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Individual Liberties Claims: Promoting a Healthy Constitution for Minnesota

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INDIVIDUAL LIBERTIES CLAIMS: PROMOTING A HEALTHY CONSTITUTION FOR MINNESOTA

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I. INTRODUCTION

Over the past twenty years, state constitutions have gained increasing prominence as sources of important rights for criminal defendants. Some of these rights are independently grounded versions of federal rights that have since been curtailed. Other rights depend on unprecedented and independent interpretations of state bills of rights provisions. In either case, revitalization of state constitutional law is salutary because state constitutions expressly limit the power of the governments that they create. Giving effect to these limitations is the sole responsibility of state courts and the lawyers who practice in them.

This Article is written for those who practice criminal law in Minnesota at all levels. Part II explains the historical role that state constitutions have played in the protection of individual liberties and clarifies the proper role of state courts and state constitutions in our federal system of government. Part III outlines a consistent approach for state courts to apply when faced with individual liberties claims under a state constitution. This discussion seeks to enable practitioners to argue cogently when encouraging state courts to conduct independent review under the state constitution. Part IV lists some persuasive means available to attorneys raising state constitutional claims.

Lastly, in an appendix to this Article, the authors present examples of how two particular state constitutional claims might be raised and argued in Minnesota. Because there are endless ways to persuasively present issues to a court, this section is included only for illustrative purposes.

II. Historical Protection of Individual Rights

A. Pre-Incorporation

The notion that individual liberties are meaningfully protected by state constitutions is not new.[1] The states that joined to form the United States were pre-existing sovereigns.[2] These states delegated certain sovereign powers to the federal government and reserved to themselves the balance of those powers.[3] Eleven of the original thirteen states had state charters, eight of which contained bills of rights intended to protect individuals from the power of state governments.[4] The Bill of Rights in the Federal Constitution,[5] patterned upon these earlier state bills of rights,[6] was intended to restrain only the power of the federal government.[7] Consequently, an individual seeking to restrain state power had no claim under the Fed-

1. Unless otherwise noted, all references to constitutions refer to the protections afforded individual rights by the declarations or bills of rights found in state constitutions.

2. Charles G. Douglas, *State Judicial Activism—The New Role For State Bills of Rights*, 12 Suffolk U. L. Rev. 1123, 1126 (1978).

3. David J. Fine, *Project Report: Toward an Activist Role for State Bills of Rights*, 8 Harv. C.R.-C.L. L. Rev. 271, 277-78 (1973) [hereinafter Fine, *Project Report*]. The Tenth Amendment to the Federal Constitution provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. amend. X.

4. 1 Bernard Schwartz, The Bill of Rights: A Documentary History 383 (1971). Chief Justice John Marshall wrote: "Each state established a constitution for itself, and in that constitution, provided such limitations and restrictions on the powers of its particular government, as its judgment dictated." Barron v. Baltimore, 32 U.S. (7 Pet.) 243, 247 (1833).

5. The Bill of Rights consists of the first ten amendments to the Constitution. However, the Ninth and Tenth Amendments are not considered liberties, thus the term "Bill of Rights" usually refers to the first eight amendments. John E. Nowak et al., Constitutional Law § 10.2 (3d ed. 1986).

6. Schwartz, *supra* note 4, at 383.

7. *See Barron*, 32 U.S. (7 Pet.) at 246. The *Barron* Court noted that "[the limitations of the Federal Bill of Rights] are limitations of power granted in the instrument itself; not of distinct governments, framed by different persons and for different purposes." *Id.* at 247. After noting that art. I, § 10 of the original Constitution expressly enumerated those limitations operating on the state legislatures, Chief Justice Marshall concluded that "[h]ad the framers of [the] amendments intended them to be

eral Bill of Rights.[8] The power of a state with respect to its citizens was constrained only by the state's constitution.[9]

In the early period of our federal system, therefore, provisions that were found in both the federal and states' bills of rights were truly parallel.[10] For example, the right of an individual to be free from unreasonable search and seizure at the hands of state officials, if such a right existed at all, existed solely by virtue of a state constitutional provision guaranteeing that right.[11]

Adoption of the Reconstruction Amendments in the 1860's, including the Fourteenth Amendment in 1868, created the possibility that provisions of the Federal Bill of Rights might constrain state power.[12] In the *Slaughter-House Cases*,[13] however, the United States Supreme Court refused to read the Privileges and Immunities Clause of the Fourteenth Amendment as creating in the federal government any significant authority to restrict the power of state governments.[14] The majority feared that such a holding would "radically [change] the whole theory of the relations of the State and Federal governments to each other . . . ."[15] Therefore, with less than compelling textual support, the majority found the Privileges and

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limitations on the powers of the state governments, they would have imitated the framers of the original constitution, and have expressed that intention." *Id.* at 249.

8. However, the original Federal Constitution, as opposed to the Bill of Rights added later, contained provisions expressly applicable to the states. For example, art. I, § 10 prohibited states from passing "any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts." U.S. CONST. art. I, § 10, cl. 1.

9. In Massachusetts v. Upton, 466 U.S. 727 (1984), Justice Stevens noted:

> It must be remembered that for the first century of this Nation's history, the Bill of Rights of the Constitution of the United States was solely a protection for the individual in relation to federal authorities. State Constitutions protected the liberties of the people of the several States from abuse by state authorities. The Bill of Rights is now largely applicable to state authorities and is the ultimate guardian of individual rights. The States in our federal system, however, remain the primary guardian of the liberty of the people.

Id. at 738-39 (Stevens, J., concurring).

10. Fine, *Project Report*, *supra* note 3, at 277.

11. *See* Stewart G. Pollock, *Adequate and Independent State Grounds as a Means of Balancing the Relationship Between State and Federal Courts*, 63 TEX. L. REV. 977, 979 (1985).

12. *See* Fine, *Project Report*, *supra* note 3, at 279-80.

13. 83 U.S. (16 Wall.) 36 (1872). The *Slaughter-House Cases* were brought by a group of Louisiana butchers to challenge a statute granting monopoly status to a single corporation as a violation of the Privileges and Immunities Clause of the Fourteenth Amendment. Fine, *Project Report*, *supra* note 3, at 280.

14. *Slaughter-House Cases*, 83 U.S. (16 Wall.) at 77-78.

15. *Id.* at 78.

Immunities Clause protected only those rights "which owe their existence to the Federal government, its National character, its Constitution, or its laws."[16] Among others, the right to travel to the seat of the national government, the privilege of the writ of habeas corpus, and the right to use the navigable waters of the United States were cited as examples of interests protected by the Federal Constitution.[17] The Court vigorously avoided construing the clause as a broad grant of federal authority.

The potential for broad federal constraint of state action latent in the Fourteenth Amendment first appeared in 1925. In *Gitlow v. New York*,[18] the United States Supreme Court assumed but did not directly hold "that freedom of speech and of the press—which are protected by the First Amendment from abridgment by Congress—are among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States."[19] In *Stromberg v. California*,[20] the Court characterized its earlier assumption as a holding, stating "[t]he principles to be applied have been clearly set forth in our former decisions. It has been determined that the conception of liberty under the due process clause of the Fourteenth Amendment embraces the right of free speech."[21] This theory of absorption underwrote the controversial process of incorporation, a process that eventually made almost all guarantees in the Federal Bill of Rights applicable to the states through the Fourteenth Amendment.

B. Incorporation

Incorporation was a controversial process due, in large part, to its effect on our system of federalism—that is, on the distribution of power between the states and the central government. Incorporation significantly shifted this balance of power.[22] Applying the substantive provisions of the Federal

16. *See id.* at 79.
17. *Id.* at 79-80.
18. 268 U.S. 652 (1925).
19. *Id.* at 666. *See also* Whitney v. California, 274 U.S. 357, 369 (1927); Fiske v. Kansas, 274 U.S. 380, 386 (1927).
20. 283 U.S. 359 (1931).
21. *Id.* at 368 (citations omitted).
22. Federalism generally concerns the proper balance of state and national pow-

Bill of Rights to the states required that the states provide at least as much protection to those rights as the United States Supreme Court saw fit to require as a matter of federal constitutional law.[23] Because the Supreme Court almost uniformly required more protection under the Federal Bill of Rights than state courts had previously required under their respective bills of rights, incorporation meant that, in practice, the federal government—not the states—established the minimum protection afforded most individual rights.[24]

The bulk of the incorporation process occurred during the

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ers. In *Garcia v. San Antonio Metro. Transit Auth.*, Justice O'Connor wrote that "[t]he true 'essence' of federalism is that the States *as States* have legitimate interests which the National Government is bound to respect even though its laws are supreme." 469 U.S. 528, 581 (1985) (O'Connor, J., dissenting) (citing Younger v. Harris, 401 U.S. 37, 44 (1971)).

23. As one commentator has observed, "state courts must comply with the Supremacy Clause. Federal law, especially constitutional precedent, provides standards against which state constitutional guarantees must be measured." Earl M. Maltz, *False Prophet—Justice Brennan and the Theory of State Constitutional Law*, 15 HASTINGS CONST. L.Q. 429, 433 (1988). The Supremacy Clause provides that "[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land." U.S. CONST. art. VI, § 2. In determining which Bill of Rights provisions to incorporate, the Supreme Court focused on the "principle[s] of justice so rooted in the tradition and conscience of our people as to be ranked as fundamental" and thus "implicit in the concept of ordered liberty." Palko v. Connecticut, 302 U.S. 319, 325 (1937). *See also* Duncan v. Louisiana, 391 U.S. 145, 149 n.14 (1968) (finding that the Due Process Clause requires states to provide an accused criminal with procedural safeguards necessary to an Anglo-American regime of ordered liberty); *In re* Oliver, 333 U.S. 257, 273 (1948) (incorporating those rights "basic in our system of jurisprudence.").

24. State constitutions guarantee some individual rights that are not guaranteed by the Federal Bill of Rights. *See, e.g.*, Ravin v. State, 537 P.2d 494, 504 (Alaska 1975) (upholding an express right of privacy guarantee in the Alaska Constitution); Rand v. Rand, 374 A.2d 900, 904-05 (Md. 1977) (upholding the state equal rights amendment). *See also* Justice Hans A. Linde, *First Things First: Rediscovering the States' Bills of Rights*, 9 U. BALT. L. REV. 379, 391 nn. 54 & 56 (1980) [hereinafter Linde, *First Things First*].

Some provisions of the Federal Bill of Rights have been held not to apply to the states. *See, e.g.*, Johnson v. Louisiana, 406 U.S. 356, 363 (1972) (finding that the right in a criminal case to unanimous jury verdict does not apply to the states); Williams v. Florida, 399 U.S. 78, 103 (1970) (holding that the right in a criminal case to jury of twelve does not apply to the states); Hurtado v. California, 110 U.S. 516, 538 (1884) (finding that the right to indictment by grand jury does not apply to state prosecutions); United States v. Cruikshank, 92 U.S. 542, 553 (1875) (finding that the Second Amendment right to bear arms is not guaranteed against the states); Edwards v. Elliot, 88 U.S. (21 Wall.) 532, 557 (1874) (finding that the right to jury in civil cases does not apply to state court trials). As to these rights, the states retained the power to establish the minimum level of protection. Linde, *First Things First*, *supra* at 391.

Warren Court Era.[25] The Warren Court incorporated the protections of the Federal Bill of Rights because state courts had not afforded reasonable protections to criminal defendants under their own bills of rights.[26] By abdicating their duty to protect individual liberties, the state courts effectively invited the expansion of federal authority which they then condemned as contrary to the principle of federalism.[27]

In theory then, incorporation created a situation in which state power faced dual constraint: both the federal and state bills of rights provided protection to individuals against improper state action. However, due to the more expansive protections afforded under Supreme Court interpretations of federal law, practice diverged from theory. Thus, lawyers, who sought to vindicate a criminal defendant's rights, ignored state law claims, recognizing that such vindication would more likely be achieved under federal law.[28] Since the minimum protections provided by federal law were more generous than even

25. Earl Warren was Chief Justice from 1953 until 1969. During Warren's tenure as Chief Justice, the Court decided numerous cases incorporating criminal procedural safeguards of the Fifth, Sixth, and Eighth Amendments. *See, e.g.*, Benton v. Maryland, 395 U.S. 784, 793-96 (1969) (incorporating the protection against double jeopardy); Duncan v. Louisiana, 391 U.S. 145, 149 (1968) (incorporating the right to trial by jury); Washington v. Texas, 388 U.S. 14, 18-19 (1967) (incorporating the right to compulsory process for obtaining witnesses); Klopfer v. North Carolina, 386 U.S. 213, 222 (1967) (incorporating the right to speedy trial); Pointer v. Texas, 380 U.S. 400, 406 (1965) (incorporating the right to confrontation and cross-examination of adverse witnesses); Malloy v. Hogan, 378 U.S. 1, 8 (1964) (incorporating the privilege against self-incrimination); Gideon v. Wainwright, 372 U.S. 335, 342-44 (1963) (incorporating the right to counsel); Robinson v. California, 370 U.S. 660, 667 (1962) (incorporating the protection against cruel and unusual punishment).

The protections of the Fourth Amendment were incorporated in Wolf v. Colorado, 338 U.S. 25, 27-28 (1949). However, exclusion of evidence obtained through unreasonable search and seizure was not required in state courts until Mapp v. Ohio, 367 U.S. 643, 655 (1961).

Numerous decisions incorporated other Bill of Rights provisions. *See, e.g.*, Edwards v. South Carolina, 372 U.S. 229, 235 (1963) (incorporating freedom of assembly and freedom to petition for redress of grievances); Cantwell v. Connecticut, 310 U.S. 296, 303 (1940) (incorporating the free exercise of religion); Gitlow v. New York, 268 U.S. 652, 666 (1925) (assuming freedom of speech and press apply to the states); Chicago, Burlington & Quincy R.R. v. Chicago, 166 U.S. 226, 233 (1897) (incorporating the right of just compensation for property taken for state use).

26. *See* Vern Countryman, *Why a State Bill of Rights?*, 45 WASH. L. REV. 454, 455-56 (1970); Douglas, *supra* note 2, at 1129; Fine, *Project Report*, *supra* note 3, at 274, 283, 304.

27. *See id.* State judges roundly criticized the Supreme Court for expanding its power at the expense of the state courts. *See* Countryman, *supra* note 26, at 465-66 & n.80; Fine, *Project Report*, *supra* note 3, at 274 & n.5.

28. Linde, *First Things First*, *supra* note 24, at 380, 382, 387. *See also* Ronald K.L.

the most expansive state protections, lawyers did not bother to raise state constitutional claims. As a result, the use of state constitutions atrophied. Even though state constitutions were formerly the sole bulwark against state overreaching, federal law emerged as the dominant protector of individual rights.[29]

Beginning with the Burger Court and continuing through the Rehnquist Court,[30] the Supreme Court has increasingly limited federally guaranteed protections.[31] This twenty-year trend has created the potential for a significant shift of power back to the states. State courts have regained the latitude to determine what protections will be accorded to criminal defendants. If the Supreme Court redistributes power to the states by relaxing federal standards, state courts must be willing to exercise their authority to interpret their own constitutions to determine the law of the states.

The next section of this paper will elaborate a consistent approach to state court interpretation of state constitutions.[32]

Collins, *Reliance on State Constitutions—Away From a Reactionary Approach*, 9 HASTINGS CONST. L.Q. 1, 2 (1981) [hereinafter Collins, *Away From a Reactionary Approach*].

> In 1973, one author of the influential *Project Report* concluded the following:
> Any attempt to develop a modern role for state bills of rights must begin with the recognition that they are no longer the fundamental charters that they once were. . . . Today, the individual's first line of defense against state action is the Fourteenth Amendment. Indeed, in a very real sense, the Fourteenth Amendment has made state bills of rights expendable.

Fine, *Project Report*, *supra* note 3, at 284.

29. This phenomenon was so pervasive that, in 1970, Vern Countryman, in an article proposing a stronger role for state bills of rights, wrote that state rights guarantees should be valued as "a second line of defense." Countryman, *supra* note 26, at 457. Likewise, in 1973, the *Project Report* noted that "the absorption theory transmuted state bills of rights from charters of basic liberties to documents that were controlling only on those rights which were deemed unessential." Fine, *Project Report*, *supra* note 3, at 283.

30. Warren Burger served as Chief Justice from 1969 until 1986, when the current Chief Justice, William Rehnquist, was appointed to the post.

31. *See Developments in the Law—The Interpretation of State Constitutional Rights*, 95 HARV. L. REV. 1324, 1368-69 (1982) [hereinafter *Developments in the Law*]. *See also* Shirley S. Abrahamson, *Criminal Law and State Constitutions: The Emergence of State Constitutional Law*, 63 TEX. L. REV. 1141, 1153 & n.42 (1985).

32. There are many prior articles suggesting this consistent approach, either in whole or in part. *See, e.g.*, Ronald K.L. Collins, *Reliance on State Constitutions: Some Random Thoughts*, *in* DEVELOPMENTS IN STATE CONSTITUTIONAL LAW 1 (Bradley D. McGraw ed. 1985) [hereinafter Collins, *Some Random Thoughts*]; Abrahamson, *supra* note 31; Wallace P. Carson, Jr., *"Last Things Last": A Methodological Approach to Legal Argument in State Courts*, 19 WILLAMETTE L. REV. 641 (1983); Collins, *Away From a Reactionary Approach*, *supra* note 28; Ronald K.L. Collins & Peter J. Galie, *Models of Post-Incorporation Judicial Review: 1985 Survey of State Constitutional Individual Rights Decisions*, 55 U. CIN. L. REV. 317 (1986); Rita Coyle DeMeules, *Minnesota's Variable Approach to*

Several propositions are advanced. First, state courts have final authority to interpret their state constitutions. Second, state action should be measured against the state constitution each time the state constitution is raised and prior to reaching an analogous federal challenge. Third, Supreme Court interpretations of federal rights guarantees should not be considered presumptively correct interpretations of analogous state provisions. Rather, state court interpretations of individual rights should be independent. Finally, the benefits of state law associated with this consistent approach render its adoption not only proper but also desirable.

III. A Consistent Approach to Individual Liberties Claims Under State Constitutions

A. State Court Authority to Interpret a State Constitution

Each state is an independent sovereign. State constitutions, like their federal counterpart, uniformly provide for the existence of three branches of government: legislative, executive and judicial. State charters contemplate the creation of organic and self-sufficient governments in which each of the several governmental functions will be performed by one of the coordinate branches, without any need in the whole for outside supplementation.[33] State courts possess the authority to construe their respective constitutions by virtue of the power vested in them by those constitutions.[34] One commentator has

State Constitutional Claims, 17 Wm. Mitchell L. Rev. 163 (1991); Douglas, *supra* note 2; Terrence J. Fleming & Jack Nordby, *The Minnesota Bill of Rights: "Wrapt in the Old Miasmal Mist"*, 7 Hamline L. Rev. 51 (1984); Hans A. Linde, *Does the "New Federalism" Have a Future?*, 4 Emerging Issues St. Const. L. 251 (1991) [hereinafter Linde, *New Federalism*]; Hans A. Linde, *Without "Due Process": Unconstitutional Law in Oregon*, 49 Or. L. Rev. 125 (1970) [hereinafter Linde, *Without Due Process*]; Linde, *First Things First*, *supra* note 24; *Developments in the Law*, *supra* note 31; Robert F. Williams, *In The Supreme Court's Shadow: Legitimacy of State Rejection of Supreme Court Reasoning and Result*, 35 S.C. L. Rev. 353 (1984); Robin B. Johansen, Note, *The New Federalism: Toward a Principled Interpretation of the State Constitution*, 29 Stan. L. Rev. 297 (1977).

33. *See* Younger v. Harris, 401 U.S. 37, 44 (1971) (explaining the relevance of comity between federal and state actions).

34. *See* Elmendorf v. Taylor, 23 U.S. (10 Wheat.) 152 (1825). In *Elmendorf*, the United States Supreme Court articulated its approach to local law:

> This Court has uniformly professed its disposition, in cases depending on the laws of a particular State, to adopt the construction which the Courts of the State have given to those laws. This course is founded on the principle, supposed to be universally recognized, that the judicial department of every government, where such department exists, is the appropriate organ for construing the legislative acts of that government.

noted that the power of a state court to construe its constitution does not exist because the Supreme Court says it does.[35] Rather, the power exists because the state judiciary is the judicial branch of an independent sovereign, constituted by an independent charter.[36]

As a result of the expansive incorporation decisions, the power of state courts to authoritatively interpret their constitutions—a power which had never previously been doubted—became questionable.[37] Incorporation was essentially a judgment by the Supreme Court that rights protections in the states should be made broader.[38] Supremacy indeed requires that when state law is read to require less protection than federal law, the federal law standard must prevail. Yet, this inability of state courts to implement their law where it conflicted with higher federal standards should never have been confused with a limitation on the power of state courts to be the ultimate arbiters of the meaning of state law. State court power to interpret a state constitution is final.[39]

If state courts retain final authority to interpret their constitutions, then when should that authority be exercised? This "when" can have two distinct senses. When, in the sense of "which cases," and when in the sense of "before or after the Federal Constitution."

1. "Which cases"

State courts should reach state constitutional issues in every case in which they are raised. Even when the challenged action allegedly violates the Federal Constitution, state courts should

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Id. at 159. *See also* Johansen, *supra* note 32, at 298 (recognizing the power of states to interpret their own constitutions); *Developments in the Law*, *supra* note 31, at 1332-33, 1368 n.3, 1369 (recognizing that each state has the power to interpret its own constitution).

35. Williams, *supra* note 32, at 376.

36. *See Developments in the Law*, *supra* note 31, at 1332 (noting that "the autonomy principle licenses state courts as the final, independent arbiters of state law."); Johansen, *supra* note 32, at 298 (stating that "[n]o one questions the *right* of the state courts to engage in independent interpretation [of their own constitutions].").

37. *See* Douglas, *supra* note 2, at 1147.

38. William J. Brennan, Jr., *The Bill of Rights and the States*, 36 N.Y.U. L. REV. 761, 778 (1961). Justice Brennan noted that "[f]ar too many cases come from the states to the Supreme Court presenting dismal pictures of official lawlessness, of illegal searches and seizures, illegal detentions attended by prolonged interrogation and coerced admissions of guilt, of the denial of counsel, and downright brutality." *Id.*

39. *See Developments in the Law*, *supra* note 31, at 1332.

not ignore state constitutional provisions. The judiciary is an integral part of the government. The full and independent function of each branch is a prerequisite to the proper functioning of the system as a whole.[40] One of the most important functions of a state court is to review the actions of each branch and to determine the actions' constitutionality.[41] Thus, the duty of a state court to interpret its own constitution arises from the very nature of our federal system of government.[42] If a state court to is to carry out its contemplated function in the overall scheme of state government, it must interpret the law of the state.

Aside from the essential role that state courts play in the overall scheme of state governments, state judges take an oath to uphold the constitutions of their states.[43] Oaths place upon judges the duty to determine whether a challenged state action has violated state law any time a litigant presents the issue.[44]

The state court's duty to test state action against its own constitution is not vitiated because state action can be invalidated under federal law. While incorporation made state action reviewable under federal law, such review represents the additional protection of a dual system—not the elimination of state protections. Incorporation in no way altered the state court's duty to uphold state law and fulfill its constitutional duty. Failure on the part of a judge to interpret and apply a state consti-

40. HENRY R. GLICK, SUPREME COURTS IN STATE POLITICS: AN INVESTIGATION OF THE JUDICIAL ROLE 5 (1971). "State supreme courts are not simply duplications of the national court at a lower level of the judicial hierarchy. Instead, they are distinctive institutions which are integral parts of state political and legal systems." *Id.*

41. *See* Douglas, *supra* note 2, at 1124.

42. *See* THE FEDERALIST No. 51 (Alexander Hamilton or James Madison) (Edward Gaylord Bourne ed., 1901). In the FEDERALIST No. 51, the author specifically notes:

> [I]n the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each is subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself.

Id. at 356.

43. *See, e.g.*, MINN. CONST. art. V, § 6; MINN. STAT. § 358.05 (1992).

44. As one state judge wrote:

> By dusting off our state constitutions, judges can be "activists" in the best sense of the word and breathe life into the fifty documents. If we let them atrophy in our respective states, we will not only have failed to live up to our oaths to defend those constitutions but will have helped to destroy federalism as well.

Douglas, *supra* note 2, at 1150.

tution is an improper abdication of authority and a violation of duty.[45] This abdication disturbs the balance of power between the state and federal governments by creating a situation in which only federal law constrains state action.

If federalism requires the Supreme Court to acknowledge the power of state courts to interpret their own constitutions, then the corollary concern on the part of the state courts must be to exercise the power that is properly theirs.[46] Only the appropriate exercise of state judicial power can restore state constitutions to their proper role as the principal constraint on state power.

2. *Before or After the Federal Constitution?*

When a state action is challenged on both state and federal constitutional grounds, a state court should resolve the state law issue first. This "state-law-first" approach is proper for several reasons.

First, as Professor Hans Linde has argued,[47] addressing the state question prior to reaching the federal claim is consistent with the logic of the Fourteenth Amendment applied in the context of state court adjudication. The Fourteenth Amendment provides that "[n]o state shall . . . deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."[48] Whether the state has denied an individual a federally guaranteed due process right depends on whether the state court, *as part of the state system*, ultimately upholds the challenged action as a matter of state law.[49] Only if the action is

45. One commentator wrote: "We are state judges sworn to uphold state law. We cannot abdicate that responsibility by simply waiting for the next decision from Washington D.C." Carson, *supra* note 32, at 652.

46. In Massachusetts v. Upton, 466 U.S. 727 (1984), Justice Stevens stated:

> The maintenance of the proper balance between the respective jurisdictions of state and federal courts is always a difficult task. In recent years I have been concerned by what I have regarded as an encroachment by this Court into territory that should be reserved for state judges. The maintenance of this balance is, however, a two-way street. It is also important that state judges do not unnecessarily invite this Court to undertake review of state-court judgement.

Id. at 736-37 (Stevens, J., concurring) (citations omitted).

47. *See* Linde, *Without Due Process*, *supra* note 32, at 135; *see also* Linde, *First Things First*, *supra* note 24, at 383 (discussing the logic of addressing a state law claim prior to a federal claim).

48. U.S. CONST. amend. XIV.

49. *See* Linde, *Without Due Process*, *supra* note 32, at 133.

upheld should it then be tested against Fourteenth Amendment standards to insure that no federal right has been abridged. However, if the challenged action is invalidated as a matter of state law, then the state has not denied the aggrieved party any federally guaranteed right.[50] In contrast, the logic of the Fourteenth Amendment, applied in the context of federal court adjudication, does not require resolution of a state law issue before reaching a federal question. When a litigant elects to challenge a low level state action immediately in federal court, no higher state official is given the opportunity either to invalidate or to ratify the challenged action. The federal court decides the case based upon what the state did, but not on what the state ultimately might have done had exhaustion through the state court system been required.[51] The federal court is not part of the state system and cannot be part of the "total state action." Federal courts have no duty to test state action against state law.[52]

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50. Professor Linde notes:

> Whether . . . [the Fourteenth Amendment] has been violated depends on what the state has finally done. Many low-level errors that potentially deny due process or equal protection are corrected within the state court system; that is what it is for. The state constitution is part of the state law, and decisions applying it are part of the total state action in a case. When the state court holds that a given state law, regulation, ordinance, or official action is invalid and must be set aside under the state constitution, then the state is not violating the Fourteenth Amendment.

Id.

51. In order to preserve the rights-vindicating function of the federal courts, the Supreme Court has historically rejected an approach to the Fourteenth Amendment that would predicate federal jurisdiction on a state court decision ratifying a challenged state action. *See* Home Tel. & Tel. v. Los Angeles, 227 U.S. 278 (1913). *See also* Fine, *Project Report*, *supra* note 3, at 288 n.81. Nor is exhaustion of state remedies currently required when a Fourteenth Amendment claim is asserted in federal court under 42 U.S.C. § 1983. Section 1983 creates a cause of action for individuals who have been deprived of their civil rights by a person acting under the color of state law. *See* 42 U.S.C. § 1983 (1988). *See, e.g.*, Patsy v. Bd. of Regents, 457 U.S. 496, 500-01 (1982) (recognizing that exhaustion of state remedies is not a prerequisite to bringing a § 1983 claim).

For federal courts, it is the challenged action of the offending low-level state official—not the state's ultimate ratification of that action—that is cognizable as an infringement. In rejecting an exhaustion approach, the Supreme Court decided that immediate access to the federal courts was more important than permitting the states to remedy possible rights violations under their own law. The federal remedy is supplemental to any state remedy. *Cf.* 28 U.S.C. § 2254(b) (1988) (contrasting federal habeas corpus review which requires exhaustion of state remedies).

52. As commentators have noted:

> The [Supreme] Court does *not* impose upon the lower federal courts a duty to enforce *all* state rules governing state officers. If state law condemns a given act, while under the Supreme Court interpretation the fourteenth

The context in which a state court applies the Fourteenth Amendment justifies the state-law-first approach. The federal court must view state action as the unratified behavior of the state official alleged to have deprived another of his federal rights. The state court is under no similar constraint. To the contrary, the state court has an affirmative obligation to determine whether the challenged action is consistent with the state constitution.[53] Therefore, a state court should resolve the state law question first. The state court's determination under state law then equates to "state action" for Fourteenth Amendment purposes. Only ratification of the challenged action as a matter of state law would mandate subsequent consideration of a federal claim; invalidation, under a state constitution, renders further consideration unnecessary.

The view that a state does not deny a federally guaranteed right where the state court ultimately invalidates the challenged action as a matter of state law has been adopted by several state courts and cited with approval by Justice Stevens. In *Massachusetts v. Upton*,[54] Justice Stevens criticized the Supreme Judicial Court of Massachusetts for invalidating a search warrant on Fourth Amendment grounds without deciding whether the warrant was valid as a matter of state law. The Massachusetts court's complete failure to resolve the state law question caused extreme judicial inefficiency.[55] Moreover, according to

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amendment has not been violated, a duty to help enforce that state policy never arises.

Julius Berman & Paul Oberst, *Admissibility of Evidence Obtained by an Unconstitutional Search and Seizure—Federal Problems*, 55 NW. U. L. REV. 525, 546 (1960).

Likewise, in Estelle v. McGuire, 112 S.Ct. 475 (1991), the Supreme Court noted:

> We have stated many times that "federal habeas corpus relief does not lie for errors of state law." Today, we reemphasize that it is not the province of a federal habeas court to reexamine state court determinations on state law questions. In conducting habeas review, a federal court is limited to deciding whether a conviction violated the Constitution, laws, or treaties of the United States.

Id. at 480 (citations omitted).

53. *See supra* notes 43-45 and accompanying text.

54. 466 U.S. 727 (1984) (Stevens, J., concurring).

55. Justice Stevens explained that, when Massachusetts courts failed to resolve the state law question,

> [i]t . . . increased its own burdens as well as ours. For when the case returns to that court, it must then review the probable-cause issue once again and decide whether or not a violation of the state constitutional protection against unreasonable searches and seizures has occurred. If such a violation did take place, much of that court's first opinion and all of this Court's opinion are for naught. If no such violation occurred, the second proceeding in

Justice Stevens, the state law issue should have been resolved first:

> If the Magistrate had violated a state statute when he issued the warrant, surely the State Supreme Judicial Court would have so held and thereby avoided the necessity of deciding a federal constitutional question. I see no reason why it should not have followed the same sequence of analysis when an arguable violation of the State Constitution is disclosed by the record. As the Oregon Supreme Court has stated:
>
> "The proper sequence is to analyze the state's law, including its constitutional law, before reaching a federal constitutional claim. This is required, not for the sake either of parochialism or of style, but because the state does not deny any right claimed under the federal Constitution when the claim before the court in fact is fully met by state law."[56]

A second justification for the state law first approach is the principle of resolving a controversy at the lowest possible level. Courts have no reason to hold that a challenged state action violates a constitutional provision, state or federal, if the action violates some other provision of state law. Courts should first test the legality of a challenged action at the level of administrative rules, municipal ordinances, or court rules. Next, courts should consider applicable statutory law and case law. If the challenged action violates any of these state standards, the courts should invalidate on that basis. If none of these state standards apply, the challenged action's validity should be ascertained under the state constitution. Foremost, state law should be given complete consideration before turning to federal law.[57]

Three other reasons justify a state-law-first approach. First, initial consideration under state law prevents unnecessary state court adjudication of federal issues.[58] Second, "[S]tate courts are more expert in deciding state questions than federal ques-

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that court could have been avoided by a ruling to that effect when the case was there a year ago.

Id. at 735-36 (Stevens, J., concurring) (footnote omitted).

56. *Id.* at 736 (Stevens, J., concurring) (footnote omitted) (quoting Sterling v. Cupp, 625 P.2d 123, 126 (Or. 1983)).

57. Carson, *supra* note 32, at 643-45.

58. "Just as courts traditionally avoid, by statutory construction and like techniques, the necessity of invalidating legislation on constitutional grounds, disposition upon state constitutional grounds avoids unnecessary federal constitutional adjudication." Jerome B. Falk, Jr., *The Supreme Court of California 1971-72, Forward: The State*

tions. If a case can be decided on familiar grounds, there is no reason to risk deciding it according to unfamiliar principles."[59] Third, determining state claims first helps alleviate the overfull docket of the Federal Supreme Court.[60]

B. *State Court Interpretation of State Law Should Be Truly Independent*

1. *General Considerations*

Interpreting the state constitution each time it is raised and before reaching the Federal Constitution gives state courts a consistent approach to individual liberties cases. The consistency of this approach does not resolve perhaps the most crucial issue regarding state constitutional interpretation, that is the degree to which the court's determination should be "independent." Even with deployment of a consistent state-law-first approach, the state court must still determine the proper weight to accord decisions of other courts of last resort that interpret analogous rights provisions.

This question is one of disposition. Given that state courts have final authority to interpret their state constitutions, what degree of deference should these courts afford to decisions of other high courts, particularly the United States Supreme Court? Specifically, should state courts assume that a Supreme Court decision interpreting an analogous rights provision of the United States Constitution is a presumptively correct interpretation of the state constitutional provision under consideration?

To understand the disposition of a particular state court with respect to federal authority, a critical distinction must be made between a presumption of correctness on the one hand and a finding that a federal opinion should be followed because of its analytical persuasiveness on the other. The presumption that United States Supreme Court opinions are correct accords great deference toward that court's opinions. Before the merits of any interpretation are considered, the presumption implies that the state court will adopt a federal interpretation unless the presumption can be overcome.

Constitution: A More Than "Adequate" Nonfederal Ground, 61 CAL. L. REV. 273, 286 (1973) (footnote omitted).

59. Fine, *Project Report*, *supra* note 3, at 289 (footnote omitted).

60. *Id.*

By contrast, the conclusion that a federal opinion should be followed because it is analytically persuasive involves a non-deferential disposition. Having fully considered the merits, the state court may adopt a particular federal interpretation because it serves as a model for the most well reasoned interpretation of a state provision. The presumption of correctness is deferential because it *precedes* reasoning about a specific case. However, adopting a conclusion is non-deferential because it *follows* reasoning about a specific case. The presumption of correctness is incompatible with true independent interpretation, for it entails that the "state constitution takes on meaning only when employed to *respond* to certain interpretations of the Federal Constitution."[61]

This distinction is important because it shows what independent state court interpretation is not. Independence is not a disposition which in any way involves ignoring interpretations of federal law.[62] Rather, independence is a non-deferential stance from which interpretations of federal law will be considered only to the extent that federal law helps to elucidate similar state provisions.[63] This particular notion of independence underlies the Justice Stevens' view of state court interpretation:

> The right question, is not whether a state's guarantee is the same as or broader than its federal counterpart as interpreted by the Supreme Court. The right question is what the state's guarantee means and how it applies to the case at hand. The answer may turn out the same as it would under

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61. Collins, *Away From a Reactionary Approach*, *supra* note 28, at 5 (emphasis in original). Collins principally criticizes the instrumental use of state law, e.g. the use of state law only to achieve results not available under federal law. He characterizes this use as reactionary [properly "reactive"] because it involves recourse to state law only if a desired result cannot be obtained by applying federal law. Under such an approach, state law will depend on federal law because it will be invoked only with specific reference to federal law and, then, only as an instrument to overcome it. Collins states that

> a reactionary approach uses the state charter in a piecemeal fashion, whenever the occasion may arise—in the minds of the judges—for purposes of philosophical disagreement or in order to insulate a controversial decision from Supreme Court review. Seen in this light, the sovereign law of the state constitution becomes little more than a plaything.

Id. at 13-14.

62. Most commentators agree that it makes no sense for a state court to ignore federal precedent. *See, e.g.*, *Developments in the Law*, *supra* note 31, at 1394.

63. State courts *applying federal law* must follow Supreme Court interpretations of federal law. *See* Oregon v. Hass, 420 U.S. 714, 719 (1975).

> federal law. The state's law may prove to be more protective than federal law. The state law also may be less protective. In that case the court must go on to decide the claim under federal law, assuming it has been raised.[64]

Independent interpretation, then, concerns the proper meaning of the state constitution—not its meaning in relation to another document. This quoted passage makes clear that a state court may read a state constitutional provision to provide more or less protection than its federal counterpart.[65] Therefore, independent interpretation should not be associated only with "liberal" or expansive rights decisions.[66] United States Supreme Court decisions construing similar rights provisions may be helpful in construing a state constitution and should be considered an important resource. However, where a state court uses federal cases as an interpretive aid, the state court must be sure to make a "plain statement" that its interpretation of state law rests on adequate and independent state grounds.[67] In addition to this plain statement, the state court should explicitly identify the cited federal law as persuasive authority, authority that does not compel its state law decision.[68]

The following discussion will separate reasons favoring independent interpretation into two classes: 1) reasons which

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64. Massachusetts v. Upton, 466 U.S. 727, 738 (1984) (Stevens, J., concurring) (quoting Hans A. Linde, *E Pluribus—Constitutional Theory and State Courts*, 18 GA. L. REV. 165, 179 (1984)).

65. *See also* Linde, *First Things First*, *supra* note 24, at 384; Collins, *Away From a Reactionary Approach*, *supra* note 28, at 15.

66. *See* Abrahamson, *supra* note 31, at 1179; Collins & Galie, *supra* note 32, at 323; Johansen, *supra* note 32, at 298 n.8.

67. Michigan v. Long, 463 U.S. 1032, 1041 (1983) (requiring state courts to make a plain statement when using federal law as an interpretive aid). The purpose of the plain statement is to insure that federal law is not used by state courts to rationalize providing more expansive protections under state law than the Supreme Court itself would provide under the cited federal law. The Supreme Court has final authority to interpret federal law and has a legitimate interest in protecting its uniformity. One author, in analyzing *Michigan v. Long*, indicates that, when federal law plays a substantial role in the interpretive process,

> the Court assumes that a state decision appearing to rest primarily on federal grounds does so, unless a clear statement to the contrary appears. This rule is straightforward, easily applied, and—perhaps most importantly—presents a reasonable balance between state autonomy and federal supremacy.

David A. Schlueter, *Federalism and Supreme Court Review of Expansive Decisions: A Response to Unfortunate Impressions*, 11 HASTINGS CONST. L.Q. 523, 548 (1984) (footnote omitted).

68. Carson, *supra* note 32, at 651; Schlueter, *supra* note 67, at 534; *see also* Pollock, *supra* note 6, at 992.

depend on features of the federal courts and the federal constitution; and 2) reasons which depend on features of state courts and state constitutions.

2. *Features of the Federal Courts and the Federal Constitution that Favor Independent State Court Interpretation*

The United States Supreme Court's concern with federalism is the principal reason why state courts should not extend to Supreme Court decisions a presumption of correctness when interpreting their state constitutions. When the Supreme Court interprets either the Fourteenth Amendment or a provision of the Bill of Rights that has been incorporated to the states, the Court is making national policy.[69] This fact, combined with a concern for preserving or enlarging state sovereignty, exerts pressure on the Supreme Court to interpret protections more conservatively, since lower federal standards intrude less upon state affairs.[70] The Supreme Court's concern with federalism, an institutional concern not shared by state courts,[71] can have a subtle impact upon the Court's textual interpretations.

First, nationwide applicability places upon the Court an "obligation to search for the lowest common denominator. Taking into account all the variations from state to state and region to region, it must choose a rule that will be sure to operate acceptably in all areas of the country."[72] For example, a Supreme Court interpretation of the Sixth Amendment, which requires counsel for an indigent defendant facing any possibility of incarceration in connection with a misdemeanor charge, might intolerably burden the fiscal or human resources of some states.[73] However, such an interpretation would require no extra expenditure of resources in Minnesota where indigents facing any possible incarceration for committing a mis-

69. Fine, *Project Report*, *supra* note 3, at 290-93.

70. *See generally* Williams, *supra* note 32, at 395-96.

71. Fine, *Project Report*, *supra* note 3, at 290; Williams, *supra* note 32, at 396.

72. Fine, *Project Report*, *supra* note 3, at 290. A decision of the United States Supreme Court interpreting the Fourteenth Amendment "must operate acceptably in all areas of the nation and hence it invariably represents the lowest common denominator." Alderwood Assocs. v. Washington Envtl. Council, 635 P.2d 108, 115 (Wash. 1981) (citations omitted).

73. The Supreme Court has held that counsel be appointed only "for non-petty offenses punishable by more than six months imprisonment." Argersinger v. Hamlin, 407 U.S. 25, 25 (1972).

demeanor have been entitled to counsel as a matter of state law since 1967.[74] If counsel for such misdemeanants is not practicable in all states, it is less likely that the Sixth Amendment will be read to require it.[75]

Nationwide applicability also requires the Supreme Court to consider the impact of its decisions upon the ability of the state courts to experiment with alternate solutions to common problems.[76] In 1932, Justice Brandeis argued against national uniformity in the legislative arena by noting that it was "one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."[77] The tolerance which Justice Brandeis urged toward experimentation by state legislatures with respect to social and economic legislation is appropriate in the area of criminal protections.[78] Justice Powell has given a contemporary articulation to the Brandeis theme:

> Although the need for the innovations that grow out of diversity has always been great, imagination unimpeded by unwarranted demands for national uniformity is of special importance at a time when serious doubt exists as to the adequacy of our criminal justice system. The same diversity of local legislative responsiveness that marked the development of economic and social reforms in this country, if not barred by an unduly restrictive application of the Due Process Clause, might well lead to valuable innovations with re-

74. *See* State v. Borst, 278 Minn. 388, 400, 154 N.W.2d 888, 894 (1967) (holding that counsel should be provided to an indigent defendant whether or not charged with a misdemeanor); State v. Collins, 278 Minn. 437, 427, 154 N.W.2d 688, 689 (1967) (holding that, if a defendant may be sentenced to a jail term, the court should appoint counsel to represent him); State v. Illingworth, 278 Minn. 434, 435, 154 N.W.2d 687, 687-88 (1967) (stating that, if the punishment is apt to be incarceration, the defendant is entitled to appointed counsel). *See also* MINN. R. CRIM. P. 5.02(2). Rule 5.02(2) provides that, unless a defendant charged with a misdemeanor that is punishable by incarceration voluntarily waives counsel, the court shall appoint counsel for the defendant who appears without counsel and is financially unable to afford counsel. *Id.*

75. *See, e.g.*, Williams v. Florida, 399 U.S. 78, 134-43 (1970) (Harlan, J., concurring) (discussing approaches taken by different states).

76. *See* Fine, *Project Report*, *supra* note 3, at 290-97. The author of part 1 of the *Project Report* uses the history of the exclusionary rule to demonstrate the role that state experimentation played in the Court's jurisprudence. *Id.* The national application of the exclusionary rule still presents an intense controversy.

77. New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

78. *See* Abrahamson, *supra* note 31, at 1141-43.

> spect to determining—fairly and more expeditiously—the guilt or innocence of the accused.[79]

Expansive readings of federal rights guarantees by the Supreme Court can set minimal national standards at a level too high to permit state court experimentation. Accordingly, the desire to leave room for state court experimentation can also influence Supreme Court interpretation.

These burdens of nationwide applicability were raised as serious objections to incorporation of protections of the Federal Bill of Rights against the states. At issue was not only state sovereignty but also the integrity of the Bill of Rights:

> Justice Harlan consistently warned that incorporation of Bill of Rights' provisions . . . not only violated state sovereignty, but would also dilute the substantive content of these rights as against the federal government. [When the Court incorporated the jury trial provision of the sixth amendment in *Duncan v. Louisiana*] Justice Harlan dissented, expressing concern that "provisions of the Bill of Rights may be watered down in the needless pursuit of uniformity." In his view, this happened two years later in *Williams v. Florida*, when the Court held that states were not required to employ twelve-person juries.
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> . . . .
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> [This is] not intended to prove that incorporation has diluted all Bill of Rights' provisions . . . . It simply cannot be denied, however, that questions surrounding the scope of constitutional rights asserted against state governments are inextricably intertwined with the structural issue of whether those rights apply against the states.[80]

Federalism, a key concern of the current Court,[81] is a feature unique to decisions of the Supreme Court and is of no concern to state courts. As one commentator noted, "[t]he institutional limitations inherent in Supreme Court federal constitutional rulings upholding state policies provide state courts with am-

79. Johnson v. Louisiana, 406 U.S. 356, 376 (1972) (Powell, J., concurring) (footnote omitted).

80. Williams, *supra* note 32, at 394-96 (footnotes omitted).

81. *See* M. David Gelfand & Keith Werhan, *Federalism and Separation of Powers on a "Conservative" Court: Currents and Cross-Currents From Justices O'Connor and Scalia*, 64 TUL. L. REV. 1443 (1990) (analyzing approaches taken during recent Supreme Court terms by Justices O'Connor and Scalia to cases involving federalism and separation of powers issues); Robert E. Riggs & Guy L. Black, *Supreme Court Voting Behavior: 1990 Term*, 6 B.Y.U. J. PUB. L. 1, 22 (1992) (discussing conflict between federal and state governmental authority).

ple reasons for discounting such interpretations, even as to identically-worded state constitutional provisions."[82] Thus, Supreme Court interpretations of Bill of Rights provisions should not be viewed as presumptively valid precedent for state constitutional analysis.[83]

3. *Features of State Courts and State Constitutions that Favor Independent State Court Interpretation*

Many features of state courts and state constitutions favor independent interpretation and militate against a presumption of correctness for federal interpretations. First, state judges have a duty to interpret and to uphold the law of their state.[84] It is inconsistent with this duty for state judges simply to presume that provisions of their constitution should be interpreted the same as a foreign jurisdiction's interpretation of an analogous provision.

> To relieve state courts of the obligation to rethink the decisions of federal courts is to deprive the people of their "double security" and remove one of the very justifications for a federal system.
>
> Even if a state judge could say that his state's bill of rights was enacted with precisely the same values in mind as the Fourteenth Amendment, the ideals of federalism would prevent him from blindly accepting the Supreme Court's pronouncements on the Fourteenth Amendment as definitive interpretations of the state charter. But the language, history, and intent of every state's bill of rights are different from that of the Fourteenth Amendment. Thus, the obligation to make an independent determination would seem to apply a fortiori.[85]

Naturally, the conclusion that the interpretation of another jurisdiction provides the best construction of state law involves no such violation.

Second, it is undisputed that the Federal Bill of Rights was based upon the bills of rights found in earlier state constitu-

82. Williams, *supra* note 32, at 389.

83. *See* Robert F. Utter, *Swimming in the Jaws of the Crocodile: State Court Comment on Federal Constitutional Issues When Disposing of Cases on State Constitutional Grounds*, 63 TEX. L. REV. 1025, 1042-47 (1985) [hereinafter Utter, *Swimming in the Jaws*] (analyzing the under-enforcement of rights provisions by the Supreme Court due to federalism).

84. *See supra* notes 43-45 and accompanying text.

85. Fine, *Project Report*, *supra* note 3, at 286.

tions.[86] Even state constitutions created after the Bill of Rights existed were usually based on other state constitutions not the federal constitution.[87] Consequently, the view that interpretations of the Federal Bill of Rights are presumptively correct interpretations of analogous state provisions is backward.

Independent interpretation is also recommended by considering the position and function of the state judiciary.[88] First, a state court typically occupies a stronger position with respect to its co-equal branches than does the Supreme Court, requiring a state court to accord relatively less deference to other state branches.[89] This lesser degree of deference is justifiable, in part, due to the greater accountability of state judges, who are normally elected officials.[90] As a more accountable institution, a state court legitimately plays a greater role in creating policy at the state level than does the politically insulated Supreme Court at the national level. Second, the Supreme Court is constrained by federalism concerns to extend greater deference to state legislative and executive enactments than is a state court, which is an organic part of the state system.[91]

Additionally, qualitative differences exist between state and federal rights. The Federal Constitution enumerates powers that the states have delegated specifically to create a government of limited powers. Federal rights are negative rights: federal rights do not specify what the people may do but rather what the federal government may *not* do.[92] By contrast, state

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86. *See* SCHWARTZ, *supra* note 4, at 383. The author discusses the historical premise for the Federal Bill of Rights and states:

> By the end of the Revolutionary period, the concept of a Bill of Rights had been fully developed in the American system. Eleven of the 13 states (and Vermont as well) had enacted Constitutions to fill in the political gap caused by the overthrow of British authority. . . .
>
> Eight of the Revolutionary Constitutions were prefaced by Bills of Rights, while four contained guarantees of many of the most important individual rights in the body of their texts. Included in these Revolutionary constitutional provisions were all of the rights that were to be protected in the federal Bill of Rights. By the time of the Treaty of Paris (1783) then, the American inventory of individual rights had been virtually completed and included in the different state Constitutions whether in separate Bills of Rights or the organic texts themselves.

Id.

87. *See* Linde, *First Things First*, *supra* note 24, at 381.
88. *See* Williams, *supra* note 32, at 397-402.
89. *See id.* at 397.
90. *See id.* at 400 n.235.
91. *See id.* at 398.
92. *See id.* at 401 (emphasis added).

guaranteed rights are often affirmative or positive in character, providing that an individual shall be free to do a given thing.[93] While negative rights require a government merely to stay its hand, affirmative rights may require state action to protect them. Thus, the presumption that a Supreme Court interpretation of a negative federal right supplies a presumptively correct interpretation of a state guaranteed positive right is unwarranted.[94]

4. *Conclusions on Independent Interpretation*

State courts should not find Supreme Court opinions construing federal rights provisions presumptively valid as interpretations of even identically worded state provisions. The Supreme Court's concern with federalism and the nationwide applicability of its decisions are institutional constraints on interpretation not shared by state courts and may lead to underenforcement of federal guarantees. The state judiciary, as an integral part of the state sovereign sworn to uphold state law, typically enforces qualitatively stronger rights from a stronger institutional position. Independent interpretation by state courts is therefore not only justifiable but indispensable to the proper protection of individual liberties.

C. *Advantages of the Proposed Approach*

The foregoing section has outlined a systematic approach to state constitutional adjudication. While this approach should be adopted as a matter of propriety alone, this approach also has many benefits. First, this systematic approach will lead to rejuvenation of state law.[95] As the courts of a state begin regularly to interpret the state charter, a body of independent state constitutional law will develop. As specific provisions are explained, further interpretation of those and similar provisions will be facilitated. The broad outline of a state's dominant policy concerns will emerge as the courts struggle to interpret particular provisions.[96] Interpretation begets interpretation. Although nothing approaching a comprehensive articulation

93. *See* Williams, *supra* note 32, at 401.

94. *See id.*

95. *See* Fine, *Project Report*, *supra* note 3, at 289.

96. *Cf.* Johansen, *supra* note 32, at 316. The commentator argues that a failure of the California Supreme Court to link certain expansive state law decisions to the text of the constitution and the consequent failure to develop a systematic body of state

of state law will develop overnight, the process must begin somewhere.[97]

Second, the resulting development of state constitutional law reduces a court's susceptibility to the charge of result orientation.[98] Minnesota case law provides an excellent example. In *Friedman v. Commissioner of Public Safety*,[99] the Minnesota Supreme Court ruled that those arrested for DWI had the right to consult with counsel about the implications of refusing to submit to an intoxilizer test.[100] This right to counsel is inconsistent with federal law because the intoxilizer test is administered before formal charging, the point after which federal law guarantees counsel for critical stages of prosecution.[101] Absent a long tradition of assuring the right to counsel,[102] *Friedman* appears to be an extremely result-oriented decision.[103] The more thoroughly articulated the contours of a right, the less likely it is that a modest expansion or contraction of that right will appear to be result-oriented.

Third, the recommended approach also presents the possibility that the law of a state will become more stable.[104] As state courts clarify state constitutional protections, only those Supreme Court decisions which provide more protection than state law will have any genuine impact on state practice. Developing an independent body of state law can free a state from vacillating federal standards.[105]

A fourth benefit of a systematic approach derives from the increased respect that will accrue to state law when state power is constrained by state law.[106] Finally, the state-law-first ap-

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constitutional law made general standards difficult to discern and deterred inferences based on constitutional language or history to related fact situations. *Id.*

97. *Id.* at 317.

98. *Id.* at 316.

99. 473 N.W.2d 828 (Minn. 1991).

100. *Id.* at 835.

101. *Id.* at 838 (Coyne, J., dissenting).

102. *See id.* at 831.

103. Even with this tradition, the dissent in *Friedman* accused the majority of being result-oriented. *See id.* at 845 (Coyne, J., dissenting).

104. *Cf.* Carson, *supra* note 32, at 648-49. The commentator argues that application of the Oregon Constitution will bring stability to Oregon law by allowing independent protection of individual rights and eliminating guesswork on how the United States Supreme Court will interpret the Fourteenth Amendment. *Id.*

105. Carson, *supra* note 32, at 649; *see also* Douglas, *supra* note 2, at 1129-31.

106. *See* Jon O. Newman, *The "Old Federalism": Protection of Individual Rights by State Constitutions in an Era of Federal Court Passivity*, 15 CONN. L. REV 21, 26 (1982). The

proach helps to insure certainty in state law while assuring finality of judgment if claims are settled under that law.

> [W]hen a claim is sustained on the basis of state law, it is not subject to further federal review unless the judgment contravenes some federal law. That finality both assures the complaining party that his or her rights are not in jeopardy owing to the possibility of federal review. It also assures the state court that it will not be faced with the task of rehearing the matter under state law in those situations where [a case decided on federal grounds in the first instance] has been reversed and remanded by the United States Supreme Court.[107]

IV. Raising and Arguing Individual Liberties Claims

A. Introduction

This section is intended as a practitioner's guide to making persuasive state constitutional arguments in criminal cases. This section will discuss how to raise and argue individual liberties claims under the state constitution.

B. Writing Briefs

1. Burden on Practitioners

The burden of persuading state courts to independently interpret the state constitution falls on litigants because courts generally do not and probably should not address issues not raised by the parties.[108] Until recently, state constitutional claims have rarely been raised and seldomly addressed. Consequently, after almost a century and a half of statehood, Minnesota is left without a solid body of state constitutional case law to protect its own citizens' rights.

Much blame for the dearth of state constitutional case law rests with practitioners for failing to raise and argue state constitutional claims. When the state constitution is raised, the claim often resembles an afterthought. Generally, most consti-

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commentator suggests that, "[a]s we give renewed consideration to [a state constitution's meaning], the responsibilities of those throughout the system of state and local government to protect individual liberty remain undiminished." *Id.*

107. Collins, *Some Random Thoughts*, *supra* note 32, at 9.

108. Although this article focuses on appellate court argument, the burden of initially litigating state constitutional issues falls on practitioners at the trial court level. Constitutional issues generally cannot be litigated on appeal if the issues were not raised below.

tutional issues are given their federal name: "The arresting officers violated appellant's rights under the Fifth and Sixth Amendments by failing to read the defendant a Miranda warning before engaging in custodial interrogation." Other supporting arguments in the parties' brief often rely almost exclusively on Supreme Court cases interpreting the Federal Constitution. In closing, a statement something like the following is typically added: "Appellant's rights under the state constitution were similarly violated."

Judges and commentators alike know this is not enough to justify or to support independent interpretation:

> My impression from briefs submitted in the Supreme Court of Wisconsin . . . is that, all too frequently, counsel do not raise state constitutional issues in the trial or appellate courts, or make only passing reference to the state constitution. A Maine commentator noted: "[The Maine Constitution] is routinely cited, then routinely forgotten." The Oregon Supreme Court has suggested that Oregon courts tell the parties either to explain their state claims or abandon them.[109]

In addition to bearing responsibility for the absence of state constitutional case law, practitioners ought to worry about a much more personal concern:

> Given the emerging prominence of state constitutional law, it is only a matter of time before questions of inadequacy of counsel or legal malpractice will arise. As Justice Hans Linde has observed: "A lawyer today representing someone who claims some constitutional protection and who does not argue that the state constitution provides that protection is skating on the edge of malpractice."[110]

The goal for advocates as officers of the court is to remind the state courts to recognize their duty to uphold the state constitution and to persuade them to vindicate that duty before addressing any federal claims.

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109. Abrahamson, *supra* note 31, at 1161 (footnotes omitted). Chief Justice Burger articulated a similar concern: "For all we know, the state courts would find this statute invalid under the State Constitution, but no one on either side of the case thought to discuss this or exhibit any interest in the subject." Wisconsin v. Constantineau, 400 U.S. 433, 440 (1971) (Burger, C.J., dissenting).

110. Collins, *Some Random Thoughts*, *supra* note 32, at 2 (footnotes omitted).

2. *Explaining the Necessity for Independent Interpretation*

At least until a substantial body of state constitutional case law is developed in Minnesota, lawyers urging state constitutional claims will have to explain to the state courts their obligation and their power to interpret the Minnesota Constitution. A brief should explicitly remind the court: 1) that the Minnesota courts have unquestioned authority to independently interpret the state constitution; 2) that the duty of state judges to uphold state law requires that state constitutional issues be addressed before analogous federal claims; and 3) that interpretation of the state constitution should be truly independent.[111] This last point is particularly important because, on occasion, the Minnesota Supreme Court has indicated that it will not engage in independent interpretation without a sound basis for doing so.[112]

Because criminal cases constitute the bulk of constitutional litigation, the task of explaining to the court how it should meet its responsibility naturally falls to those lawyers who practice criminal law.[113] Urging the court to fulfill its duty to uphold the state constitution also may be easier in criminal cases:

> Criminal law is an area of traditional concern for state judges. It is an area of law in which state judges have special experience and expertise. The very bulk of the criminal cases in the state trial court may justify a state's attempt to formulate rules to achieve stability of state law, relatively free of the changes wrought by the United States Supreme Court, and to achieve uniformity within the state judicial system. Because of the state supreme courts' supervisory power over trial courts and procedural rules, it may be easier to develop independence in criminal procedural law than in other areas of constitutional law.[114]

3. *Order of Claims*

Persuading the Minnesota appellate courts to give independ-

111. *See supra* notes 62-93 and accompanying text.

112. *See, e.g.*, State v. Hamm, 423 N.W.2d 379 (Minn. 1988). The *Hamm* court stated, "[W]e may be required to interpret our own constitution more stringently than the federal Constitution, but we certainly do not do so lightly." *Id.* at 382 (citing State v. Gray, 413 N.W.2d 107, 111 (Minn. 1987)).

113. Hans A. Linde, *E Pluribus—Constitutional Theory and State Courts*, 18 GA. L. REV. 165, 175 (1984) [hereinafter Linde, *E Pluribus*].

114. Abrahamson, *supra* note 31, at 1150.

ent effect to the state constitution must start with presenting claims in a logical order. A court is less likely to appreciate the logic of deciding state constitutional claims before reaching federal constitutional issues if a litigant ignores other relevant state law authority. Counsel should avoid constitutional issues when ordinary law will provide effective relief.[115]

Advocates need to change the focus of individual liberties issues from United States Supreme Court Bill of Rights decisions to state law. The logical way to accomplish this shift is to litigate from the bottom up, thus encouraging the development of a body of state law. Typically, however, advocates have analyzed claims from the "top." For example, when a child's hearsay statements have been used to convict a defendant of criminal sexual conduct, it is tempting to move right to the Confrontation Clause, thus bypassing the state rules of evidence and the state statute governing admission of children's hearsay statements in a sex abuse prosecution.

One jurist has set forth a more reasoned approach by recommending a five-point checklist for making legal arguments in state courts:[116]

First, determine if an administrative or court rule governs the challenged act or ruling. For example, if the challenged act violates a rule of evidence or criminal procedure, the court's analysis of the claim on appeal could end there.[117]

Second, ascertain whether the challenged act or ruling has breached a state statute. If a statute seems to apply, scour the annotations for appellate court decisions interpreting, defining, and limiting the statute's application.[118] Litigating individual rights issues under state statutes is particularly important in Minnesota; some so-called constitutional rights were codified by the Minnesota Legislature before those rights were incorporated under the Fourteenth Amendment.[119]

Third, address whether the challenged practice violates any provision of the state constitution.[120] Fourth, determine whether any federal law might regulate the challenged state act

115. Linde, *E Pluribus*, *supra* note 113, at 190.
116. Carson, *supra* note 32, at 641.
117. *Id.* at 643.
118. *Id.* at 644.
119. *See, e.g.*, MINN. STAT. § 611.07 (1963) (repealed 1989) (providing the right to counsel).
120. Carson, *supra* note 32, at 645.

or ruling.[121] And finally, explore whether the practice violates any provision of the United States Constitution.[122]

4. Style

Making the stylistic changes necessary to present a persuasive analysis of a state constitutional claim will require thoughtfulness beyond organizing an argument into perfect IRAC[123] form:

> [Raising a principled state claim] takes work. A grudging parallel citation to a state constitution, or an argument that the state particularly values the rights of its citizens, in a brief devoted to federal law does nothing to aid in the development of state jurisprudence, so that everyone can know from reading a particular state court's decisions what factors would impel that court to decide one way or the other. Only by the customary process of research and reasoning can there be principled development of a body of state constitutional law that does not seek merely to sidestep review by the United States Supreme Court in isolated cases but one that truly supports the state constitution, as state court judges and lawyers are charged to do.[124]

Litigants cannot expect state courts to engage in independent interpretation if the lawyers themselves refuse to engage in independent analysis when urging state constitutional claims. Counsel should phrase a claim affirmatively as a matter of autonomous state law rather than beg the court to follow blindly or to diverge radically from federal interpretation of the Federal Constitution.[125]

If counsel agrees with a federal interpretation of a federal analogue to the state constitutional provision at issue, the federal interpretation should be cited as persuasive, not mandatory authority. If counsel disagrees, counsel should present the court with an analysis that properly supports the

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121. *Id.*

122. *Id.*

123. IRAC is an acronym standing for Issue, Rule, Analysis, Conclusion: "The basic structure for an analytical paragraph or paragraph block includes (i) issue, (ii) the governing rules of law, (iii) relevant facts, (iv) application of law to facts, and (v) conclusion or summary of statement." LYNN B. SQUIRES & MARJORIE D. ROMBAUER, LEGAL WRITING IN A NUTSHELL 43 (1982).

124. Judith S. Kaye, *A Midpoint Perspective on Directions in State Constitutional Law*, 1 EMERGING ISSUES STATE CONST. L. 17, 24 (1988).

125. Carson, *supra* note 32, at 650.

suggested construction.[126]

Independent analysis also requires a shift away from automatic reliance on federal jargon and litmus tests with origins in Supreme Court decisional law. Complaining about the legitimacy of a "Terry stop" or bemoaning an egregious "Massiah violation" will do little to encourage a state court to give serious independent consideration to state constitutional claims. Instead, help the court develop its own state constitutional jargon.[127] Better yet, a lawyer can propose an alternative test more consonant with the policies which give independent force to the state constitution.

Finally, independent analysis should invite innovation:

> Doctrines themselves are not the constitution, either state or federal; they are only the judicial cliches of a generation. . . .
>
> . . . The best arguments to an appellate court do not take judicial doctrine for granted; they are built upon curiosity about text and history and about the challenged law, and they invite the court to examine and improve past formulas for itself.[128]

C. *Engaging in Independent Interpretation*[129]

The process of convincing a state appellate court to independently interpret the state constitution depends on the lawyer's own ability to engage in "principled" analysis of the claim, regardless of whether the attorney is urging a result or an interpretation different from the federal interpretation of a federal constitutional analogue. Commentators, litigants, and court decisions have settled on a number of relevant factors to consider in making a persuasive argument. What follows is a review of those factors, with citations to specific examples in Minnesota law.[130]

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126. *Id.* at 650-51.

127. *Id.*; *see also* Linde, *E Pluribus*, *supra* note 113, at 175-76.

128. Linde, *E Pluribus*, *supra* note 113, at 188.

129. Fine, *Project Report*, *supra* note 3, at 285; Johansen, *supra* note 32, at 318-19.

130. This section is intended as a checklist for practitioners to ensure that, analytically, the "bases are covered." The section is not meant to suggest that each of the mentioned analytical tools is a necessary element of every state constitutional issue or that the devices should be used in a particular order.

1. *Constitutional Text*

State constitutional interpretation should begin with a reading of the state constitutional provision in question. The text of a particular provision may suggest a plain meaning so that further interpretation is unnecessary. Also, a comparison of the wording of the state provision with its federal parallel may reveal important linguistic variations. Such linguistic differences affect the proper interpretation of the provision and may require divergence from the Supreme Court interpretation.

To determine the significance of a linguistic variation, a litigant should research the legislative history and early case law interpreting the state constitutional provision. If the legislative history and early case law are sparse or ambiguous, the litigant should determine whether the difference is intentional and, if so, what interpretation is mandated by that difference.[131]

For example, in *People v. Anderson*,[132] the California Supreme Court held that the death penalty violated California's constitutional prohibition against "cruel *or* unusual" punishment[133] as opposed to the federal constitutional ban on "cruel *and* unusual" punishment.[134] The court interpreted the presence of the disjunctive "or" in the California provision to require challenged punishments to be tested independently for their cruelty and unusualness.[135] The Minnesota Constitution similarly prohibits the infliction of cruel *or* unusual punishments.[136] However, the Minnesota Court of Appeals recently held that the legislative "history of construction place[d] no significance on the use of the conjunction 'or' rather than 'and.' "[137]

Other provisions in Minnesota's bill of rights contain significant variations in language from their closest federal analogue.

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131. Johansen, *supra* note 32, at 318.

132. 493 P.2d 880, 891 (Cal.), *cert. denied*, 405 U.S. 983 (1972).

133. CAL. CONST. art. 1, § 6 (emphasis added).

134. U.S. CONST. amend. VIII.

135. *Anderson*, 493 P.2d at 883.

136. MINN. CONST. art. I, § 5.

137. State v. Combs, No. C5-92-2025, 1993 WL 287294, at *5 (Minn. Ct. App. Aug. 3, 1993). The court of appeals specifically rejected the defendant's argument that the Minnesota Constitution's use of cruel *or* unusual punishment provided broader protection than the Federal Constitution's language of cruel and unusual punishment. *Id.* at *4. At the time of publication, the Minnesota Supreme Court had not ruled on Combs' petition for further review.

For example, article I, section 16 of the Minnesota Constitution provides:

> The enumeration of rights in this constitution shall not deny or impair others retained by and inherent in the people. The right of every man to worship God according to the dictates of his own conscience shall never be infringed; nor shall any man be compelled to attend, erect or support any place of worship, or to maintain any religious or ecclesiastical ministry, against his consent; nor shall any control of or interference with the rights of conscience be permitted, or any preference be given by law to any religious establishment or mode of worship; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness or justify practices inconsistent with the peace or safety of the state, nor shall any money be drawn from the treasury for the benefit of any religious societies or religious or theological seminaries.[138]

The First Amendment to the United States Constitution simply provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."[139]

Concerning the textual differences between the two provisions, the Minnesota Supreme Court has held: "This language [article I, section 16] is of a distinctively stronger character than the federal counterpart . . . . Whereas the first amendment establishes a limit on government action at the point of *prohibiting* the exercise of religion, section 16 precludes even an *infringement* on or an *interference* with religious freedom."[140]

In many instances, the language of the Minnesota Constitution affords Minnesota citizens more protection than the Federal Constitution.[141] The substantial difference in language between the two documents lessens the persuasiveness of United States Supreme Court decisions regarding the more limited protection stated in the Federal Bill of Rights.[142] For example, the Minnesota Constitution safeguards the right to

138. MINN. CONST. art. I, § 16.

139. U.S. CONST. amend. I.

140. State v. Hershberger, 462 N.W.2d 393, 397 (Minn. 1990) (emphasis in the original).

141. Fleming & Nordby, *supra* note 32, at 68.

142. *Id.* (footnote omitted).

trial by jury more emphatically than does the Federal Constitution. The right to trial by jury is preserved in article I, sections 2, 4, and 6.[143] Minnesota's bill of rights also expressly grants affirmative free press, free speech, and freedom of conscience rights, while the corresponding federal provision simply restrains governmental action.[144]

State legislative history, constitutional history, and state appellate court decisions may also be helpful in explaining linguistic differences between the state and federal provisions.[145] For instance, the Minnesota Supreme Court has recognized that the "history [of the state constitution] supports a broad protection for religious freedom in Minnesota."[146] This conclusion was compelled, in part, by the preamble to the state constitution.[147] Framers of the state constitution "acknowledged religious liberty as coequal with civil liberty. The history of the adoption of the constitution indicates the importance of individual rights to the framers."[148]

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143. MINN. CONST. art. I, §§ 2,4,6.

144. Fleming & Nordby, *supra* note 32, at 67.

145. *See id.* at 70-71. *Cf.* Paul W. Kahn, *Interpretation and Authority in State Constitutionalism*, 106 HARV. L. REV. 1147 (1993). In his recent article, Professor Kahn "abandon[s] the central premise of most previous works [on state constitutionalism], namely, that the interpretation of a state constitution must rely on unique state sources of law." *Id.* at 1147. Professor Kahn argues that the state and federal benches are equally important participants in American constitutionalism, "[an] interpretive enterprise that seeks to understand the appropriate role for the rule of law in a democratic order." *Id.* at 1156. This enterprise is, in part, "an effort to articulate those values that stand behind a rule of law—equality, liberty, and due process." These are values "that inform constitutional debate wherever it occurs . . . ." *Id.* at 1160.

In Kahn's view, "state constitutional texts are best thought of as multiple efforts to articulate a common aspiration for constitutional governance." *Id.* Therefore, restricting state courts to an originalist methodology applied to unique state sources impoverishes their ability to make meaningful contributions to American constitutionalism. *Id.* at 1160-62. Professor Kahn argues that the never-ending process of interpretation itself—not the doctrine of unique state sources—will lead to interpretive diversity and healthy constitutional discourse in the best tradition of federalism. *Id.* at 1155-56, 1160-61, 1166.

146. State v. Hershberger, 462 N.W.2d 393, 398 (Minn. 1990) (citing Fleming & Nordby, *Minnesota Bill of Rights: "Wrapt in the Old Miasmal Mist"*, 7 HAMLINE L. REV. 51, 70-71 (1984)).

147. The preamble to the Minnesota Constitution states: "We, the people of the state of Minnesota, grateful to God for our civil and religious liberty, and desiring to perpetuate its blessings and secure the same to ourselves and our posterity, do ordain and establish this Constitution." MINN. CONST. pmbl.

148. *Hershberger*, 462 N.W.2d at 398 (citing Fleming & Nordby, *Minnesota Bill of Rights: "Wrapt in the Old Miasmal Mist"*, 7 HAMLINE L. REV. 51, 70-71 (1984)).

The history of religious freedom in Minnesota was a significant factor in the Minnesota Supreme Court's decision that a landlord's right to practice his religion under the freedom of conscience provision of the Minnesota Constitution outweighed any interest of a tenant in cohabiting with her fiance in rental property before her marriage.[149] The court based its holding on "the history our state shares with Wisconsin," a history which indicated "a lively appreciation by its members [of the constitutional convention] of the horrors of sectarian intolerance and the priceless value of perfect religious and sectarian freedom and equality . . . ."[150]

It is crucial, however, to rely on more than merely the constitutional language when urging an independent interpretation of the state constitution. This is particularly important when the wording of the state and federal provisions is identical and the state court has adopted the Supreme Court interpretation lock, stock, and barrel. Past adherence to federal decisional law does not mean the state court is bound to construe the state constitution in accordance with federal interpretation of the Federal Constitution for time and eternity.[151] State courts are free to disagree with the reasoning underlying the Supreme Court's decision about a particular federal provision. This is especially true in situations where new Supreme Court cases appear to undermine the policies set forth in prior Supreme Court decisions.

Finally, counsel should become familiar with the text of the state constitution so that unique state constitutional provisions that provide "plenary safeguards for Minnesota citizens"[152] are not ignored. Those unique provisions may provide a remedy where none exists under the Federal Bill of Rights. For example, article I, section 8 of the Minnesota Constitution specifically provides for the right of remedy: "Every person is

149. *See* State v. French, 460 N.W.2d 2, 8-11 (Minn. 1990). The court noted that "[t]he people of the state of Minnesota have always cherished religious liberty". *Id.* at 8.

150. *Id.* at 9 (quoting State *ex rel.* Weiss v. District Bd., 44 N.W. 967, 974-75 (Wis. 1890)).

151. *See* Abrahamson, *supra* note 31, at 1169 nn. 109, 110. *See also* Fleming & Nordby, *supra* note 32, at 68: "The fact that certain state and federal constitutional provisions . . . are virtually identical, should be considered only a neutral factor. Identical meaning should not be implied merely because there is identical language." *Id.*

152. Fleming & Nordby, *supra* note 32, at 69.

entitled to a certain remedy in the laws for all injuries or wrongs which he may receive to his person, property or character, and to obtain justice freely and without purchase, completely and without denial, promptly and without delay, conformable to the laws."[153]

2. *State Statutes and Precedent*

State precedent at odds with current federal constitutional doctrine will certainly merit independent attention from the state appellate court.

> If in an earlier decision a majority of the state court believed that either the state or federal constitution, without saying which one, required a particular result, the court should examine its own constitution before reversing itself. To do otherwise is to denigrate not only the state constitution, but the state supreme court as well by suggesting that the earlier decision, no matter how well-reasoned, must be sacrificed to a decision by another court interpreting another constitution. Surely such a result can add little to the dignity of either the state court or the state consititution.[154]

For instance, prior to *Gideon v. Wainwright*,[155] indigent defendants in Minnesota had a statutory right to counsel when charged with felonies or gross misdemeanors.[156] Thus, even though the language of article I, section 6 of the Minnesota Constitution is strikingly similar to the language of the Sixth Amendment to the United States Constitution, the Minnesota Constitution protected the right to counsel for state defendants before the Fourteenth Amendment required the states to honor the Sixth Amendment's mandate.

Minnesota's constitutional commitment to the right to counsel extended to indigents charged with misdemeanors where imprisonment could follow well before the right was incorporated into the Fourteenth Amendment.[157] This type of state precedent proves that the state constitution historically has

153. MINN. CONST. art. I, § 8.

154. Johansen, *supra* note 32, at 318 (footnote omitted).

155. 372 U.S. 335 (1963) (holding that the assistance of counsel is a fundamental right protected by the Fourteenth Amendment to the United States Constitution).

156. *See* MINN. STAT. § 611.07 (1963) (repealed 1989).

157. *See, e.g.*, State v. Borst, 278 Minn. 388, 397, 154 N.W.2d 888, 894 (1967) (recognizing the right to counsel in Minnesota in 1967). *Cf.* Argersinger v. Hamlin, 407 U.S. 25, 37 (1972) (stating that "[n]o person may be imprisoned for any offense . . . unless he was represented by counsel at his trial.").

had autonomous force without reference to the Federal Constitution.[158]

3. *Local Conditions*

In some circumstances, unique local conditions may be helpful in persuading the court to analyze the state constitutional provision separately from its federal complement.

> A state may have a history of flagrant abuse or fastidious protection of certain rights that requires stricter [or different] remedies under the state constitution; it may have a particularly large minority deserving of special protection or a peculiar circumstance due to a state's geographic or demographic characteristics.[159]

The state court should respond to unique local conditions by looking to the state constitution when analyzing constitutional issues related to such issues.[160]

Prior Minnesota commentary has suggested several factors to consider when examining whether unique local conditions require a particular result under the state constitution:

> [W]hether Minnesota's history and traditions are relevant to the controversy; whether the controversy is local in nature; whether resolution of the controversy rests primarily on a determination of localized facts; whether the Minnesota Supreme Court is in a better position than the federal courts to make the adjudication because of its superior knowledge of, experience with, and proximity to the controversy; whether the controversy warrants an individualized, experimental resolution of statewide applicability or necessitates a broad, uniform resolution of nation-wide applicability; and whether there are other circumstances unique to Minnesota which mandate a decision contrary to the existing federal doctrine.[161]

Affirmative answers to these important questions may be few and far between. Generally, however, the Minnesota criminal justice system prides itself on its scrupulous attention to individual liberties. Using this source of "state pride" as a backdrop for individual liberties claims under the state constitution

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158. *See, e.g.*, Friedman v. Comm'r of Pub. Safety, 473 N.W.2d 828, 829-32 (Minn. 1991) (discussing the relationship between state and federal constitutions).

159. Johansen, *supra* note 32, at 319.

160. *Id.*

161. Fleming & Nordby, *supra* note 32, at 76.

may be an effective way to persuade the court to give effect to the meaning of the state constitution.

4. Horizontal Federalism

a. Sister State Precedent

Litigants should not hesitate to engage in horizontal federalism.[162] Sister state precedent is important because other state appellate courts are in an identical institutional position: sister states are unconstrained by federalism concerns and are often enforcing similar state rights. As a result, sister state precedent should be at least as persuasive as Supreme Court precedent.[163] "The Supreme Court, and the Constitution it interprets, differ in too many ways from state courts and state constitutions for that Court's decisions to carry presumptive weight in state constitutional analysis."[164]

Precedents from other states construing their own constitution have tremendous persuasive potential, especially if the other state's bill of rights has a common origin with the Minnesota Constitution or shares linguistic similarities. For example, the Republican Constitutional Convention in Minnesota was heavily influenced by the text of the Wisconsin Constitution.[165] Thus, decisions construing the Wisconsin Constitution may be helpful in interpreting the Minnesota Constitution.[166]

b. United States Supreme Court Decisions

Neither counsel nor the state courts, in their quest for independence, should ignore the persuasive influence of the United States Supreme Court position on federal constitutional issues.[167] Although the federal interpretation cannot

162. One article stated the following regarding horizontal federalism: "[I]nteractions among the American states are an equally important component of the federal relationships and contribute to policy development throughout the states. Mary Cornelia Porter & G. Alan Tarr, *State Supreme Court Policymaking and Federalism*, *in* STATE SUPREME COURTS: POLICYMAKING IN THE FEDERAL SYSTEM xxi (Mary Cornelia Porter & G. Alan Tarr eds., 1981).

163. Williams, *supra* note 32, at 403 (footnotes omitted).

164. *Id.*

165. Fleming & Nordby, *supra* note 32, at 70 n.81.

166. *Id.*

167. One commentator has noted:

> Whatever the Supreme Court says will influence the legal community and the general populace; the court that disagrees must recognize that fact if it is at all concerned about the way in which its decision will be received. Certainly the age of the ruling, as well as the breadth of its holding, may make a

bind the state interpretation, it certainly should be given careful consideration, noting, however, that the language, history, and policy underlying the federal interpretation may be at odds with the state's own separate language, history, and policy.[168]

The Minnesota Supreme Court has explicitly recognized the persuasive, as opposed to authoritative, value of United States Supreme Court interpretation of the Federal Constitution. In *Americans United, Inc. v. Independent School District No. 622*,[169] the state supreme court noted that Supreme Court precedent interpreting the First Amendment to the Federal Constitution was "simply persuasive and distinguished precedent."[170]

c. Open Federal Questions

State court litigants should invite the state courts to explore categories left open by the United States Supreme Court. When the guidelines established by the Supreme Court for federal constitional issues are vague, the state court could see the ambiguity as an indication that independent state action is needed to fill the gap.[171] For instance, the Sixth Amendment right to counsel does not "attach" until the criminal justice proceedings against an individual have reached a critical stage.[172] However, a proceeding may be considered a critical stage by a state court where the United States Supreme Court would decide the opposite. The open-endedness of the Sixth Amendment protection virtually begs each state to look to its

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difference, but no state court can ignore the persuasive influence of a Supreme Court opinion.

Johansen, *supra* note 32, at 319.

168. One commentator asserts:

> United States Supreme Court opinions may be examined for the persuasiveness of their reasoning on a particular issue [while still independently analyzing the state law]. There is a substantial difference between citing a Supreme Court case for its holding, and examining its approach to analysis. If the analysis is compelling, it must still be demonstrated to apply within the context of the state constitution, taking into account the different structure and purposes of that document.

Linda White Atkins, Note, *Federalism, Uniformity, and the State Constitution*, 62 WASH. L. REV. 569, 585 n.139 (1987).

169. 288 Minn. 196, 179 N.W.2d 146 (1970).

170. *Id.* at 201, 179 N.W.2d at 149.

171. Elias N. Matsakis & Philip L. Spector, *Project Report: Toward an Activist Role for State Bills of Rights* 8 HARV. C.R.-C.L. L. REV. 271, 318-19 (1973).

172. *See* Kirby v. Illinois, 406 U.S. 682, 689-90 (1972) (holding that the initiation of judicial criminal proceedings is the starting point in the criminal justice system and is where the right to counsel attaches).

own constitution for the appropriate point at which criminal proceedings reach a critical stage.

Alternatively, where the Supreme Court's federal constitutional limits are seemingly clear and rigid, state courts should be urged, under their own constitutions, to determine whether those limits are consistent with the broad principles underlying the rights in question.[173] For example, a number of states have rejected, as a matter of state constitutional law, the federal notion that a "good faith exception" to the warrant requirement is consistent with the protections intended by the warrant requirement.[174]

D. Summary

Counsel's role in the development of an independent body of state law is critical:

> The assumption by counsel of the duty to present fully formed arguments dealing with state constitutional claims, the placement of this argument in its proper sequence, and the choice of the correct method of analysis will aid state courts in exercising their responsibility for the principled development of the law. State courts can be responsible laboratories for the growth of state and federal constitutional law with the assistance and scholarly effort of those who appear before them.[175]

V. Conclusion

Historically, state courts and state constitutions have played an important role in the protection of individual liberties. If citizens are to have the dual protection contemplated by the United States Constitution, state courts must continue to hear and to decide individual liberties claims under their own state constitutions. The burden of properly raising and persuasively arguing state constitutional claims is on criminal law practi-

173. Matsakis & Spector, *supra* note 171, at 318 (advocating state interpretation of vague Supreme Court decisions to protect constitutional rights); *see also* Williams, *supra* note 32, at 371 n.78 (discussing potential approaches to constitutional interpretation).

174. *See, e.g.*, State v. White, 640 P.2d 1061, 1069-70 (Wash. 1982) (rejecting the good-faith exception to the warrant requirement).

175. Robert F. Utter, *Ensuring Principled Development of State Constitutional Law: Responsibilities for Attorneys and Courts*, 1 Emerging Issues State Const. L. 217, 227 (1988).

tioners at every phase of the process. This burden is especially important at the trial court level where claims not raised are most likely waived. If Minnesota practitioners consistently raise state claims, the state will someday have a truly independent constitutional jurisprudence.

APPENDIX

This final part presents the practitioner with two examples of how particular individual liberties claims under the state constitution might be presented to a Minnesota appellate court. These examples are written as arguments which would be incorporated into an appellant's brief. The arguments, in varying degrees and different manners, incorporate the techniques for independent state constitutional analysis as suggested in Parts III and IV.

The first argument addresses the issue of whether article I, section 6 of the Minnesota Constitution requires that a criminal defendant have assistance of counsel during a post-arrest, pre-charge lineup. The second argument raises the issue of whether article I, section 7 of the Minnesota Constitution precludes the application of harmless error analysis when a coerced confession was erroneously admitted at trial. The authors chose these particular issues as examples because state appellate courts have not explicitly addressed these issues under the Minnesota Constitution. These arguments are intended as illustrations only—the authors attempting to practice what they preach.

I. RIGHT TO COUNSEL: A HYPOTHETICAL ARGUMENT UNDER THE MINNESOTA CONSTITUTION

Argument

Defendant's Conviction Must be Reversed Because the Trial Court Refused to Suppress Evidence Obtained From the Post-Arrest, Pre-Charge Lineup That Was Conducted in Violation of Appellant's State Constitutional Right to Counsel.

Shortly after defendant was arrested and booked into the county jail, the investigating officer informed her that a lineup would be conducted that evening. Defendant requested consultation with an attorney before the lineup occurred. The officer told defendant that she could not refuse to appear in the lineup and that she was not entitled to speak to a lawyer be-

cause no charges had been filed. The victim identified defendant during the lineup. A formal complaint was filed against her the next morning.

The post-arrest, pre-charge lineup violated defendant's right to counsel in violation of article I, section 6 of the Minnesota Constitution. The unconstitutional abridgement of the defendant's right to counsel requires reversal of her conviction.

Article I, section 6 of the Minnesota Constitution provides:

> In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the county or district wherein the crime shall have been committed, which county or district shall have been previously ascertained by law. In all prosecutions of crimes defined by law as felonies, the accused has the right to a jury of 12 members. In all other criminal prosecutions, the legislature may provide for the number of jurors, provided that a jury have at least six members. The accused shall enjoy the right to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor and *to have the assistance of counsel in his defense.*

Minn. Const. art. I, § 6 (emphasis added).

The right to counsel has particular significance in Minnesota. "Minnesota has a long tradition of assuring the right to counsel." *Friedman v. Comm'r of Pub. Safety*, 473 N.W.2d 828, 831 (Minn. 1991) (noting that, in addition to the constitutional provision, Minnesota has had a statute recognizing the "important right to counsel" since 1877). *See also* Minn. Stat. § 611.07 (1963) (repealed 1989); *State v. Borst*, 278 Minn. 388, 399, 154 N.W.2d 888, 895 (1967) (extending a right to counsel to indigents charged with misdemeanors where imprisonment could follow *before* the federal right to counsel for misdemeanants was incorporated into the Fourteenth Amendment in *Argersinger v. Hamlin*, 407 U.S. 25, 36-37 (1972)).

In support of this state's "long tradition" of guaranteeing counsel to those accused of crimes, the Minnesota Supreme Court recently held that an individual arrested for DWI has the right, upon request, to a reasonable opportunity to consult with an attorney before deciding whether to submit to chemical testing. *Friedman*, 473 N.W.2d at 835. The court adopted the United States Supreme Court's test for determining an individual's need for assistance of counsel: "whether the accused

require[s] aid in coping with legal problems or assistance in meeting his adversary." *Id.* at 833 (quoting *United States v. Ash*, 413 U.S. 300, 313 (1973)).

In interpreting the state constitutional right to counsel, the court agreed with the Supreme Court's determination that counsel is necessary when a defendant reaches a "critical stage" in adversary criminal proceedings. The court also adopted as analytically useful the Supreme Court's definition of what constitutes a "critical stage": a critical stage includes "those pretrial procedures that would impair defense on the merits if the accused is required to proceed without counsel." *Friedman*, 473 N.W.2d at 835 & n.4 (quoting *Gerstein v. Pugh*, 420 U.S. 103, 122 (1975)).

Under this definition, an individual who had been arrested for DWI and asked to submit to chemical testing is at a critical stage. *Friedman*, 473 N.W.2d at 833. In this situation, "[a]n attorney functions as an objective advisor who could explain the alternative choices. We think the Minnesota constitution protects the individual's right to consult counsel when confronted with this decision." *Id.*

The *Friedman* decision is crucial to the disposition of this case for several reasons. First, the court's holding vigorously reinforces Minnesota's independent commitment to provide counsel to individuals faced with criminal accusations. Second, the court's interpretation demonstrates that a critical stage in an adversary criminal proceeding can exist where none exists under federal law. Third, the decision establishes the criteria for determining what constitutes a critical stage under Minnesota law. Finally, *Friedman* demonstrates that the critical stage determination depends on balancing the state's interest in a given procedure with the accused's interest in the function of counsel at the proceeding.

Certainly, the post-arrest, pre-charge lineup conducted in this case did not violate the defendant's federal constitutional right to assistance of counsel. *See Kirby v. Illinois*, 406 U.S. 682, 690 (1972). The issue in this case is whether the lineup violated the defendant's rights under the Minnesota Constitution. The answer to this question depends on the authority of prior case law under article I, section 6 of the Minnesota Constitution, application of the *Friedman* criteria for determining when

a critical stage exists, and the persuasive analyses of other jurisdictions, including the United States Supreme Court.

The Minnesota Supreme Court has never explicitly held that article I, section 6 of the Minnesota Constitution does not require the presence of counsel at pre-charge police lineup procedures. Such a holding may be implicit in the court's reliance on federal doctrine: "This court in a number of cases has indicated that it intends to follow the United States Supreme Court's approach of granting a right to counsel at lineups only after the formal commencement of prosecution by complaint or indictment." *State v. Lee*, 266 N.W.2d 181, 182 (Minn. 1978) (citing *Kirby v. Illinois*, 406 U.S. 682, 690 (1972); *State v. Carey*, 296 Minn. 214, 219-20, 207 N.W.2d 529, 532 (1973)).

However, reported state court decisions have never actually mentioned the state constitutional provision for counsel. Because there is no binding precedent explicitly holding that post-arrest, pre-charge lineups are not a critical stage under the Minnesota Constitution, the *Friedman* decision provides the applicable criteria to determine whether counsel must be present under article I, section 6.

An individual's state constitutional right to receive assistance of counsel attaches when the individual faces a "critical stage" of an adversary criminal proceeding. Minnesota has broadly defined what constitutes a "critical stage." This definition includes "those pretrial procedures that would impair defense on the merits if the accused is required to proceed without counsel." *Friedman*, 473 N.W.2d at 833 (quoting *Gerstein v. Pugh*, 420 U.S. 103, 122 (1975)).

In a footnote immediately following the supreme court's citation to *Gerstein*, the court explained that it used the term "critical stage," even though the term arose from federal doctrine, because it embodied a concept which provided guidance in examining the state constitution. *Friedman*, 473 N.W.2d at 833 n.4. Since the court held that chemical testing prior to formal charging is a critical stage in Minnesota, although it is not under the Federal Constitution, obviously the court did not consider itself bound to follow federal court interpretation of what constitutes a critical stage.

Regardless of past adherence to federal doctrine in decisions not explicitly based on the state constitution, the determination of what constitutes a critical stage in Minnesota does not

depend on federal law. Nor does it depend on Minnesota decisions interpreting federal law. Rather, the court's determination must depend on the most persuasive analysis of the issue under the Minnesota Constitution. *See Friedman*, 473 N.W.2d at 832 (notwithstanding prior Minnesota Supreme Court decisions that, under the Federal Constitution, the decision whether to submit to chemical testing was not a critical stage, the federal analysis was not persuasive under the state constitution).

In light of the broad definition of what constitutes a critical stage under the Minnesota constitution and this state's powerful commitment to the right to counsel, federal precedent simply does not provide a persuasive basis for deciding that a lineup is not a critical stage. In *United States v. Wade*, 388 U.S. 218 (1967) and *Gilbert v. California*, 388 U.S. 263 (1967), the Supreme Court held "that a post-indictment pretrial lineup at which the accused is exhibited to identifying witnesses is a critical stage of the criminal prosecution; that police conduct of such a lineup without notice to and in the absence of his counsel denies the accused his Sixth [and Fourteenth] Amendment right to counsel . . . ." *Gilbert*, 388 U.S. at 272.

The *Wade* court specifically rejected the government's contention that a confrontation for identification was "a mere preparatory step in the gathering of the prosecution's evidence," much like the scientific examination of fingerprints and blood samples. *Wade*, 388 U.S. at 227. The Court concluded scientific tests were distinguishable because in such cases "the accused has the opportunity for a meaningful confrontation of the Government's case at trial through the ordinary processes of cross-examination of the Government's expert witnesses and the presentation of the evidence of his own experts." *Id.* at 227-28. Scientific tests were not critical stages because there was a "minimal risk that [a defendant's] counsel's absence at such stages might derogate from his right to a fair trial." *Id.* at 227-28.

In contrast, the Court observed, "the confrontation compelled by the State between the accused and the victim or witnesses to a crime to elicit identification evidence is peculiarly riddled with innumerable dangers and variable factors which might seriously, even crucially, derogate from a fair trial." *Id.* Significantly, "the accused's inability effectively to reconstruct at trial any unfairness that occurred at the lineup may deprive

him of his only opportunity meaningfully to attack the credibility of the witness' courtroom identification." *Id.* at 231-32.

A plurality of the Court subsequently limited the *Wade/Gilbert* right to counsel to only those identity confrontations which occurred after formal charging. *See Kirby v. Illinois*, 406 U.S. 682, 690 (1972). In a vigorous dissent, Justice Brennan criticized the plurality's opinion for making the right to counsel depend on the overly formalistic proposition that the initiation of adversary judicial criminal proceedings could not commence prior to charging:

> A post-arrest confrontation for identification is not "a mere preparatory step in the gathering of the prosecution's evidence." A primary, and frequently sole, purpose of the confrontation for identification at that stage is to accumulate proof to buttress the conclusion of the police that they have the offender in hand. The plurality offers no reason, and I can think of none, for concluding that a post-arrest confrontation for identification, unlike a post-charge confrontation, is not among those "critical confrontations of the accused by the prosecution at pretrial proceedings where the results might well settle the accused's fate and reduce the trial itself to a mere formality."

Id. at 699 (Brennan, J., dissenting) (citation omitted).

Prior to the *Kirby* decision, only five states had construed the *Wade/Gilbert* rule to be limited to post-indictment lineups. However, thirteen states had applied those cases to pre-indictment lineups, as had *every* United States Court of Appeals panel which had confronted the issue. *Kirby* at 704 n.14 (Brennan, J., dissenting).

The plurality reasoning in *Kirby* is not persuasive authority for deciding whether a post-arrest, pre-charge lineup is a critical stage under the Minnesota constitution for two reasons. First, as the dissent in *Kirby* observed, the plurality did not provide any justification for the highly formalistic conclusion that the state is not sufficiently adverse to an arrestee to require the *Wade/Gilbert* right to counsel at a pre-charge identification confrontation. Second, the Minnesota Supreme Court explicitly rejected this formalistic approach in *Friedman*, finding the following logic more persuasive:

> A person taken into formal custody by the police on a potentially criminal charge is confronted with the full legal power of the state, regardless of whether a formal charge

> has been filed. Where such custody is complete, neither the lack of a selected charge nor the possibility that the police will think better of the entire matter changes the fact that the arrested person is, at that moment, ensnared in a "criminal prosecution." The evanescent nature of the evidence the police seek to obtain may justify substantially limiting the time in which the person may exercise his or her [state constitutional] right, but it does not justify doing away with it.

Friedman, 473 N.W.2d at 834 (quoting *State v. Spencer*, 750 P.2d 147, 155-56 (Or. 1988)). *See also Nyflot v. Comm'r of Pub. Safety*, 369 N.W.2d 512, 521 (Minn. 1985) (Yetka, J., dissenting) (arguing that "[i]f forcing an individual to a police station alone is an intrusion on one's dignity, holding someone incommunicado on top of it makes the intrusion all the more severe."

Thus, the supreme court's rejection in *Friedman* of the United States Supreme Court's formalistic determination of when adversary criminal proceedings begin should provoke a similar, more specific rejection of the federal notion that pre-charge lineups do not constitute a critical stage in the criminal process.

Several states have done just that. For example, in *Blue v. State*, 558 P.2d 636 (Alaska 1977), the Alaska Supreme Court addressed the issue of whether its own constitution recognized a pre-indictment right to counsel at lineups. The court applied the analysis set forth in *Kirby v. Illinois* but held that the right to counsel found in the Alaska constitution required a different result:

> The determination whether counsel is required at a pre-indictment lineup involves a difficult balance. On the one hand, the state has a legitimate concern in the "prompt and purposeful investigation of an unsolved crime." Conducting an eyewitness identification procedure as soon as possible and while the memory of the eyewitness is fresh serves a valid purpose. Assuming the lineup complies with due process safeguards, the fresher the memory, the more accurate and trustworthy the identification may be.
>
> On the other hand, we must also view the suspect's legitimate right "to be protected from prejudicial procedures." The interests of a suspect in having counsel present involve the constitutional guarantee of right to counsel, the right to due process during the lineup procedures and the right to

> confront witnesses which insures effective cross-examination at trial. . . .
>
> In balancing the need for prompt investigation against a suspect's right to fair procedures, we hold that a suspect who is in custody is entitled to have counsel present at a pre-indictment lineup unless exigent circumstances exist so that providing counsel would unduly interfere with a prompt and purposeful investigation.

Blue, 558 P.2d at 641-42 (quoting *Kirby*, 406 U.S. at 691) (footnotes omitted)).

The Pennsylvania Supreme Court reached a similar result under the Pennsylvania Constitution, applying the same type of balancing process:

> The decision in *Kirby* does not suggest that the rationale which spawned *Wade* is inapplicable to such [pre-indictment] lineups. Rather, *Kirby* was concerned with striking "the appropriate constitutional balance between the right of a suspect to be protected from prejudicial procedures and the interest of society in the prompt and purposeful investigation of an unsolved crime."
>
> . . . .
>
> *Kirby* does not establish an all inclusive rule; rather, the line to be drawn depends upon the procedure employed by each state. . . .
>
> [T]he policy behind the *Wade* rule applies with equal force to all confrontations conducted after arrest. *Kirby* only instructs us to limit that rule where the limitation would benefit the interest of society in the prompt and purposeful investigation of an unsolved crime. In light of Pennsylvania's procedure, we find no countervailing benefit where the lineup occurs after arrest.

Commonwealth v. Richman, 320 A.2d 351, 352-53 (1974) (quoting *Kirby*, 406 U.S. at 691). *See also People v. Bustamante*, 634 P.2d 927, 930, 935 (Cal. 1981) (holding that the California Constitution provides a defendant with the right to assistance of counsel at a pre-indictment lineup: "[T]o limit the right to counsel at a lineup to postindictment lineups would as a practical matter nullify that right."); *People v. Jackson*, 217 N.W.2d 22, 27 (Mich. 1974). In *People v. Jackson*, the Michigan Supreme Court, under its supervisory power, held that "independent of any federal constitutional mandate, that, both before and after commencement of the judicial phase of a prosecution, a suspect is entitled to be represented by counsel at a corporeal

identification . . . unless the circumstances justify the conduct of an identification procedure before the suspect [has] an opportunity to request and obtain counsel."

These decisions, coupled with *Friedman*'s broad definition of "critical stage," provide a compelling basis for determining that an accused has a state constitutional right to the presence and assistance of counsel at a post-arrest, pre-charge lineup. Any other finding would subvert the holding and rationale announced in *Friedman*.

A person taken into custody by the police based on probable cause that the person has committed a crime is no less confronted with the "legal power of the state" simply because a formal complaint has not been filed. Likewise, the accused's defense will be just as impaired by a pre-charge lineup as by a post-charge lineup. Finally, the state's interest in obtaining pre-charge lineup identifications cannot be any greater than its interest in obtaining post-charge lineup identifications.

Given Minnesota's strong commitment to protect the right to counsel, entitlement to that right cannot turn on the "formalistic distinction" between pre-charge, in-custody identity confrontations and post-charge confrontations. Thus, this court must "repeat the age-old rule of law that was embodied in our state constitution: The defendant shall have the right to counsel." *Friedman*, 473 N.W.2d at 835.

II. Application of Harmless Error Analysis: A Hypothetical Argument Under the Minnesota Constitution

Argument

The Trial Court Deprived Defendant of His State Constitutional Right to be Free From Compelled Self-Incrimination by Refusing to Suppress Evidence of His Coerced Confession.

The trial court's erroneous refusal to suppress defendant's coerced confession, obtained in violation of article I, section 7 of the Minnesota Constitution, requires that his conviction be reversed. Article I, section 7 provides, in relevant part, "No person shall be . . . compelled in any criminal case to be a witness against himself . . . ." Minn. Const. art. I, § 7. Under the federal counterpart to article I, section 7,[176] the United States

176. U.S. Const. amend. V.

Supreme Court recently held that harmless error analysis applies to coerced confessions introduced at trial. *Arizona v. Fulminante*, 111 S.Ct. 1246 (1991).

While Minnesota courts would be required to apply *Fulminante* to any challenges brought under the federal constitution,[177] the use at trial of defendant's confession was independently a violation of his rights under the Minnesota Constitution and requires that defendant's conviction be reversed without resort to a harmless error analysis.

Because the language of the state and federal constitutional provisions prohibiting the use of coerced confessions is the same, this court conceivably could look to the United States Supreme Court's decision in *Arizona v. Fulminante* for guidance in interpreting the state provision. *State v. Murphy*, 380 N.W.2d 766, 771 (Minn. 1986)(citing *State v. Fuller*, 374 N.W.2d 722, 727 (Minn. 1985)). However, because *Fulminante* disregards a long line of precedent, rests on flawed reasoning, ignores the inherent dangers of upholding a conviction based at least in part on a coerced confession, and conflicts with Minnesota's tradition of jealously guarding the right to be free from compelled self-incrimination, this court cannot adopt the holding of *Fulminante* as a proper construction of article I, section 7 of the Minnesota Constitution.

State courts have a duty to independently interpret their state constitutions and may find them to provide broader individual rights than does the United States Constitution. *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 81 (1980); *see also O'Connor v. Johnson*, 287 N.W.2d 400, 405 (Minn. 1979) (acknowledging this power). Although the language of the state and federal constitutional provisions in question is identical, this court clearly has the authority to interpret article I, section 7 independently of the United States Supreme Court's interpretations of the Fifth Amendment.[178]

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177. State courts are required to follow United States Supreme Court interpretations of federal constitutional provisions. *See Oregon v. Hass*, 420 U.S. 714, 719 (1975) (citations omitted).

178. *State v. Murphy*, 380 N.W.2d 766, 771 (Minn. 1986). Quoting the California Supreme Court, Justice Wahl pointed out that

> [i]t is a fiction too long accepted that provisions in state constitutions textually identical to the Bill of Rights were intended to mirror their federal counterpart. The lesson of history is otherwise: the Bill of Rights was based upon the corresponding provisions of the first state constitutions, rather than the reverse.

In fact, Minnesota courts have found article I, section 7 to provide broader protections against compelled self-incrimination than does the Fifth Amendment. *See State v. Rixon*, 180 Minn. 573, 575-766, 231 N.W. 217, 218 (1930) (stating courts should zealously guard the guaranty against convictions obtained through use of compelled self-incrimination); *see also Murphy*, 380 N.W.2d at 774 (Wahl, J., dissenting) (arguing that "[a]rticle I, section 7 of the Minnesota Constitution, embod[ies] our abiding belief as a people that the state cannot be permitted to obtain a criminal conviction by words compelled from the mouth of the accused.").

For example, the state constitution prohibits state grand juries from compelling testimony from the subject of a grand jury investigation. *See State v. Froiseth*, 16 Minn. 260 (1870-71) (setting aside, as the product of compelled self-incrimination, an indictment against defendant where defendant was subpoenaed by grand jury and examined as witness as to criminal charge against him); *State v. Rixon*, 180 Minn. 573, 231 N.W. 217 (1930) (quashing indictment against an accused where grand jury investigating the crime subpoenaed accused to attend and testify concerning his connection with the crime under investigation).

Similarly, the law with respect to the use at trial of coerced confessions traditionally has been more demanding under the Minnesota Constitution than under the Fifth Amendment. Under the federal constitution, courts presume a lack of compulsion so that, if the defendant does not raise his rights under the Fifth Amendment, he waives those rights, absent rebuttal by the accused. *See Murphy*, 380 N.W.2d at 775 (Wahl, J., dissenting). In contrast, under Minnesota law, the state must affirmatively show a lack of compulsion: the right is presumed to apply and must be knowingly waived. *Id.*

Both state and federal courts historically have rejected the notion that the erroneous admission of a coerced confession was subject to the harmless error rule established in *Chapman v. California*, 386 U.S. 18, *reh'g denied*, 386 U.S. 987 (1967). Under the *Chapman* harmless error rule, constitutional errors do not automatically require reversal of a conviction. *Id.* at 22. However, to avoid reversal, the state must show the error to be

Id. at 773-74 (Wahl, J., dissenting) (quoting *People v. Brisendine*, 531 P.2d 1099, 1113 (Cal. 1975)).

harmless beyond a reasonable doubt. *Id.* at 24-26. In establishing this rule, the *Chapman* Court explicitly exempted coerced confessions from harmless-error analysis. *Id.* at 23 n.8. The Minnesota Supreme Court has read *Chapman* to "establish that the erroneous admission of a coerced confession is not subject to the harmless error rule." *State v. Garner*, 294 N.W.2d 725, 727 (Minn. 1980).

The rule exempting erroneous admission of coerced confessions from harmless error analysis was based on three serious problems inherent in the use of coerced confessions at trial: sanctioning the methods by which they are acquired, their inherent unreliability, and their irreversible psychological impact on the trier of fact. First, the use of coerced confessions offends the most basic notions of justice due to the ways by which they are acquired. The Court has, over the years, established a tradition and history of condemning the tactics used by the police in securing coerced confessions. *See, e.g., Watts v. Indiana*, 338 U.S. 49 (1949); *Malinski v. New York*, 324 U.S. 401 (1945); *Lyons v. Oklahoma*, 322 U.S. 596 (1944). Coercive official conduct violated constitutional notions of justice and fundamental fairness and could "never be treated as harmless error."[179] Condoning the use of coerced confessions implicitly sanctions the methods used to extract them and thus sullies the civilized character of the American criminal justice system. *Watts v. Indiana*, 338 U.S. 49 (1949).

Second, some coerced confessions are inherently unreliable. *Jackson v. Denno*, 378 U.S. 368, 385-86 (1964); *Spano v. New York*, 360 U.S. 315, 320 (1959); *Brown v. Mississippi*, 297 U.S. 278, 280 (1936); *Garner*, 294 N.W.2d at 727.

Third, improperly admitted confessions, whether coerced or not, have a profound psychological impact on the trier of fact, no matter how emphatically the court has admonished the jury to ignore the confession. Confessions are often the most probative and damaging type of evidence and can have the effect of relegating all other evidence to a secondary position in the jury's deliberations. *See Fulminante*, 111 S. Ct. at 1255 (White, J., dissenting) (citations omitted). Therefore, when a coerced confession is improperly admitted, regardless of the amount of other evidence at trial, "no one can say what credit and weight

179. *Chapman*, 386 U.S. at 23 (citing Payne v. Arkansas, 356 U.S. 560 (1958) for the proposition that admission of coerced confessions is never harmless error).

the jury gave to the confession." *Payne v. Arkansas*, 356 U.S. 560, 568 (1958).

Prior to 1991, the United States Supreme Court had consistently held that coerced confessions could not be admitted at trial and were not subject to harmless error analysis. Thus, the Court's decision in *Arizona v. Fulminante* was a radical departure from precedent. Ignoring that precedent, the Court characterized the admission at trial of an involuntary confession as a simple "trial error." *Fulminante*, 111 S. Ct. at 1264-66. The majority held that the trial error—in this case, the erroneous admission of a coerced confession—was capable of "quantitative assessment." *Id.* at 1264. The court ruled that this trial error could be separated from the other evidence that led to the defendant's conviction and thereby subject the violation to harmless error analysis. *Id.* at 1265.

The decision that the erroneous admission of a coerced confession could be a harmless trial error is both unprincipled and analytically unsound. First, the opinion violated the doctrine of stare decisis by refusing to recognize the binding force of a long line of plainly applicable precedent. Second, the opinion failed to offer any reasoned analysis concerning the most crucial issue in the case: why coerced confessions, which precedent held could not be subject to harmless error analysis, were suddenly subject to the harmless error rule. In sum, the *Fulminante* Court's reasoning should be rejected by this court as being incompatible with a criminal defendant's state constitutional right to be free from compelled self-incrimination.

In holding that the harmless error rule applies to coerced confessions obtained in violation of the United States Constitution, the *Fulminante* Court rejected a ninety-four year history of case law. *See, e.g., Brown v. Mississippi*, 297 U.S. 278 (1936). Refusing to acknowledge the existence of binding precedent, the *Fulminante* Court distinguished *Payne v. Arkansas* in which the Court had said:

> Respondent suggests that, apart from the confession, there was adequate evidence before the jury to sustain the verdict. But where, as here, a coerced confession constitutes a part of the evidence before the jury and a general verdict is returned, no one can say what credit and weight the jury gave to the confession. And in these circumstances this Court has uniformly held that even though there may

> have been sufficient evidence, apart from the coerced confession, to support a judgment of conviction, the admission in evidence, over objection, of the coerced confession vitiates the judgment because it violates the Due Process Clause of the Fourteenth Amendment.

Payne, 356 U.S. at 567-68 (footnote omitted). Chief Justice Rehnquist and the majority read this language so as to conclude that the *Payne* Court did not intend to reject the harmless error rule later formulated in *Chapman*.[180] *Fulminante*, 111 S. Ct. at 1264. Rather, according to Chief Justice Rehnquist, the *Payne* Court rejected a rule that would have allowed the conviction to stand if the other evidence admitted at trial, apart from the confession, had been merely *sufficient* to support the judgment. *Id.* at 1264.[181] This implausible interpretation permitted the court to avoid admitting its naked violation of stare decisis.

Worse than the *Fulminante* majority's refusal to acknowledge precedent was its failure to candidly address the reasoning underlying the Court's tradition of rejecting harmless error analysis in the area of coerced confessions. The majority completely ignored the precise portion of *Payne* which it overruled: the view that "no one can say what credit and weight the jury gave to [a coerced] confession." *Payne*, 356 U.S. at 568. *Payne* specifically indicated that the impact of an improperly admitted coerced confession could not be quantitatively assessed. The impossibility of quantitative assessment is precisely what caused the *Chapman* Court to list coerced confession as one of only three constitutional errors that could not be categorized as harmless error. *Fulminante*, 111 S. Ct. at 1254 (White, J., dissenting).

The *Fulminante* majority failed to present any reasoned analysis in support of its holding that the improper admission of a coerced confession was subject to quantitative assessment. Instead, the majority indulged in a tour de force of bad reasoning that permitted it to deduce the possibility of quantitative

180. The majority opinion also stated that, because *Chapman* relegated *Payne* to a footnote, *Payne* did not create such a rule. *Chapman* simply made "historical reference" to the holding in *Payne*. *Fulminante*, 111 S. Ct. at 1264.

181. In effect, Chief Justice Rehnquist argued that *Payne* did not reject harmless-error analysis, which focused on the effect of the *inadmissible* evidence, but rather, the *Payne* Court rejected a rule which focused on the strength of the *admissible* evidence. *Fulminante*, 111 S. Ct. at 1264.

assessment without explaining this possibility. The centerpiece of the court's "analysis" was the postulation of a dichotomy between "trial errors" and "structural defects." *Id.* at 1264-65. Since creation of the *Chapman* harmless error rule, the majority said, the Court has applied harmless error analysis to a broad range of cases:

> The common thread connecting these cases is that each involved 'trial error'—error which occurred during the presentation of the case to the jury, and which may therefore be quantitatively assessed in the context of other evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt.

Id. at 1264.[182]

In contrast, the *Fulminante* majority found that the Court has refused to apply harmless error analysis to certain other errors. When *Chapman* was decided, these errors (again ignoring *Payne*) included only denial of trial counsel and the presence of a biased judge. *Id.* at 1265. Others have since been added. These errors could be categorized as "structural defects." The common feature of structural defects is that they undermine the constitution of the trial mechanism. *Id.* Structural defects therefore "defy analysis by 'harmless-error' standards." *Id.*

Having postulated this dichotomy, the majority reasoned as follows:

> It is evident from a comparison of the constitutional violations which we have held subject to harmless error, and those which we have held not, that involuntary statements or confessions belong in the former category. The admission of an involuntary confession is a "trial error," similar in both degree and kind to the erroneous admission of other types of evidence. . . . When reviewing the erroneous admission of an involuntary confession, the appellate court, as it does with the admission of other forms of improperly admitted evidence, simply reviews the remainder of the evidence against the defendant to determine whether the admission of the confession was harmless beyond a reasonable doubt.

Fulminante, 111 S. Ct. at 1265. This reasoning is invalid.

When deciding whether to apply harmless error analysis to a

182. The desire to protect this "common thread" explains why neither *Payne* nor *Chapman* could be read to hold that presentation to the jury of a coerced confession could never be harmless error.

particular type of error in the past, the Court has *started* with the question: "Can the effect of the error be quantified?" As the dissent observes in the context of discussing jury instructions, this decision can be made "only by considering the nature of the right at issue and the effect of an error upon the trial." *Fulminante*, 111 S. Ct. at 1255 (White, J., dissenting in part). If quantitative assessment is possible, harmless error analysis may be applied; if it is not possible, harmless error analysis may not be applied.[183] The *Chapman* exemptions from harmless error analysis therefore reflected three independent judgments that quantitative assessment was not possible.

The *Fulminante* majority stands this process of reasoning on its head. By artificially categorizing[184] former decisions as concerning either "trial errors" subject to harmless error or "structural defects" not subject to harmless error, the court permitted itself to deduce from mere class membership what was formerly the principal focus of analysis: whether quantitative assessment was possible. Instead of carefully examining whether the improper admission of a coerced confession is susceptible to quantitative assessment, the Court focused on which of its categories subsumed this error.

Deciding that the erroneous admission of a coerced confession is a "trial error," the court simply deduced its desired conclusion: because other trial errors were subject to harmless error and because harmless error analysis applied only when quantitative assessment was possible, this error too must be susceptible to quantitative assessment. Where former Courts had deduced that harmless error analysis was applicable because quantitative assessment was possible, the *Fulminante* majority deduced that quantitative assessment was possible because harmless error analysis was applicable.

This inverted reasoning should be rejected. *Payne* and *Chap-*

183. The majority and dissent appear to agree that susceptibility to quantitative assessment is a condition precedent to the application of harmless error. *Compare* Fulminante, 111 S. Ct. at 1264-65 *with id.* at 1255 (White, J., dissenting).

184. As Justice White observed in his dissent:

> The majority also attempts to distinguish "trial errors" which occur "during the presentation of the case to the jury," and which it deems susceptible to harmless error analysis, from "structural defects in the constitution of the trial mechanism," which the majority concedes cannot be so analyzed. This effort fails, for our jurisprudence on harmless error has not classified so neatly the errors at issue.

Fulminante, 111 S. Ct. at 1254-55 (White, J., dissenting) (citations omitted).

man clearly indicate that some trial errors are not subject to quantitative assessment and are therefore not subject to harmless error analysis. In addition, as Justice White observed in his dissent, the Court also found that failure to instruct the jury on the reasonable doubt standard—a clear trial error—is not subject to harmless error analysis. *Fulminante*, 111 S. Ct. at 1255 (White, J., dissenting in part) (citing *Jackson v. Virginia*, 443 U.S. 307, 320 n.14 (1979)). In its effort to fashion categories that could be used to excuse the Court from conducting proper analysis, the majority ignored applicable case precedent.[185]

By falsely deducing its desired holding, the majority excused itself from addressing the unique characteristics of coerced confessions that make them unsusceptible to harmless error analysis. First, the Court failed to address the issue of the effect that confessions have on juries. Justice White's dissent emphasized this fact:

> A confession is like no other evidence. Indeed, "the defendant's own confession is probably the most probative and damaging evidence that can be admitted against him . . . . Certainly, confessions have profound impact on the jury, so much so that we may justifiably doubt its ability to put them out of mind even if told to do so."

Fulminante, 111 S. Ct. at 1257 (White, J., dissenting in part) (citing *Bruton v. United States*, 391 U.S. 123, 139-40 (1968)).[186]

Nor did the Court adequately address the issue of the inherent unreliability of coerced confessions. *But see Fulminante*, 111 S. Ct. at 1266 (concluding that, in instances where coerced confession may have had a dramatic effect on the trial, reviewing court would simply conclude that the error was harmful). At one point, the majority commented that "[t]he evidentiary impact of an involuntary confession, and its effect upon the composition of the record, is indistinguishable from that of a confession obtained in violation of the Sixth Amendment . . . ." *Id.* at 1265. This may be so; the evidentiary impact may be the same. However, coerced confessions are notoriously unrelia-

185. The majority's rough treatment of *Payne* is noted above. Nowhere in the majority opinion is *Jackson* even mentioned.

186. One commentator has noted that "[a] confession, more than any other type of evidence, has the potential to completely undermine the defense." Jennifer L. Renfro, *Arizona v. Fulminante: Extending Harmless-Error Analysis to The Erroneous Admission of Coerced Confessions*, 66 Tul. L. Rev. 581, 590 (1991).

ble. *Jackson v. Denno*, 378 U.S. 368, 385-86 (1964); *Spano v. New York*, 360 U.S. 315, 320 (1959). Therefore, the majority analysis would permit unreliable and improperly admitted evidence to have the same evidentiary impact as reliable and properly admitted evidence. Given the majority's purported concern with the truth-seeking function of criminal trials, this is a peculiar holding. *See Fulminante*, 111 S. Ct. at 1254-57 (White, J., dissenting).

Third, the Court completely ignored its prior history of condemning the tactics employed by the police in compelling a person to confess, tactics which are incompatible with our system of justice. Justice White argued: "[C]ertain constitutional rights are not, and should not be, subject to harmless-error analysis because those rights protect important values that are unrelated to the truth-seeking function of the trial." *Id.* at 1257 (White, J., dissenting) (quoting *Rose v. Clark*, 478 U.S. 570, 587 (1986) (Stevens, J., concurring)).

Applying harmless error analysis to coerced confessions admitted at a criminal trial in violation of article I, § 7 of the Minnesota Constitution would require this court to ignore its own recognition of the damage done by such evidence. The Minnesota courts have adopted a number of prospective procedural devices that embody a belief about the inescapable effect of exposing a trier of fact to an ultimately inadmissible confession: exposure will taint judgment on the merits.

As a means of avoiding the danger of exposing juries to an inadmissible confession, the Minnesota Supreme Court has prohibited the admission of arguably tainted confessions to the jury for a determination of whether the confession was voluntary. *State v. Hanson*, 286 Minn. 317, 330-31, 176 N.W.2d 607, 616-17 (1970). This prohibition arose from a recognition of the inherent risk created by allowing juries to determine whether a confession was voluntary. Even if the jury determined that the confession was involuntary, no safeguard existed to prevent the jury from considering the confession, either deliberately or subconsciously, in deciding the defendant's guilt or innocence. *See generally Jackson v. Denno*, 378 U.S. 368, 377-91 (1964).

Similarly, in the context of juvenile court proceedings, the Minnesota Court of Appeals has also recognized the danger of exposing fact-finders to inadmissible confessions. In *In re*

J.P.L., 359 N.W.2d 622 (Minn. Ct. App. 1984), the court stated in dicta that, where a juvenile challenged the admissibility of a coerced confession, the better procedure[187] would be to prohibit a judge who ultimately excluded the confession from hearing the case on the merits. *Id.* at 625. Disposition by a judge who had not been exposed to the inadmissible confession insured that the confession would have absolutely no impact on the final outcome of the proceeding. *Id.* ("Expecting a judge who is entitled to see and examine a confession before suppressing it on constitutional grounds to go on to decide the guilt or innocence of a defendant based solely on the state's other evidence without using that confession, subconsciously or consciously, to corroborate the state's other evidence, is unrealistic. Such an expectation asks for objectivity that logically cannot be delivered.")

Likewise, in *In re A.B.L*, 358 N.W.2d 417 (Minn. Ct. App. 1984), the court strongly suggested that the failure to bifurcate the suppression hearing from trial on the merits undermined the integrity of the trial process. *Id.* at 422 ("[L]eaving both the trial court and the reviewing court to read suppressed evidence and attempt to divine the precise parameters of the suppression ruling, vastly increases the difficulty of maintaining fairness in the decision-making process.").

These prospective procedural safeguards recognize the inescapable taint produced by exposing the trier of fact to an ultimately inadmissible confession. These are *per se* rules and do not permit a trier of fact exposed to an inadmissible confession to decide the merits in cases where evidence other than the confession is strong. These procedural rules focus on qualitative taint, not quantitative impact: confessions are unique in their ability to taint. Moreover, these rules demonstrate a judicial acknowledgement that even judges, who are generally assumed to be capable of separating legal and factual issues, cannot be expected to make an untainted decision on the merits at a bench trial after hearing an inadmissible confession.

Appellate review is a retrospective procedural safeguard. There is absolutely no reason to believe that the tainting effect

187. In juvenile cases, prior to *In re J.P.L.*, the judge would rule on any suppression motions and then, regardless of the decision as to the admissibility of evidence, would hear the matter on the merits. *In re J.P.L.*, 359 N.W.2d 622, 625 (Minn. Ct. App. 1984).

so candidly recognized by prospective safeguards has not operated when reviewing judgment on the merits in retrospect. The unique capacity of confessions to taint any quantity of other evidence makes quantitative assessment impossible. Therefore, harmless error analysis should not be applied when a coerced confession has been improperly admitted. This is particularly true when the trier of fact has been a jury. The prospective rules recognize that even judges cannot be expected to ignore a confession. It is therefore unrealistic to contend that a reviewing court can somehow validly conclude that a particular jury has found the mental discipline to decide the merits completely without reference to an improperly admitted confession.

Once exposed to a confession, a finder of fact simply cannot be expected to exercise the mental discipline necessary to disregard the confession when required to do so. Thus, where a confession has been improperly admitted, it can never be supposed that the factfinder actually determined the outcome of the case solely on the basis of other evidence presented at trial. The conventional rule that harmless error analysis cannot be applied to the erroneous admission of coerced confessions is both justifiable and logical: it is unrealistic to imagine that the jury would have come to the same conclusion had it not been exposed to the coerced confession.

Minnesota courts have consistently exercised their independent authority to interpret the Minnesota Constitution to provide appropriate protections for its citizens accused of crimes. Minnesota courts also have a history, based on analytically persuasive federal case law, of refusing to apply harmless error analysis to coerced confessions. Taken together, and, in light of the analytical deficiencies in the United States Supreme Court's decision in *Arizona v. Fulminante*, this court must continue to reject harmless error analysis when a coerced confession has been admitted at a criminal trial in violation of article 1, § 7 of the Minnesota Constitution.

In this case, the trial court erred by refusing to suppress evidence of a confession obtained from defendant in violation of his state constitutional right to be free from compelled self-incrimination. This critical error requires reversal of the defendant's conviction.