Vanderbilt Law Review

Volume 47
Issue 3 *Issue 3 - April 1994*

Article 4

4-1994

The Continuing Evolution of Criminal Constitutional Law in State Courts

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SPECIAL PROJECT

The Continuing Evolution of Criminal Constitutional Law in State Courts

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INTRODUCTION

Although early state constitutions were important and ambitious documents for their time, the development of state constitutional law stagnated after the drafting and adoption of the federal constitution.[1] As the doctrine of federalism has resurfaced, however, states have begun to turn to their constitutions to grant more protection for their citizens.[2] The states' criminal constitutional

1. Ken Gormley, ed., *State Constitutions and Criminal Procedure: A Primer for the 21st Century*, 67 Or. L. Rev. 689, 691 (1988). The application of the Bill of Rights has impeded the use of state constitutional law further. William J. Brennan, Jr., *The Bill of Rights and the States: The Revival of States as Guardians of Individual Rights*, 61 N.Y.U. L. Rev. 535, 548 (1986); Shirley S. Abrahamson, *Criminal Law and State Constitutions: The Emergence of State Constitutional Law*, 63 Tex. L. Rev. 1141, 1144-48 (1985).

2. See generally Rebert F. Utter, *State Constitutional Law, the United States Supreme Court, and Democratic Accountability: Is There a Crocodile in the Bathtub?*, 64 Wash. L. Rev. 19 (1989); Gormley, 67 Or. L. Rev. 689 (cited in note 1); Abrahamson, 63 Tex. L. Rev. at 1148-89 (cited in note 1); Rebert F. Utter, *Swimming in the Jaws of the Crocodile: State Court Comment*

laws have changed significantly and continue to evolve today.[3]

In the 1960s, the Warren Court expanded basic protections for criminal defendants by finding that the Fourteenth Amendment incorporates the Fourth, Fifth, and Sixth Amendments.[4] The Court held that the Eighth Amendment prohibits cruel and unusual punishment by the states.[5] The Court extended the Fifth Amendment privilege against self-incrimination to criminal defendants,[6] held that this privilege also requires police to give warnings to suspects prior to custodial interrogations,[7] and applied the double jeopardy clause to states.[8] The Court extended the Sixth Amendment to give criminal defendants further rights: to be represented by an attorney,[9] to be confronted by the witnesses against them,[10] to have a speedy trial,[11] to have a trial by an impartial jury,[12] and to have a compulsory process for obtaining witnesses in favor of the defense.[13] During this period, states hardly had time to consider what protections their own constitutions might give to criminal defendants because the Supreme Court was expanding the federal rights so rapidly to citizens accused of state-law crimes.

Following this plethora of decisions, however, the Burger and Rhenquist Courts began to limit the rights of criminal defendants

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on Federal Constitutional Issues When Disposing of Cases on State Constitutional Grounds, 63 Tex. L. Rev. 1025, 1025 n.1 (1985) (citing several relevant articles).

3. Gormley, ed., 67 Or. L. Rev. at 695-96 (cited in note 1).

4. Brennan, 61 N.Y.U. L. Rev. at 541-45 (cited in note 1).

5. *Robinson v. California*, 370 U.S. 660, 667 (1962). The Court cited the *Robinson* case in *Furman v. Georgia*, 408 U.S. 238, 239-40 (1972), to strike down the death penalty by fully incorporating the cruel and unusual punishment clause of the Eighth Amendment. Id. at 241 (Douglas, J., concurring). The Court later limited that view in *Gregg v. Georgia*, 428 U.S. 153, 186-87 (1976) (opinion of Stewart, J., Powell, J., and Stevens, J.) (holding that imposing the death penalty for murder did not violate the Eighth and Fourteenth Amendments in all circumstances); *Proffitt v. Florida*, 428 U.S. 242, 259-60 (1976) (opinion of Stewart, J., Powell, J., and Stevens, J.) (holding that imposition of the death penalty is not per se cruel and unusual punishment); *Jurek v. Texas*, 428 U.S. 262, 276 (1976) (opinion of Stewart, J., Powell, J., and Stevens, J.) (same).

6. *Malloy v. Hogan*, 378 U.S. 1, 8 (1964). The Court noted that it "has not hesitated to re-examine past decisions according the Fourteenth Amendment a less central role in the preservation of basic liberties than that which was contemplated by its Framers when they added the Amendment to our constitutional scheme." Id. at 5.

7. *Miranda v. Arizona*, 384 U.S. 436, 444-45 (1966).

8. *Benton v. Maryland*, 395 U.S. 784, 793-96 (1969).

9. *Gideon v. Wainwright*, 372 U.S. 335, 341-45 (1963). See also *Argersinger v. Hamlin*, 407 U.S. 25, 40 (1972).

10. *Pointer v. Texas*, 380 U.S. 400, 403-06 (1965).

11. *Klopfer v. North Carolina*, 386 U.S. 213, 222-23 (1967).

12. *Parker v. Gladden*, 385 U.S. 363, 364-65 (1966).

13. *Washington v. Texas*, 388 U.S. 14, 17-19 (1967).

rather than further expanding those rights,[14] and those Courts sometimes have refused to provide clear guidelines to the states.[15] Thus, many states have responded by turning to their own constitutions to extend more protection to criminal defendants.[16] Perhaps this shift is appropriate considering that the framers intended the federal constitution to limit the power of the federal government while courts and commentators perceive the state constitutions to grant citizens affirmative rights.[17]

In general, states have the right to disregard federal precedent in any area of concurrent jurisdiction when they support their judgment with adequate and independent grounds.[18] Furthermore, a

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14. Brennan, 61 N.Y.U. L. Rev. at 547 (cited in note 1). See, for example, *Oregon v. Elstad*, 470 U.S. 298, 314 (1985) (holding that an admission of a suspect who was not given *Miranda* warnings may be admissible if the statement was not coerced and was repeated after the *Miranda* warnings were given); *New York v. Quarles*, 467 U.S. 649, 655-56 (1984) (creating a "public safety" exception to the *Miranda* warning requirements); *Harris v. New York*, 401 U.S. 222, 223-26 (1971) (holding that statements from a defendant who was not given *Miranda* warnings could be used to impeach that defendant).

Since the *Harris* decision, some commentators have argued that the Supreme Court has diluted *Miranda*'s principles. See, for example, Gerald M. Caplan, *Questioning* Miranda, 38 Vand. L. Rev. 1417, 1418 (1985); David Sonenshein, Miranda *and the Burger Court: Trends and Countertrends*, 13 Loyola U. Chi. L. J. 405, 406-08 (1982); Geoffrey R. Stene, *The* Miranda *Doctrine in the Burger Court*, 1977 S. Ct. Rev. 99, 100-01. At least one commentator has asserted that the Supreme Court should consider overruling *Miranda*. Caplan, 38 Vand. L. Rev. at 1467-76. See also William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489, 495-98 (1977); Renald K.L. Collins, *Reliance on State Constitutions: Some Random Thoughts*, 54 Miss. L. J. 371, 374 (1984).

Of all the criminal constitutional amendments, the Fourth Amendment has sustained the most direct attack. Brennan, 61 N.Y.U. L. Rev. at 547. See, for example, *United States v. Leon*, 468 U.S. 897, 922-25 (1984) (holding that courts will not necessarily suppress the fruits of a search when the search is based on a police officer's reasonable reliance on a warrant not supported by probable cause); *Fisher v. United States*, 425 U.S. 391, 408-09 (1976) (holding that a citizen's privato papers may be seized and introduced as evidence against him); *United States v. Miller*, 425 U.S. 435, 443 (1976) (holding that citizens do not have a legitimate expectation of privacy in their bank records); *United States v. Watson*, 423 U.S. 411, 423-25 (1976) (holding that police searches based on consent are constitutional even if consent is not knowing or intolligent). See also *Rummel v. Estelle*, 445 U.S. 263, 284-85 (1980) (holding that it is not cruel and unusual punishment to sentence a habitual bad-check writer te life in prison); *Apodaca v. Oregon*, 406 U.S. 404, 410-14 (1972) (plurality opinion of Whito, J.) (holding that a person may be convicted of a crime by a jury vote that is not unanimous).

15. See, for example, *Michigan v. Mosley*, 423 U.S. 96, 103-04 (1975) (refusing to provide guidelines for determining when questioning may be renewed if a defendant has chosen to remain silent). See also Malcolm S. Dorris, Note, *The Declining* Miranda *Doctrine: The Supreme Court's Development of* Miranda *Issues*, 36 Wash. & Lee L. Rev. 259, 260 (1979).

16. Brennan, 90 Harv. L. Rev. at 495 (cited in note 14). In fact, Justice Brennan has stated that he believes the "Court's contraction of federal rights and remedies on grounds of federalism should be interpreted as a plain invitation to state courts to step into the breach." Brennan, 61 N.Y.U. L. Rev. at 548 (cited in note 1).

17. Brennan, 61 N.Y.U. L. Rev. at 549 (cited in note 1).

18. *Murdock v. City of Memphis*, 87 U.S. (20 Wall.) 590, 635-36 (1875) (enumerating seven rules for reviewing state court decisions). See also Abrahamson, 63 Tex. L. Rev. at 1156-69 (cited in note 1) (discussing the states' experimentation with constitutional law); Utter, 63 Tex. L. Rev.

federal court does not have the power to review the judgment of a state supreme court when a state ground sufficiently supports its holding.[19] Federal protection of civil liberties is only the minimum, and states are free to surpass these rulings if the states' actions do not conflict with federal law[20] and if the Supreme Court has not imposed specific restrictions.[21] Realistically, without the protective forces of state law, citizens' full realization of liberties is not guaranteed.[22]

With regard to criminal constitutional law, the Supreme Court has held specifically that states may impose greater restrictions on police powers than required by the federal constitution.[23] In fact, many states have used their state constitutions to justify departure from federal decisions even when the language of their constitutions is essentially the same as the federal constitution.[24] Occasionally, those same states subsequently have reversed their decisions to require the same level of protection given by the United States Supreme Court.

This Special Project addresses four significant criminal constitutional issues in which the states have chosen to depart, at least temporarily, from the Supreme Court's determination of the constitutional rights that must be afforded criminal defendants. In each of these areas of criminal constitutional law, this Special Project

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at 1025-26 (cited in note 2); Earl M. Maltz, *The Dark Side of State Court Activism*, 63 Tex. L. Rev. 995, 995 (1985).

19. See U.S. Const., Art. III, § 2; Brennan, 90 Harv. L. Rev. at 501 & n.80 (cited in note 14) (citing *Murdock v. City of Memphis*, 87 U.S. (20 Wall.) 590 (1875)); Stewart G. Pollock, *Adequate and Independent State Grounds as a Means of Balancing the Relationship Between State and Federal Courts*, 63 Tex. L. Rev. 977, 980-82 (1985).

See also 28 U.S.C. § 1257; Donald E. Wilkes, Jr., *More on the New Federalism in Criminal Procedure*, 63 Ky. L. J. 873, 873-75 (1975); Donald E. Wilkes, Jr., *The New Federalism in Criminal Procedure: State Court Evasion of the Burger Court*, 62 Ky. L. J. 421, 435 (1974); Collins, 54 Miss. L. J. at 406-08 (cited in note 14); *Reich v. City of Freeport*, 388 F. Supp. 953, 955 (N.D. Ill. 1974); *United States ex rel. Pascal v. Burke*, 90 F. Supp. 868, 871 (E.D. Pa. 1950).

20. Brennan, 61 N.Y.U. L. Rev. at 548 (cited in note 1). This principle was introduced first by Justice Bradley, who stated that "constitutional provisions for the security of person and property should be liberally construed. . . . It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon." *Boyd v. United States*, 116 U.S. 616, 635 (1886).

21. *Oregon v. Hass*, 420 U.S. 714, 719 (1975) (holding that a state cannot impose greater restrictions when the Supreme Court specifically has refrained from imposing them). See also Brennan, 61 N.Y.U. L. Rev. at 550 (cited in note 1).

22. Brennan, 90 Harv. L. Rev. at 491, 503 (cited in note 14). Justice Brennan also concludes that the series of decisions in the 1960s indicates that "there exists in modern America the necessity for protecting all of us from arbitrary action by governments more powerful and more pervasive than any in our ancestors' time." Id. at 495.

23. *Hass*, 420 U.S. at 719, 728 (stating that "a State is free *as a matter of its own law* to impose greater restrictions on police activity than those this Court holds te be necessary upon federal constitutional standards") (emphasis in the original). See also *Cooper v. California*, 386 U.S. 58, 62 (1967); Pollock, 63 Tex. L. Rev. at 980-82 (cited in note 19).

24. Abrahamson, 63 Tex. L. Rev. at 1169 (cited in note 1). See generally Pollock, 63 Tex. L. Rev. at 982 (cited in note 19).

examines the development of federal protections, the later stagnation of the federal courts, the evolution of state's decisions based on their respective constitutions, and the effect of these states' decisions on criminal defendants.

This Special Project first considers canine sniffs in the context of an individual's right to be free from unreasonable government searches.[25] The Supreme Court has refused to apply a standard of suspicion below probable cause in determining the reasonableness of certain types of police investigatory activities. Because the governmental costs of acquiring probable cause outweigh the offsetting benefits to individual interests when the searching activity intrudes only minimally on individual privacy, the Court has exempted less intrusive police activities, such as canine sniffs, from the rigors of the Fourth Amendment, subjecting them to no judicial scrutiny whatsoever. By contrast, several states have found sniffs to be searches under their state constitutions but have applied a reasonable suspicion standard, as described in *Terry v. Ohio*.[26] This Note explores the development of and policies supporting the reasonable suspicion standardn for canine sniffs, suggests that courts should use this standard in minimally intrusive investigatory searches, such as canine sniffs, proposes a test that courts can use to detormine when a search warrants application of this lower standard, but warns against applying the reasonable suspicion standard too broadly.

The Project also considers another Fourth Amendment issue: the constitutionality of an undercover law enforcement official's conducting electronic surveillance in an individual's home without a warrant or consent from that individual.[27] In *United States v. White*,[28] the Supreme Court held that this surveillance is not unconstitutional. Dissatisfied with this ruling, many statos interpreted their state constitutions to prohibit the admission of evidence obtained from warrantless consensual electronic surveillance. Some of those states subsequently reversed their decisions, returning to the Supreme Court's interpretation. This Note discusses the state and federal decisions, identifies facters that state courts have used to determine

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25. See Kenneth L. Pollack, *Stretching the* Terry *Doctrine to the Search for Evidence of Crime: Canine Sniffs, State Constitutions, and the Reasonable Suspicion Standard*, 47 Vand. L. Rev. 803 (1994).

26. 392 U.S. 1 (1968).

27. See Melanie L. Black Dubis, *The Consensual Electronic Surveillance Experiment: State Courts React to* United States v. White, 47 Vand. L. Rev. 857 (1994).

28. 401 U.S. 745 (1971).

the constitutionality of warrantless consensual electronic surveillance, and analyzes the state courts' trend toward returning to the Supreme Court's ruling.

This Project next examines the Fifth Amendment right of a criminal defendant to remain silent or to have an attorney present during custodial interrogations.[29] Although *Miranda v. Arizona*[30] has received much criticism, many states actually have expanded *Miranda* because of a concern for the continuing problem of coerced confessions. Unfortunately, most states have focused on the quantity rather than the quality of information given to criminal defendants when determining whether that defendant's rights have been preserved. This Note examines New York's rule of *People v. Arthur*,[31] discusses the policy concerns accompanying adoption of this standard, and ultimately recommends widespread adoption of this rule.

Finally, this Project discusses the various states' reaction to the good faith exception to the exclusionary rule established in *United States v. Leon*.[32] After weighing *Leon*'s reasoning against the problems arising from the adoption of the exception, this Note examines the appropriateness of the reactive rulings of most states that have rejected *Leon* on state constitutional grounds.[33] A number of states have not decided whether to adopt the exception, and this Note ultimately encourages those states to reject *Leon*.

Clearly, the states have been very active in determining whether they will extend more rights to their citizens than the federal courts require, with varying results depending on the criminal constitutional issue under consideration. The states should be allowed to continue their analyses for a number of reasons: the federal rulings are only minimum standards for the states to follow; the federal courts have failed to provide clear guidelines forthose minimum standards; the states often want to extend more protection to their criminal defendants; the legal community generally perceives the state constitutions as granting affirmative rights to their citizens; and, otherwise, citizens have no guarantee of full liberties. The ultimate consequence of allowing the states to continue this experimentation is

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29. See Lorraine J. Adler, *New York's Loyalty to the Spirit of* Miranda: *Simply the Best for Twenty-Five Years*, 47 Vand. L. Rev. 889 (1994).

30. 384 U.S. 436 (1966).

31. 22 N.Y.2d 325, 239 N.E.2d 537 (1968).

32. 468 U.S. 897 (1984).

33. See Loigh A. Morrissey, *State Courts Reject* Leon *on State Constitutional Grounds: A Defense of Reactive Rulings*, 47 Vand. L. Rev. 917 (1994).

to achieve justice by establishing the proper balance between law enforcement effectiveness and individual freedom.

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* I would like to thank Professor Hall and the editors of this Project for their help.