1982

On Recognizing Variations in State Criminal Procedure

Jerold H. Israel
University of Michigan Law School, israelj@umich.edu

ON RECOGNIZING VARIATIONS IN STATE CRIMINAL PROCEDURE

Jerold H. Israel*

Everyone recognizes that the laws governing criminal procedure vary somewhat from state to state.[1] There is often a tendency, however, to underestimate the degree of diversity that exists. Even some of the most experienced practitioners believe that aside from variations on some minor matters, such as the number of peremptory challenges granted, and variation on a few major items, such as the use of the grand jury, the basic legal standards governing most procedures are approximately the same in a large majority of states.[2]

I have seen varied evidence of this misconception in practitioner discussions of law reform proposals, particularly at the local level. Too often, both prosecutors and defense counsel have shown no hesitancy in almost automatically characterizing their jurisdiction's rule as "the general rule," or more cautiously, as "a common rule." At times, even local idiosyncrasies have been characterized as national standards. When reference to the law of other jurisdictions would be particularly helpful, no reference has been made because the speaker apparently assumed that

* Alene and Allen F. Smith Professor of Law, University of Michigan. B.B.A., 1956, Case Western Reserve University; L.L.B., 1959, Yale University. This Article is an expansion of remarks delivered before the Alaska Judicial Conference in August, 1981. I am indebted to the innovativeness of the Alaska judiciary for renewing my interest in the variations in state law, a subject I first began to explore as a co-reporter for the Uniform Rules of Criminal Procedure and as a participant on several Michigan Bar projects relating to the revision of that state's procedural standards.

1. In focusing on variations in the laws regulating the criminal justice process I do not mean to downplay the importance of also recognizing diversity in the "institutional" elements of the process. Differences in size, jurisdiction, personnel, organizational structure, administrative style, and similar factors often have greater practical significance than differences in legal standards. This is especially true when, as is so common in the criminal justice process, applicable legal standards grant administrators considerable discretion at several critical points in the process. *See, e.g.*, M. GOTTFREDSON & D. GOTTFREDSON, DECISIONMAKING IN CRIMINAL JUSTICE: TOWARD THE RATIONAL EXERCISE OF DISCRETION *passim* (1980). Two jurisdictions with almost identical laws may have criminal justice systems operating quite differently due to differences in these institutional factors. *See, e.g.*, P. WICE, BAIL AND ITS REFORM: A NATIONAL SURVEY 4-32 (1973).

2. Even some academicians share this notion of "uniform" state laws, particularly when focusing excessively on Supreme Court rulings. *See infra* notes 63-64 and accompanying text.

nothing new would be gleaned from the laws of other jurisdictions. State laws have been criticized for failing to consider elements that could be found in the laws of other jurisdictions, but without reference to those other laws as examples of what could be done. Reformers have urged the elimination of a particular state procedure, but failed to cite other states which have successfully eliminated that procedure. Even where the speakers have been aware that their local law differs from the law followed in numerous other states, assumptions as to uniformity may have created confusion. Because substantial variation was viewed as the exception rather than the general rule, the local departure from the perceived norm may have been treated as an occasional sport — though it could just as easily have been one of a substantial body of departures from that norm.

One factor that apparently plays a large role in fostering an assumption of basic similarity in state law is a widespread misconception as to the unifying role of common sources that have helped shape state law. This Article will briefly explore that misconception, note the extent to which it understates the diversity in the law, and consider some of the benefits that might be gained through a more accurate recognition of that diversity.[3]

Obviously, not all those who underestimate the degree of state law variation do so for the same reasons. The discussions I have heard, however, suggest an underlying misconception as to the influence of three common sources on state law. That misconception ordinarily rests on one or more of the following premises: (1) for those procedures regulated heavily by the federal Constitution, the United States Supreme Court decisions set a uniform standard, except for an occasional state rule that may exceed that standard; (2) for those areas regulated commonly by court rule or legislation, many state provisions are based upon a common model, such as the Federal Rules of Criminal Procedure, and therefore have largely similar standards; (3) for still other areas, common law standards govern, and those standards are fairly uniform. All of these premises contain some truth, yet each overstates the situation. Of the three, the first is the most troublesome — perhaps because it is the most valid — and will

3. I recognize that many practitioners — particularly many readers of this journal, which so often features new state legislation — fully recognize the degree of diversity that exists in the law. I believe, however, that such awareness is the exception rather than the general rule. My own experience suggests that Justice Holmes's prescription is particularly apposite to this subject: "[A]t this time we need education in the obvious more than investigation of the obscure." O. HOLMES, *Law and the Court*, in COLLECTED LEGAL PAPERS 291, 292-93 (1920).

therefore be considered at greater length than the others.[4]

I. CONSTITUTIONAL REGULATION AND UNIFORMITY IN STATE LAW

Although constitutional standards provide a uniform floor for state law, individual states are free to go above that floor and adopt standards exceeding constitutionally mandated minimums. It is generally recognized that states often do this when the constitutional minimum falls below traditional state common law requirements. For instance, the federal constitutional minimum permits a non-unanimous jury verdict,[5] but attorneys familiar with the process are unlikely to assume that many states allow such verdicts.[6] The same is true of felony juries of less than twelve persons, a practice mandated by only a handful of states.[7] Constitutional standards in these areas are correctly assumed to have had an insignificant impact upon state law.

There is a quite different perception, however, as to areas of criminal procedure in which constitutional standards often exceed traditional common law requirements, especially where the constitutional regulation is fairly extensive. Many practitioners assume that, in these areas, the constitutional minimum is almost always the controlling standard, and therefore there is basic uniformity in the law throughout the country. Here, it is thought, the states, with only a few exceptions, have declined to exercise their authority to go beyond the constitutional minimums. Accordingly, it is assumed that the controlling search and seizure standards are those set by Supreme Court decisions interpreting the fourth amendment, that the standards for admissibility of confessions are those prescribed by *Miranda v. Ari-*

4. This emphasis should not be taken as evidence of "constitutional myopia." Although many academicians find the constitutional aspects of criminal procedure more stimulating than the non-constitutional aspects, *see infra* notes 63-65 and accompanying text, my focus here stems from the tendency to give constitutional minimums greater credit as a unifying factor in the law.

5. *See* Apodaca v. Oregon, 406 U.S. 404 (1972) (upholding a 10-2 verdict); Johnson v. Louisiana, 406 U.S. 356 (1972) (upholding a 9-3 verdict). Non-unanimous verdicts for six person juries are not, however, constitutionally acceptable. *See* Burch v. Louisiana, 441 U.S. 130 (1979).

6. As of 1976, only four states permitted non-unanimous verdicts and only two of these, Louisiana and Oregon, permitted such verdicts in felony cases. *See* E. PRESCOTT, FACETS OF THE JURY SYSTEM 9 (1976).

7. *See* Williams v. Florida, 399 U.S. 78 (1970) (upholding the use of six-person juries in non-capital felony cases). As of 1977, only five states mandated juries of less than 12 persons in felony cases. *See* J. VAN DYKE, JURY SELECTION PROCEDURES 286-89 (1977).

zona[8] and its progeny, that the standards relating to a defendant's right to counsel are those set by sixth amendment precedent, and that the standards governing permissible retrials are those set by the Supreme Court's double jeopardy rulings.

For many aspects of these subjects, the prevailing standard *is* that set by Supreme Court decisions. The vast majority of the states, however, have standards governing at least a few aspects that exceed the constitutional minimum. Although these divergent state standards are exceptions to the general dominance of constitutional standards, the exceptions are by no means few or limited to a small group of states. Indeed, the more rigorous state standards sometimes constitute the majority position. When appointing counsel to assist indigent misdemeanor defendants, for example, a majority of the states have standards exceedings the *Scott v. Illinois*[9] ruling limiting mandatory appointment of counsel to cases in which the defendant receives a jail sentence.[10]

It would take more space and research assistance than I have available to attempt even a modest review of the various state standards exceeding the constitutional minimum.[11] The range of these standards can be fairly well illustrated, however, by examining the standards even of a single state. I have selected Michigan for this purpose because I am most familiar with Michigan law. Admittedly, the Michigan courts have been somewhat more "activist" than courts in many other states, but the Michigan legislature has probably been less active than its counterparts in other states. Even if Michigan has more standards exceeding the

---

8. 384 U.S. 436 (1966).

9. 440 U.S. 367 (1979).

10. Justice Brennan's dissent in *Scott* noted that "Scott would be entitled to appointed counsel under the current laws of at least 33 States." *Id.* at 388. Seven years before *Scott*, at the time of Argersinger v. Hamlin, 407 U.S. 25 (1972), it was only a considerably smaller number of states that managed to provide counsel for all jail-sentence cases. Most states apparently limited their appointments to the more serious misdemeanor offenses. *See* Israel, *Criminal Procedure: The Burger Court, and the Legacy of the Warren Court*, 75 MICH. L. REV. 1319, 1338 n.76 (1977). Once *Argersinger* required these states to adopt a broader standard, many of them did not limit their new standard to the actual incarceration requirement, but included instead all cases in which there was statutory potential for imprisonment. *See, e.g., Scott*, 440 U.S. at 386 n.18 (Brennan, J., dissenting) (citing cases and statutes). If the line were drawn at actual incarceration, a magistrate would have to prejudge the likelihood of incarceration in the individual case, and these states apparently preferred to avoid that difficulty.

11. The *Harvard Law Review* recently devoted ten pages simply to describing recent state constitutional interpretations that exceeded federal standards in the areas of search and seizure, self-incrimination, double jeopardy, and right to counsel. *See Developments in the Law — The Interpretation of State Constitutional Rights*, 95 HARV. L. REV. 1324, 1370-79 (1982).

constitutional minimum than most other states, it is by no means an extreme example.

A. *Search and Seizure: Standing*

In *United States v. Salvucci*,[12] the Supreme Court abandoned the "automatic standing" rule of *Jones v. United States*.[13] *Jones* had granted defendants the automatic right to challenge the seizure of property when they were charged with an offense that included as an element their possession of that property. *Salvucci* held that the mere possession of property did not necessarily coincide with a reasonable expectation of privacy in that property. Consequently, the person with possession would not be assumed automatically to have a sufficient privacy interest to challenge the property's seizure. In *People v. Smith*,[14] the Michigan Court of Appeals refused to follow *Salvucci*. It held instead that Michigan would continue to adhere to the automatic standing rule in *Jones*, "as it provides greater protection to the citizens of this state from unreasonable searches and seizures."[15]

In *Rakas v. Illinois*,[16] the Supreme Court discarded another aspect of the *Jones* analysis of standing — the suggestion that any defendant legitimately on the premises at the time of a search would have standing to challenge that search. *Rakas* substituted an analysis focusing upon the defendant's reasonable expectation of privacy in the particular area searched, arguably cutting off standing to such persons as the casual visitor at the scene of a search. In *People v. Chernowas*,[17] the Michigan Court of Appeals did not need to choose between the *Jones* and *Rakas* formulations of standing, but did urge the Michigan Supreme Court to retain the legitimate-presence standard of *Jones* when the issue arose.[18]

---

12. 448 U.S. 83 (1980).

13. 362 U.S. 257 (1960).

14. No. 51035, 115 Mich. App. - (Mich. Ct. App. May 14, 1982).

15. *Id.* at ***. The Michigan court relied in part on the reasoning of State v. Alston, 88 N.J. 211, 440 A.2d 1311 (1981), another state court decision retaining automatic standing. *See also* State v. Simpson, 95 Wash. 2d 170, 622 P.2d 1199 (1980).

16. 439 U.S. 128 (1978); *see also* Rawlings v. Kentucky, 448 U.S. 98 (1980) (reaffirming support for *Rakas*).

17. 111 Mich. App. 1, 314 N.W.2d 505 (1981).

18. *See also* People v. Nabers, 103 Mich. App. 354, 303 N.W.2d 205 (1981) (suggesting that a defendant's legitimate presence on the premises provides standing to challenge the search), *rev'd on other grounds*, 411 Mich. 1046, 309 N.W.2d 187, *amended*, 41* Mich. ***, 313 N.W.2d 284 (1981).

B. *Search Warrants*

The United States Supreme Court has consistently held that search warrant affidavits may be based on information obtained from informants, provided there are sufficient indicia of the information's reliability.[19] The Michigan search warrant statute, however, imposes a further limitation. To avoid reliability questions, it requires that warrant affidavits contain "affirmative allegations that the person [who supplied information to the complainant] spoke with personal knowledge of the matters contained therein."[20] This provision arguably bars reliance on the hearsay of one informant repeating information received from another informant — that is, an affidavit based on double hearsay.[21]

Michigan statutory law also goes beyond the federal constitutional standard governing the execution of search warrants. Under Supreme Court precedent, a state may authorize an unannounced entry into a building when notice of the officer's intention to enter would likely result in destruction of the evidence to be seized.[22] In contrast, the Michigan statute on entry to execute a search warrant limits entry without notice only to those situations in which notice would create a physical danger to the officer or another person. It does not include a destruction-of-evidence exception.[23]

---

19. *See, e.g.*, United States v. Harris, 403 U.S. 573 (1971).

20. MICH. COMP. LAWS § 780.653 (1979).

21. *See* Israel, *Legislative Regulation of Searches and Seizures: The Michigan Proposals*, 73 MICH. L. REV. 221, 264-65 (1974) (noting Bar Committee recommendation to eliminate this requirement as constitutionally unnecessary). This statutory requirement is unlikely to apply when the first informant is another police officer. *See* People v. Fuller, 106 Mich. App. 263, 307 N.W.2d 467 (1981) ("when one police officer receives information from a fellow police officer, the law allows him to assume that his source is credible. . . . [T]he magistrate, too, may consider the source to be credible.").

22. *See* Ker v. California, 374 U.S. 23 (1963). Although *Ker* involved unannounced entry to make an arrest, it is generally viewed as authorizing unannounced entry to search on the same grounds. *See, e.g.*, 2 W. LAFAVE, SEARCH AND SEIZURE § 4.8 (1978).

23. Michigan law provides for unannounced entry by an officer executing a warrant "when necessary to liberate himself or any person assisting him in execution of the warrant." MICH. COMP. LAWS § 780.656 (1979). This language is generally viewed as recognizing a danger-to-the-person exception, though the matter is far from settled. *See* Israel, *supra* note 21, at 284. Courts in other jurisdictions with similar statutes have recognized a destruction-of-evidence exception as part of the common law. *See, e.g.*, People v. Gastelo, 67 Cal. 2d 586, 432 P.2d 706, 63 Cal. Rptr. 10 (1967). The controversy surrounding that exception, however, makes it highly questionable whether the Michigan courts would act without legislative authorization. *See, e.g.*, People v. Marshall, 69 Mich. App. 288, 244 N.W.2d 451 (1976), discussed *infra* note 27. *See generally* Israel, *supra* note 21, at 286-89. A Michigan Bar Committee recommended adoption of a destruction-of-evidence exception when the unannounced entry was approved by the magistrate in issuing

Supreme Court dictum in *Davis v. Mississippi*,[24] indicates that full-fledged probable cause is not necessary to issue a warrant directing an officer to take a suspect into custody for the limited purpose of obtaining identification evidence such as fingerprints.[25] Although such "identification orders" have been issued in other jurisdictions,[26] the Michigan Court of Appeals has held that, absent legislative authorization, Michigan courts lack authority to issue identification orders on less than probable cause.[27]

C. *Scope of Warrantless Searches*

In *Chambers v. Maroney*,[28] the United States Supreme Court held that the moving vehicle exception to the warrant requirement extended to a warrantless search of an automobile made after the driver's arrest and the automobile's seizure. Although not expressing disagreement with the *Chambers* ruling, the Michigan Court of Appeals has taken a very narrow view of the

---

the warrant, *id.* at 286, but no legislative action was taken on this proposal.

24. 394 U.S. 721 (1969).

25. The Court in *Davis* noted that it was "arguable . . . that, because of the unique nature of the fingerprinting process, . . . detentions [for the limited purpose of obtaining prints] might, under narrowly defined circumstances, be found to comply with the Fourth Amendment even though there is no probable cause in the traditional sense." *Id.* at 727. Further support for the constitutionality of such orders may be found in United States v. Dionisio, 410 U.S. 1 (1973). *See generally* UNIF. R. CRIM. PROC. 436 comment (1974); Note, *Detention to Obtain Physical Evidence Without Probable Cause*, 72 COLUM. L. REV. 712 (1972).

26. *See, e.g.*, Wise v. Murphy, 275 A.2d 205 (D.C. 1971) (lineup orders); *In re* Fingerprinting of M.B., 125 N.J. Super. 115, 309 A.2d 3 (1973). *See generally* Israel, *supra* note 21, at 238-41 (noting statutory provisions authorizing identification orders on less than probable cause).

27. *See* People v. Marshall, 69 Mich. App. 288, 244 N.W.2d 451 (1976). *Marshall* involved an order to obtain blood type and hair samples. Because the taking of blood involves a substantially greater personal intrusion than fringerprinting, the *Davis* dictum suggesting a less-than-probable-cause standard, 394 U.S. at 727, would arguably not apply. *See* Schmerber v. California, 384 U.S. 757 (1966). The taking of the hair sample, on the other hand, belongs arguably to the same category as the fingerprinting considered in *Davis*. *See* UNIF. R. CRIM. PROC. 436 comment (1974). *But cf. In re* Grand Jury Proceedings (Mills), 522 F. Supp. 500, 502 (D. Del. 1981) (holding that hair samples are "more comparable to blood samples" than to voice exemplars or the measurement of defendant's height and weight). The *Marshall* opinion acknowledged the possible distinction between taking fingerprints and taking blood samples, but chose to bar any type of identification order based on less than probable cause "in the absence of legislation or rule promulgated by the Supreme Court." 69 Mich. at 299, 244 N.W.2d at 457. Treating the order before it as a search warrant, the *Marshall* court went on to find the order supported by probable cause and therefore valid.

28. 399 U.S. 42 (1970).

Chambers expansion of the moving vehicle exception.[29] Thus, the search of the trunk of an automobile — as opposed to its interior — has been held not to fall within the moving vehicle exception where the occupants were in custody and the "vehicle was entirely under the control of the authorities."[30]

D. Electronic Eavesdropping

Although *Katz v. United States*[31] held that non-consensual electronic eavesdropping was a search under the fourth amendment, the Court there also made clear that limited electronic eavesdropping, authorized by a warrant, could meet fourth amendment standards. In response, Congress adopted Title III

---

29. *See infra* note 30.

30. People v. Gaskill, 107 Mich. App. 304, 315, 309 N.W.2d 250 (1981). The search in *Gaskill* occurred after the defendants were arrested for possession of marijuana following a traffic stop. The court noted that, while stopping the vehicle and subsequently searching the interior "may have been reasonable under the circumstances," *id.*, opening the trunk and searching it and the articles found there was not:

> The vehicle was entirely under the control of the authorities after the three subjects exited from the vehicle and were placed in the police cruiser. A wrecker service was summoned to tow the vehicle to the appropriate impoundment lot, and the police could have, and indeed did, secure a search warrant which was executed in less than 24 hours from the time of the stop.

Whether the Court of Appeals will continue to adhere to *Gaskill* is questionable in light of Michigan v. Thomas, 102 S. Ct. 3079 (1982)(per curiam), *rev'g* People v. Thomas, 106 Mich. App. 601, 308 N.W.2d 170 (1981). *People v. Thomas*, relying on a restrictive view of *Chambers*, held that the search of an air vent did not fall within the moving vehicle exception when the car had been impounded prior to the search. In reversing that ruling, the Supreme Court of the United States stressed that where a car is stopped on the road and the police have probable cause to believe there is contraband inside, the justification for a warrantless search "does not vanish once the car has been immobilized." *Id.* at 3081.

While it is obvious that the Michigan Court of Appeals — and perhaps the Michigan Supreme Court, *see* People v. Long, 413 Mich. 461, 320 N.W.2d 866 (1982) (rejecting a protective search justification for a car search) — would prefer a narrower compass for warrantless automobile searches than that suggested by United States Supreme Court precedent, that result is not readily reached under state law. Most of the car search cases have involved the seizure of narcotics or firearms, and the Michigan Constitution's provision on searches prohibits excluding from evidence "any narcotic drug, firearm, bomb, explosive or any other dangerous weapon, seized by a peace officer outside the curtilage of any dwelling house." MICH. CONST. art. 1, § 11. This has led the Michigan Supreme Court to rule that it cannot construe "the Michigan search and seizure clause [as] imposing a higher standard of reasonableness for searches and seizures of items named in the proviso than the United States Supreme Court has held applicable under the Fourth Amendment." People v. Moore, 391 Mich. 426, 435, 216 N.W.2d 770, 775 (1974) (footnotes omitted). *But cf.* People v. Cavitt, 86 Mich. App. 59, 272 N.W.2d 196 (1978) (seemingly ignoring United States v. Robinson, 414 U.S. 218 (1973), in holding that an officer, after frisking a person arrested on a traffic offense, could not withdraw a pill container from his person without a reasonable basis for believing it contained a weapon).

31. 389 U.S. 347 (1967).

of the Omnibus Crime Control and Safe Streets Act of 1968,[32] authorizing non-consensual electronic eavesdropping under standards designed to meet the fourth amendment requirements noted in *Katz* and *Burger v. New York*.[33] Because Title III preempted the field, the failure of a state to adopt legislation following the Title III standards leaves its courts without authority to authorize non-consensual electronic eavesdropping.[34] Michigan and approximately half the states have refused to adopt the necessary enabling legislation.[35]

In *United States v. White*,[36] the Supreme Court held that electronic eavesdropping conducted with the prior consent of one of the parties to the recorded or monitored conversation did not fall within the fourth amendment. Relying in large part on the analysis of Justice Harlan's dissent in *White*, the Michigan courts have held that such consensual electronic eavesdropping does constitute a search under the Michigan Constitution, and therefore is permissible only when authorized by a valid search warrant.[37]

E. Police Interrogation

In *People v. Reed*,[38] the Michigan Supreme Court stated that *Miranda* warnings must be given prior to the interrogation of

---

32. 18 U.S.C. §§ 2510-2520 (1977 & Supp. IV 1981).

33. 388 U.S. 41 (1967) (holding a New York eavesdropping statute unconstitutional).

34. *See* 18 U.S.C. §§ 2510-2516 (1977 & Supp. IV 1981).

35. *See* M. HINDELANG, M. GOTTFREDSON & T. FLANAGAN, 1980 SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 395 (1981) (listing 25 states that had adopted enabling legislation as of 1979). Enabling legislation has been introduced in the Michigan legislature on several occasions but has never advanced very far. *See, e.g.*, H.B. 5545 & H.B. 5546, 78th Leg., 1st Sess. (1975).

36. 401 U.S. 745 (1971) (plurality).

37. *See* People v. Beavers, 393 Mich. 554, 227 N.W.2d 511 (1975); People v. Taylor, 93 Mich. App. 292, 287 N.W.2d 210 (1979); People v. Hall, 88 Mich. App. 324, 276 N.W.2d 897 (1979). Justice Harlan's dissent in *White* drew a distinction between third-party monitoring, where a participant uses an electronic device that transmits the conversation to a third party, and participant recording, where the participant records secretly the conversation for subsequent divulgence to a third party. 401 U.S. at 792 (Harlan, J., dissenting). Earlier cases had held that participant recording did not constitute a search, *see, e.g.*, Lopez v. United States, 373 U.S. 427 (1963), and Justice Harlan argued against the extension of those rulings to third-party monitoring. Although the *Beavers* opinion relied on Justice Harlan's analysis and the *Beavers* ruling was clearly limited to third-party monitoring, 393 Mich. at 562-63 n.2, 227 N.W.2d at 514 n.2, the decisions in *Hall* and *Taylor* extended the *Beavers* rationale to participant recordings as well. *See also* People v. Atkins, 96 Mich. App. 672, 293 N.W.2d 671 (1980) (requiring prior judicial authorization for two-way recording by third party).

38. 393 Mich. 342, 357-60, 224 N.W.2d 867, 874 (1975).

any suspect upon whom "the investigation had focused."[39] Under this "focus" standard, warnings could be required even though the suspect had not been taken into custody. The United States Supreme Court's subsequent opinions in *Beckwith v. United States*[40] and *Oregon v. Mathiason*,[41] emphasized that custody, not focus, triggers the *Miranda* warnings. Nevertheless, in *People v. Brannan*,[42] without mentioning *Beckwith* or *Mathiason*, the Michigan Supreme Court continued to refer to a focus standard.[43] The Court of Appeals panels subsequently split on the continuing vitality of the focus test, some finding that it was retained, apparently as a matter of Michigan, not federal, constitutional law.[44]

F. Entrapment

In *United States v. Russell*,[45] the Supreme Court rejected the defendant's contention that due process should "preclude any prosecution when it is shown that the criminal conduct would not have been possible had not an undercover agent 'supplied an indispensible means to the commission of the crime.' "[46] The

39. *Id.* at 360.

40. 425 U.S. 341 (1976).

41. 429 U.S. 492 (1977).

42. 406 Mich. 104, 276 N.W.2d 14 (1979).

43. *Id.* at 118-20, 276 N.W.2d at 22. The reference was confusing, however, because the court also talked in terms of custody, apparently equating focus with custody. The *Brannan* opinion followed a three-step analysis, reasoning that: (1) the concept of custody under *Miranda* applied to those " 'taken into custody *or otherwise deprived of [their] freedom of action in a significant way*,' " *id.* at 127 n.3, 276 N.W.2d at 22 n.3 (emphasis added) (quoting Miranda v. Arizona, 384 U.S. 436, 444 (1966)); (2) the *Miranda* Court, in explaining Escobedo v. Illinois, 378 U.S. 478 (1964), indicated that the focus test was related to this concept of "custody," 384 U.S. at 444 n.4; therefore, (3) a suspect should be assumed automatically to be in "custody" — i.e., deprived of his freedom in a significant way — when he is being questioned by a police officer and the investigation has obviously focused upon him. The lower court ruling affirmed in *Brannan* excluded five statements obtained through jailhouse interrogation. The court did not, however, exclude an earlier statement, finding that the defendant "was not in custody" at the time "of the interview." The setting of that "interview" was not discussed. *See* People v. Brannan, 64 Mich. App. 374, 236 N.W.2d 80 (1975), *aff'd*, 406 Mich. 104 (1979).

44. *Compare* People v. Chernowas, 111 Mich. App. 1, 314 N.W.2d 505 (1981) (applying *Miranda* to questioning following a traffic stop, where the investigation had focused because the officer detected a strong odor believed to be marijuana), *and* People v. Wallach, 110 Mich. App. 37, 312 N.W.2d 387 (1981) (focus test still applies), *with* People v. Martin, 78 Mich. App. 518, 260 N.W.2d 869 (1977) (*Beckwith* and *Mathiason* override focus test, because that test was based on an interpretation of *Miranda*), *and* People v. Schram, 98 Mich. App. 292, 296 N.W.2d 840 (1980) (same).

45. 411 U.S. 423 (1973).

46. *Id.* at 431 (quoting Brief for Respondent, at 20-21).

Court adhered to the "subjective" test for entrapment, looking not at police conduct, but at the defendant's predisposition to commit the crime.[47] In dissent, Justice Stewart urged adoption of the "objective test" for entrapment pursuant to the Court's supervisory power over the administration of justice in federal courts.[48] In *People v. Turner*,[49] the Michigan Supreme Court, persuaded by Justice Stewart's reasoning, adopted as a matter of state law the objective test for entrapment.[50]

G. Identification Procedures

In *Kirby v. Illinois*,[51] the United States Supreme Court held that an arrested person subjected to a "show-up" or "lineup" has a sixth amendment right to counsel[52] only if adversary judicial criminal proceedings have already been initiated. Before then, the arrestee is not an "accused" in a "criminal prosecution" so the sixth amendment does not attach.[53] In *United States v. Ash*,[54] the Supreme Court held that even a person against whom adversary judicial proceedings have been initiated is not entitled to representation at a photo-identification procedure because it is not a "critical stage" in the criminal prosecution.[55] In *People v. Jackson*,[56] the Michigan Supreme Court went beyond both *Kirby* and *Ash*. The *Jackson* opinion, reaffirming the pre-*Ash* decision in *People v. Anderson*,[57] held that: (1) "[s]ubject to certain exceptions, identification by photograph should not be used where the accused is in custody;" and (2) "[w]here there is a legitimate reason to use photographs for

---

47. *Id.* at 433. The Court did acknowledge, however, that it might someday be presented with a situation "so outrageous" that due process would bar prosecution regardless of the defendant's predisposition. *Id.* at 431-32.

48. *Id.* at 441-45 (Stewart, J., dissenting). The objective test, advanced in concurring opinions in Sherman v. United States, 356 U.S. 369 (1958), and Sorrells v. United States, 287 U.S. 435 (1932), focuses on whether the methods employed by government agents, viewed "objectively" (without regard to the particular defendant's predisposition), should be condemned because they created too great a risk that even a normally law-abiding citizen might be induced to commit a crime.

49. 390 Mich. 7, 210 N.W.2d 336 (1973).

50. *Id.* at 22; *see also* People v. Alford, 405 Mich. 570, 275 N.W.2d 484 (1979).

51. 406 U.S. 682 (1972) (plurality opinion).

52. U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.").

53. 406 U.S. at 690.

54. 413 U.S. 300 (1973).

55. *Id.* at 313-17, 321.

56. 391 Mich. 323, 217 N.W.2d 22 (1974).

57. 389 Mich. 155, 205 N.W.2d 461 (1973).

identification of an in-custody accused, he has the right to counsel as much as he would for corporeal identification procedures."[58] By equating photo-identifications with lineups for the purpose of the right to counsel, *Jackson* clearly rejects *Ash*. The rejection of *Kirby* is not as clear because *Jackson* refers simply to *Anderson's* holding on the rights of an "in-custody accused."[59] Read in light of *Anderson*, however, which sharply criticized the *Kirby* dividing line, it is apparent that the *Jackson* court intended to encompass all arrestees within its reference to an "in-custody accused."[60]

H. Joint Representation by Counsel

Under *Holloway v. Arkansas*[61] and *Cuyler v. Sullivan*,[62] a trial judge has a constitutional duty, under limited circumstances, to inquire into a possible conflict of interest when codefendants are jointly represented by the same counsel. Although the decisions leave unanswered the exact circumstances triggering that duty, *Cuyler* makes it clear that the judge has no duty to inquire in every case of multiple representation.[63] Michigan court rules, on the other hand, require this automatic inquiry in all joint representation cases.[64] Moreover, joint representation is allowed only on three conditions: (1) the lawyer involved must state on the record that joint representation "will in all probability not cause a conflict of interest" and must also state the reasons for this conclusion; (2) the defendants must state that it is their desire to proceed with the same lawyer; and (3) the trial court must find that joint representation "will in all probability not cause a

58. *Jackson*, 391 Mich. at 337-38, 217 N.W.2d at 27.

59. *Id.* (quoting *Anderson*, 389 Mich. at 187). *See Developments in the Law*, *supra* note 11, at 1378 n.75 (treating the *Jackson* rejection of *Kirby* as dictum).

60. The *Anderson* decision treated *Kirby* as a decision without precedential value because there was only a plurality opinion adopting the dividing line of adversary judicial proceedings. Nevertheless, the *Anderson* court clearly expressed its disapproval of the *Kirby* dividing line, noting that it had not been followed in the Michigan decisions applying pre-*Kirby* Supreme Court precedent. *See Anderson*, 389 Mich. at 170-71, 205 N.W.2d at 467-68. Moreover, the Michigan Supreme Court's statement of the facts in *Jackson* suggests that the defendant there had not been the subject of adversary judicial proceedings at the time of the photo-identification; the identification occurred when he was in custody on another offense and not yet under arrest for the crime being investigated. *See Jackson*, 391 Mich. at 330-31, 217 N.W.2d at 23 (opinion of the court), *id.* at 348-49, 217 N.W.2d at 32 (Coleman, C.J., dissenting).

61. 435 U.S. 475 (1978).

62. 446 U.S. 335 (1980).

63. *Id.* at 346-48.

64. MICH. GEN. CT. R. 785.4(4).

conflict of interest," and must give reasons for its finding.[65]

I. Immunity

In *Kastigar v. United States*,[66] the Supreme Court held that the government could constitutionally supplant an individual's fifth amendment privilege against self-incrimination by granting him immunity against the "use and derivative use" of compelled testimony.[67] It had previously been assumed that broader transactional immunity was constitutionally required and many state immunity statutes at that time granted such transactional immunity.[68] Although some jurisdictions followed the federal example,[69] and adopted use and derivative use immunity,[70] Michigan retained transactional immunity.[71] Indeed, the applicable Michigan statute guarantees the immunized grand jury witness the right to have counsel present during testimony,[72] protection that again exceeds the constitutional minimum.[73]

J. Defendant's Silence

A series of United States Supreme Court decisions have found no constitutional violation in prosecutorial use of a defendant's

---

65. *Id.* 785.4(4)(a)-(c).

66. 406 U.S. 441 (1972).

67. *Id.* at 462; *see also* Zicarelli v. New Jersey State Comm'n of Investigation, 406 U.S. 472 (1972) (upholding state statute on use/derivative use of testimony).

68. *See, e.g.*, MICH. COMP. LAWS §§ 767.19a-.19c (1970).

69. *See* 18 U.S.C. § 6002 (1970).

70. *See, e.g.*, GA. CODE ANN. § 38-1715 (1975); OHIO REV. CODE ANN. § 2945.44 (Page 1978).

71. *See* MICH. COMP. LAWS §§ 767.19a-.19c (1970); People v. Patterson, 58 Mich. App. 727, 228 N.W.2d 804 (1975). A special committee of the Michigan State Bar recommended the adoption of legislation giving the prosecutor the option of choosing between transactional and use/derivative use immunity, but no legislative action was taken on that proposal. *See* SPECIAL COMMITTEE FOR THE REVISION OF CRIMINAL PROCEDURE OF THE STATE BAR OF MICHIGAN, PROPOSED REVISIONS OF THE MICHIGAN CODE OF CRIMINAL PROCEDURE: PROPOSED CHAPTERS SIX AND SEVEN 247-52 (1977).

72. MICH. COMP. LAWS § 767.19e (1979).

73. Although there is no Supreme Court ruling directly on point, the Court has stated in dictum that witnesses do not have a constitutional right to the presence of counsel when they testify, *see In re* Groban, 352 U.S. 330, 333 (1957), and federal practice traditionally has not permitted counsel's presence, *see* FED. R. CRIM. P. 6(d) (limiting persons who may be present to the witness, the stenographer, and the government attorney). *See also* United States v. Mandujano, 425 U.S. 564, 581 (1976) (plurality opinion) (supporting *Groban* dictum); *cf. id.* at 603-05 (Brennan, J., concurring) (rejecting *Groban* dictum, yet supporting the right to counsel only for a putative defendant-witness; even there, not necessarily counsel located in the grand jury room).

pre-arrest or post-arrest silence (other than that following *Miranda* warnings) for impeachment purposes at trial.[74] In contrast, Michigan does not permit impeachment use — or any other use — of either pre-arrest or post-arrest silence, except where used to contradict the assertion that defendant actually made a statement.[75] In *Lakeside v. Oregon*,[76] the Supreme Court held that the defendant's fifth amendment right to refuse to take the stand was not unconstitutionally burdened by a trial court's insistence upon giving a "protective instruction" advising the jury that no adverse conclusion could be drawn from defendant's failure to testify, notwithstanding defendant's preference that the instruction not be given. Under Michigan law, the defendant has the option of preventing that instruction.[77]

K. Speedy Trial

Under the four-pronged balancing test of *Barker v. Wingo*,[78] the period of pretrial delay, including incarceration pending trial, may be quite substantial without violating a defendant's constitutional right to a speedy trial.[79] While Michigan does not go as far as states which restrict pretrial delay to a limited time period,[80] it does restrict the permissible period of pretrial incarceration.[81] In their treatment of precharge delay, Michigan

---

74. *See* Jenkins v. Anderson, 447 U.S. 231 (1980) (pre-arrest silence); Fletcher v. Weir, 102 S. Ct. 1309 (1982) (post-arrest silence without *Miranda* warnings); *cf.* Doyle v. Ohio, 426 U.S. 610 (1976) (post-arrest silence following *Miranda* warnings).

75. People v. Bobo, 390 Mich. 355, 212 N.W.2d 190 (1973); People v. Hurd, 102 Mich. App. 424, 301 N.W.2d 881 (1980), *cert. granted pending lower court determination of state or federal constitutional grounds*, 102 S. Ct. 81 (1981); People v. Wade, 93 Mich. App. 735, 287 N.W.2d 368 (1979).

76. 435 U.S. 333 (1978).

77. People v. Hampton, 394 Mich. 437, 231 N.W.2d 654 (1975) (also noting, however, that in a joint trial the instruction must be given if any one defendant requests it).

78. 407 U.S. 514 (1972).

79. *Barker* listed four factors to be considered on a case-by-case basis: (1) length of delay; (2) the government's justification for the delay; (3) whether and how the defendant assert his rights; and (4) prejudice caused by the delay. *Id.* at 530-33. In *Barker*, a delay of over five years, including incarceration for 10 months, was held not to violate the defendant's sixth amendment right.

80. *See* Y. KAMISAR, W. LAFAVE & J. ISRAEL, MODERN CRIMINAL PROCEDURE: CASES, COMMENTS AND QUESTIONS 1111 (5th ed. 1980).

81. *See* MICH. GEN. CT. R. 789.1 (requiring defendants' release on their own recognizance after incarceration of six months in felony cases or 30 days in misdemeanor cases). The rule excludes from this tabulation, however, delays resulting from: (1) other judicial proceedings; (2) continuances granted on defendant's personal request (after being advised of speedy trial rights); (3) continuances granted to the prosecutor on special justification; (4) joint trial complications where there is good cause for not granting a severance; and (5) other periods of delay for good cause, but not including delay caused by

courts adhere to the United States Supreme Court ruling in *United States v. Lovasco*[82] that due process is violated only upon a showing of both unjustified delay and actual prejudice.[83] Michigan decisions arguably go beyond *Lovasco*, however, in placing a lighter burden on the defendant for that showing.[84]

L. Double Jeopardy

In *Bartkus v. Illinois*,[85] the United States Supreme Court held that a state was not barred from bringing state charges against a person for essentially the same act — a bank robbery — that had served as the basis for a previous federal prosecution.[86] In *People v. Cooper*,[87] a similar case of dual bank robbery prosecutions, the Michigan Supreme Court held that the double jeop-

---

docket congestion. *Id.* at 789.1(1)-(5).

In addition, when a defendant is imprisoned on one charge and demands a speedy trial on pending charges, the pending case must ordinarily be brought to trial within 180 days or be dismissed with prejudice. *See* MICH. COMP. LAWS §§ 780.131-.133 (1979); *see also* People v. Hill, 402 Mich. 272, 262 N.W.2d 641 (1978); People v. Moore, 96 Mich. App. 754, 293 N.W.2d 700 (1980); *cf.* People v. Forrest, 72 Mich. App. 266, 249 N.W.2d 384 (1976) (recognizing a limited good-faith exception that can carry the period beyond 180 days).

82. 431 U.S. 783 (1977).

83. *Id.* at 790; United States v. Marion, 404 U.S. 307 (1971).

84. People v. Bisard, 114 Mich. App. 784, 310 N.W.2d 670 (1982) (holding that, once defendant shows "some prejudice," the burden shifts to the prosecutor to show justification). The *Bisard* court viewed this position — based on pre-*Lavasco* Michigan rulings — as the preferable interpretation of *Lovasco*, while acknowledging that other jurisdictions read *Lavasco* as placing a much heavier burden on the defendant. Consider also People v. Parshay, 104 Mich. App. 411, 304 N.W.2d 593 (1981), noting that while a lack of prejudice precluded a due process violation, the previously incarcerated defendant would be given credit for incarceration during the period of an unjustified precharge delay.

85. 359 U.S. 121 (1959).

86. *Id.* at 127-39 (allowing state prosecution after the defendant was acquitted on the federal charge). While *Bartkus* was decided prior to the incorporation of the federal double jeopardy prohibition as a standard applicable to the states under the fourteenth amendment, the current validity of the *Bartkus* ruling is unquestioned. The companion case to *Bartkus*, Abbate v. United States, 359 U.S. 187 (1959) (upholding a federal prosecution that followed a state prosecution), involved an application of the double jeopardy clause; and the Court there utilized the same dual sovereignty analysis that was the foundation for the *Bartkus* ruling. Moreover, in United States v. Wheeler, 435 U.S. 313 (1978) (decided after the fourteenth amendment incorporation of the double jeopardy bar), the Court relied heavily on *Bartkus* in applying the dual sovereignty rationale in the context of successive federal and Indian tribal prosecutions. *Wheeler* has been viewed as putting to rest any suggestion that Murphy v. Waterfront Comm'n, 378 U.S. 52 (1964) (rejecting a separate-sovereignty limitation on the self-incrimination privilege), undermined *Bartkus* and *Abbate*. *See, e.g.*, State v. Moeller, 178 Conn. 67, 420 A.2d 1153 (1979); *see also* Rinaldi v. United States, 434 U.S. 22 (1977) (assuming continuing validity of *Abbate*).

87. 398 Mich. 450, 247 N.W.2d 866 (1976).

ardy clause of the Michigan Constitution barred the state's successive prosecution.[88]

In *People v. White*,[89] the Michigan Supreme Court has given a broader reading to the Michigan double jeopardy clause than the United States Supreme Court has given to the fifth amendment's double jeopardy clause. In a series of concurring and dissenting opinions, Justice Brennan has urged the United States Supreme Court to adopt the view that the federal double jeopardy clause bars multiple trials for separate offenses arising out of the same transaction.[90] The Supreme Court has continued to read the clause, however, in light of the traditional "*Blockburger* test,"[91] focusing not on whether the offenses arose out of the same transaction, but on whether each of the offenses requires proof of additional facts.[92] In *White*, the Michigan Supreme Court discarded the *Blockburger* test in favor of Justice Brennan's "same transaction" test.[93]

---

88. *Id.* at 461, 247 N.W.2d at 870 ("[The Michigan constitution] prohibits a second prosecution for an offense arising out of the same criminal act unless it appears from the record that the interests of the State of Michigan and the jurisdiction which initially prosecuted are substantially different."); *cf.* People v. Formicola, 407 Mich. 293, 294 N.W.2d 334 (1979) (applying exception noted in *Cooper* based on differences in maximum penalties and in substantive — as opposed to jurisdictional — elements of the federal and state offenses).

89. 390 Mich. 245, 212 N.W.2d 222 (1973).

90. *See, e.g.*, Harris v. Oklahoma, 439 U.S. 970, 972 (1979) (Brennan, J., dissenting); Brown v. Ohio, 432 U.S. 161, 170 (1977) (Brennan, J., concurring); Thompson v. Oklahoma, 429 U.S. 1053, 1054 (1977) (Brennan, J., dissenting); Ashe v. Swenson, 397 U.S. 436, 453 (1970) (Brennan, J., concurring).

91. *See* Blockburger v. United States, 284 U.S. 299, 304 (1932).

92. *See* Illinois v. Vitale, 447 U.S. 410, 416 (1980); Brown v. Ohio, 432 U.S. 161 (1977).

93. 390 Mich. at 258, 212 N.W.2d at 227. At the time *White* was decided, some thought that Justice Brennan's view might prevail in the United States Supreme Court; the *White* opinion thus relied upon both federal and state constitutional arguments. *See id.* After the Supreme Court majority made clear its continued adherence to *Blockburger*, *see* Brown v. Ohio, 432 U.S. 161 (1977), Michigan nevertheless continued to apply *White's* same-transaction test, *see, e.g.*, People v. Sullivan, 407 Mich. 303, 284 N.W.2d 337 (1979).

Michigan law is also more protective of defendant's rights than federal double jeopardy decisions with respect to prosecutorial appeals once jeopardy has attached. Although United States v. Wilson, 420 U.S. 332 (1975), would apparently permit a prosecution appeal from a trial judge's entry of a judgment of acquittal following the return of a jury verdict of guilty, *see, e.g.*, United States v. Blasco, 581 F.2d 681 (7th Cir.), *cert. denied*, 439 U.S. 966 (1978), the applicable Michigan statute does not authorize such an appeal, *see* MICH. COMP. LAWS § 770.12; People v. Coolce, 113 Mich. App. 272, 275, 317 N.W.2d 594, 595 (1982). The Michigan statute permits an appeal from a post-jeopardy dismissal of an indictment only where the dismissal is "based upon the invalidity or construction of the statute upon which such indictment is founded." This provision also would apparently not authorize the appeal upheld in United States v. Scott, 437 U.S. 82 (1978) (appeal from post-jeopardy dismissal based on prejudicial precharge delay).

M. Prosecutorial and Judicial Vindictiveness

In *North Carolina v. Pearce*[94] and *Blackledge v. Perry*,[95] the United States Supreme Court adopted prophylactic due process standards designed to preclude prosecutorial or judicial vindictiveness against defendants who exercise their right of appeal under state law. *Pearce* held that where a defendant successfully appealed a conviction, was retried, and again convicted, the sentence imposed upon the second conviction could not exceed the original sentence unless the higher sentence was justified by reference to "objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentence proceeding."[96] *Blackledge* held that, where the defendant moved his case from a magistrate court to a court of general jurisdiction by exercising his right to a trial de novo on a misdemeanor appeal, the prosecutor could not respond by instituting a higher charge in the latter court.[97] Neither *Pearce* nor *Blackledge* applies when the defendant is charged with an offense, pleads guilty to a lesser offense, and successfully challenges that lesser plea. In such a case the prosecutor can apparently reinstitute the original charge and, if the defendant is convicted on retrial, the judge can impose a higher sentence commensurate with the higher charge.[98]

In *People v. McMiller*,[99] however, the Michigan Supreme Court expressed concern that permitting the prosecutor to return to the higher charge would "discourage exercise of the defendant's right to appeal a conviction claimed to be based on an improperly accepted plea, and [thereby] . . . tend to insulate from appellate scrutiny non-compliance with [Michigan's] guilty plea procedure."[100] The court therefore prohibited the state from charging a higher offense after a successful challenge to a guilty plea, thereby limiting retrial to the charge for which the previously accepted plea was offered.[101] This decision ordinarily

---

94. 395 U.S. 711 (1969).

95. 417 U.S. 21 (1974).

96. 395 U.S. at 726.

97. 417 U.S. at 28-29.

98. *See, e.g.*, United States *ex rel.* Williams v. McMann, 436 F.2d 103 (2d Cir. 1970), *cert. denied*, 402 U.S. 914 (1971); *see also* Borman, *The Chilled Right to Appeal from a Plea Bargain Conviction: A Due Process Cure*, 69 NW. U.L. REV. 663, 701-02 (1974).

99. 389 Mich. 425, 208 N.W.2d 451, *cert. denied*, 414 U.S. 1080 (1973).

100. *Id.* at 432, 208 N.W.2d at 453.

101. *Id.* at 434, 208 N.W.2d at 454; *accord* People v. Thornton, 403 Mich. 389, 269 N.W.2d 192 (1978). The *McMiller* rule does not apply where the prosecutor calls the plea-taking error to the attention of the trial judge, but the judge nevertheless accepts

would bar a higher sentence as well.[102]

Although not exhaustive, the above review of Michigan's departures from minimum federal constitutional standards should indicate the broad range of significant issues on which states may exceed federal constitutional standards, even in areas of substantial consitutional regulation. Moreover, contrary to what might be suggested by recent commentary, state adoption of more rigorous standards is not a new development, either in Michigan or elsewhere.[103] Although state courts are undoubtedly

---

the plea. Guilty Plea Cases, 395 Mich. 96, 135-36, 235 N.W.2d 132, 148 (1975), *cert. denied*, 429 U.S. 1108 (1977).

102. Because Michigan's indeterminate sentencing procedure adopts automatically the statutory maximum, a defendant benefited by *McMiller* could not receive a higher maximum term. *See* MICH. COMP. LAWS § 769.8 (1979). A higher minimum is possible (so long as the original minimum was less than two-thirds of the statutory maximum, *see, e.g.*, People v. Tanner, 387 Mich. 683, 199 N.W.2d 202 (1972)), but to accord with *Pearce* that minimum must be justified by reference to defendant's conduct after the original sentencing proceeding. *See* People v. Payne, 386 Mich. 84, 191 N.W.2d 375 (1971) (applying *Pearce* to reconvictions on the same charge following a successful challenge to a guilty plea), *rev'd on other grounds*, 412 U.S. 47 (1973). Moreover, at least under Michigan law, a defendant's shift from a position of admitted guilt to one of insisting upon trial would not constitute post-sentencing conduct justifying a higher sentence. *See id.*; People v. Grable, 57 Mich. App. 184, 225 N.W.2d 724 (1974); *see also* People v. Bottany, 43 Mich. App. 375, 204 N.W.2d 230 (1972) (dictum).

103. Law review commentators have recently given considerable attention to what they have described as the "new federalism" movement among state courts, noting an "emerging trend" of state court reliance upon state constitutional provisions to impose safeguards that the current Supreme Court refuses to impose under the federal constitution. *See, e.g.*, Wilkes, *The New Federalism in Criminal Procedure: State Court Evasion of the Burger Court*, 62 KY. L.J. 421 (1974). *See generally Developments in the Law, supra* note 11, at 1369 n.8 (citing a variety of articles on the subject). This trend is usually attributed to the "retreat" of the Burger Court from the "Warren Court's philosophical commitment to protection of the criminal suspect." Wilkes, *More on the New Federalism in Criminal Procedure*, 63 KY. L.J. 873, 873 (1975). Persuaded by Supreme Court dissenting opinions arguably closer to the Warren Court philosophy, state courts have apparently moved from federal constitutional grounds to state constitutional grounds and adopted positions urged in those dissents. The dissenting justices have sometimes suggested that the state courts do exactly that. *See, e.g.*, Oregon v. Kennedy, 102 S. Ct. 2083, 2089 (1982) (Brennan, J., dissenting); Michigan v. Mosley, 423 U.S. 96, 120 (1975) (Brennan, J., dissenting); *see also* Robbins v. California, 453 U.S. 420, 451 n.12 (1981) (Stevens, J., dissenting).

This "rediscovery" of state constitutions is attracting considerable notice and is more likely than any other factor to increase awareness of state departures from federal constitutional standards. At least one major conference was held on the subject and separate law school courses devoted to state constitutional law are being promoted. *See* Margolick, *State Judiciaries Are Shaping Law That Goes Beyond Supreme Court*, N.Y. Times, May 19, 1982, at 1, col. 1. The "new federalism movement" has also been highlighted in criminal procedure casebooks. *See, e.g.*, Y. KAMISAR, W. LAFAVE & J. ISRAEL, *supra* note 80, at 47-50. This combination of events should increase substantially awareness of state departures.

Unfortunately, the commentary on the "new federalism" does not always make clear either that these "innovative" state constitutional rulings are a continuation of a well-established practice, or that they represent the most visible portion of the myriad state

turning more frequently to state constitutional guarantees as a separate source of protection for individual liberties, they are hardly "rediscovering" a source that had been ignored for "decades" or "generations."[104] Before federal constitutional decisions worked a significant change in the state criminal justice process, state constitutional guarantees were a major source of definition of individual rights. Moreover, state courts often interpreted these guarantees as imposing more rigorous limitations upon the state process than similar federal constitutional guarantees imposed upon the federal process.[105] As the United States Supreme Court moved toward a more expansive interpretation of federal constitutional guarantees, and those federal guarantees were more frequently made applicable to the states, reliance on state constitutional provisions decreased. State courts hardly forgot, however, their authority to construe more broadly their state constitutions. Many state constitutional rulings in the 1950's and even in the 1960's — at the height of the Warren Court's "criminal procedure revolution" — far exceeded positions taken by the United States Supreme Court.[106]

---

legal standards which exceed federal constitutional minimums.

104. *Cf.* Margolick, *supra* note 103, at B8, col. 1 (recent Supreme Court rulings "have created both a responsibility and an opportunity for state judges to scrutinize state constitutional provisions for the first time in decades or perhaps in generations") (quoting ACLU President Norman Dorsen).

105. *See, e.g.*, Betts v. Brady, 316 U.S. 455, 479-80 (1940) (Black, J., dissenting) (noting several state constitutional rulings requiring appointment of counsel for indigent defendants in all felony cases before the Supreme Court reached a similar conclusion under the sixth amendment in Johnson v. Zerbst, 304 U.S. 458 (1938)); Little v. State, 171 Miss. 818, 159 So. 103 (1935) (refusing to follow the silver platter doctrine of federal cases long before Elkins v. United States, 364 U.S. 206 (1960), rejected that doctrine); Note, *An Epilogue to* Cichos: *Double Jeopardy Examined*, AM. U.L. REV. 500 (1968) (noting a substantial body of state double jeopardy decisions adopting an implied acquittal analysis, contrary to Trono v. United States, 199 U.S. 521 (1905), long before the Supreme Court rejected *Trono* in Green v. United States, 355 U.S. 184 (1957)).

106. *See, e.g.*, Blake v. Municipal Court, 242 Cal. App. 2d 731, 51 Cal. Rptr. 771 (1966) (though Supreme Court had not yet announced scope of sixth amendment in misdemeanor cases, state constitution required appointment of counsel for indigents charged with traffic offense carrying maximum punishment of $50 fine or five days in jail); Cardenas v. Superior Court, 56 Cal. 2d 273, 363 P.2d 889, 14 Cal. Rptr. 657 (1961) (California double jeopardy clause would not be construed within the boundaries of Gori v. United States, 367 U.S. 364 (1961); retrial would not be allowed simply because the trial judge, declaring a mistrial on his own initiative, had acted to benefit the defendant); People v. Martin, 45 Cal. 2d 755, 290 P.2d 855 (1955) (allowing non-victim defendant standing to challenge an unconstitutional search, a position rejected consistently by the Supreme Court, *see* Rakas v. Illinois, 439 U.S. 128 (1978)); People v. Albea, 2 Ill. 2d 317, 118 N.E.2d 277 (1954) (applying fruit-of-the-poisonous-tree doctrine to exclude testimony of a witness whose identity was discovered through an illegal entry, a position that went far beyond federal precedent at the time and possibly beyond current federal law, *cf.* United States v. Ceccolini, 435 U.S. 268 (1978)); Lebel v. Swincicki, 354 Mich. 427, 93 N.W.2d 281 (1958) (taking a blood sample from an unconscious driver constituted an

Moreover, notwithstanding increased reliance upon state constitutional provisions, the majority of state court standards exceeding federal constitutional minimums are probably based not on state constitutional provisions but on other sources of state law. As with state constitutional interpretations, there is a well established tradition of more rigorous state standards based on court rules and statutes. In those areas where a substantial number of states go beyond constitutional minimums, the more rigorous state standards are based most frequently on legislation.[107]

II. THE COMMON MODEL AND UNIFORMITY IN STATE LAW

Variations in state legal standards are more widely recognized in those areas of state criminal procedure not subject to substantial constitutional regulation; nevertheless, the historical diversity in this area of state law also tends to be underestimated. This stems largely from overestimating the influence of common models as a unifying factor in shaping state law. For those judicial procedures governed ordinarily by court rule or statute, for instance, the most frequently cited common model is the Federal Rules of Criminal Procedure ("Federal Rules"). Prominent federal legislative reforms, such as the Bail Reform Act of

---

unreasonable search under the Michigan constitution, regardless of whether probable cause for the search existed at the time; such evidence is thus excluded from a civil tort action, just as in a criminal case); People v. Donovan, 13 N.Y.2d 148, 193 N.E.2d 628, 243 N.Y.S.2d 841 (1963) (once an attorney enters the proceedings, though adversary judicial proceedings have not yet commenced, the *Miranda* warnings are insufficient; the police may not question the arrestee unless counsel is present or a valid waiver is made in counsel's presence); *accord* People v. Arthur, 22 N.Y.2d 325, 239 N.E.2d 537, 292 N.Y.S.2d 663 (1968).

107. Illustrative are the state laws barring a subsequent state prosecution based on the same act as a previous federal prosecution, *see supra* notes 85-93 and accompanying text: approximately half the states would prohibit the successive state prosecution upheld in Bartkus v. Illinois, 359 U.S. 121 (1959). *See* Y. KAMISAR, W. LAFAVE & J. ISRAEL, *supra* note 80, at 1512. In a few instances, state courts had held that the successive state prosecution violated the state constitution. *See, e.g.*, People v. Cooper, 398 Mich. 450, 247 N.W.2d 866 (1976); State v. Hogg, 118 N.H. 262, 385 A.2d 844 (1978). *But cf.* State v. Moeller, 178 Conn. 67, 420 A.2d 1153 (1979); State v. Rogers, 90 N.M. 604, 606, 566 P.2d 1142 (1977) (each noting numerous state cases following *Bartkus* in the interpretation of their state double jeopardy provisions). The majority of the states, however, have rejected the *Bartkus* position through statutory, not state constitutional, prohibitions, and many of these statutes had preceded the *Bartkus* ruling. *See* Y. KAMISAR, W. LAFAVE & J. ISRAEL, *supra* note 80, at 1512 (citing representative statutes). Statutes adopted prior to *Bartkus* are listed in MODEL PENAL CODE § 1-11 (Tent. Draft No. 5, 1966). At least ten states not included in that list now have statutory prohibitions that would bar the state prosecution upheld in *Bartkus*. Included in that group is Illinois, the state that brought the prosecution in *Bartkus*. *See* ILL. REV. STAT. ch. 38, § 3-4 (1979).

1966[108] and the Jury Selection Act of 1968,[109] also are cited as common models followed by a substantial number of states. Many lawyers, especially in jurisdictions not following the model, too often assume that the laws of different states based on a particular model will be substantially similar in their basic elements.[110] Michigan lawyers, for example, frequently characterize the law in "the Federal Rules states" as if all of these states simply tracked each Federal Rule. Lawyers from Federal Rules states, familiar with departures in their own jurisdiction's rules, are likely to recognize that significant variations exist among Federal Rules states. Nevertheless, many frequently assume that there is at least substantial similarity as to those Rules that their own state follows closely.

Determining the degree of similarity in the law of the Federal Rules states depends initially upon the meaning of "Federal Rules state." If this reference includes only those states with court rules largely tracking the language of the Federal Rules, provision by provision, then it encompasses no more than a half-dozen states[111] — hardly a sufficient number to contribute significantly to uniformity in state law. It is only when the reference includes states that have simply borrowed substantially from the Federal Rules that the group includes more than half of the states.[112]

---

108. 18 U.S.C. §§ 3146-3156 (1976).

109. 28 U.S.C. §§ 1861-1876 (1976 & Supp. IV); *see also* UNIF. JURY SELECTION AND SERVICE ACT, 13 U.L.A. 509 (1970) (modeled in large part on the federal act).

110. As with any common source, variations are expected in minor matters of administration, such as the size of the required master list in a statute modeled after the Jury Selection Act. It is assumed, however, that states relying on that Act would have adopted its basic elements, e.g., random selection from a voter registration list, possibly supplemented by other lists; limited grounds for disqualification; limited grounds for exemption; and requirement of extremely prompt challenges to alleged violations.

111. Even under the most liberal construction of "largely tracking" Federal Rules, this group would include no more than the states of Delaware (Superior Court Criminal Rules), Idaho, Maine, North Dakota, Ohio, and West Virginia. Moreover, each of these states deviates in some way from the Federal Rules. *Compare* DEL. SUPER. CT. CRIM. R. 24(e) *with* FED. R. CRIM. P. 24, IDAHO R. CRIM. P. 8(a) *with* FED. R. CRIM. P. 8(a), N. DAK. R. CRIM. P. 7(g) *with* FED. R. CRIM. P. 7, W. VA. R. CRIM. P. 5.1(a) *with* Fed. R. Crim. P. 5.1(a). *See also infra* notes 128-32 and accompanying text.

112. This category includes the states cited *supra* note 111 as well as Alaska, Arizona, Colorado, Florida, Hawaii, Iowa, Kentucky, Maryland, Massachusetts, Minnesota, New Jersey, Rhode Island, South Dakota, Tennessee, Vermont, Virginia, and Washington. In addition, in several states with court rules of limited scope, state statutes draw heavily on the Federal Rules covering the same subjects. *See, e.g.*, KAN. STAT. ANN. §§ 22-3201 to -3401 (1981); MONT. CODE ANN. §§ 46-1-101 to -31-202 (1981); UTAH CODE ANN. §§ 77-1-1 to -23-12 (1978 & Supp. 1979).

By definition this larger group of states that only "borrow substantially" from the Federal Rules have departed from the Federal Rules on various matters. Such departures are hardly surprising because, in many respects, the state and federal criminal jus-

Within this larger group of Federal Rules states, the basic standards of the Rules are followed on numerous issues. For example, almost every Federal Rules state follows Federal Rule 12(b), requiring that motions to suppress be made before trial,[113] rather than at trial through a contemporaneous objection to the introduction of the evidence.[114] As under Federal Rule 12(f), the states treat the failure to make the motion before trial, absent good cause, as a basis for forfeiture of the objection. Some division may arise concerning the scope of the trial judge's discretion to excuse a failure to object,[115] but the basic elements of the

---

tice processes operate in quite different settings. As a result crimes prosecuted in federal courts often have a somewhat different character than crimes typically treated in the state systems. Federal prosecutions involve a substantially smaller portion of "street crimes" and a substantially higher portion of white collar crimes. *See* M. HINDELANG, M. GOTTFREDSON & T. FLANAGAN, *supra* note 35, at 419-20 (1981) (30% of all federal prosecutions fall within categories of "embezzlement and fraud" or "forgery and counterfeiting," while only 6.5% fall within the category of "homicide, robbery, assault, and burglary"). In addition, state prosecuting and police agencies tend to be much more fragmented and less interdependent than their counterpart federal agencies. *See* H. KERPER, INTRODUCTION TO THE CRIMINAL JUSTICE SYSTEM 407-11, 426-29 (J. Israel 2d ed. 1979). State courts also often have much heavier caseloads. *See id.* at 198.

113. *See* ALASKA R. CRIM. P. 12(b); ARIZ. R. CRIM. P. 16.1; COLO. R. CRIM. P. 41(e); DEL. SUPER. CT. P. 41(e); FLA. R. CRIM. P. 3.190(h); HAWAII R. CRIM. P. 12(b); IDAHO R. CRIM. P. 12(b); IOWA R. CRIM. P. 10(2); KAN. STAT. ANN. § 22-3216(3) (1981); ME. R. CRIM. P. 41(e); MD. R. CRIM. P. 736(g); MASS. R. CRIM. P. 13; MINN. R. CRIM. P. 8.03; MONT. CODE ANN. § 46-13-302(2) (1981); N.J. R. CRIM. P. 3:5-7(a); N.D. R. CRIM. P. 12(b); OHIO R. CRIM. P. 12(b); R.I. R. CRIM. P. 41(f); S.D. CODIFIED LAWS ANN. § 23A-8(3) (1979); TENN. R. CRIM. P. 12(b); UTAH CODE ANN. § 77-35-12(b) (Supp. 1981); VT. R. CRIM. P. 12(b); WASH. R. CRIM. P. 4.5(h); W. VA. R. CRIM. P. 12(b).

114. This latter practice was formerly very common. *See* Annot., 50 A.L.R.2d 531, 589-90 (1956); *see also* Henry v. Mississippi, 379 U.S. 443 (1965). Today, the only Federal Rules states following this practice are Kentucky and Virginia. *See* KY. R. CRIM. P. 9.78 ("If at any time before trial a defendant moves to suppress, or during trial makes timely objection to the admission of evidence consisting of (a) a confession or other incriminating statements alleged to have been made by him to police authorities or (b) the fruits of a search, the trial court shall conduct an evidentiary hearing. . . ."). Virginia does not have a separate provision on the timing of the motion to suppress. The general provision on motions that must be made before trial, however, does not refer to the suppression motion, *see* VA. R. CRIM. P. 3A:12(c), and case law establishes that suppression motions need not be made before trial, Manley v. Commonwealth, 211 Va. 146, 176 S.E.2d 309, *cert. denied*, 403 U.S. 936 (1970).

115. *See* FED. R. CRIM. P. 12(e) (providing that failure to make the motion before trial "shall constitute waiver thereof, but the court for cause shown may grant relief from the waiver"). Some states follow this language, leaving the definition of good cause to judicial development. *See, e.g.*, ALASKA R. CRIM. P. 12(e). Other states legislatively define excuses for failure to make the motion before trial. *See, e.g.*, ARIZ. R. CRIM. P. 16.1(c) (the basis for the motion "was not then known, and by exercise of reasonable diligence could not then have been known, and the party raises it promptly upon learning of it"). Still others follow the original language of FED. R. CRIM. P. 41(e), 327 U.S. 865 (1946) ("the motion shall be made before trial unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the court in its discretion may entertain the motion at the trial or hearing."), *amended*, 406 U.S. 996-97 (1972).

provisions are alike. This near unanimity as to Federal Rule 12(b) stands in sharp contrast, however, to the position of the Rules states on those Federal Rules raising more controversial policy questions. Consider, for example, the Federal Rule 16 provisions on defense discovery.

As originally adopted, Rule 16 provided for very narrow discovery. The trial court had discretion only to order disclosure of documents and tangible objects "obtained from or belonging to the defendant or obtained from others by seizure or by process, upon a showing that the items sought may be material to the preparation of his defense and that the request is reasonable."[116] In 1966, after considerable debate, the Rule was completely overhauled, with substantial liberalization of the breadth of discovery.[117] Although the Rule retained the language of discretion[118] and restrictively protected internal government documents and witness' statements from discovery,[119] there was substantial extension in coverage to include other material documents and tangible objects held by the government,[120] as well as prior recorded statements of the defendant and certain scientific examinations.[121]

In 1975, the Rule was again revised to provide broader discovery, though not as broad as the Advisory Committee had recommended.[122] The items listed would no longer be disclosed at the discretion of the court, nor need there be a showing of special need.[123] All of the 1966 items were carried over, and two items

---

See, e.g., DEL. SUPER. CT. R. CRIM. P. 41(e).

116. Fed. R. Crim. P. 16, 327 U.S. 846 (1945).

117. FED. R. CRIM. P. 16(a)-(g), 383 U.S. 1097, 1097-99 (1965).

118. *See id.* 16(a), 383 U.S. at 1097 ("the court may order").

119. *See id.* 16(c), 383 U.S. at 1099 (prohibiting use of the expanded discovery provisions to gain disclosure of internal documents made by government agents (e.g., use of police reports), or statements of government witnesses; such statements would, however, be made available at trial pursuant to the Jencks Act, *see* 18 U.S.C.A. 3500 (1969 & Supp. 1982)).

120. *Id.* 16(b), 383 U.S. at 1098 (allowing all documents and tangible objects within the "possession, custody, or control of the government," aside from internal documents and statements of government witnesses, upon a "showing of materiality" and reasonableness of the request).

121. *Id.* 16(a), 383 U.S. at 1097-98 (including "written or recorded statements or confessions" of the defendant, prior grand jury testimony of the defendant, and reports of "physical or mental examinations and of scientific tests of experiments"). Moreover, in contrast to documents and tangible objects, discovery of these items did not require a showing of possible materiality to defense preparation. *Id.*

122. *See infra* note 124.

123. *See* FED. R. CRIM. P. 16(a)(1)(A), (C), (D). The language of the Rule was recast from "the court may order," to "the court shall order" and "the government shall permit." *Id.* at (A). The requirement of a showing of reasonableness of a request for documents and tangible items, *see supra* note 120, was dropped. *Id.* at (C).

were added: (1) the substance of any oral statement given by defendant in response to interrogation, where the government intended to use the statement at trial; and (2) the prior record of the defendant as established by government records.[124] The 1975 Rule retained, however, the prohibition against requiring pretrial disclosure of internal memoranda and statements of government witnesses.[125] Overall, the 1975 Amendment fell short of the breadth of the A.B.A. Standards,[126] but it was certainly a more liberal discovery provision than the 1966 version.[127]

Not surprisingly, discovery procedures in the Federal Rules

---

124. *Id.* at (A), (B). The Advisory Committee also recommended adding the names of government witnesses. *See* Advisory Committee Report, 62 F.R.D. 271, 312 (1975). Congress rejected this proposal. *See* Pub. L. 94-64, § 3(2)-(28), 89 Stat. 374; Pub. L. 94-149, § 5, 89 Stat. 806.

125. *See* FED. R. CRIM. P. 16(2); *see also supra* note 119.

126. The Advisory Committee for the 1975 Amendments relied upon the then-current A.B.A. Criminal Justice Standards, STANDARDS RELATING TO DISCOVERY AND PROCEDURE BEFORE TRIAL § 1.2 (Approved Draft 1970) [hereinafter cited as A.B.A. Standards], in supporting its recommendation for liberalizing federal discovery. *See* Advisory Committee Report, 62 F.R.D. 271 *passim* (1975). The A.B.A. Standards were revised in 1978 to provide for open file discovery, but the state rules incorporating the A.B.A. proposals all rely on the original version rather than the revision; further reference in this Article is thus to the 1970 version.

The Committee's proposal to disclose witness names, *see supra* note 124, was a step in the direction that the Standards advocated, but it still fell short of the A.B.A. proposal. The Committee was limited by the Jencks Act, 18 U.S.C.A. 3500(a) (1969 & Supp. 1982), which forbids disclosure of prior recorded statements of government witnesses until those witnesses testify at trial. The A.B.A. Standards, in contrast, provide for pretrial disclosure of the names *and statements* of all persons the government intends to call as witnesses, along with their prior criminal records. A.B.A. Standards, *supra* at § 2.1. This requirement would encompass statements of police officers as well as other witnesses, and therefore would include some of the internal memoranda (e.g., police reports) specifically exempted under the Federal Rules. When the Advisory Committee found itself unable to provide for discovery of witnesses' statements, and Congress rejected disclosure of witness names, *see supra* note 124, the 1975 amendments fell considerably short of the A.B.A. Standards in this area.

The A.B.A. Standards also give the court discretion to provide for discovery of additional matter upon a showing of materiality. *See* A.B.A. Standards, *supra* at § 2.5. This provision also allows discovery of items exempted under the Federal Rules provision on internal memoranda. Where a police officer is not expected to be a witness and the officer's report does not include statements of witnesses, the report may nevertheless be discoverable under this A.B.A. provision. *See* Y. KAMISAR, W. LAFAVE & J. ISRAEL, *supra* note 80, at 1166 n.b.

Unlike the A.B.A. Standards, the Federal Rules also do not provide for disclosure for a codefendant's statement in a joint trial. *See* A.B.A. Standards, *supra*, at § 2.1(a)(ii). Where those statements are most likely to be used against the defendant — in conspiracy cases — discovery may nevertheless be available in the federal courts on the theory that the codefendant's statement is being treated as defendant's own. *See* J. MOORE, 8 MOORE'S FEDERAL PRACTICE D 16.05[1] (2d ed. 1981).

127. It was not more liberal, however, than the broad interpretation of the 1966 Amendment adopted by some district courts. *See generally* 1 C. WRIGHT, FEDERAL PRACTICE AND PROCEDURE § 253 (1969) (citing cases).

states range throughout the discovery spectrum, once one gets beyond the original version of the Federal Rules. A few states have provisions very much like the 1966 version of Rule 16, providing for discovery of documents, scientific reports, and the defendant's own statements, in the discretion of the court.[128] Three states have a modified combination of the 1966 and 1975 versions of the Rules, basically making disclosure of defendant's statements mandatory and disclosure of other items discretionary.[129] Several states have provisions that generally follow the 1975 version of the Federal Rules.[130] A few have provisions that follow the Advisory Committee's 1975 proposal to include disclosure of witness lists.[131] A substantial number of states have provisions based on the A.B.A. Standards, with a few arguably providing for even broader mandatory disclosure.[132]

Because I have not had the opportunity to review thoroughly all of the provisions of the various Federal Rule states, I cannot guarantee that precisely the same degree of state diversity is to be found as to other Federal Rules. It is safe to say, however, that a substantial number of departures from the Federal Rules will undoubtedly be found in most areas of controversy. Federal Rule 11, for example, authorizes a practice of prosecutorial sentence bargaining (with subsequent judicial approval) that is an anathema to the judiciary in many jurisdictions.[133] Federal Rule

---

128. *See* N.D. R. CRIM. P. 16; KY. R. CRIM. P. 7.24; *cf.* KAN. STAT. ANN. § 22-3212 (1981) (including a summary of the defendant's oral statements).

129. *See* IOWA R. CRIM. P. 13; MASS. R. CRIM. P. 14; UTAH CODE ANN. § 77-35-16(a) (Supp. 1981). These provisions also go beyond the 1975 Rules in some respects. The Iowa provision includes disclosure of a codefendant's statement and the Massachusetts rule provides for discretionary disclosure of the names of witnesses.

130. *See, e.g.*, DEL. SUPER. CT. CRIM. R. 16; S.D. R. CRIM. P. 16(a)(1); TENN. R. CRIM. P. 16; VA. R. CRIM. P. 3A:14. The Delaware and Tennessee rules also provide for discovery of a codefendant's statement in a joint trial. *See supra* note 126.

131. *See, e.g.*, OHIO R. CRIM. P. 16; W. VA. R. CRIM. P. 16; *cf.* ME. R. CRIM. P. 16 (witness list discretionary).

132. *See, e.g.*, ALASKA R. CRIM. P. 16; ARIZ. R. CRIM. P. 15.1; COLO. R. CRIM. P. 16; FLA. R. CRIM. P. 3.220; HAWAII R. CRIM. P. 16; IDAHO R. CRIM. P. 16; MD. R. CRIM. P. 741; MINN. R. CRIM. P. 9.01; N.J. R. CRIM. P. 3.13-3; R.I. R. CRIM. P. 16; VT. R. CRIM. P. 16; WASH. R. CRIM. P. 4.7. While the A.B.A. Standards, *supra* note 126, require disclosure of the names and recorded statements of only those persons the government intends to introduce as witnesses, the Alaska and Florida provisions require disclosure of the names and statements of all persons known by the prosecutor to have relevant facts. *See* FLA. R. CRIM. P. 3.220(a)(1)(i); ALASKA R. CRIM. P. 16(b)(1)(i)-(ii). On the other hand, several of the states following the A.B.A. model have broader work-product exceptions and provide for more extensive reciprocal discovery by the prosecution. *See, e.g.*, FLA. R. CRIM. P. 3.220(b)(4) (reciprocal disclosure); ARIZ. R. CRIM. P. 15.4(b)(1) (work product).

133. *See, e.g.*, People v. Johnson, 105 Mich. App. 614, 307 N.W.2d 385 (1981); *cf.* Y. KAMISAR, W. LAFAVE & J. ISRAEL, *supra* note 80, at 177 (4th ed. Supp. 1977) (noting federal judicial opposition to the amendment). *See generally* H. MILLER, W. MCDONALD & J. CRAMER, PLEA BARGAINING IN THE UNITED STATES (1978).

11 also prohibits judicial participation in the plea agreement discussions, a procedure which would alter the practice in numerous states.[134] Federal Rule 5.1 permits a preliminary hearing bindover to be based entirely on hearsay, though most states, particularly those prosecuting by information, insist upon more substantial evidence.[135] On these issues and others, the common model of the Federal Rules falls far short of providing uniformity among the states.

The foregoing analysis also applies to federal statutory models. The Federal Bail Reform Act of 1966 presents one of the most successful statutory models.[136] A recent survey found that, as of 1978, more than half of the states had one or more of the basic features of the Bail Reform Act: a stated preference for release on personal recognizance; a ten-percent cash alternative to the bail bond; and a direction to utilize the least restrictive condition for release, consistent with ensuring defendant's appearance at trial.[137] Yet the same survey concluded that "[p]erhaps the most striking feature of the kinds of provisions included in the guidelines [i.e., legal standards] of the different states is their heterogeneity."[138] Working from the same federal model, one state adopted a ten-percent alternative that effectively eliminated bail bondsmen,[139] while another failed even to direct the magistrate to look first to the ten-percent provision to determine if that procedure could substitute satisfactorily for the bail bond.[140] Likewise, while the Federal Act refers only to the ultimate goal of reasonably ensuring appearance at trial,[141] several states with provisions otherwise similar to the Federal Act further recognize the purpose of protecting the community from dangerous defendants.[142]

---

134. *See* Alschuler, *The Trial Judge's Role in Plea Bargaining, Part I*, 76 COLUM. L. REV. 1059, 1060 & n.8 (1976); Cramer, Rossman & McDonald, *The Judicial Role in Plea Bargaining*, in W. MCDONALD & J. CRAMER, PLEA-BARGAINING 139 (1980); Ryan & Alfini, *Trial Judges' Participation in Plea Bargaining: An Empirical Perspective*, 13 L. & SOC'Y 479 (1978-79).

135. *See* Y. KAMISAR, W. LAFAVE & J. ISRAEL, *supra* note 80, at 997-99.

136. 18 U.S.C. §§ 3146-3149 (1976).

137. *See* J. GOLDKAMP, TWO CLASSES OF ACCUSED 56-59, Table 4-1 (1979).

138. *Id.* at 55.

139. ILL. REV. STAT. ch. 38, § 110-7 (1979); *see also* M. KANNENSOHN & D. HOWARD, BAIL BOND REFORM IN KENTUCKY AND OREGON 12-13, 18 (1978) (noting these states' provisions effectively eliminating bondsmen).

140. *See* Pugh v. Rainwater, 557 F.2d 1189, 1201 nn.26-27 (5th Cir. 1977) (explaining how the Florida Supreme Court adopted bail rules that did not require the use of the least onerous bail provisions), *vacated as moot*, 572 F.2d 1053 (5th Cir. 1978).

141. 18 U.S.C. § 3146(a) (1976). The reference here is to noncapital cases and release pending trial, not to release after conviction. *See id.* at § 3148.

142. *See* J. GOLDKAMP, *supra* note 137, at 61 n.19.

III. THE COMMON LAW AND UNIFORMITY IN STATE LAW

The "common law" — those standards derived from English legal tradition or well established in the American legal tradition before the turn of the century — is occasionally cited as another common source that produces substantial uniformity in various aspects of state law.[143] Many aspects of Michigan criminal procedure are governed by common law rules, and in the course of researching a proposed revision of the Michigan Code of Criminal Procedure, I had occasion to review the treatment of those common law rules in various other states. In every instance in which our Committee members suggested we possibly modify or abandon the common law rule, I found at least several other states had already taken that step.

One of the more controversial common law rules that we reviewed was that limiting police arrest authority for misdemeanors. Under the traditional rule, an officer could make a warrantless arrest for a misdemeanor only if the misdemeanor was committed in the officer's presence.[144] A then-recent Michigan case suggested possible acceptance of mere probable cause to believe that a misdemeanor was being committed in the officer's presence.[145] Critics of the common law rule urged that we go beyond this new standard and reject any form of the "in-presence" requirement; it should be sufficient, they argued, to have the same probable cause needed for felony arrests. Supporters of the common law rule felt that any lower threshold for misdemeanor arrests was an improper innovation.[146] A review of the law of other states, aided by a recent ALI survey,[147] revealed that some

---

143. *Cf.* H. KERPER, *supra* note 112, at 27-28.

144. The original English rule and the early American rule limited the arrest authority of any person to misdemeanors involving a breach of the peace and committed in the presence of the person making the arrest. *See* Bohlen & Shulman, *Arrest With and Without a Warrant*, 75 U. PA. L. REV. 485, 490-91 (1927); Wilgus, *Arrest Without a Warrant*, 22 MICH. L. REV. 673, 701-09 (1924). For police officers, however, American law soon extended authorization for warrantless arrests to any misdemeanor committed in the officer's presence. *See* A.L.I. CODE OF CRIMINAL PROCEDURE 231 (1931) (citing various statutes and judicial decisions). As a result, the common law rule is often described today without reference to the early breach-of-the-peace limitation. *See, e.g.*, United States v. Watson, 423 U.S. 411, 418 (1976).

145. *See* People v. Dixon, 45 Mich. App. 64, *aff'd*, 392 Mich. 691 (1973).

146. *See* SPECIAL COMMITTEE FOR THE REVISION OF CRIMINAL PROCEDURE OF THE STATE BAR OF MICHIGAN, PROPOSED REVISIONS OF THE MICHIGAN CODE OF CRIMINAL PROCEDURE: PROPOSED CHAPTERS TWO-FIVE 144-50 (1976) (discussing the holdings in various jurisdictions).

147. A MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE 692-95 (Proposed Official Draft 1975) [hereinafter cited as MODEL PRE-ARRAIGNMENT CODE]. This survey is rather

states followed the position of the supporters, others followed the position of the critics, and many others adopted positions that fell between the two.

Among the jurisdictions following the common law rule, several required actual commission of the misdemeanor in the officer's presence,[148] while others required only probable cause to believe that a misdemeanor was being committed in the officer's presence.[149] Several states retained the "in-presence" requirement for some misdemeanors, but permitted arrests upon probable cause alone for other misdemeanors.[150] Other states eliminated the "in-presence" requirement for all misdemeanors when the officer had reason to believe that an immediate arrest was necessary to ensure the person's apprehension or to prevent physical injury or property damage.[151] Finally, several states had discarded completely the "in-presence" requirement, treating misdemeanor arrests in the same manner as felony arrests. Although some of these jurisdictions had only recently come to that position,[152] others had rejected the common law requirement prior to the turn of the century.[153]

Although the misdemeanor arrest rule was one of the few common law standards retained in Michigan that had been modified or abandoned by a majority of the states, we found numerous other common law standards from which a substantial group of states had departed. At common law, no limits were placed on the type of evidence that could be considered by the grand jury

---

dated. In particular, many states generally following the common law rule have eliminated the "in-presence" requirement for warrantless arrests in domestic violence cases. N.C.C. & D., Criminal Justice Newsletter, May 8, 1980; *see, e.g.*, MICH. COMP. LAWS § 764.15a (1979).

148. *See* MODEL PRE-ARRAIGNMENT CODE, *supra* note 147, at 692 (citing various statutes requiring that the crime be "committed" in the officer's presence). Notwithstanding statutory language, decisions indicated that several of these states might find acceptable the standard of probable cause to believe the offense was being committed in the officer's presence. *See* 2 W. LAFAVE, *supra* note 22, § 5.1, at 237.

149. *See* MODEL PRE-ARRAIGNMENT CODE, *supra* note 147, at 692.

150. *See, e.g.*, MD. CODE ANN. art. 27, § 594(B); OHIO REV. CODE ANN. § 2935.03 (Page 1982); ORE. REV. STAT. § 133.310(1) (1981); WASH. REV. CODE § 10.31.100 (1980 & Supp. 1982).

151. *See, e.g.*, KAN. STAT. ANN. § 22-2401 (1981); NEB. REV. STAT. § 29-404.02 (1981); N.C. GEN. STAT. § 15A-401(b)(2) (1978 & Supp. 1981); UTAH CODE ANN. § 77-7-2 (Supp. 1981).

152. *See, e.g.*, COLO. REV. STAT. § 16-3-102(c) (1978 & Supp. 1981); N.Y. CRIM. PROC. LAW § 140.10(1)(b) (McKinney 1981 & Supp. 1982); WIS. STAT. § 968.07(1)(d) (1971 & Supp. 1981).

153. *See, e.g.*, HAWAII REV. STAT. § 803-5 (1976 & Supp. 1980) (recodifying P.C. 1869, C. 49 § 5); ILL REV. STAT. ch. 38, § 107-2(c) (1980 & Supp. 1982) (codifying R.S. 1874, div. 6, §§ 4, 5, 8); IOWA CODE § 804.7 (1979 & Supp. 1982) (recodifying 1873 Code, §§ 4199, 4200).

in issuing an indictment.[154] Nevertheless, a substantial group of states now bar grand jury use of certain types of evidence that would be inadmissible at trial.[155] The common law also placed no limits on the prosecutor's authority to refile a charge after it had been dismissed for insufficient evidence at a preliminary hearing.[156] Today, however, several states prohibit refiling without the support of additional evidence.[157] A similar development has occurred in the grand jury process, as several states now require court approval for resubmission to the grand jury following a refusal to indict.[158] In these areas and others, the common law commands the adherence of a large number of states, but falls short of providing general uniformity. The common law — like the Federal Rules model and federal constitutional standards — produces substantial similarity in some aspects of state law, but has not precluded development of important alternative approaches in other areas.

CONCLUSION

Failure to recognize the full range of state law diversity is hardly the worst of the errors commonly made in analyzing the criminal justice process,[159] yet it carries with it certain significant costs. Initially, this failing may result in a skewed criticism of the governing law. This is especially true in the area of police practices, where criticisms tend to be focused almost entirely on constitutional standards. By failing to recognize the numerous state standards that exceed the constitutional minimum, civil libertarians often depict the law as providing far less protection for the individual than presently exists.[160] The criticism from

---

154. *See* Costello v. United States, 350 U.S. 359 (1956).

155. *See* Y. KAMISAR, W. LAFAVE & J. ISRAEL, *supra* note 80, at 1048-50.

156. *See* United States *ex rel.* Rutz v. Levy, 268 U.S. 390 (1925); State v. Fahey, 275 N.W.2d 870 (S.D. 1979).

157. *See, e.g.*, People v. George, 114 Mich. App. 204, 318 N.W.2d 666 (1982); Jones v. State, 481 P.2d 169 (Okla. Crim. App. 1971); Wittke v. State *ex rel.* Smith, 80 Wis. 2d 332, 259 N.W.2d 515 (1977); *cf.* McNair v. Sheriff, Clark County, Nevada, 89 Nev. 434, 514 P.2d 1175 (1973) (good cause necessary).

158. *See* Y. KAMISAR, W. LAFAVE & J. ISRAEL, *supra* note 80, at 1027.

159. It is probably not in the same class, for example, as the failure to appreciate administrative realities, or the failure to appreciate the integrated nature of the process. *See generally* R. NIMMER, THE NATURE OF SYSTEM CHANGE: REFORM IMPACT IN THE CRIMINAL COURTS (1978); H. KERPER, *supra* note 112, at 192-94; Allen, *Central Problems of American Criminal Justice*, 75 MICH. L. REV. 813, 819-20 (1977).

160. Moreover, when these critics do consider the possible impact of state law, they tend to narrowly confine their analysis to state standards that deal with precisely the

the other side, by those concerned with achieving greater crime control, too often also ignores the entire picture. These critics commonly direct one complaint after another at Supreme Court rulings that supposedly "handcuff" the police, while largely ignoring state legislative standards denying the police important investigative authority otherwise acceptable under Supreme Court precedent.[161]

A lack of appreciation of the diversity in state law is also likely to affect adversely the progress of law reform. Lawyers seeking to overturn a well-established local rule too often look to the law of other jurisdictions with the expectation that little help is likely to be found there. If they fail to come across a judicial ruling that is directly on point, their research ends; systematic review of statutes and court rules, or of judicial decisions dealing with related aspects of the same procedure, will not be attempted. As a result, courts and legislatures do not have before them the full range of the experience of other jurisdictions. There have undoubtedly been many instances in which rejected reforms would have been adopted, or adopted reforms modified, if such information had been available.[162]

---

same issue as the Supreme Court ruling, ignoring other aspects of state law that might also limit police authority. Consider the criticism that followed United States v. Robinson, 414 U.S. 218 (1973), and Gustafson v. Florida, 414 U.S. 260 (1973), which upheld a full search of the person following a "custodial arrest" for a traffic offense. Justice Marshall's dissent in *Robinson*, 414 U.S. at 244-47, cited a variety of state decisions taking a contrary position, so civil libertarian critics generally conceded that those states might continue to bar full searches under their state constitutions. *See, e.g.*, People v. Brisendine, 13 Cal. 3d 528, 531 P.2d 1099, 119 Cal. Rptr. 315 (1975). Critics complained that application of the *Robinson-Gustafson* standard in the remaining states would leave the police there almost unlimited discretion in determining whether to search. Once a traffic stop was made, the argument went, the officer could choose between either issuing a citation, or making the full custodial arrest with its accompanying full search. *Cf.* Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 416 (1974). This was the situation that apparently existed in *Gustafson*, where the state of Florida did not limit the traffic offenses for which a custodial arrest could be made. In many states, however, custodial arrests are permitted for only a limited class of traffic offenses, such as driving without a license. For the vast majority of traffic offenses, the officer must release the licensed driver on a citation, and *Robinson-Gustafson* does not apply. *See* Y. KAMISAR, W. LAFAVE & J. ISRAEL, *supra* note 80, at 402 n.a; *see also* Robbins v. California, 453 U.S. 420, 451 n.12 (1981) (Stevens, J., dissenting).

161. For instance, the Michigan legislature opposes broad electronic eavesdropping practices. *See supra* note 32 and accompanying text. Other states continue to impose the "in-presence" requirement for misdemeanor arrests. *See supra* notes 148 & 150 and accompanying text. In the last few years, the "new federalism" movement has captured the attention of the crime-control critics and directed more of their efforts at state law. California's recently adopted "Victim's Bill of Rights" was apparently aimed, in part, at California state court decisions that exceeded federal constitutional minimums in the area of search and seizure. *See* CAL. CONST. art. I, § 28(d).

162. Even where an effort is made to thoroughly review statutes, court rules, and

Part of the responsibility for the lack of practioner appreciation of the variation in state law lies with the law schools. Many criminal procedure courses are actually courses in constitutional criminal procedure, with the course materials focusing almost entirely on the United States Supreme Court's constitutional rulings.[163] Other courses do no more than add coverage of the Federal Rules and lower federal court rulings.[164] There are sound pedagogical reasons for both constitutional procedure courses and constitutional/Federal Rules courses. For those interested primarily in teaching legal method, the constitutional procedure course has the advantage of focusing on the development of a single source by a single court.[165] For those interested primarily in presenting the process as an interrelated system, there is an advantage in focusing on a single jurisdiction. The federal system is selected both because it contributes a "national outlook" to the course and because the Federal Rules are viewed as a "typical" set of standards.

My colleagues and I have long taken the position, however, that a course in criminal procedure should be more comprehensive. It should also expose the student to the diversity of state rules dealing with the various aspects of the criminal process.[166] To appreciate what the process had done and can do, the student must see more than the federal system and the constitu-

---

decisions of the various jurisdictions, the failure to appreciate the full range of diversity in state law may unduly restrict the scope of that inquiry. The criminal justice process is integrated, each part bearing on the other. A procedural reform may work well in one jurisdiction in large part because of the way it meshes with other procedures in that jurisdiction. When another state considers transplanting that reform, it must consider the differences not only in the particular procedure to be reformed, but also in the state's treatment of those related procedures. Differences in related procedures could be ignored, however, if one too readily assumes basic similarity in state procedures. I recall such an instance in a discussion of a proposal that Michigan substantially restrict its preliminary hearing. A proponent of that proposal noted that Florida no longer required any form of preliminary hearing. *See* FLA. R. CRIM. P. 3.140(g). He knew that Florida, like Michigan, relied largely on prosecution by information, rather than by indictment, and assumed that the Florida experience therefore was analogous. What he failed to recognize was that Florida, unlike Michigan (and most other states), had an extensive discovery deposition procedure. *See id.* at 3.220(d); Y. KAMISAR, W. LAFAVE & J. ISRAEL, *supra* note 80, at 1168-70. One of the major defense uses of the preliminary hearing in Michigan is as a makeshift procedure for deposing prosecution witnesses. *See id.* at 966-72.

163. *See, e.g.*, J. SCARBORO & J. WHITE, CONSTITUTIONAL CRIMINAL PROCEDURE: CASES, QUESTIONS AND NOTES (1977).

164. *See, e.g.*, L. WEINREB, CRIMINAL PROCESS: CASES, COMMENT, QUESTIONS (1978).

165. For many, the course in constitutional criminal procedure is more an extension of the basic course on constitutional law than a course in criminal procedure.

166. *See* Y. KAMISAR, W. LAFAVE & J. ISRAEL, *supra* note 80 (5th ed. 1980, 4th ed. 1974, 3d ed. 1969).

tional aspects of criminal procedure. The addition of state material necessarily adds to the size of the course book, but there are points at which a little less detail on the federal position could be readily sacrificed for the exploration of somewhat divergent state positions. In recent years, some of the new course books entering the field have taken a similar position.[167] If this trend continues, more students should recognize the potential for state law variation, and be alert for it in their everyday practice and their service on committees and commissions engaged in law reform.

167. *See, e.g.*, F. MILLER, R. DAWSON, G. DIX & R. PARNAS, CASES AND MATERIALS ON CRIMINAL JUSTICE ADMINISTRATION (2d ed. 1982); S. SALTZBURG, AMERICAN CRIMINAL PROCEDURE: CASES AND COMMENTARY (1980).