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NOTES & COMMENTS

EXPANDING CRIMINAL PROCEDURAL RIGHTS UNDER STATE CONSTITUTIONS

An important trend is developing within the criminal law field: state courts are interpreting provisions in their constitutions more expansively than United States Supreme Court decisions construing similar provisions in the Federal Constitution.[1] Consequently, criminal defendants are often being afforded greater protection under their state Bill of Rights than under the federal Bill of Rights. While some commentators have hailed this trend as indicative of a healthy federalism,[2] the methods adopted by state courts to expand individual rights present several difficulties. These problems arise because of the Supreme Court doctrine of selective incorporation[3] which has affected state criminal procedure by entrusting the protection of certain basic rights to the federal government. Only by analyzing this doctrine's impact on state procedure can the ramifications of these expansive state decisions be adequately examined.

In the constitutional convention prior to the adoption of the Federal Constitution, the delegates realized that more power should be given to the national government than had been provided in the unsuccessful Articles of Confederation.[4] Nevertheless, the framers developed a federal system in which the individual states exercised all powers except those specifically granted to the national government.[5] During the debates over adoption of the Constitution, its proponents emphasized the limited nature of the national government and the ultimate responsibility of the states to insure individual

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[1] *See, e.g.*, People v. Disbrow, 127 Cal. Rptr. 360, 545 P.2d 272 (1976); State v. Kaluna, 55 Hawaii 361, 520 P.2d 51 (1974); State v. Johnson, 68 N.J. 349, 346 A.2d 66 (1975).

[2] *See, e.g.*, Wilkes, *More on the New Federalism in Criminal Procedure*, 63 KY. L. J. 873 (1975); Wilkes, *The New Federalism in Criminal Procedure: State Court Evasion of the Burger Court*, 62 KY. L. J. 421 (1974); Note, *Robinson at Large in the Fifty States: A Continuation of the State Bills of Rights Debate in the Search and Seizure Context*, 5 GOLDEN GATE L. REV. 1 (1974).

[3] According to this doctrine once a right is deemed "fundamental" it is incorporated into the fourteenth amendment and is therefore binding on the states. *See* text accompanying notes 27-42 *infra*.

[4] A. PRESCOTT, DRAFTING THE FEDERAL CONSTITUTION 812 (1941); *see* Brennan, *The Bill of Rights and the States*, 36 N.Y.U.L. REV. 761 (1961) [hereinafter cited as Brennan].

[5] Brennan, *supra* note 4.

liberties.[6] The Constitution's strongest supporters, therefore, argued that since the federal government held such limited powers there was no need for a federal Bill of Rights.[7] However, the opponents of the Constitution prevailed on this issue, and a federal Bill of Rights was specifically created to act as an additional check on the powers of the federal government.[8]

Any doubt concerning the intended scope of the federal Bill of Rights was resolved by the Supreme Court in *Barron v. Baltimore*.[9] Chief Justice Marshall wrote the unanimous opinion holding that the federal Bill of Rights applied only to the federal government.[10] The

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[6] THE FEDERALIST No. 84, at 133 (R. Fairfield ed. 1966) (J. Madison), in which James Madison states:

> The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite . . . . The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State.

Id. at 137.

[7] THE FEDERALIST No. 84, at 259 (R. Fairfield ed. 1966) (A. Hamilton). Believing that a federal Bill of Rights would be meaningless and taking freedom of the press as an example, Hamilton argued that since the federal government had not been granted any power to restrict the press, there was no sense in creating a prohibition against restricting the press. Since the power had not been granted, it was not capable of being abused. This argument may have been more of a response to the error of the Constitutional Convention in omitting a Bill of Rights from the text of the Constitution than a true belief that a national Bill of Rights would be superfluous. J. LEWIS, ANTI-FEDERALISTS VERSUS FEDERALISTS 54 (1967). The authors, and particularly Hamilton who wrote Number 84, were trapped into advocating a non-Bill of Rights position for two reasons. First, a Bill of Rights was unnecessary unless they admitted that the Constitutional Convention had done an ineffective and incomplete job. Second, recognizing the need for a national Bill of Rights in the Constitution proposed for ratification by the states would undermine the validity of the draft Constitution as a document sufficient to secure and maintain liberty. *Id.* at 54-55.

[8] L. LEVY, LEGACY OF SUPPRESSION: FREEDOM OF SPEECH AND PRESS IN EARLY AMERICAN HISTORY 266 (1960). The Virginia and Kentucky Resolutions exemplify political thought during the early days of the nation and demonstrate the view that was taken of the Bill of Rights. In the Virginia and Kentucky Resolutions, the same anti-federalists who supported the existence of a federal Bill of Rights erected them into a "bill of wrongs" the Congress must not commit. *Id.* During the early decades of the nineteenth century, the rhetoric about the Bill of Rights acting as a constitutional limitation on the power of the federal government was invoked more to promote sectional power than to protect individual liberty. H. HYMAN, A MORE PERFECT UNION 10 (1973). *See also* Project Report: *Toward an Activist Role for State Bills of Rights*, 8 HARV. CIV. RIGHTS — CIV. LIB. L. REV. 271, 276-77 (1973).

[9] 32 U.S. (7 Pet.) 464 (1833).

[10] *Id.* at 468.

Barron Court clearly stated that since state constitutions had bills of rights, the individual must rely exclusively on them for protection against his state.[11] This bifurcated system for protection of individual liberties was consistently approved,[12] and remained unchanged until the passage of the reconstruction amendments after the Civil War.[13]

Although historically the purpose of a Bill of Rights was to reserve certain privileges to individuals and thereby limit the prerogatives available to the government,[14] the bifurcated system of state and federal Bills of Rights established by the *Barron* Court was incapable of serving that purpose effectively since the state provisions only protected against state activities and the federal amendments only applied to federal activities. As a result, both the state and federal governments were powerless to protect fundamental rights from all governmental infringement. The theory of a total separation of state and federal Bills of Rights assumes that both the state and federal governments will provide at least minimum protection for individual liberties.[15] Yet the Civil War amendments focused attention on this unsound assumption and pointed out the conceptual weakness of trying to protect basic rights through numerous autonomous systems.[16]

In drafting the fourteenth amendment,[17] Congress sought to insure that the individual rights granted would be protected from state deprivations.[18] The original draft was sent back to the Judiciary Committee and the phrase "No state" was inserted to protect against state

[11] In *Barron*, a wharf owner attempted to invoke the fifth amendment against the City of Baltimore in his suit for damages for the destruction of his wharf by the city. The Court held that whatever rights the wharf owner might have would have to be found under state law. *Id.*

[12] *See, e.g.*, Withers v. Buckley, 61 U.S. (20 How.) 84 (1857); Smith v. Maryland, 59 U.S. (18 How.) 71 (1855); Fox v. Ohio, 46 U.S. (5 How.) 447 (1847).

[13] U.S. CONST. amends. XIII, XIV & XV.

[14] THE FEDERALIST No. 84, at 262 (R. Fairfield ed. 1966) (A. Hamilton).

[15] *See*, Note, *Robinson At Large in the Fifty States: A Continuation of the State Bills of Rights Debate in the Search and Seizure Context*, 5 GOLDEN GATE L. REV. 1, 9 (1974).

[16] Project Report: *Toward an Activist Role For State Bills of Rights*, 8 HARV. CIV. RIGHTS — CIV. LIB. L. REV. 271, 278 (1973).

[17] U.S. CONST. amend. XIV, § 1 states in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

[18] *See* H. BRANNON, THE FOURTEENTH AMENDMENT 138 (1901); C. COLLINS, THE FOURTEENTH AMENDMENT AND THE STATES 29 (1912).

abridgement of those rights guaranteed under the Federal Constitution.[19] Although Congress intended that the amendment broadly protect individual rights, within five years of its enactment the Supreme Court rendered a very restrictive interpretation in the *Slaughter-House Cases*.[20] There, the Court construed the privileges and immunities clause of the fourteenth amendment[21] to apply only to those rights which owed "their existence to the Federal government, its National character, its Constitution, or its laws."[22] The Court reasoned that a broad application of the fourteenth amendment would encroach upon each state's freedom in regulating individual rights.[23] This restrictive view of the fourteenth amendment was consistently upheld[24] until the development of the "absorption" theory,[25] subsequently refined into a "selective incorporation" doctrine,[26] which transformed the first eight amendments to the Federal Constitution into national statements of basic liberties.

The theory of "incorporating" or "absorbing" the specific provisions of the federal Bill of Rights into the fourteenth amendment developed in response to the need for national protection of individual rights.[27] Since the fourteenth amendment specifically proscribes

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[19] Hemphill, *State Action and Civil Rights*, 23 MERCER L. REV. 519, 523-25 (1972).

[20] 83 U.S. (16 Wall.) 36 (1873).

[21] *See* note 17 *supra*.

[22] 83 U.S. (16 Wall.) at 79. The Court cited certain rights which were exclusively protected by the Federal Constitution such as the right to travel, the right to petition for redress of grievances, and the right to use the navigable waters of the United States. *Id.* at 79-80.

[23] In the *Slaughter-House Cases*, the Supreme Court stated:

> to bring within the power of Congress the entire domain of civil rights heretofore belonging exclusively to the States . . . [would be] to fetter and degrade the State governments by subjecting them to the control of Congress, in the exercise of powers heretofore universally conceded to them of the most ordinary and fundamental character . . . .

Id. at 77-78.

[24] *E.g.*, Presser v. Illinois, 116 U.S. 252 (1886); Hurtado v. California, 110 U.S. 516 (1884); Walker v. Sauvinet, 92 U.S. 90 (1875).

[25] *See* text accompanying notes 27-33 *infra*.

[26] *See* text accompanying notes 34-40 *infra*.

[27] The premise of the absorption theory is that the specific provision in the federal Bill of Rights is absorbed into the due process clause of the fourteenth amendment, thereby making the provision enforceable against the states. This proposition has been and continues to be a debatable issue of historical interpretation. *Compare* H. FLACK, THE ADOPTION OF THE FOURTEENTH AMENDMENT (1908) and Crosskey, *Charles Fairman, "Legislative History," and the Constitutional Limitations on State Authority*, 22 U. CHI. L. REV. 1 (1954), *with* Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding*, 2 STAN. L. REV. 5 (1949) and Morrison, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Judicial Interpretation*, 2 STAN. L. REV. 140 (1949). *See* text accompanying notes 17-19 *supra*.

state activities,[28] the effect of absorbing one of the provisions of the Bill of Rights into the due process clause is to make the specific provision applicable to the states. The significance of this theory is that authority for protecting a right depends on the actual nature of the right itself, rather than on which government happens to be abridging the right[29] or whether the right was "national" in origin.[30] The test that the Court devised for deciding to absorb a particular right involved an inquiry into whether the right was so fundamental as to be "of the very essence of a scheme of ordered liberty."[31] This analysis was initially utilized to absorb the first amendment,[32] but was subsequently used in decisions dealing with other amendments in the Bill of Rights.[33]

This test was slightly modified over the years by the process of selective incorporation.[34] Although the decision to incorporate a right remained subjective, the Court evaluated the right in the specific context of the anglo-american system of justice rather than in the abstract.[35] Using this case-by-case process of exclusion and inclusion, the Court, particularly during the 1960's, applied to the states almost all of the rights guaranteed by the federal Bill of Rights.[36] Further,

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[28] *See* note 17 *supra.*

[29] *See* text accompanying notes 9-12 *supra.*

[30] *See* text accompanying notes 20-23 *supra.*

[31] Palko v. Connecticut, 302 U.S. 319, 325 (1937). This "flexible" test examines the fundamental nature of the right to ascertain if it is so basic to our system of justice as to require incorporation into the due process clause. In contrast, Justice Black took the approach that the fourteenth amendment was meant to incorporate the Bill of Rights without regard to the fundamental nature of the right. Adamson v. California, 332 U.S. 46, 68 (1947) (Black, J., dissenting); *see* Black, *The Bill of Rights*, 35 N.Y.U.L. REV. 865 (1960).

[32] Gitlow v. New York, 268 U.S. 652 (1925).

[33] *E.g.*, Wolf v. Colorado, 338 U.S. 25 (1949) (fourth amendment); Palko v. Connecticut, 302 U.S. 319 (1937) (fifth amendment).

[34] *See* Henkin, *"Selective Incorporation" in the Fourteenth Amendment*, 73 YALE L. J. 74 (1963); Lacy, *The Bill of Rights and the Fourteenth Amendment: The Evolution of the Absorption Doctrine*, 23 WASH. & LEE L. REV. 37 (1966).

[35] Henkin, *"Selective Incorporation" in the Fourteenth Amendment*, 73 YALE L. J. 74, 82 (1963). *See also* Duncan v. Louisiana, 391 U.S. 145, 149-50 n.14 (1968).

[36] Rights which have been incorporated into the fourteenth amendment and are therefore binding on the states are: the first amendment, Gitlow v. New York, 268 U.S. 652 (1925) (freedom of speech and press); Cantwell v. Connecticut, 310 U.S. 296 (1940) (freedom of religion); Edwards v. South Carolina, 372 U.S. 229 (1936) (freedom of assembly and freedom to petition for redress of grievances); the fourth amendment, Wolf v. Colorado, 338 U.S. 25 (1949) (freedom from unreasonable searches); Mapp v. Ohio, 367 U.S. 643 (1961) (the exclusionary rule); the fifth amendment: Chicago, Burlington & Quincy R.R. v. Chicago, 166 U.S. 226 (1897) (just privilege against self-

under the theory of selective incorporation, once a right is incorporated into the fourteenth amendment, it has the exact limiting effect on state activities that the applicable amendment has on federal activities.[37]

Recently there has been a gradual yet significant shift in the incorporation philosophy of the Supreme Court. While the Court still adheres to a selective incorporation theory,[38] the emphasis on applying the full sweep of a federal right against the states is lacking.[39] Thus, many judicially developed requirements which delineate the

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incrimination); Benton v. Maryland, 395 U.S. 784 (1969) (double jeopardy clause); the sixth amendment, Gideon v. Wainwright, 372 U.S. 335 (1963) (right to counsel); In Re Oliver, 333 U.S. 257 (1948) (public trial); Pointer v. Texas, 380 U.S. 400 (1965) (right to confrontation); Klopfer v. North Carolina, 386 U.S. 213 (1967) (speedy trial); Washington v. Texas, 388 U.S. 14 (1967) (compulsory process for obtaining witnesses); Duncan v. Louisiana, 391 U.S. 145 (1968) (trial by jury); the eighth amendment, Robinson v. California, 370 U.S. 660 (1962) (cruel and unusual punishment).

[37] *E.g.*, Malloy v. Hogan, 378 U.S. 1 (1964), in which Justice Brennan stated:

> We hold that the Fourteenth Amendment guaranteed the petitioner the protection of the Fifth Amendment's privilege against self-incrimination, and that *under the applicable federal standard*, the [state court] erred . . . [Previously incorporated rights are] enforced against the States under the Fourteenth Amendment *according to the same standards that protect those personal rights against federal encroachment.*

Id. at 3, 10 (emphasis added). *See also* Benton v. Maryland, 395 U.S. 784, 795 (1969); Duncan v. Louisiana, 391 U.S. 145, 149 (1968).

In each decision espousing the philosophy of selective incorporation, there were vigorous dissents or concurrences in which it was argued that the far-reaching effect of the selective incorporation philosophy would be total uniformity between state and federal criminal systems. For example, Justice Harlan stated:

> [T]he States have been put in a federal mold with respect to this aspect of criminal law enforcement, *thus depriving the country of the opportunity to observe the effects of different procedures in similar settings.*

Coolidge v. New Hampshire, 403 U.S. 443, 490-91 (1971) (Harlan, J., concurring) (emphasis added). One commentator has found that the logical consequence of the incorporation doctrine is that the right becomes applicable to the states with all of the overlays of judicial gloss which the Supreme Court has developed in applying the right to the federal government. *See* Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 CAL. L. REV. 929, 935 (1965).

[38] Michigan v. Tucker, 417 U.S. 433, 440 (1974) (citing with apparent approval the *Malloy v. Hogan* incorporation of the fifth amendment's privilege against self-incrimination); Davis v. Alaska, 415 U.S. 308, 315 (1974) (reversing decision due to failure of trial court to apply fully the right to confrontation incorporated in *Pointer v. Texas*); Cady v. Dombrowski, 413 U.S. 433 (1973) (assuming the incorporation of the fourth amendment).

[39] *See* Cord, *Neo-Incorporation: The Burger Court and the Due Process Clause of the Fourteenth Amendment*, 44 FORD. L. REV. 215 (1975).

contours of a right in the federal system are no longer forced upon the states through the selective incorporation doctrine.[40] Perhaps influenced by this philosophic change, a rapidly increasing number of state courts[41] have declined to follow Supreme Court decisions in the criminal law area, and have established higher standards within their respective states based upon the authority of state constitutions.[42]

Indicative of this trend is the recent New Jersey Supreme Court decision of *State v. Johnson*.[43] The issue in *Johnson* concerned the proper procedure to be followed by the police in conducting a consent search. In dealing with the identical problem,[44] the United States

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[40] Illustrative of the Court's aversion to applying the precise federal standards surrounding an incorporated right are the Court's decisions dealing with the sixth amendment's right to jury trial. The right was incorporated in the 1960's in an opinion that appeared to include all the "bag and baggage" of federal judicial precedent. Duncan v. Louisiana, 391 U.S. 145, 213 (1968) (Fortas, J., concurring). However, in recent decisions, the Court has held that the sixth amendment does not require the states to meet the federal precedents of juries consisting of 12 members, Williams v. Florida, 399 U.S. 78 (1970), or unanimous verdicts, Apodaca v. Oregon, 406 U.S. 404 (1972); Johnson v. Louisiana, 406 U.S. 356 (1972).

[41] *See* Wilkes, *More on the New Federalism in Criminal Procedure*, 63 KY. L. J. 873 (1975).

[42] The trend among the state courts is to ground the decision on the provision in the state constitution which parallels the applicable amendment in the Federal Constitution. *See* note 41 *supra*.

[43] 68 N.J. 349, 346 A.2d 66 (1975). The following is a representative sampling of recent state court decisions that have expanded individual criminal rights beyond the applicable standard of the Supreme Court: Scott v. State, 519 P.2d 774 (Alas. 1974) (disclosing names of alibi witnesses prior to trial); People v. Disbrow, 127 Cal. Rptr. 360, 545 P.2d 272 (1976) (use of statements obtained in violation of fifth amendment); People v. Brisendine, 13 Cal. 3rd 528, 119 Cal. Rptr. 315, 531 P.2d 1099 (1975) (scope of searches) *discussed in*, Jordan, *The Brisendine Case: Progression in the Area of Warrantless Searches*, 3 WEST. ST. L. REV. 1 (1975); Note, *People v. Brisendine-California Limits the Scope of Weapons Search Incident to Mala Prohibita Citation Offenses*, 7 WEST. L. A. L. REV. 253 (1975); State v. Kaluna, 55 Hawaii 361, 520 P.2d 51 (1974) (scope of search); State v. Santiago, 53 Hawaii 254, 492 P.2d 657 (1971) (admissibility of compelled statements to impeach); State v. Collins, 297 A.2d 620 (Me. 1972) (burden of establishing admissibility); People v. Beavers, 393 Mich. 554, 227 N.W. 2d 511 (1975) (electronic eavesdropping); People v. Jackson, 391 Mich. 323, 217 N.W. 2d 22 (1974); Commonwealth v. Richman, 320 A.2d 351 (Pa. 1974) (right to counsel) *discussed in*, Note, *Commonwealth v. Richman: A State's Extension of Procedural Rights Beyond Supreme Court Requirements*, 13 DUQ. L. REV. 577 (1975); Commonwealth v. Campana, 304 A.2d 432 (Pa. 1973) (double jeopardy). A much more detailed summary of many of these cases can be found in Wilkes, *More on the New Federalism in Criminal Procedure*, 63 KY. L. J. 873 (1975); Wilkes, *The New Federalism in Criminal Procedure: State Court Evasion of the Burger Court*, 62 KY. L. J. 421 (1974).

[44] The United States Supreme Court sets standards for searches in accordance with the provisions of the fourth amendment. U.S. CONST. amend. IV.

Supreme Court had previously held that the police were not required to inform a person that he could refuse to consent to a search.[45] The Court had stated that in determining whether the consent was given voluntarily and was uncoerced the "totality of the circumstances" should be the governing standard.[46] Nevertheless, the New Jersey court held that consent to search was not voluntary unless the person giving the consent was expressly informed of his right to refuse.[47] The *Johnson* court stated that this result was required under the New Jersey constitution[48] although acknowledging that the state provision was taken almost verbatim from the fourth amendment in the United States Constitution.[49] The court analyzed the consent issue in terms of a "waiver" of a known right and held that — notwithstanding the Supreme Court's rejection of the "waiver" rationale[50] — it would henceforth be the governing standard under state law.[51]

In another search and seizure case, *State v. Kaluna*,[52] the Hawaii Supreme Court held that the scope of a search incident to a lawful arrest should be limited to protecting the arresting officer and seizing evidence or fruits of the crime.[53] The *Kaluna* court acknowledged that the United States Supreme Court had previously held that a full body search was permissible after any custodial arrest,[54] but stated that the Hawaii constitution[55] afforded its citizens greater protection from governmental intrusions than provided by the textually similar provi-

[45] Schneckloth v. Bustamonte, 412 U.S. 218, 248-49 (1973).

[46] *Id.*

[47] 346 A.2d at 68.

[48] N.J. CONST. art I, par. 7. The defendant in *Johnson* pleaded a violation of his Federal Constitutional rights under the fourth amendment. The issue of protection under the state constitution was brought up by the state court on its own motion. 346 A.2d at 68. While a court may properly examine its jurisdiction on its own motion, *Mansfield, Coldwater & Lake Mich. Ry. v. Swan*, 111 U.S. 379 (1884), the propriety of a court raising defenses to a criminal prosecution by way of its own motion is questionable. A.B.A. CANNONS OF JUDICIAL ETHICS No. 3.

[49] 346 A.2d at 68 n.2.

[50] The Supreme Court in *Schneckloth* refused to apply the standard of a knowing and intelligent waiver of a constitutional right to the issue of consent to a search. The Court held that the waiver rationale only applied to those rights needed to preserve a fair trial. 412 U.S. at 235.

[51] 346 A.2d at 68.

[52] 55 Hawaii 361, 520 P.2d 51 (1974).

[53] 520 P.2d at 61.

[54] *See* United States v. Robinson, 414 U.S. 218 (1973), in which the Court held that a full body search was reasonable under the fourth amendment. U.S. CONST. amend. IV.

[55] HAWAII CONST. art. I, § 5.

sion in the federal Bill of Rights.[56] In determining the applicable search and seizure standard under state law, the *Kaluna* court noted that as long as the result was greater protection of individual rights, a United States Supreme Court opinion was "merely another source of authority" which it could adopt or reject in determining the precise contours of a right under state law.[57]

An individual's privilege against self-incrimination has also been subjected to conflicting interpretations by state and federal courts.[58] The United States Supreme Court has held that statements by criminal defendants which are obtained in violation of the privilege against self-incrimination,[59] while inadmissible as affirmative evidence, can nevertheless be used to impeach the defendant's trial testimony as long as the statements were not coerced. However, in *People v. Disbrow*,[60] the California Supreme Court recently held that as a matter of state constitutional law,[61] a statement obtained in violation of the privilege against self-incrimination could not be used by the prosecution for any purpose.[62] The *Disbrow* court rejected the federal precedent primarily because juries, even with a limiting instruction, might consider the defendant's extra-judicial statements as substantive evidence of guilt rather than as merely a reflection on credibility.[63] Thus, the California court specifically reaffirmed its power to independently define individual rights based on state law.[64]

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[56] 520 P.2d at 58.

[57] *Id.* at 58 n.6.

[58] *Compare* Harris v. New York, 401 U.S. 222 (1971), *with* People v. Disbrow, 127 Cal. Rptr. 360, 545 P.2d 272 (1976). The fifth amendment privilege against self-incrimination was incorporated into the fourteenth amendment and made applicable to the states in Malloy v. Hogan, 378 U.S. 1 (1964).

[59] Harris v. New York, 401 U.S. 222 (1971). The particular violation of the privilege was a failure to abide by the requirements enunciated by the Supreme Court in Miranda v. Arizona, 384 U.S. 436 (1966).

[60] 127 Cal. Rptr. 360, 545 P.2d 272 (1976).

[61] CAL. CONST. art. I, § 15. The language of this state provision is similar to the fifth amendment to the Federal Constitution: "Persons may not . . . be compelled in a criminal cause to be a witness against themselves . . . ."

[62] 545 P.2d at 280.

[63] 545 P.2d 279. The court in *Disbrow* also expressed concern that the federal precedent would encourage police misconduct since the illegally obtained statements would be available to the prosecution if the defendant attempts to take the stand in his own defense. *Id.*

[64] In People v. Brisendine, 13 Cal. 3d 528, 119 Cal. Rptr. 315, 531 P.2d 1099 (1975), the California Supreme Court held that the state constitutional provisions which mirror the federal Bill of Rights could be the source of broader individual rights than found under the federal provisions. In so doing, the court rejected the federal precedent in the area of searches incident to arrest.

Cases such as these which expand the protection of individual rights based upon state constitutional provisions raise substantial questions concerning the scope of appellate review of these state decisions by the United States Supreme Court. Regardless of what the Court's analysis of a particular state decision would be on the merits, review of the state decisions is necessarily predicated upon the Supreme Court exercising its appellate review power notwithstanding the adequate and independent state ground doctrine.[65]

However, the dissent in *Disbrow* argued that while the state court may have the power to reject the federal precedent, there should be distinctive conditions within the state to justify any variance from the federal Supreme Court standard. 545 P.2d at 284. (Richardson, J., dissenting).

[65] The other available methods to allow Supreme Court review are merely remote possibilities. First, Congress could pass legislation that pervasively regulated the rights of the accused and the procedures to be followed. Once the congressional design to occupy the field was established, all state regulations of the subject matter would be preempted regardless of whether the state regulation impaired the actual operation of the federal law. *See* Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132 (1963). This congressional action could conceivably be grounded on the "general welfare" clause, U.S. CONST. art. I, § 8 cl. 1; the commerce clause, U.S. CONST. art. I, § 8 cl. 3; or the "equal protection" clause, U.S. CONST. amend. XIV, § 5. Use of the general welfare clause would involve an implementation of the power through the "necessary and proper" clause, U.S. CONST. art. I, § 8 cl. 18. The argument for using the commerce clause as a constitutional base would be an extension of the reasoning of the Court in *Perez v. United States*, 402 U.S. 146 (1971). In *Perez*, the Supreme Court held that the defendant's loan-sharking activities could be constitutionally proscribed, as a class, if Congress found that this particular class of activities affected commerce. This holding disregarded the fact that in the case before the Court, there was no evidence that defendant's activities had affected interstate commerce. The reasoning of the *Perez* Court that activities can be regulated by class could be interpreted to include virtually every substantive crime, since in modern society most crime, in some manner, affects or utilizes interstate commerce. If Congress could provide for a code of substantive crimes under the commerce clause, a necessary incident to this power would be to establish a national code of criminal procedure. U.S. CONST. art. I, § 8 cl. 18.

Support for the position that the equal protection clause provides a ground for legislating criminal procedure can be found in the case of Katzenbach v. Morgan, 384 U.S. 641 (1966). The *Morgan* Court upheld an act of Congress which invalidated a New York statute, but did not find that the state statute itself was violative of the equal protection clause. By so holding, the Court deferred to the judgment of Congress that invalidation of the state statute was essential to the enforcement of the equal protection clause. This reasoning could lead to the conclusion that Congress could legislate a code of criminal procedure applicable to the states. *See* Cox, *The Supreme Court 1965 Term; Foreword: Constitutional Adjudication and the Promotion of Human Rights*, 80 HARV. L. REV. 91, 108 (1966).

However, it is doubtful that the framers of the constitution ever intended the national government to provide a national criminal code. THE FEDERALIST *No. 82*, at 253 (R. Fairfield ed. 1966) (A. Hamilton). In addition, it is probable that all of these proposed constitutional bases would succumb to Chief Justice Marshall's "pretext"

The extent of the Supreme Court's appellate jurisdiction over state decisions is established by congressional authorization.[66] The Judiciary Act of 1789[67] was the legislative enactment first vesting the Supreme Court with jurisdiction to review state court decisions. Under the original Judiciary Act, the Court's appellate jurisdiction was limited in part to review of a state court decision which had denied a claim of federal right or privilege.[68] More than a century later the scope of review was legislatively modified to enable the Supreme Court to review state court decisions which upheld federal rights.[69] The key consideration is whether a federal question was presented in the state proceeding.[70]

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argument for limiting national power. M'Cullouch v. Maryland, 17 U.S. (4 Wheat.) 316, 423 (1819). *See* Engdahl, *Preemptive Capability of Federal Power*, 45 U. COLO. L. REV. 51 (1973). However, while Congress has shown some interest in the past in entering the criminal law field (*e.g.*, 18 U.S.C. § 1952 (1970) (Interstate and Foreign Travel or Transportation in Aid of Racketeering Enterprises)), the trend is away from federal centralization. *See* Note, *The Preemption Doctrine: Shifting Perspectives on Federalism and the Burger Court*, 75 COLUM L. REV. 623 (1975).

The second possibility might be a constitutional amendment establishing a uniform code of criminal law. The problem with this alternative is that the same parties who lose power under such an amendment would be required to endorse it, an unlikely prospect in most state legislatures. *See* Davidow, *One Justice for All: A Proposal to Establish, by Federal Constitutional Amendment, a National System of Criminal Justice*, 51 N.C.L. REV. 259 (1972).

[66] U.S. CONST. art. III, § 2 cl. 2 provides in relevant part:

> In all the other Cases before mentioned, the Supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

This legislative power to make "exceptions" is generally thought to be unlimited unless those alterations would emasculate the essential functions of the Supreme Court within the federal system. Ratner, *Congressional Power Over the Appellate Jurisdiction of the Supreme Court*, 109 U. PA. L. REV. 157, 201-02 (1960). *See also* Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts; An Exercise in Dialectic*, 66 HARV. L. REV. 1362 (1953). It has also been suggested that the legislative power is subject "to compliance with at least the requirements of the Fifth Amendment." Battaglia v. General Motors Corp., 169 F.2d 254, 257 (2d Cir.), *cert. denied*, 335 U.S. 887 (1948).

[67] Judiciary Act of 1789, ch. 20, § 25, 1 Stat. 85-87.

[68] *Id.*

[69] Judiciary Act of 1914, ch. 2, 38 Stat. 790.

[70] The Supreme Court's appellate jurisdiction is currently codified as 28 U.S.C. § 1257 (1970) and provides in part:

> Final judgments or decrees . . . may be reviewed by the Supreme Court as follows: (3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United

However, in *Murdock v. City of Memphis*,[71] the Supreme Court established that the presence of a federal question in a case did not grant the Court broad power to decide all of the questions presented by the case.[72] Consistently adhering to this precept, the Court developed the doctrine that in cases involving a federal question, the Court would first look to any nonfederal grounds supporting the decision to determine whether they independently and adequately sustained the state court judgment. If there existed an adequate and independent state ground which supported the judgment, the Supreme Court would dismiss the case for want of jurisdiction.[73]

In making this determination, the Court has traditionally taken a deferential attitude toward state court decisions that are ambiguous as to whether federal or nonfederal grounds were relied on in reaching the decision. In such a case, the Court's practice has been to grant certiorari and then remand to the state court for clarification of whether the grounds supporting the decision are federal or nonfederal or both.[74] The test of "adequacy" under the doctrine is primarily

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States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

[71] 87 U.S. (20 Wall.) 590 (1875).

[72] Note, *The Untenable Nonfederal Ground in the Supreme Court*, 74 HARV. L. REV. 1375, 1376-77 (1961).

[73] *E.g.*, Viator v. Stone, 203 Miss. 109, 37 So. 2d 1, *appeal dismissed*, 336 U.S. 948 (1949); Wood v. Chesborough, 228 U.S. 672 (1913). While this practice somewhat alters *Murdock*, which held that a judgment resting on an adequate nonfederal ground should be affirmed, 87 U.S. at 636, the practical effect of the Supreme Court's dismissal for want of jurisdiction is to affirm the judgment of the highest state court. However, that dismissal arguably would not carry the same force in later state decisions as would an express affirmance by the Supreme Court. C. WRIGHT, FEDERAL COURTS § 108 at 495 (1970).

[74] *See* Minnesota v. National Tea Co., 309 U.S. 551 (1940), wherein the Minnesota Supreme Court invalidated a sales tax on both federal and state constitutional grounds. In its opinion the Minnesota court mentioned the state constitution, but primarily relied on five federal cases *"directly deciding the question presented." Id.* at 554 (emphasis in original). On remand after the Supreme Court had vacated the judgment, the state court declared that the original decision was based on state constitutional grounds, thereby precluding federal Supreme Court review. National Tea Co. v. State, 208 Minn. 607, 294 N.W. 230 (1940). *But see* Oregon v. Hass, 420 U.S. 714 (1975), where there was some doubt over whether federal or nonfederal grounds were relied on in the state courts. 420 U.S. 714, 726 (Marshall, J., dissenting). Assuming that there is doubt as to whether federal or nonfederal grounds were relied upon by the state courts the Supreme Court is not compelled to remand to the state courts for clarification; rather, the Court itself may examine the record, submit certified questions to the state courts, or use other techniques to clarify the record and identify the grounds relied on by the state courts. *E.g.*, Clay v. Sun Ins. Office, Ltd., 363 U.S. 207 (1960); C. WRIGHT, FEDERAL COURTS § 107 at 491 (1970).

a distillation of efforts to cope with the problem of state procedural requirements that preclude the state courts from reaching the federal question.[75] However, not every state procedural policy that forecloses a substantive federal claim will be found inadequate. To the contrary, state requirements have only been found inadequate where they have no precedent in prior state law,[76] where the state rule is applied with pointless severity,[77] or where its application involves trivial adherence to form.[78]

Although there has been no major modification of the "adequacy" concept by the Supreme Court in recent years, the decision of *Henry v. Mississippi*[79] intimated that the traditional definition is not settled and may be susceptible to change.[80] In *Henry*, defense counsel failed to object to an unlawful search in a timely manner as required by local procedure. On review, the Mississippi Supreme Court withdrew an initial opinion and held that the defendant had "waived" his right to object.[81] The United States Supreme Court granted certiorari and held that even if a state procedural rule was fairly applied, in order to be "adequate" the state requirement must also serve a "legitimate" state interest.[82]

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[75] Bice, *Anderson and the Adequate State Ground*, 45 So. CAL. L. REV. 750, 753 (1972). In Williams v. Georgia, 349 U.S. 375 (1955), Justice Clark concisely stated that there were two situations in which a state ground would be found inadequate:

> *First*, where the circumstances give rise to an inference that the state court is guilty of an evasion — an interpretation of state law with the specific intent to deprive a litigant of a federal right. *Second*, where the state law, honestly applied though it may be, and even dictated by the precedents, throws such obstacles in the way of enforcement of federal rights that it must be struck down as unreasonably interfering with the vindication of such rights (footnotes omitted).

Id. at 399 (Clark, J., dissenting) (emphasis in original). *See generally* Note, *The Untenable Nonfederal Ground in the Supreme Court*, 74 HARV. L. REV. 1375 (1961).

[76] NAACP v. Alabama *ex. rel.* Patterson, 357 U.S. 449 (1958) (nothing in prior state cases to suggest that certiorari unavailable to enable highest state court to review a contempt order).

[77] NAACP v. Alabama *ex. rel.* Flowers, 377 U.S. 288 (1964) (formal arrangement of points in brief); Rogers v. Alabama, 192 U.S. 226 (1904) (two page motion stricken as too long and wordy).

[78] Shuttlesworth v. City of Birmingham, 376 U.S. 339 (1964) (typeface and size of paper incorrect); Wright v. Georgia, 373 U.S. 284 (1963) (failure to repeat formally point already made).

[79] 379 U.S. 443 (1965).

[80] *See* Hill, *The Inadequate State Ground*, 65 COLUM. L. REV. 943 (1965); Sandalow, *Henry v. Mississippi and the Adequate State Ground: Proposals for a Revised Doctrine*, 1965 SUP. CT. REV. 187 (1965) [hereinafter Sandalow].

[81] Henry v. State, 154 So. 2d 289 (Miss. 1963); *see* Sandalow, *supra* note 80, at 190-93.

[82] Henry v. Mississippi, 379 U.S. 443, 447 (1965).

The effect of this test is to compound the already subjective evaluation of "adequacy" with an additional subjective evaluation of what constitutes a "legitimate" state interest. While the majority in *Henry* professed to decide the case according to settled principles[83] there are hints throughout the opinion that the standard for determining adequacy may be changing.[84] Although there has been no change in the standard during the eleven years since *Henry* was decided, if the Court does make an alteration, it will almost certainly be a dilution of the concept of adequacy[85] since, even if a state ground passes muster under the traditional tests of adequacy,[86] the Court can still examine the state interest and find that it is not legitimate. Moreover, the Court could ascertain that while the state interest may concededly by legitimate, it is nevertheless inadequate because it may be "substantially served" by some other procedure.[87]

To insure expansion of individual rights under state law, it is essential that the adequate and independent state ground doctrine be adhered to by the United States Supreme Court. The doctrine provides a well-established means by which state courts can insulate their decisions from Supreme Court review.[88] In the context of the recent state criminal cases, such as the *Johnson* decision,[89] the doctrine suggests that by basing the expansion of criminal procedural rights on the state constitution the state court can effectively ignore the federal precedent in the area and avoid the rigor of Supreme Court review. Therefore, Supreme Court appellate review of state criminal decisions such as *Johnson, Kaluna,* and *Disbrow*[90] would seem to require a reconsideration of the doctrine that an adequate and independent state ground acts as a bar to Supreme Court review of a federal question in a case.

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[83] *Id.* at 452.

[84] An example of the equivocal nature of the decision is the Court's admonition that the standard of adequacy in *Henry* "will not lead inevitably to a plethora of attacks on the application of state procedural rules." 379 U.S. at 448 n.3. If the decision was based on settled principles, such a statement would be seemingly unnecessary.

[85] The dissent in *Henry* anticipated such a change and argued that it "portends a severe dilution, if not complete abolition, of the concept of 'adequacy' as pertaining to state procedural grounds." 379 U.S. 443, 457 (Harlan, J., dissenting).

[86] *See* text accompanying notes 75-98 *supra* and *infra.*

[87] Henry v. Mississippi, 379 U.S. 443, 448 (1965).

[88] *See* Project Report, *Toward an Activist Role for State Bills of Rights,* 8 HARV. CIV. RIGHTS — CIV. LIB. L. REV., 271, 313-14 (1973).

[89] *See* text accompanying notes 44-51 *supra.*

[90] *See* text accompanying notes 44-64 *supra.*

The first section of the doctrine that would have to be reexamined is the test of the "independence" of the state ground. The Court has traditionally said that a state analysis is independent if it can withstand the collapse of the federal analysis.[91] Therefore, it would be possible for the Court to reason that, because of the history of selective incorporation,[92] any analysis based on a state constitutional provision which substantially mirrors the language of its federal counterpart is dependent on analysis of that federal provision.[93] Likewise, selective incorporation has so intertwined the state and federal provisions protecting the same right that any deprivation of the right automatically presents a federal question, thereby investing the Supreme Court with appellate jurisdiction. However, the Court has shown a deferential attitude toward state court decisions that allows "independence" to be established by a simple willingness on the part of the state court to base the decision on state law grounds.[94] Consequently, the Court has not discussed the effect of incorporation on the independence of a state constitutional provision, confining itself to an inquiry into whether the intended basis for the state decision was federal or state law.

"Adequacy," the second requirement, presents a different problem. The test for adequacy developed in response to the discriminatory and arbitrary application of state procedural rules to defeat federal substantive rights.[95] Such is not the case where a state court relies on a substantive provision in the state constitution to expand individual rights.[96] In order to declare this ground inadequate, the Supreme Court could redefine adequacy by reasoning that the history of incorporation, when coupled with the extended dormancy of state constitutional provisions,[97] has stripped those provisions of sufficient adequacy to foreclose Supreme Court appellate review.

Considering these factors, a significant change in the adequate and independent state ground doctrine does not seem probable. His-

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[91] *E.g.*, Enterprise Irrigation Dist. v. Farmers Mut. Canal Co., 243 U.S. 157, 164 (1917); Creswill v. Grand Lodge Knights of Pythias, 225 U.S. 246, 261 (1912). *See* Hart, *The Supreme Court 1958 Term; Foreword: The Time Chart of the Justices*, 73 HARV. L. REV. 84, 110 & n.76 (1959).

[92] *See* text accompanying notes 34-42 *supra*.

[93] Project Report, *Toward an Activist Role for State Bills of Rights*, 8 HARV. CIV. RIGHTS - CIV. LIB. L. REV. 271, 313 (1973).

[94] Minnesota v. National Tea Co., 309 U.S. 551 (1940).

[95] *See* text accompanying notes 75-78 *supra*.

[96] Bice, *Anderson and the Adequate State Ground*, 45 SO. CAL. L. REV. 750, 753 (1972).

[97] *See* Countryman, *The Role of a Bill of Rights in a Modern State Constitution*, 45 WASH. L. REV. 453, 464-66 (1970).

torically, the Supreme Court has found state grounds untenable when the deprivation of a federally guaranteed right was involved. Since state decisions expanding individual rights under state law do not involve a denial of a federal right, there appears to be no compelling reason why the Supreme Court should alter the doctrine to facilitate appellate review. However, the doctrine is judicially created and the Supreme Court could always return to the scope of the statute which authorizes appellate review whenever a federal question is presented.[98] In addition, the Court has the inherent power to define the parameters of concepts such as "adequacy" and "independence."[99] Nevertheless, it is probable that the adequate and independent state ground doctrine will continue to operate in its present form, thus providing state courts that disagree with federal precedent a means to insulate their decisions from Supreme Court review.[100]

In addition to appellate review by the Supreme Court, the methods and justifications used by state courts to expand individual rights raise other questions. Prior to enlarging individual rights under state law, a state court should clearly and definitively discuss what conditions peculiar to its state justify the court's divergence from Supreme Court precedent. Unless these distinctive circumstances are present, state courts should refrain from producing a "shadow tier" of state constitutional rights[101] based solely upon the predeliction of a majority of the state court to reach a different result than the United States Supreme Court.

The propriety of these state decisions is also questionable in view of the interaction of state expansion of criminal rights and the selective incorporation doctrine. While the majority of the federal Bill of Rights was being incorporated into the fourteenth amendment, the Supreme Court rejected the notion that an incorporated right applied

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[98] 28 U.S.C. § 1257 (1970); *see* text accompanying note 70 *supra*.

[99] Hill, *The Inadequate State Ground*, 65 COLUM. L. REV. 943 (1965). While the Supreme Court is invested with broad discretion, it is still proscribed by statute, 28 U.S.C. § 1257 (1970), from reviewing a state decision which relies solely on state law and in which no federal claim is presented. *See* Falk, *The Supreme Court of California, 1971-1972, Foreword: The State Constitution: A More than "Adequate" Nonfederal Ground*, 61 CALIF. L. REV. 273 (1973).

[100] Sandalow, *supra* note 80, at 189. State decisions will not be insulated, however, if they clearly rest on federal grounds. The Supreme Court has not hesitated to assume jurisdiction and decide the federal question on its merits. *E.g.*, Michigan v. Mosley, 96 S. Ct. 321 (1975) (state court interpreted fifth amendment rights too broadly); California v. Green, 399 U.S. 149 (1970) (state court interpreted confrontation clause of the sixth amendment too broadly).

[101] People v. Disbrow, 127 Cal. Rptr. 360, 370, 545 P.2d 272, 284 (1976) (Richardson, J., dissenting).

to the states only a "watered-down subjective version of the individual guarantees of the Bill of Rights."[102] Although the selective incorporation doctrine was developed to provide national protection for certain basic rights, the inevitable consequence of the doctrine is "compelled uniformity" of criminal procedure between the state and federal governments.[103] Whether uniformity is a desirable goal in the context of federal and state systems is a much-debated question,[104] but there is little doubt that if the incorporation philosophy was carried to its logical extreme, it would stifle state court efforts to expand individual rights through state law. The Supreme Court has never seriously considered such an extreme position,[105] but this does not obviate the fact that the expansive state decisions are not totally reconcilable with the selective incorporation philosophy since these decisions result in a multiplicity of constitutional rules surrounding the same right.

Another question which state court decisions increasing individual rights raises is the extent to which the rights of a criminal defendant ought to depend on the cleverness of counsel and on artful pleading. Once the precedent is set within a particular state for increased protection of individual rights, alert attorneys representing criminal defendants within that state will plead only deprivations of rights under state law. In addition to the anticipated favorable ruling based on the earlier state precedent, framing of the issues in a particular case will bar any possibility of Supreme Court review since no federal right or question would be involved.[106] By contrast, a defen-

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[102] Malloy v. Hogan, 378 U.S. 1, 11-12 (1964), *quoting from* Ohio *ex. rel.* Eaton v. Price, 364 U.S. 263, 275 (1960) (Brennan, J., dissenting).

[103] Malloy v. Hogan, 378 U.S. 1, 16 (1964) (Harlan, J., dissenting).

[104] *Compare*, F. FRANKFURTER, LAW AND POLITICS 192-93 (1939); Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 CALIF. L. REV. 929 (1965); *with*, R. STREAMER, THE SUPREME COURT IN CRISIS 286 (1971); Davidow, *One Justice for All: A Proposal to Establish by Federal Constitutional Amendment, a National System of Criminal Justice*, 51 N.C.L. REV. 259 (1972).

[105] Complete uniformity of criminal procedure would seem to be the result of Justice Black's proposed "total incorporation" theory. *See* text accompanying note 31 *supra*.

[106] 28 U.S.C. § 1257 (1970). Although stare decisis suggests a ruling in conformity with the prior state precedent expanding criminal rights, this will not necessarily be the result. The risk the criminal defendant assumes by pleading only under state law is twofold: first, the state court may render a restrictive decision contrary to earlier decisions and second, the defendant may be subsequently found to have deliberately bypassed the state courts before asserting his federal rights, thereby "waiving" his right to assert them in a federal habeas corpus proceeding. Fay v. Noia, 372 U.S. 391 (1963). Moreover, the *Fay* test of "deliberate bypass" of state courts has recently been

dant who asserts his federal rights may be afforded less protection since the state court will analyze his case in terms of the more restrictive federal precedent.[107] Even if he pleads a deprivation of his rights under both federal and state law, the defendant may find the state court constrained to judge the case on federal precedent since a federal question will already have been injected into the case.[108]

Compounding these policy considerations is the possibility that there are more appropriate methods available for state courts to increase individual rights for criminal defendants. The majority of state decisions expanding criminal rights, exemplified by the *Johnson, Kaluna,* and *Disbrow* cases,[109] base their opinions on a provision in the state constitution. While a state constitution remains the primary repository of rights for the citizens of that state, there are reasons to believe that a court's reliance on it in a case such as *Johnson* is misplaced. First, the state constitutional provision relied on will almost invariably be identical or similar to the corresponding provision in the federal constitution.[110] Although this fact does not prevent a state court from construing its constitution differently,[111] the situation becomes confusing when the accused demands his rights under both the federal and state constitution. The court should then distinguish the state right from the federal right and express why the result varies in an identical fact situation based on identical constitutional language.[112]

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modified so that an accused would seem to lose almost all ability to assert a federal right on habeas corpus unless he properly makes the claim first at his trial. If the criminal defendant fails to assert a federal right at trial, he now has to demonstrate both reasonable cause why the right was not urged at trial and actual prejudice to his case. Frances v. Henderson, 44 U.S.L.W. 4620 (U.S. May 3, 1976); Estelle v. Williams, 44 U.S.L.W. 4609 (U.S. May 3, 1976). Arguably, that risk may act as a check upon defendants only pleading deprivations of state rights, thus limiting the number of state decisions similar to *Johnson, Kaluna,* and *Disbrow.*

[107] Although only federal rights are asserted, the court could still give the defendant the benefit of the expanded state protection of individual rights by raising the issue of rights under state law by the court's own motion. *See* note 48 *supra.*

[108] *E.g.,* People v. Lumpkin, 394 Mich. 456, 231 N.W. 2d 637 (1975). *See* note 127 *infra.*

[109] *See* text accompanying notes 43-65 *supra.*

[110] *E.g.,* The New Jersey Constitution, art. I, ¶ 7 provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ." This provision mirrors the corresponding provision in the federal Constitution. U.S. CONST. amend. IV.

[111] *E.g.,* Minnesota v. National Tea Co., 309 U.S. 551 (1940); *see* note 74 *supra.*

[112] This problem has led many state courts to discuss the state constitutional right in terms of federal case law and the federal constitutional right in terms of past state

A second reason for believing that non-constitutional grounds would be more appropriate for a state decision that enlarges criminal procedural rights is based on the concept of judicial self-restraint. In deciding whether to predicate a decision on constitutional grounds, a state might adopt the judicial rule of the Supreme Court: "[t]he Court will not pass upon a constitutional question . . . if there is also present some other ground upon which the case may be disposed of."[113] Notwithstanding this rule, if a state court decides to interpret a provision of its state constitution more broadly than the analogous federal provision, the state court should squarely base its legal or social justification for the expansion on state law grounds. Doing so will have the salutary effect of clearly precluding Supreme Court review of the decision,[114] while establishing the state provision as a viable, independent source of individual rights.

While the use of state constitutional provisions predominates the analysis of state court decisions according individuals greater protection of their rights than have certain United States Supreme Court decisions, it is by no means the only available mode of analysis. There are two other realistic judicial alternatives upon which a state court can rely if it wishes to expand criminal rights.[115] The first of these alternatives is a state supreme court's power to promulgate rules of procedure.[116] Under this power, the highest state court can establish

precedent. *E.g.*, State v. Johnson, 68 N.J. 349, 346 A.2d 66, 68 (1975). This constitutional interplay is the cause of much of the ambiguity which has motivated the Supreme Court under the adequate and independent state ground doctrine to remand many of the cases for clarification of which authority — state or federal — was relied on to reach the decision. *See* text accompanying note 74 *supra*.

[113] Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring).

[114] A state supreme court is the final arbiter of state law. Erie R.R. v. Tompkins, 304 U.S. 64, 78 (1938). Unless a federal question is injected into the case, the United States Supreme Court does not have jurisdiction to review the state decision. *See* note 99 *supra*.

[115] A third potential alternative exists in the form of an advisory opinion. If permitted under state law, a state court could render an advisory opinion expanding the scope of a federal right. Since the federal courts are limited by the "case or controversy" requirement, the state advisory opinion would be free from Supreme Court review. U.S. CONST. art. III, § 2. However, this alternative is unrealistic because the protection vanishes as soon as a case develops in which the defendant relies upon the expanded federal right granted in the earlier state court advisory opinion. The "case or controversy" requirement is then met, and the Supreme Court would probably reverse the case for construing federal rights too broadly. *E.g.*, California v. Green, 399 U.S. 149 (1970); *see* Wilkes, *The New Federalism in Criminal Procedure: State Court Evasion of the Burger Court*, 62 KY. L. J. 421, 434 (1974).

[116] *E.g.*, VA. CONST. art. VI, § 5.

a procedure to be followed by all of the courts of the state handling criminal prosecutions. Although the power is usually intended to be limited in scope, it can still be utilized to give the accused more protection than is required under the Federal Constitution.[117]

The second alternative available to a state supreme court would be to enlarge criminal procedural rights through the use of its general supervisory authority over the state judicial system. Through this method, the state supreme court could provide, as a matter of state law, a higher degree of protection for the accused without having to distinguish federal cases limiting protection.[118] However, the major advantage to adopting this judicial method is the flexibility it allows. Any decision concerning the scope of criminal rights involves a delicate balancing of the accused's interest in fairness and society's interests in deterrence and retribution. If the supervisory power is used, the court can experiment with altering that balance by providing a right of less than constitutional dimension. After using the new procedural right for a short time, the court can reassess their propriety and perhaps return to the old system without the necessity of overruling a decision that held the right so fundamental as to be protected by the state constitution.[119]

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[117] Commonwealth *ex. rel.* West v. Rundle, 428 Pa. 102, 237 A.2d 196 (1968); *see* Note, *Commonwealth v. Richman: A State's Extension of Procedural Rights Beyond Supreme Court Requirements*, 13 DUQ. L. REV. 577, 608 (1975).

[118] In a constitutional holding, a state court decision contravening federal precedent should always distinguish the federal case on the facts and policies underlying the federal decision. Only by doing this can a rational basis for an expansive state interpretation be established. In comparison, by basing its decision on the supervisory power, a state court can recognize the federal precedent, but hold that while the federal constitution might not demand it, the state court believes — as a matter of efficient, fair judicial administration — that the additional procedural rights should be provided.

[119] The flexibility available by using the supervisory power can be demonstrated by taking the facts of *State v. Johnson* as an example. 68 N.J. 349, 346 A.2d 66 (1975). The issue involved was the requirement to insure the voluntary nature of consent to a search. *See* text accompanying notes 43-51 *supra*. As a matter of state constitutional law, the court held that the police must expressly inform the person giving consent of the right to refuse to consent. 346 A.2d at 68. The United States Supreme Court had previously held that the "totality of the circumstances" was the appropriate standard. Schneckloth v. Bustamonte, 412 U.S. 218, 226 (1973). If the *Johnson* court, after observing the effect of this new individual right, decided that its marginal value to a criminal defendant was outweighed by the interference with police work, the court would be confronted with the problem of circumventing its own decision holding the right to be so fundamental as to be expressly protected by the New Jersey Constitution. Out of concern for the stability of the judicial system, a state supreme court will seldom want to reverse itself on a matter of state constitutional law established by its own

If these alternatives are utilized, the result will be a paradoxical return to the type of criminal system that existed prior to the enforcement of the federal Bill of Rights against the states through the selective incorporation doctrine. When criminal defendants increasingly demand their rights under state law,[120] the situation will be analogous to the historical criminal system where the primary shield the individual had against state action was to be found under state law.[121]

Most of the state courts expanding individual rights have invoked the long history of allowing state governments to experiment with new and varied policies and procedures.[122] However, this principle is most appropriate when there is little or no Supreme Court guidance on the particular constitutional right. For example, in the only Supreme Court case in which the scope of the eighth amendment's proscription against unreasonable bail was expressly argued and decided,[123] the Supreme Court held that if the amount of bail set was higher than was needed to persuade the defendant to appear at trial, it was excessive.[124] With only this vague guidance, state courts would be justified in trying new approaches and systems for determining the proper amount of bail in each particular case. However, the situation is not the same when there is specific and persuasive Supreme Court guidance on the precise question to be decided. When this is the case, the Supreme Court interpretation should be accorded deference and generally followed.[125] Consequently, although some state courts have expanded criminal procedural rights in spite of a more restrictive Supreme Court decision on the point,[126] other state courts have de-

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recent decision. On the other hand, if the *Johnson* decision was grounded on the court's supervisory power, the court could later reverse its decision as ill-advised in view of its effect in actual operation. The end result of this flexibility would be a fairer, better balanced criminal system, tempered with the experience of trial and error.

[120] *See* text accompanying notes 106-07 *supra*.

[121] *See* text accompanying notes 9-23 *supra*.

[122] In Williams v. Florida, 399 U.S. 78 (1970), Justice Harlan extolled:

> '[T]he essentially federal nature of our government' . . . one of whose basic virtues is to leave ample room for governmental and social experimentation in a society as diverse as ours . . . .

Id. at 133 (Harlan, J., concurring) (citation omitted); New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

[123] Stack v. Boyle, 342 U.S. 1 (1951).

[124] *Id.* at 5.

[125] Pickett v. Matthews, 238 Ala. 542, 192 So. 261 (1939); Cohen v. Superior Court, 173 Cal. App. 2d 61, 343 P.2d 286 (1959); People v. Jackson, 22 Ill. 2d 382, 176 N.E. 2d 803 (1961); City of Portland v. Thornton, 174 Or. 508, 149 P.2d 972 (1944).

[126] *See* note 41 *supra*.

ferred to the Supreme Court holding in the area.[127] Thus, if a state court intends to increase individual rights, while it has the power to do so, the court should justify its divergence from the Supreme Court standard by analyzing the particular facts of the case or policies within the state or behind the state constitutional provision that make its solution the preferable one. A mere exercise of judicial power without meaningful justification or reason is the antithesis of principled decision-making.[128]

In considering the various means by which states may expand criminal procedural rights, a desirable alternative is the legislative system. A recent legislative enactment in Massachusetts[129] may be the harbinger of state legislative proposals in the future. In 1973, the Supreme Court modified the law surrounding searches and seizures incident to arrest by holding that after a custodial arrest, a police officer could conduct a full scale search of the arrestee's person.[130] Believing that the scope of the search allowed by these decisions unreasonably interfered with an individual's privacy, the Massachusetts state legislature passed a bill that severely limited the nature of a search incident to a lawful arrest to the specific purposes of removing weapons from the arrestee and seizing evidence of the crime for which the arrest had been made.[131] It is clearly within the power of the state legislature to pass such a law since it amounts to no more than a stricter limit on state activities than is required under the Federal Constitution.[132] Indeed, the Supreme Court has stated, most recently in *Oregon v. Hass*, that states have the power to provide for higher standards of police conduct than required under the Federal Constitution.[134]

Another legislative approach in the search and seizure area was adopted in Florida.[135] Under this law, most traffic offenses have been

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[127] Sizemore v. State, 308 N.E. 2d 400 (Ind. 1974) *cert. denied*, 420 U.S. 909 (1975); State v. Cromwell, 509 S.W. 2d 144 (Mo. 1974); Hughes v. State, 522 P.2d 1331 (Okl. 1974); State v. Mabra, 61 Wis. 2d 613, 213 N.W. 2d 545 (1974).

[128] *See* Golding, *Principled Decision-Making and the Supreme Court*, 63 COLUM. L. REV. 35 (1963); Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

[129] MASS. GEN. LAWS, ANN., Ch. 276, § 1 (Supp. 1974).

[130] Gustafson v. Florida, 414 U.S. 260 (1973); United States v. Robinson, 414 U.S. 218 (1973).

[131] *See* Arons & Katsh, *Reclaiming the Fourth Amendment in Massachusetts*, 2 CIV. LIB. REV. 82 (1975) [hereinafter cited as Arons & Katsh].

[132] *Id.* at 83.

[133] 420 U.S. 714 (1975).

[134] Lego v. Twomey, 404 U.S. 477, 489 (1972); Cooper v. California, 386 U.S. 58, 62 (1967).

[135] FLA. STAT. §§ 318.11 *et. seq.* (1975).

decriminalized with the result that in many traffic situations the police do not have authority to arrest. Consequently, there is no basis for a search incident to a lawful arrest.[136] This approach differs from the Massachusetts-type legislation in that it eliminates certain searches by denying the police the power to arrest rather than limiting the search subsequent to an arrest.

There are several advantages to either of these legislative initiatives as opposed to their judicial counterparts. First, the use of a legislative statement provides a rational, compact statement of the law in any given area of criminal procedure. In this way it has significant formative advantages over the layering process which is often inherent in the case-by-case judicial method of rule-making.[137] Second, the statute can be legislatively reviewed and questionable language modified soon after a problem of interpretation arises. This flexibility is much more responsive and efficient than judicial rules which are constrained by the "case or controversy" limitation and must await a similar case to reverse a prior holding.[138] Third, the facilities for collecting information from a cross-section of society as to what the proper balance between the rights of the accused and the interests of society should be are far superior in the legislative system.[139] In comparison, a court has only the evidence that the parties or amicus briefs can muster during the limited amount of time preceding trial.[140] Finally, the legislative system has the important advantage of being directly responsible to the citizenry of the state. If the legislature decides to increase the rights of criminal defendants, each legislator's position will be subjected to the political pressures of re-election.[141]

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[136] *See* Wilkes, *More on the New Federalism in Criminal Procedure*, 63 Ky. L. J. 873, 877 n.20 (1975).

[137] Platt, *A Legislative Statement of Warrantless Search Law: Poaching in Sacred Judicial Preserves?*, 52 Ore. L. Rev. 139 (1973).

[138] *Id.* at 153.

[139] *Id.*

[140] Arons & Katsh, *supra* note 131.

[141] Arguably, elected state judges are subject to the same democratic check, but ideally they are individuals who are immune to political pressure and campaign based on their attributes of integrity and impartiality.

Recently, some judges have voiced approval of using legislative methods to form criminal procedure standards. *E.g.*, Johnson v. Louisiana, 406 U.S. 356 (1972), in which Justice Powell stated:

> The same diversity of *local legislative responsiveness* that marked the development of economic and social reforms in this country . . . might well lead to valuable innovations with respect to determining — fairly and more expeditiously — the guilt or innocence of the accused.

The rapidly developing practice of state courts construing their state constitutions so as to afford greater protection to individual rights is not without controversy. First, Supreme Court review of these state decisions would require a re-examination of the adequate and independent state ground doctrine. Any relaxation of that doctrine as a limitation on the scope of Supreme Court appellate review of state decisions would not only alter substantial Supreme Court precedent[142] but would make it more difficult for state courts to insulate their decisions.

In addition to the problem of Supreme Court appellate review, there are other difficulties surrounding the method by which state courts are expanding the protection of individual rights. For instance, most state courts have based their decisions almost entirely on state constitutional provisions, thereby creating a rigid constitutional rule with a paucity of analysis on precisely what facts and policies led the court to hold that the right was deserving of greater constitutional protection than that accorded by prior United States Supreme Court decisions. Similarly, the state courts have failed to look to other more flexible means by which to achieve greater protection of individual rights. Finally, there has been far too little involvement of the state legislatures in the process of creating criminal procedural standards.

While the goal of increased protection of individual rights in the criminal context may be laudable, the means employed to achieve that protection constitute little more than ad hoc state judicial decisions that more protection is needed.[143] At a past conference of state Chief Justices, the group adopted a resolution in response to the Warren Court's judicial activism, which called upon the Supreme Court to exercise

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Id. at 376 (Powell, J., concurring) (footnote omitted) (emphasis added). Likewise, Judge Friendly of the Second Circuit has encouraged the development of the ALI model codes, both for substantive and procedural law, and expects that they will "set workable standards for the police and afford useful guidance for judges." Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 CALIF. L. REV. 929 (1965).

[142] Henry v. Mississippi, 379 U.S. 443 (1965); Minnesota v. National Tea Co., 309 U.S. 551 (1940); Murdock v. City of Memphis, 87 U.S. (20 Wall.) 590 (1875). *See* text accompanying notes 66-100 *supra*.

[143] Justice Cardozo recognized the difficulty for any judicial tribunal to justify significantly its decision when more than simply affirming a prior holding is involved:

> [t]he hard judicial work begins when precedents are in conflict or are non-existent but the hardest work of all confronts the judge when precedents are ample and clear but social justice demands that they be reversed.

B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 21 (1921).

> [t]he power of judicial self-restraint — by recognizing and giving effect to the difference between that which, on the one hand, the Constitution may prescribe or permit, and that which, on the other, a majority of the Supreme Court, as from time to time constituted, may deem desirable or undesirable.[144]

In view of the recent state court decisions,[145] it might be appropriate for the Supreme Court to re-address and return the resolution to the state Chief Justices with the same admonition.

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[144] Countryman, *Why a State Bill of Rights?*, 45 WASH. L. REV. 454, 455 (1970), *quoting from*, COUNCIL OF STATE GOVERNMENTS, PROCEEDINGS OF TENTH ANNUAL MEETING OF THE CONFERENCE OF CHIEF JUSTICES 23-24 (1958).

[145] *See* note 43 *supra*.