertaken absent probable cause despite the method’s less intrusive character than an incursion by way of doors or windows.\textsuperscript{134}

\section*{III. The Exclusionary Rule Reexamined}

In many ways comparable to search and seizure differences and often of equal fervor were recurrent disputes over the exclusionary rule and the federally created good faith exception. Vigorous discourse and controversy associated with a continuing wave of assaults on the exclusionary rule centered about proposals to modify it in the interest of more effective law enforcement procedures. The rule itself, applied to the states since 1961, has served to exclude evidence secured contrary to the terms of the Fourth Amendment.\textsuperscript{135} Its modification, a drastic one by any measure as introduced in a 1984 Supreme Court case, \textit{United States v. Leon}, permitted evidence seized by a warrant issued without probable cause to be used at trial if the executing officer could demonstrate a good faith reliance on the warrant.\textsuperscript{136} That the modification promised to effect a significant dilution of the rule was self-evident. It was repeatedly

\begin{itemize}
  \item \textsuperscript{127} \textit{Id.}
  \item \textsuperscript{128} \textit{Id.} at 1020.
  \item \textsuperscript{129} \textit{Id.} at 1022–23.
  \item \textsuperscript{130} \textit{Id.} at 1026–27 (Greene, J., dissenting).
  \item \textsuperscript{131} \textit{Id.} at 1027.
  \item \textsuperscript{132} \textit{Id.}
  \item \textsuperscript{133} \textit{Id.}
  \item \textsuperscript{134} \textit{Id.}
  \item \textsuperscript{135} \textit{Mapp v. Ohio}, 367 U.S. 643, 655 (1961).
  \item \textsuperscript{136} 468 U.S. 897, 922–23 (1984).
\end{itemize}
decried by proponents of the Fourth Amendment who sought to maintain this constitutionally protected tool of individual rights.\textsuperscript{137} The Burger Court, notably the Chief Justice, had often proved antagonistic to the exclusionary rule and had conveyed a desire to abandon it in the disposition of criminal cases.\textsuperscript{138} There were recurrent allusions to the dire effects that had resulted from adherence to the rule over the years.\textsuperscript{139} However, if the exclusionary rule corollary could not readily be discarded by the U.S. Supreme Court majority, its role could be mitigated by the good faith exception. The decision in \textit{Leon} seemed consistent with state interests and the goals that they were designed to serve. It appeared certain to assuage then prevailing public revulsion over rising levels of violence, generally heightened national attention to the offenses of lawbreakers, and effective ways of containing them.

What remained uncertain in the aftermath of \textit{Leon} was the response of state supreme courts at the height of the new judicial federalism. Would ventures be launched to counteract presumed incursions upon the exclusionary rule that threatened its extinction as an effective deterrent to law enforcement excesses? Such questions arose at a time when an increasing number of state courts had begun a process of rethinking the wisdom and propriety of major departures from the findings of the Supreme Court. All the same, a revival of state judicial activism, in defense of defendant rights, could not be easily anticipated not only because of its poor timing but also because of the traditional affinity of state judges to the interests of law enforcement officers. And efforts to expand upon Fourth Amendment guarantees did not promise to enhance the prospects of judges closely associated with the popular will. It bears recalling that state judges have always been more subject to the wrath of enraged citizens than are the constitutionally sheltered members of the Supreme Court.\textsuperscript{140} For state courts, a great degree of trepidation attaches to forays into the criminal law and its discordant array of unfavorable end-products.

The Rehnquist Court’s acquiescence in the good faith exception to the exclusionary rule represented acceptance of a significant and continuing doctrinal shift. As a result, it became even more essential, yet fraught with uncertainty, for state courts to introduce

\textsuperscript{137} See, e.g., Brennan, \textit{supra} note 22, at 547.
\textsuperscript{138} See Kamisar, \textit{supra} note 14, at 160–66.
\textsuperscript{139} See \textit{Leon}, 468 U.S. at 906–08.
\textsuperscript{140} See Wendy R. Weiser, \textit{Regulating Judges’ Political Activity After White}, 68 ALB. L. REV. 651, 667 & n.69 (2005).
modifications or to reject the exception in its entirety. It was the latter course that a number of state courts elected to follow.

Quite unexpectedly, in view of earlier pronouncements opposing the exclusionary rule, the New Jersey Supreme Court moved to reject the good faith exception in a 1987 case, *State v. Novembrino*.\(^{141}\) This reversal of course occurred when the state court had come to be recognized nationally as a source of inventiveness in the espousal of major social reforms.\(^{142}\) In *Novembrino*, the court held that the exclusionary rule was “imbedded in our jurisprudence.”\(^{143}\) A dissent condemned the departure from the U.S. Supreme Court’s position.\(^{144}\) It advanced the claim that there were neither “sound historical [n]or valid policy reasons” for the attempted transformation of a judicially created remedy into what seemed to have taken on the visage of a constitutional right.\(^{145}\)

By contrast, Michigan’s early adherence to the undiluted federal exclusionary rule as such\(^{146}\) did not ensure that the state’s highest court would reject the *Leon* Court’s exception. A majority, while reiterating its right to proceed on independent state grounds where warranted,\(^{147}\) “[chose] to embrace *Leon* as a matter of our interpretive right under the common law.”\(^{148}\) Any presumed deterrence of police misconduct, the court asserted, would not be served where the “police officers’ good-faith reliance on the search warrant was objectively reasonable.”\(^{149}\) Thus suppression of the evidence was not required, “the costs of an exclusionary rule without a good-faith exception [being] enormously high, while the benefits [were] virtually nonexistent.”\(^{150}\)

What distinguished the Michigan court’s retreat from the pristine exclusionary rule was the vigor of departure from its earlier

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\(^{142}\) For examples of the New Jersey court’s progressivism, see S. Burlington County NAACP v. Twp. of Mount Laurel, 336 A.2d 713, 731–32 (N.J. 1975) (holding that municipality could not use zoning to effectively bar low income housing); Robinson v. Cahill, 303 A.2d 273, 297–98 (N.J. 1973) (finding unconstitutional the New Jersey system of funding public schools through local taxes, a system which resulted in great disparity in dollar input per pupil across the state).

\(^{143}\) 519 A.2d at 851.

\(^{144}\) See id. at 870 (Garibaldi, J., concurring in part and dissenting in part).

\(^{145}\) Id. at 866.

\(^{146}\) See People v. Marxhausen, 171 N.W. 557, 561 (Mich. 1919).

\(^{147}\) People v. Goldston, 682 N.W.2d 479, 484–85 (Mich. 2004).

\(^{148}\) Id. at 487.

\(^{149}\) Id. at 490.

\(^{150}\) Id. at 490 n.1 (Markman, J., concurring).
declamation. The concurrence not only sustained and added to the
court’s opinion, it also addressed the concerns of the dissent and of
all who feared the outcome in the absence of an unalloyed
exclusionary rule.\footnote{See id. at 490–97.} The latter was characterized once again as an
"extraordinarily costly obstacle in the way of effective law
enforcement."\footnote{Id. at 497.} And the lack of evidence resulting from a rigorous
application of the rule was said to tie the hands of jurors intent
upon reaching a fair determination of guilt or innocence.\footnote{Id. at 491.}
Consequently, the concurrence concluded, it “ill-serves the interests
of a responsible criminal justice system.”\footnote{Id. at 497.}

The dissent reproached what it took to be the majority’s assault
upon the constitutional system and the protections afforded the
operation of the justice system.\footnote{See id. at 501 (Cavanagh, J., dissenting).} In a footnote, the dissent
compared the court’s decision—attenuating historic safeguards—to
the much-maligned writs of assistance that had rankled the
colonists in the years preceding the American Revolution.\footnote{Id. at 501 n.5.} An
impressive list of state courts opposed to the good faith exception on
independent state grounds was set out to reinforce the arguments
against the majority’s judgment.\footnote{Id. at 499 n.2.} As if to underscore its litany of
vitriolic comments, the dissent warned that “public confidence is
shattered by a government that does not respect the constitutional
rights of its citizens.”\footnote{Id. at 504.}

IV. SELF-INCrimINATION AND STATUTORY IMMUNITY

The history of immunity legislation, its roots grounded in the
closing decades of the nineteenth century, has revealed a variety of
problems to which its multiformed applications have been
addressed. Current issues date from excesses of the McCarthy era
when frequent recourse was made to the Fifth Amendment as a
protective barrier against recurring incursions threatening
individual rights. A national preoccupation with subversive
activities and communist threats during the 1950s led to a renewed
reliance on the privilege against self-incrimination. Its invocation
occurred not only in resulting criminal trials but also at an earlier

\footnote{See id. at 490–97.}
\footnote{Id. at 497.}
\footnote{Id. at 491.}
\footnote{Id. at 497.}
\footnote{See id. at 501 (Cavanagh, J., dissenting).}
\footnote{Id. at 501 n.5.}
\footnote{Id. at 499 n.2.}
\footnote{Id. at 504.}
stage in the testimony of hostile witnesses summoned before congressional committees of inquiry.\textsuperscript{159} The constitutional safeguard, long recognized among the bulwarks of human liberty, came to be regarded in the popular idiom as a spurious defense by those who sought to conceal illicit acts. To secure testimony from witnesses who took refuge in the privilege and who stood mute, a series of immunity statutes were devised to overcome what appeared to be an otherwise impenetrable wall of silence.

Among the first of the modern immunity laws, a 1954 act of Congress extended a broad-based transactional immunity from prosecution.\textsuperscript{160} Such immunity, conferred in relatively few cases upon those whose disclosures were deemed indispensable, sheltered witnesses whose compelled testimony might reveal possible evidence of guilt.\textsuperscript{161} The grant of immunity was said to be so wide-ranging as to displace any danger by providing protection substantially equal to that afforded by the Fifth Amendment.\textsuperscript{162} Justice Felix Frankfurter, writing for the Supreme Court in sustaining that 1954 law, held that “[o]nce the reason for the privilege ceases, the privilege ceases.”\textsuperscript{163} But, in succeeding years, legislative interests changed and a greater emphasis on criminal law enforcement began to prevail. The 1954 act, conferring an almost unlimited immunity when granted, no longer appeared to serve the public interest and, opponents argued, it was not necessary in constitutional terms.\textsuperscript{164}

What replaced the immunity bath attributable to transactional immunity was a lesser measure of statutory protection that more closely met the rising tide of criticism. It lay in limiting immunity to use and derivative use as encompassed in acts subsequently passed.\textsuperscript{165} The protection extended, admittedly at a lesser level, was taken to be “coextensive with the scope of the privilege.”\textsuperscript{166} As


\textsuperscript{161} Immunity Act of 1954.

\textsuperscript{162} \textit{Ullman}, 350 U.S. at 431.

\textsuperscript{163} \textit{Id.}

\textsuperscript{164} Leonard N. Sosnov, \textit{Separation of Powers Shell Game: The Federal Witness Immunity Act}, 73 \textit{Temp. L. Rev.} 171, 181 n.65 (2000) (“The primary contention was that [the 1954 Act] should be held unconstitutional on separation of powers grounds because the judiciary should have no constitutional role in reviewing actions of the other branches of the government in the absence of a case or controversy.”).

\textsuperscript{165} See \textit{Kastigar v. United States}, 406 U.S. 441, 458 (1972).

\textsuperscript{166} \textit{Id.}
proponents described use and derivative use immunity in *Kastigar v. United States*, it was “all that the Constitution require[d] even against the jurisdiction compelling [the] testimony.”\(^{\text{167}}\) Accordingly, a far less demanding standard sufficed and served as a general minimum in lieu of the Fifth Amendment privilege, albeit not necessarily a model of a constitutional safeguard. In fact, Justice William Douglas submitted a sharply worded rejoinder in *Kastigar* to the majority’s acquiescence in the newly announced standard. He accused his colleagues of having impaired “one of the chief procedural guarantees in our accusatorial system.”\(^{\text{168}}\)

Among the significant by-products of the new judicial federalism was a return to transactional immunity in several states. At the forefront of the movement, the high courts of Hawaii and Massachusetts explicitly rejected *Kastigar* as a controlling precedent.\(^{\text{169}}\) Each embraced transactional immunity as an essential component of the state constitution’s specified privilege against self-incrimination.\(^{\text{170}}\) An appellate court in Alaska, in part, patterned its opinion after the reasoning of the Supreme Court of Hawaii in declining to sanction use and derivative use immunity as sufficient to replace the privilege.\(^{\text{171}}\) The lesser grant, the court avowed, did not fulfill the state constitution’s requirements and its “unique concern” with liberty and privacy rights.\(^{\text{172}}\)

A year later, the same case, *State v. Gonzalez*,\(^ {\text{173}}\) came before the Supreme Court of Alaska for review. The court had to decide which type of immunity was equitable with the protection mandated by the state constitution.\(^ {\text{174}}\) Transactional immunity, the court noted, had been previously approved “as a matter of practice,” but no opinion had revealed whether the narrower use and derivative use immunity might also be permissible.\(^ {\text{175}}\) Before considering the merits, the court recognized that the trial court and the court of appeals had held the use and derivative use statute unconstitutional.\(^ {\text{176}}\) The high court affirmed these decisions.\(^ {\text{177}}\)

\(^{\text{167}}\) Id. at 459.

\(^{\text{168}}\) Id. at 467 (Douglas, J., dissenting).


\(^{\text{172}}\) Id. at 933.

\(^{\text{173}}\) 853 P.2d 526 (Alaska 1993).

\(^{\text{174}}\) Id. at 529.

\(^{\text{175}}\) Id. at 528.

\(^{\text{176}}\) Id.
Initially, the Alaska court moved to reexamine the self-incrimination clause of the state constitution and to determine its scope.\textsuperscript{178} In doing so, the court opted to premise its meaning on “\textit{local constitutional language}” controlled by state precedents.\textsuperscript{179} The “hazard of incrimination” had to be “remove[d]” before an individual could be compelled to give testimony.\textsuperscript{180} And that hazard always existed when the responses elicited might supply evidentiary links that could lead to a conviction.\textsuperscript{181} It was this hazard that persisted despite a grant of use and derivative use immunity.

As the court viewed the judicial process, it was unable to provide sufficient safeguards to protect against use and derivative use of the compelled testimony.\textsuperscript{182} Whether because of “problems of proof” or “human frailties,” the accused could never be fully aware of or fully able to cope with the results of the dissemination of the statements made.\textsuperscript{183} Neither was it possible for the state to assure that the nonevidentiary use of the testimony would be sufficiently confined to eliminate adverse effects upon the defendant to the advantage of the prosecution.\textsuperscript{184} Thus, the court concluded, the act extending use and derivative use immunity failed the constitutional test.\textsuperscript{185} In the aggregate, there was no way to guard adequately against the dangers presented.

It is not surprising that the Alaska high court, like tribunals elsewhere, adopted such rigorous safeguards in defense of the rights of the accused. Doubtless the course pursued reflected antipathy to many of the sentiments espoused by the Rehnquist Court majority. Perhaps, to an even greater extent, the route selected was expressive of Alaska’s heritage. Or, setting aside the foibles of original intent, an old-style reliance on constitutional relativism came to control. It may have been the latter, for all of its imperfections and failings, that served as the prevailing reason for the court’s choice of strategies. The breadth of statutory immunity, viewed in this light, provided a twofold device both to protect defendant rights and to advance the cause of a vigorous activism in a court well known for its progressive predilections.

\textsuperscript{177} Id.
\textsuperscript{178} Id. at 529–30.
\textsuperscript{179} Id. at 529.
\textsuperscript{180} Id. at 530.
\textsuperscript{181} Id.
\textsuperscript{182} Id.
\textsuperscript{183} Id.
\textsuperscript{184} Id. at 531 (quoting Surina v. Buckalew, 629 P.2d 969, 977 (Alaska 1981)).
\textsuperscript{185} Id. at 533.
V. TRIAL PROCESSES AND PROCEEDINGS

A right to counsel, now regarded as an accepted constitutional requirement, did not impart any positive guidelines during its early years. The guarantee provided by the Sixth Amendment went no further than an elemental directive that the accused “have the Assistance of Counsel for his defence.”¹⁸⁶ When, in the oft-noted 1932 case, *Powell v. Alabama*, the Supreme Court found that the aid of counsel was necessary in support of ignorant defendants in a capital case, it did so as a matter of due process under the Fourteenth Amendment.¹⁸⁷ It remained for another day before the Sixth Amendment itself was made applicable to those unable to pay for their own defense in federal proceedings.¹⁸⁸ But the Court, in a succeeding case, went on to reject pleas that state courts had to provide counsel to indigent criminal defendants.¹⁸⁹ It was only after the nationalization of the Bill of Rights had gained momentum during the Warren Court era that the obligation was extended to the states and made binding as a principle of constitutional right in *Gideon v. Wainwright*.¹⁹⁰

While *Gideon* focused attention upon the plight of the indigent in a criminal prosecution, the nature or skill of the attorney assigned did not figure as an important consideration at the time. Much of the effort in the aftermath of *Gideon* was to assure no more than the availability of counsel, often by means of improvised arrangements. Little interest was directed to the competence or suitability of the defense to assist those without financial resources of their own. More than two decades were to pass before the Supreme Court moved to elaborate upon any evaluative standards to be applied.

That the Sixth Amendment conveyed an implicit guarantee of effective trial counsel was never in doubt. Lacking was a description of what constituted effective representation and how it was to be measured in constitutional terms construed by appellate courts. A significant step toward defining standards emerged from a murder prosecution pursued for review before the United States Supreme Court.¹⁹¹ The Court of Appeals for the Fifth Circuit had reversed the conviction, finding that the defendant had suffered

¹⁸⁶ U.S. CONST. amend. VI.
ineffective assistance of counsel.\footnote{Washington v. Strickland, 693 F.2d 1243, 1263–64 (5th Cir. 1982).} To the contrary, the Supreme Court, in Strickland v. Washington, found that there had been no adequate showing of deficiencies sufficient to warrant reversal and a new trial.\footnote{Strickland, 466 U.S. at 700–01.} But, in doing so, the Court set out guidelines that have been broadly applied and explored in subsequent criminal proceedings.

The standards that the Court provided in Strickland were strikingly simple and, without extensive interpretive enlargement, they did not constitute significant additions to the judicial repertory.\footnote{Id. at 687–96.} Little of practical value could be derived from modest references to the need for the demonstration of an “objective” lack of competency in the performance of trial counsel.\footnote{Id. at 687–88; see also Williams v. Taylor, 529 U.S. 362, 397–99 (2000) (rejecting the Virginia Supreme Court’s “analysis of prejudice” in assessing the competency of counsel).} Neither was much added by the Court’s call for convincing evidence that such deficiencies contributed materially to an unjust result and that, were it not for the errors of counsel, the outcome might have been different.\footnote{Strickland, 466 U.S. at 693–94.} This two-pronged standard of review, though appealing by reason of its studied ambiguity, offered little by way of concrete guidelines. What it presented was an analytical shell that opened the way for additional criteria looking toward creative enlargement and redefinition. The opportunity existed for state courts to adopt, to reject, or to modify the description of counsel adequacy offered in Strickland.

Justice Sandra Day O’Connor, who wrote for the Court in Strickland, made clear that judicial scrutiny of an attorney’s performance had to be “highly deferential.”\footnote{466 U.S. at 689.} Thus the first of the two prongs pointed to errors in performance sufficiently serious to undermine the Sixth Amendment guarantee.\footnote{Id. at 687–91.} The second prong required evidence of the deprivation of a fair trial because of deficiencies that prejudiced the defense.\footnote{Id.} Throughout consideration of these prongs was a stringent need to overcome a strong presumption of attorney competency, even if it could be only minimally demonstrated.\footnote{See id.} There was always the propensity to assume that “counsel’s conduct falls within the wide range of
reasonable professional assistance” and that the challenged action could be taken to be sound trial strategy.\textsuperscript{201} Within such a limited context, state high courts were confronted by questions and choices that went to the core of the decision-making process. Should federal standards be followed, at least in broad terms, or did the guarantee of effective counsel necessitate an enhancement of standards that could only be sustained by a reliance on a turn to independent state grounds?

A Michigan case, \textit{People v. Pickens}, provoked a lively debate that centered about the selection of an appropriate course of action.\textsuperscript{202} What prompted such an inquiry was the serious nature of the crimes committed and of the sentences imposed.\textsuperscript{203} Yet the attention directed to structural differences could not be attributed merely to such familiar factors. Instead, other elements played a role, promoting a turn to examination of the options available. The majority adhered to no more than the standards announced in \textit{Strickland}, limiting the Michigan constitutional guarantee to a demonstrable showing by the defendant “that counsel’s performance fell below an objective standard of reasonableness, and that the representation so prejudiced the defendant as to deprive him of a fair trial.”\textsuperscript{204}

By contrast, several members of the court remained unconvinced that the issue of ineffective assistance could be resolved so cavalierly. There were references to a continuing problem that required some means of removing inadequate lawyers in a criminal justice system that placed an excessive burden on defendants who lacked sufficient resources or expertise to make realistic judgments.\textsuperscript{205} One proposal lay in a modification of \textit{Strickland} premised on independent state grounds.\textsuperscript{206} A defendant would have had to demonstrate that his attorney’s incompetence had “deprived him of an otherwise available and likely meritorious defense.”\textsuperscript{207} Did this addition to \textit{Strickland}’s prejudice prong reflect the creation of rights independently derived? Or was the addition no more than a “refinement” of a test open to differing interpretations?

If assurances of a fair trial and of adequate counsel cannot always

\begin{itemize}
\item \textsuperscript{201} \textit{Id.} at 689.
\item \textsuperscript{202} 521 N.W.2d 797, 799 (Mich. 1994).
\item \textsuperscript{203} \textit{Id.} at 799–801.
\item \textsuperscript{204} \textit{Id.} at 799.
\item \textsuperscript{205} \textit{See id.} at 820 (Mallett, J., concurring in part and dissenting in part).
\item \textsuperscript{206} \textit{Id.} at 816, 820–21.
\item \textsuperscript{207} \textit{Id.} at 820.
\end{itemize}
be relied upon, the right to a trial by jury need not irrefutably be considered free from imperfection as a requisite of the criminal justice system. Yet the historic roots of trial by jury predate the American constitutional system by several centuries. Traditionally, the notion of a trial by jury of one’s peers has been extolled as essential in a criminal case to ensure that the accused is treated fairly and that his or her rights are preserved. Few issues elicited the interest of the Framers to the same extent as the jury trial requirement.\textsuperscript{208} Safeguards appear in Article III of the Federal Constitution.\textsuperscript{209} The Bill of Rights several years later added guarantees in the Sixth Amendment.\textsuperscript{210} Nonetheless, jury trials have not always been considered the most efficient or just way to proceed. The outlook becomes particularly dim and discouraging when the issues raised are volatile and may evoke strong emotional responses. Under such conditions, trial by jury no longer can be expected to convey the renown that it has customarily received.

More recently, the question of waiver has been pressed with increasing force. That courts have not been disposed to approve a waiver without careful, almost grudging scrutiny has been made clear from surveys of the decisional law in this area. A New Jersey case, \textit{State v. Dunne}, posed the question with particular attention to the factors that need to be taken into account—especially the factual details of a case and the emotional dilemma that might be expected to becloud or even to despoil the outcome.\textsuperscript{211} The defendant was accused of a “bizarre murder” that had occurred without apparent reason.\textsuperscript{212} There was well-founded apprehension that the defense of insanity would be tainted by the introduction of evidence that the accused had displayed violent and “abnormal homosexual fantasies.”\textsuperscript{213} A jury, it was claimed, would be biased from the outset and unlikely to weigh without immoderate prejudice any psychiatric appraisal advanced in the defendant’s behalf.\textsuperscript{214} Consequently, the defense pressed the issue of a bench trial to avoid, at least in some measure, the anticipated proclivity of a jury to arrive at a precipitous finding that lacked any elements of an

\textsuperscript{208} See, \textit{e.g.}, \textsc{The Federalist} No. 83 (Alexander Hamilton).
\textsuperscript{209} U.S. Const. art. III, § 2, cl. 3.
\textsuperscript{210} U.S. Const. amend. VI.
\textsuperscript{211} 590 A.2d 1144, 1150–51 (N.J. 1991).
\textsuperscript{212} \textit{Id.} at 1145.
\textsuperscript{213} \textit{Id.} at 1146.
\textsuperscript{214} \textit{Id.}
even-tempered decision.\textsuperscript{215}

Despite persistent pleas, the trial court responded negatively to the request for a waiver.\textsuperscript{216} The judge was not persuaded that a fair trial had to be predicated on a non-jury proceeding.\textsuperscript{217} Instead, the court took the position that there was no compelling reason to authorize a waiver, that "this [was] the kind of case that is appropriate to have the community decide."\textsuperscript{218} Any prejudice against the defendant could be sorted out and avoided by the proposed jury voir dire.\textsuperscript{219} The public, it appeared, ought not to be excluded from participation in a trial of this nature.\textsuperscript{220}

The New Jersey Supreme Court, while referring to the conditions noted, refused to hold that a waiver was required.\textsuperscript{221} It dealt first with the question whether a "unilateral or absolute right" to a non-jury trial existed.\textsuperscript{222} Pursuing lines of development closely following federal precedents, the majority held that while no constitutional impediment to waiver prevailed, it did not suggest any "implied correlative right" of a defendant to demand a non-jury trial.\textsuperscript{223} Moving beyond the basic issue of constitutional right or privilege, the court proceeded to evaluate charges that the trial court's denial of a bench trial amounts to an abuse of its discretionary powers.\textsuperscript{224} "[T]ilting in favor of jury trial," as the majority perceived it, was the gravity of the crime.\textsuperscript{225} The court found that the greater the severity of the offense, the greater the weight that needed to be accorded a jury trial.\textsuperscript{226} Attention had to be directed to the preservation of public confidence in the system of criminal justice, an important objective best served by a jury trial.\textsuperscript{227} Not only was it essential to ensure a voluntary and knowing waiver, it was also necessary to determine whether the waiver was being used as a defense strategy to achieve impermissible ends.\textsuperscript{228} In closing a lengthy peroration touching upon fairness, waiver, and related factors, the court

\textsuperscript{215} Id.
\textsuperscript{216} Id.
\textsuperscript{217} Id.
\textsuperscript{218} Id.
\textsuperscript{219} Id.
\textsuperscript{220} Id.
\textsuperscript{221} Id. at 1148, 1150, 1152.
\textsuperscript{222} Id. at 1146.
\textsuperscript{223} Id. at 1148.
\textsuperscript{224} Id.
\textsuperscript{225} Id. at 1151.
\textsuperscript{226} Id.
\textsuperscript{227} Id. at 1149–50.
\textsuperscript{228} Id. at 1150.
adverted to time-honored historical elements that persuasively assisted in devising the judicial role and response.229 “We surrender to no clamor when we protect trial by jury; we simply accept the wisdom of the ages and benefit from the experience of thousands of judges over hundreds of years who continue to marvel at the consistent soundness of jury verdicts.”230

To the dissent in Dunne, the court had not succeeded in explaining or illustrating the special circumstances needed to require a waiver.231 It was troubling to understand why the majority had made it so difficult for a defendant to opt in favor of a bench trial.232 The emphasis on community expectations was said to be misplaced when the protection of the accused needed to be accorded primacy.233 As the dissent noted, judiciary-public relations might enjoy a benefit due to public confidence in juries, but this benefit was not “a legal precept that can be reconciled with due process and fundamental fairness.”234 Absent legislative intervention to the contrary, the dissent called for the onus of responsibility to be placed upon the court in setting out reasons for a waiver denial.235

Notwithstanding the court’s vigorous and repeated disclaimers in Dunne, treatment of the defendant’s request for a non-jury trial may have been little more than a reflexive action by the majority. It was difficult to justify a waiver denial in view of the extraordinary facts of this case evidenced in the opinion. Neither was it convincing to assert that the state constitution or rules tilt in favor of a trial by jury under the conditions noted. In fact, the court appeared at once adamant and apprehensive over the results announced. There seemed to be peculiar circumstances, either explicitly stated or inferred, that contributed to the confounding analytic course pursued here. Surely the judiciary’s professed need to assure public confidence in the administration of justice, in itself, did not suffice to warrant disapproval of the waiver request. A curious intermix marked a divided court clearly troubled by the outcome and heedful, almost to the point of an apologia, of an attempt to elude its

229 Id. at 1151–52.
230 Id. at 1152.
231 Id. at 1153 (Handler, J., dissenting).
232 Id.
233 Id. at 1158–59.
234 Id. at 1160.
235 Id. at 1161.
constitutional obligation when faced by trying circumstances. The guidance provided to trial courts was elusive, premised upon the implication, as the dissent charged, “that in this kind of case a criminal verdict by a trial judge would not be trustworthy, that a judge’s adjudication of crime would lack the integrity or cogency of a verdict rendered by a jury.”

Among ancillary issues related to the trial process was that of the permissible reach of peremptory challenge in the removal of prospective jurors. The New Jersey Supreme Court held that mere recognition of the religious garb of persons or of the work performed by missionaries could not be used as the basis of dismissal without more. Exclusion based on “religious bias rooted in stereotypes,” the court declared, served “neither the purpose of the peremptory challenge nor of the representative cross-section rule.” The law condemns blanket exclusion as discriminatory and requires case specific bias that such “demonstrably religious persons” “would be disposed to favor the defense.”

The Supreme Court of Washington reaffirmed the right to a public trial unless the closure gave rise to and demonstrated overriding interests warranting such action. Neither could a trial be conducted under conditions violative of the defendant’s constitutional right to be tried by an impartial jury. The Supreme Court of Oregon found that a prison courtroom was inherently prejudicial and not conducive to a fair trial as required by the state constitution’s impartial jury guarantee. It was evident, the court observed, that the public would be unlikely to attend within the confines of a penal institution. Consequently, the trial held could not meet constitutional safeguards and the result had to be set aside despite the defendant’s past violent behavior during the period of his incarceration. The court concluded that a prison trial “forcefully conveys to a jury the overriding impression of a defendant’s dangerousness and . . . by extension, his or her guilt.”

236 See id. at 1151–52 (majority opinion).
237 Id. at 1159 (Handler, J., dissenting).
238 State v. Fuller, 862 A.2d 1130, 1147 (N.J. 2004).
239 Id. at 1145.
240 Id. at 1146–47.
241 In re Orange, 100 P.3d 291, 298 (Wash. 2004).
242 U.S. CONST. amend. VI.
243 State v. Cavan, 98 P.3d 381, 382 (Or. 2004).
244 Id. at 389.
245 Id.
246 Id.
VI. THE CAPITAL PUNISHMENT IMBROGLIO

Of the penalties that may be imposed upon those convicted of crimes, capital punishment represents the pinnacle on any designated scale. Few issues of recent note have elicited the emotional fervor and unlikely alliances associated with infliction of the death penalty. New York became the thirty-eighth state to authorize capital punishment.\(^{247}\) But the future of the law remained uncertain, especially in light of projected constitutional challenges premised upon provisions of state charters. What attracted close scrutiny were misgivings related to the rising number of minority group members subjected to execution, the protection of the mentally retarded,\(^{248}\) and the training and experience of attorneys assigned to represent indigent defendants.\(^{249}\)

Much of the debate and the political controversy that it evoked dated from the United States Supreme Court’s fragmented holding in \textit{Furman v. Georgia} that capital punishment, under specified circumstances, was unconstitutional.\(^{250}\) When Congress and more than thirty states approved a series of new laws intended to meet the Court’s objections, a majority reversed course and sustained capital punishment as not inherently cruel or unusual.\(^{251}\) Other questions, subsequently resolved in part, dealt with youthful offenders, the mentally retarded, and race and the death penalty.

With the application of the Eighth Amendment to the states by way of the Fourteenth Amendment,\(^{252}\) it appeared that federal jurisprudence would control and that the states henceforth would be guided largely if not completely by national precedents. But the revival of state constitutional law in the 1970s altered the calculus of decision-making. While the states were precluded from providing lesser safeguards than those in the U.S. Constitution, they were not prevented from affording higher levels of protection. Neither was it necessary that an explicit state counterpart of the ban on cruel and unusual punishment be available to ensure a resort to state predicates. An adroit construction of less confining provisions such

\(^{248}\) See \textit{Furman v. Georgia}, 408 U.S. 238, 249–51 & nn.15–16 (1972) (discussing the results of a study suggesting that the sick and minorities are disproportionately subjected to the death penalty).
\(^{249}\) \textit{Id.} at 251 n.16.
\(^{250}\) \textit{Id.} at 239–40.
as due process was capable of serving the same purpose without
exacting phraseology in the constitutional text.\textsuperscript{253} Whether a state
court elected to move beyond federal precedents linked to the
Eighth Amendment remained open to choice as the new judicial
federalism added momentum and renewed vitality.

A Connecticut case, \textit{State v. Ross}, challenging the validity of the
state’s death penalty statute, prepared the groundwork for diverse
exchanges among the justices.\textsuperscript{254} The majority found no basis for a
holding of unconstitutionality under prevailing federal standards.\textsuperscript{255}
On the basis of what was referred to as a “multitiered pyramid,” the
court concluded that the state law met all of the criteria required to
afford the capital sentencer—a jury or the court—sufficient guided
discretion to assure appropriate determination respecting the
individual defendant and the specific crime under review.\textsuperscript{256}
Additionally, by dint of the fact that the capital sentencing statutes
were not “impermissibly mandatory,” they were in compliance with
the essential requisites of the Eighth and Fourteenth
Amendments.\textsuperscript{257}

A 1990 ruling by the Supreme Court—invalidating a state
sentencing statute because the jury, in its role as the capital
sentencer, could consider mitigating circumstances only when found
unanimously—did not weigh against the Connecticut law.\textsuperscript{258}
The Connecticut law, as the majority viewed it, “[did] not interfere with
the ability of each individual juror to consider and to give effect to
any mitigating factor of which he or she is convinced by a
preponderance of the evidence.”\textsuperscript{259}

What remained in the turmoil over capital sentencing procedures
was the language and construction of the state constitution and its
effects on the outcome. The court readily conceded that the lack of
an explicit ban on cruel and unusual punishment did not exclude
the prohibition as a matter of due process guarantees and historical
considerations tied to the common law.\textsuperscript{260} Yet an inquiry on
independent state grounds did not persuade the majority to hold the

\textsuperscript{253} See, e.g., People v. LaValle, 817 N.E.2d 341, 365 (N.Y. 2004).
\textsuperscript{254} 646 A.2d 1318, 1328, 1330 (Conn. 1994). The case elicited considerable public interest
and widespread publicity, especially the killer’s expressed wish to die. See Nathan
\textsuperscript{255} \textit{Ross}, 646 A.2d at 1354.
\textsuperscript{256} Id. at 1351.
\textsuperscript{257} Id. at 1352.
\textsuperscript{259} \textit{Ross}, 646 A.2d at 1354.
\textsuperscript{260} Id. at 1355.
sentencing act unconstitutional. An examination of the law’s textual provisions, state precedents, the intent of the framers, and the experience of other state courts did not lead to a different conclusion.

Apart from an exacting scrutiny of the law, the sole basis for a possibly negative holding lay in “contemporary understandings of applicable economic and sociological norms.” Despite the defendant’s repeated pleas, the court was not convinced that “evolving standards of human decency” categorically required that the statute be set aside. Community standards, as they had a bearing on legislative choices, had to be taken into account, particularly when these choices had been reflected in the perpetuation of death penalty laws in a majority of states. Nor were the contentions in support of statutory invalidity, advanced in a federal law context, any more persuasive when measured against a state constitutional law framework. The arguments set forth by the defense, the majority avowed, mirrored those projected and rejected in federal law terms and were equally unconvincing when pressed on state law grounds. The court found that the applicable statutes “authorize the death penalty only in defined circumstances that impose a heavy burden on the state to justify the death penalty and that permit the defendant wide latitude to persuade the sentencer to the contrary.”

To the dissent in Ross, the majority’s findings were unjustified not only with regard to the trial court’s poor performance in this case but, more significantly, respecting the constitutionality of the death penalty itself. The dissent pointed to the wording of the state constitution of 1818 that barred deprivation of life without due process of law and a clause that no person be punished unless “clearly warranted by law.” Both provisions were said to suffice to proscribe cruel and unusual punishment. But the dissent had to admit that the death penalty was permitted at the time of the

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261 Id. at 1355, 1357, 1359.
262 Id. at 1356–59.
263 Id. at 1356.
264 Id. at 1357.
265 Id.
266 Id.
267 Id.
268 Id. at 1359.
269 Id. at 1373 (Berdon, J., dissenting in part).
270 Id. at 1375.
271 Id. (citing CONN. CONST. art. I, §§ 8, 9).
constitution’s adoption. Consequently, the unfeigned and updated reason for holding the current statute invalid was a shift toward viewing its unacceptability “through the lens of contemporary standards.” Judged by such standards of decency and morality, imposition of the death penalty was intolerable. According to the dissent, “[n]ot only does the death penalty degrade the individuals who are sentenced to die, but it also degrades and dehumanizes a society that permits it to be imposed, calling into question the morality of every one of us.”

Both the majority and dissenting opinions in Ross failed to offer adequate consideration of the sentencing statute and the death penalty itself, either singly or in concert, on independent state grounds. In particular, the court’s extensive analysis of federal law may have served to produce an inhibiting effect, whether purposely pursued or not. The emphasis on contemporary standards and ethics, prominent in most debates on the death penalty, did not prove to be decisive in establishing a sound basis for a finding of unconstitutionality. More was required if an imperative premised on high-principled righteousness was to be turned into a reversal of the trial court’s findings. Nor was much of a probative value conveyed by the dissent’s repeated references to measures of decency. It is possible that a well-honed resort to the common law, revitalized as an updated judicial medium, might have accomplished more in terms of doctrinal stability and a consistent adherence to enduring principles.

Spirited public discussion of the detriments and the claimed benefits of maintaining capital punishment marked the closing years of the twentieth century. Despite a rising tide of protracted arguments on both sides, a U.S. Supreme Court majority could not be marshaled for the abolition of the practice. But the debate led to the Court’s adoption of significant policy changes promoted, in part, by international pressures as well as a reliance on “evolving standards of decency.” Indeed, the Eighth Amendment’s ban on cruel and unusual punishment developed by way of constitutional relativism and a search for a national consensus on the issue.

The execution of the mentally retarded was prohibited when the court found the practice to be unconstitutional. Three years later,
the Court went on to end the execution of offenders under the age of eighteen,\footnote{Roper v. Simmons, 543 U.S. 551, 575 (2005).} sustaining a like ban imposed by the Supreme Court of Missouri.\footnote{Simmons v. Roper, 112 S.W.3d 397, 399–400 (Mo. 2003).} Justice Kennedy, writing for the United States Supreme Court majority, referred to the development of a viable national consensus and to international concerns.\footnote{Roper, 543 U.S. at 564, 577–78.} It is noteworthy that the Court took cognizance of a 1994 Act of Congress forbidding juvenile executions.\footnote{Roper, 543 U.S. at 567.}

In a few states, the abolition of capital punishment came to the fore amid efforts to salvage the death penalty when, for reasons indicated, the practice itself was held unconstitutional. The Court of Appeals of New York, in \textit{People v. LaValle}, found a statutorily mandated “deadlock instruction” in violation of the state constitution’s due process clause.\footnote{People v. LaValle, 817 N.E.2d 341, 359 (N.Y. 2004).} It was said that jurors were given a “Hobson’s choice” between death and life with parole.\footnote{Id. at 358.} Those in the jury minority, opting for a life sentence without the possibility of parole, would be impelled to vote for death to avoid making the defendant ultimately eligible for parole because of a non-unanimous verdict.\footnote{See id.} To prevent this result from impeding the deliberative process, the court held the instruction invalid “because of the unacceptable risk that it may result in a coercive, and thus arbitrary and unreliable, sentence.”\footnote{Id. at 359.} Nevertheless, except for technical details, significant though these were, the merits or detriments of capital punishment as such were not weighed or explored except by indirection.

The concurrence in \textit{LaValle} not only supported the majority’s arguments and findings, it went on to describe the statutory instruction as “inexplicable and fatally defective.”\footnote{Id. at 369 (Rosenblatt, J., concurring).} Deference to the legislative will could not be justified as the basis for an
unreliable sentencing verdict.\textsuperscript{286} Nor could it be properly charged that not more than a “trifling or arcane technicality” was at issue.\textsuperscript{287} Deadlock instruction jurisprudence, the concurrence concluded, is “literally, a matter of life and death.”\textsuperscript{288}

To the dissent, the majority had gone too far in holding the instruction unconstitutionally coercive.\textsuperscript{289} And, even if invalid, the instruction section could be severed without abrogating the entire death penalty law.\textsuperscript{290} The dissent found the court’s decision an astonishing holding, invalidating a procedure followed throughout the country and “supported by weighty policy considerations.”\textsuperscript{291} The judgment, the dissent asserted, reflected the majority’s “discomfort with the death penalty,” thus “weighting the balance in the defendant’s favor.”\textsuperscript{292}

The Kansas Supreme Court held the state’s capital punishment law unconstitutional since it called for imposition of the death penalty where aggravating and mitigating circumstances were equally balanced.\textsuperscript{293} The court declined to rewrite what appeared to be an unambiguous statute requiring a weighing equation established by the legislature.\textsuperscript{294} Instead, the majority called upon the legislature to respond as it deemed proper.\textsuperscript{295} To do otherwise, it was said, would substitute the judiciary for the legislative branch as the appropriate agency to resolve the issue of whether the law should be revised “to pass constitutional muster.”\textsuperscript{296} One of the dissents took exception to what it construed as an unlikely event in which a tie went to the state instead of the defendant.\textsuperscript{297} Another held that no more than a change in the court’s membership had led to the result reached, thwarting “the intention of the legislature, ostensibly, in order to pay tribute to it.”\textsuperscript{298}

An effort to return capital punishment to the criminal justice system in Massachusetts prompted the governor to propose a
multifaceted scheme to guard against "questionable execution[s]." Only the most serious crimes were to include the possibility of the imposition of the death penalty. And, even in such cases, guilt would be linked to findings of "no doubt," a standard said to be stricter than the usual "beyond a reasonable doubt." Nevertheless, while the safeguards suggested might have served as "a model for the nation," the plan appeared to have little chance of adoption, in part because of its cost.

VII. CLOSING COMMENTS

Any review of the criminal law of the states must be highly selective in view of the areas and issues open to coverage. Significant state cases might readily have included a host of other issues, surely not to be dismissed as esoteric. All the same, the selections in this article reflect some of the most controversial themes that have developed. The contrasts between federal and state efforts to resolve the questions raised remain problematic. The cases reviewed revealed mixed results that fail to support arguments in favor of an unequivocal, more forceful turn to an expanded reliance on independent state grounds. In fact, those who seek an expansive reading of suspect rights will be hard pressed to be cavalierly dismissive either of federal or state constitutional components. Much depends on the nature of the crime charged and the precedents available on which a reliable choice so heavily depends.

Existing safeguards for the protection of the criminally accused, linked to state constitutional predicates, often parallel, with some modifications, the course of federal case law. Where the Supreme Court has not embarked upon immoderate changes or extravagant transformations, diversions from federal precedents may continue to be minimal, with attention directed mainly to details of implementation rather than to fundamental principles. The most telling departures from earlier norms seem to have been reserved for sustaining some of the barriers impeding habeas corpus relief for convicted felons. And, it needs to be recalled, the introduction of

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300 See Pam Belluck, Massachusetts Governor Urges Death Penalty, N.Y. TIMES, Apr. 29, 2005, at A16 (quoting Governor Mitt Romney).
301 Id.
302 Id.
303 See id. (quoting Governor Mitt Romney).
304 The need to ensure the continued vitality of habeas corpus rights was stressed in an
state screening and of protective measures in this area is limited and often unproductive. There is little to be gained in habeas review by way of a combative judicial federalism, a route so often pursued by a few activist state courts especially during the early 1970s.

That many of the products of the Warren Court have survived is best exemplified by the Rehnquist Court’s refusal to overturn *Miranda* by means of a much-avoided section of an act of Congress intended to set aside the ruling. The decision, dating from the halcyon years of the Warren Court, is said to have “sent its critics over the top because of its unapologetically legislative quality.”

Nevertheless, Chief Justice Rehnquist, writing for the Court in a 2000 case, *Dickerson v. United States*, declined to depict *Miranda* as a prime example of judicial outreach and extraconstitutional activism. Instead, the Court, bolstered by a seven-member majority, went on to characterize *Miranda* as a constitutional decision that “may not be in effect overruled by an Act of Congress, and we decline to overrule *Miranda* ourselves.”

The Court stressed the ruling’s appropriate reliance on the Fifth Amendment right against self-incrimination and Fourteenth Amendment due process. On all counts, the *Miranda* warnings were held to continue to be applicable to custodial interrogation in federal and state courts. Congress, the majority warned, was precluded from any effort that might “legislatively supersede” decisions construing and applying the Constitution. In addition, the Court spurned any invitation to reject established precedents, especially for a decision affirming warnings that had “become part of our national culture” and “routine police practice.”

To the contrary, Justice Scalia, joined only by Justice Thomas, decried in vigorous language what to many court watchers was a surprising and welcome turn by Chief Justice Rehnquist in sustaining *Miranda* and the specific requirements set forth in what the Chief Justice took to be a constitutionally prescribed rule. Justice Scalia condemned the Court’s rejection of history and

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307 Id. at 432.
308 Id. at 434–35.
309 Id.
310 Id. at 437.
311 Id. at 443.
precedent, calling the course followed “preposterous.” He denounced the assumption of “an immense and frightening antidemocratic power” that went beyond the bounds of the Constitution and sought to impose what it regarded as “useful ‘prophylactic’ restrictions upon Congress and the States.” Miranda, the dissent concluded, had been converted from a “milestone of judicial overreaching into the very Cheops’ Pyramid . . . of judicial arrogance.” From the tone of Justice Scalia’s scathing opinion, it appeared that Miranda’s survival depended upon acts of judicial effrontery hitherto unknown or rarely pursued. Nonetheless, Miranda warnings continued to be in effect—symbols of moderation and adherence to the principles of stare decisis in the construction and application of the criminal law.

In many respects, the Court’s performance in Dickerson resembled the actions of a centrist coalition of Justices in a seminal 1992 abortion rights case, Planned Parenthood of Southeastern Pennsylvania v. Casey. The newly formed group, consisting of Justices O’Connor, Kennedy, and Souter, took pains to support the basic holding of Roe v. Wade as one founded upon a “constitutional analysis which we cannot now repudiate.” Justice Blackmun, who wrote for the Court in Roe, termed the joint opinion in Casey “an act of personal courage and constitutional principle.” In a reference to the need to maintain the Court’s legitimacy and integrity, the Casey coalition steadfastly refused to be swayed by repeated efforts of the executive branch and a vocal minority of the public to overrule what the coalition characterized as settled law. Much of the same spirit seemed to prevail in Dickerson as in Casey, reflecting a strong commitment to the rule of law, to the wisdom of ending national divisiveness, and to the urgency of maintaining the Court’s status as a respected and final expositor of constitutional principles.

Should the Supreme Court continue to follow a course of moderation, any return to a widespread reliance on independent state grounds seems unlikely. The Court needs to avoid politicalization and pandering to public whims of the moment.

312 Id. at 448 (Scalia, J., dissenting).
313 Id. at 446.
314 Id. at 465.
316 Id. at 869.
317 Id. at 923.
318 Id. at 868–69.
Adherence to such precedents as *Miranda* may represent a repudiation of what critics have charged is the attempted trivialization of the doctrine of stare decisis. It is probable that Fourth Amendment safeguards will continue to decline as the exclusionary rule becomes less reliable. Yet the survival of a number of Warren Court precedents, predictably something more than lusterless shells, may serve to secure the Burger Court’s reputation as a less threatening foe of criminal justice rights. If the signals emanating from *Dickerson* prove to be correct and of reasonably long term impact, state high courts may no longer be prone to be measurably at odds with the United States Supreme Court. To like effect, the Court’s position on significant aspects of capital punishment law may also encourage a less activist response from state courts. Neither federal nor state courts are obligated to reflect closely the oscillating waves of public opinion as they seek to preserve the rights of the criminally accused and to protect against prosecutorial excesses.