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BOOK REVIEW

STATE CONSTITUTIONS AND CRIMINAL JUSTICE

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STATE CONSTITUTIONS AND CRIMINAL JUSTICE. By *Barry Latzer*.
Greenwood Press 1991. Pp. 218.

A welcome contribution to the literature of state constitutional law, this rather slender volume explores what the author describes as the "New Federalism," a concerted effort by state appellate courts to modify the alleged growing conservatism of the Supreme Court in criminal case review.¹ Much of the text compares the Warren Court liberalism with the Burger-Rehnquist Court tilt toward conservatism. By liberalism, the author means a distinct emphasis on defendant rights, using every conceivable constitutional means; by conservatism, he refers to a reverse judicial penchant apparently favoring the police and prosecution.

Latzer correctly points out that the Warren Court (1953-1969) interpreted the "four key criminal justice Bill of Rights provisions . . . more favorably to the accused,"² and also subsumed them more quickly into the Due Process Clause of the Fourteenth Amendment than previous high courts.³ Conversely, he claims that the Burger-Rehnquist Court (1970-present) began to narrowly interpret de-

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¹ BARRY LATZER, *STATE CONSTITUTIONS AND CRIMINAL JUSTICE* (1991). "This state constitutional law renaissance is known variously as the new (judicial) federalism, the state law movement or, more extravagantly, the state constitutional revolution." *Id.* at 1. Justice William Brennan also described this concept as "[r]ediscovery by state supreme courts of the broader protections afforded their own citizens by their state constitutions . . . is probably the most important development in constitutional jurisprudence of our times." The Fourteenth Amendment, Address to the Section on Individual Rights and Responsibilities of the American Bar Association (Aug. 8, 1986), in *NAT'L L.J.*, Sept. 29, 1986, (Special Supplement) at S-1.

² LATZER, *supra* note 1, at 3. Specifically, the Fourth, Fifth, Sixth, and Eighth Amendments all deal with a defendant's rights under the criminal justice system.

³ *Id.*

fendants' rights in criminal cases, precipitating state court reactions. The states realized at this time that "although they could not *reduce* the rights mandated by due process, the state courts were free to *expand* as a matter of state law."⁴ This, then, is the essence of the "New Federalism" expounded by Latzer: while the Supreme Court has unquestioned jurisdiction over federal constitutional interpretations, it does not have jurisdiction over the interpretations of state constitutions.⁵

Former Justice Brennan is cited as the champion of criminal defendants' rights, as well as a progenitor and early defender of the "New Federalism." This poses some interesting comparisons in legal and constitutional syntax. Traditionally, scholars view federalism as the balance between state and federal authority as originally envisaged in Articles I and III of the Constitution,⁶ certainly within the Tenth Amendment⁷ and also within the Supremacy Clause, which mandates state court acceptance of federal constitutional issues.⁸ But the interesting double helix is that this "New Federalism," rather than manifesting the old states' rights opposition to centralized judicial authority, actually surpasses Justices Brennan, Marshall, and Stevens, and their Fourteenth Amendment crusade to grant more latitude to defendants in criminal trials.

Latzer uses two measuring stratagems to test his thesis that in order to protect criminal defendants, state constitutional amendments expand Fourteenth Amendment interpretations more than the federal judicial system. The initial strategy uses a case-by-case comparison of legal issues, such as search and seizure, *Miranda* rights and self-incrimination, right to counsel, adverse witness confrontation, cruel and unusual punishment, and double jeopardy.

⁴ *Id.* This, however, can be considered moot. If the states are bound to heed the Supreme Court decisions only on federal law, the U.S. Constitution and treaties, but not when interpreting their own state law, what prevents the Court from *interpreting* state statutes as violations of federal law? Judicial decisions follow application and interpretation, as well as fact. Supreme Court negative review can include state statutes.

⁵ *Id.* at 5. The Supreme Court would have jurisdiction over state constitutions only if they were to *interpret* them in violation of the federal constitution.

⁶ Article I grants Congress the "necessary and proper" authority for exercising enumerated powers, but it was the Supreme Court that spelled this out in the implied powers doctrine in *Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819); *McCullough v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819) *et al.* Article III did not expressly endow the Supreme Court with judicial review powers, but it was so interpreted by Chief Justice John Marshall in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

⁷ "The 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.

⁸ ". . . Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. CONST. art. VI, § 2.

The second strategy utilizes a quantitative comparison of all fifty state supreme courts with the Supreme Court in criminal case jurisprudence.⁹

Looking initially at case law comparisons, the author has compiled post-briefs on a large number of cases reflecting these federal constitutional issues. Starting with the now venerable *Mapp v. Ohio*,¹⁰ in which the Warren Court imposed the exclusionary rule regarding illegally obtained evidence on state criminal cases, Latzer demonstrates how the Burger-Rehnquist Court has consistently narrowed the *Mapp* protection, through such cases as *United States v. Calandra*.¹¹ In this case, the Supreme Court held the *Mapp* protection inapplicable to proceedings other than the trial and restricted Fourth Amendment habeas corpus review. In other words, the Court downgraded the philosophical intent of the exclusionary rule to a mere "judicially created remedy."¹² But if the United States Supreme Court was attempting to assist police and prosecutors by gradually desiccating the exclusionary rule without actually overturning it, Latzer cites ample evidence that many state supreme courts simply were not buying it. Hence, the states created a "New Federalism" in criminal law, which was also championed consistently by United States Supreme Court Justices Brennan and Marshall.

The Oklahoma Supreme Court, for example, in *Turner v. City of Lawton*,¹³ ruled against the Burger Court's reasoning in *United States v. Janis*¹⁴ that under the exclusionary rule, drugs found in an unlawful search were inadmissible for use in a disciplinary administrative personnel hearing. The Oklahoma court ruled that exclusion is a fundamental right under the Oklahoma Constitution, and not just a rule of judicial procedure. In doing so, the court followed the lead

⁹ LATZER, *supra* note 1, at ch. 8.

¹⁰ *Id.* at 3, 33. See also 367 U.S. 643 (1961). An excellent brief discussion of the gradual application of the exclusionary rule to the states is found in MARTIN SHAPIRO & ROCCO J. TRESOLINI, *AMERICAN CONSTITUTIONAL LAW* 631-33 (6th ed. 1983).

¹¹ 414 U.S. 338 (1974). LATZER, *supra* note 1, at 33-34.

¹² LATZER, *supra* note 1, at 34. The exclusionary rule derives from the Fourth Amendment prohibition against "unreasonable searches and seizures," which the Warren Court expanded in such cases as *Chimel v. California*, 395 U.S. 752 (1969) (ruling against warrantless searches of a home), and *Trupiano v. United States*, 334 U.S. 699 (1948) (ruling against warrantless searches of other property, in this case, an alcohol still). Eloquent dissenting in the Court's limiting of the exclusionary rule in *United States v. Rabinowitz*, 339 U.S. 56 (1950), Justice Frankfurter said, "the test of reason which makes searches reasonable . . . [is] underlying and expressed by the Fourth Amendment." *Id.* at 83.

¹³ 733 P.2d 375 (Okla. 1987). LATZER, *supra* note 1, at 46 n.19.

¹⁴ 428 U.S. 433 (1976). LATZER, *supra* note 1, at 35.

of the Oregon Supreme Court which strongly asserted the right of the defendant to invoke the exclusionary rule from the Fourth Amendment.¹⁵ Latzer correctly points out that Oregon followed *Weeks v. United States*,¹⁶ which was the first case to mandate that evidence illegally obtained in a criminal case may not be used against the defendant by virtue of the Fourth Amendment exclusionary rule.¹⁷ But the dictum in that case pertained only to the person, not to a warrantless search of property.¹⁸

Other states, including Massachusetts and Connecticut, have joined this "New Federalism" extension of the exclusionary rule to prevent *Mapp* rights from being reduced. The Connecticut Supreme Court even invoked the increasingly rare legal concept of *desuetude* (loss of precedent through disuse) to support exclusionary protection.¹⁹

Other states are more conservative, however, preferring the so-called *inclusionary* rule, which allows state judges to admit certain kinds of illegally obtained evidence. California and Florida use inclusionary rules, and Michigan goes so far as to refuse to exclude *any* evidence in criminal cases involving bombs, drugs, or weapons, no matter how obtained.²⁰

Apart from the multitudinous *Mapp* spin-offs, especially the poetic legalism known as "the fruit of the poisoned tree,"²¹ as extensions of the exclusionary rule, this small but heavily compact volume is well-researched in other areas of state constitutionalism and criminal justice. These include private searches (normally not subject to warrants nor *Miranda*), and the concept of "automatic standing" for

¹⁵ LATZER, *supra* note 1, at 35.

¹⁶ 232 U.S. 383 (1914).

¹⁷ LATZER, *supra* note 1, at 33, 46 n.16, 17.

¹⁸ See *Chimel v. California*, 395 U.S. 752, 755 (1969) (quoting *Weeks*, 232 U.S. at 392).

¹⁹ LATZER, *supra* note 1, at 37. See also *State v. Dukes*, 547 A.2d 10 (Conn. 1988), and ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 148-56 (2d ed. 1986), for an excellent historical analysis of *desuetude* in British and American law.

²⁰ "California's Proposition 8, adopted June 8, 1982, placed in that state's constitution an inclusionary rule broader than Michigan's . . . prohibiting exclusion of any 'relevant evidence,' even if seized in violation of the state charter." LATZER, *supra* note 1, at 37. See also *People v. Moore*, 216 N.W.2d 770 (Mich. 1974).

²¹ The "poison tree" doctrine dates back to 1920, but with such exceptions as information from sources independent of the illegal search. The Burger-Rehnquist Court expanded the exceptions. LATZER, *supra* note 1, at 38-39. "The colorfully named fruit of the poisonous tree doctrine is an extension of the exclusionary rule to evidence derived from other, illegally obtained evidence." *Id.*

evidence suppression.²² Search and seizure problems are further illuminated in such diverse examples as electronic surveillance, bank and phone records, overflights, bodily intrusions, automobile searches, and various specialized warrant problems.²³

Latzer criticized the Burger-Rehnquist Court's *New York v. Belton*²⁴ decision as another conservative trend, and "hardly a ringing endorsement of the Burger Court's efforts,"²⁵ since no less than eleven states reject the idea.²⁶ He states further that the *Belton* case has caused the most significant rift among state courts.²⁷

Continuing what he observes as an exacerbating gap between the state and federal courts over exclusionary rule interpretations, Latzer also makes heavy use of *Miranda* as a landmark in defendant rights, which the current Supreme Court has weakened.²⁸ Three select cases illustrate his claim: *Harris v. New York*,²⁹ in which *Miranda* rights were ignored to admit impeachment of a defendant;³⁰ *New York v. Quarles*,³¹ in which the Court placed public safety over the Fifth Amendment self-incrimination protection;³² and *Oregon v. Elstad*,³³ in which a failure to administer *Miranda* rights before a suspect's initial statement did not prejudice subsequent warned statements, *provided* the first statement was voluntary.³⁴ Latzer has documented a potentially serious problem here in demonstrating the extent to which the Burger-Rehnquist Court has experimented with the "poison tree" violations in its persistent whittling down of defendants' rights in criminal cases.³⁵

²² LATZER, *supra* note 1, at 40. Automatic standing is granted to "persons legitimately on the premises." *Jones v. United States*, 362 U.S. 257 (1960).

²³ LATZER, *supra* note 1, at ch. 3.

²⁴ 453 U.S. 454 (1981). In this case, the Court allowed police to search the passenger compartment of an automobile, but not the trunk.

²⁵ LATZER, *supra* note 1, at 71.

²⁶ *Id.*

²⁷ *Id.* Furthermore, the author declares that the "Supreme Court's Fourth Amendment rulings have been so numerous and so controversial that they have served as virtual lightning rods for *state court divergence* . . . the Burger-Rehnquist Court has made significant incursions into defendants' Fourth Amendment rights—especially in such matters as the exclusion of evidence, standing, automobile searches, the validity of warrants, and searches incident to arrest." *Id.* at 73 (emphasis added).

²⁸ Compare LATZER, *supra* note 1, at 89 ("The Burger Court weakened but did not overturn *Miranda*.") with SHAPIRO & TRESOLINI, *supra* note 10, at 649 ("The Burger Court has very seriously reduced the scope of *Miranda*.") (emphasis added).

²⁹ 401 U.S. 222 (1971).

³⁰ LATZER, *supra* note 1, at 89.

³¹ 467 U.S. 649 (1984).

³² LATZER, *supra* note 1, at 90.

³³ 470 U.S. 298 (1985).

³⁴ LATZER, *supra* note 1, at 90.

³⁵ "Fruit" metaphors abound in the law. See BLACK'S LAW DICTIONARY 669-70 (6th

In gathering his artillery against the Burger-Rehnquist Court, the author summons up heavy reserves of legal ammunition from various state supreme courts on the *Miranda* issue. For example, when the current Court ruled in *Moran v. Burbine*³⁶ that the police are not required to inform a suspect in custody that a *third party* has retained counsel on his behalf, six states promptly opposed it, specifically California, Connecticut, Florida, Louisiana, New York, and Oklahoma.³⁷ In *People v. Houston*,³⁸ the California court ruled that a defendant must be informed if an attorney retained by his friends arrives at the police station;³⁹ the other five states ruled in similar, if slightly different, scenarios.⁴⁰

Latzer also has compiled concise but highly informative chapters on the Eighth Amendment⁴¹ *vis-a-vis* the death penalty, and the Fifth Amendment's limitations on double jeopardy.⁴² A legal as well as a semantic conundrum for scholars has always been the question of "cruel *and* unusual" or "cruel *or* unusual." A conjunction or correlative can make a big difference in the criminal law. What of the normal meaning of words?⁴³ Obviously the Eighth Amendment forbids cruel *and* unusual punishment, but does this allow executions that are cruel but not unusual? The late Justice Clark was fond of saying that the death penalty would be clearly unconstitutional had there not been that ubiquitous conjunction.

The Burger-Rehnquist Court has upheld the death penalty, however, and most state supreme courts have, in the author's words, "brushed aside arguments relying on phraseology."⁴⁴ The California State Court has found its own state death penalty provision us-

ed. 1990). LATZER, *supra* note 1, at 90 ("Miranda can still be the poisoned fruit" *if not administered properly*.) (emphasis added).

³⁶ 475 U.S. 412 (1986).

³⁷ LATZER, *supra* note 1, at 92.

³⁸ 724 P.2d 1166 (Cal. 1986).

³⁹ LATZER, *supra* note 1, at 105.

⁴⁰ Latzer cites *State v. Stoddard*, 537 A.2d 446 (Conn. 1988) (must inform defendant of efforts by counsel to suppress confession if assertion of right against self-incrimination would have been reasonably likely); *Haliburton v. State*, 514 So. 2d 1088 (Fla. 1987) (family retained counsel); *State v. Welch*, 337 So. 2d 1114 (La. 1976) (police must honor father's request for counsel); *People v. Arthur*, 239 N.E.2d 537 (N.Y. 1968) (attorney went to police station due to television news report); *Lewis v. State*, 695 P.2d 528 (Okla. Crim. App. 1984) (parents retained counsel). See LATZER, *supra* note 1, at 105 n.32.

⁴¹ LATZER, *supra* note 1, at ch. 6.

⁴² *Id.* at ch. 7.

⁴³ *Caminetti v. United States*, 242 U.S. 470 (1917). In Justice Day's opinion in this case, "Statutory words are uniformly presumed, unless the contrary appears, to be used in their *ordinary and usual sense*." *Id.* at 485 (emphasis added).

⁴⁴ LATZER, *supra* note 1, at 135. Where the U.S. Constitution uses "and," 21 state constitutions use the word "or." *Id.* at 139 n.28, 205-06.

ing "or" to be highly significant,⁴⁵ but if there really exists "New Federalism," the sobering fact remains that most states have not vociferously opposed federal doctrine on this issue.⁴⁶

The question of whether a truly strong case can be made for the "New Federalism" in criminal law is moot because jurisprudential interpretations between the states and the federal government remain mixed. In some areas, such as the exclusionary rule, the states seem to be more liberal than the Supreme Court, and in others, such as the death penalty, the states are more conservative; but the thesis remains interesting and deserves more attention by scholars in constitutional law.

Latzer has summed up the impact of "New Federalism," not only through exhaustive case law review, but also by means of a quantitative measuring tool he devised.⁴⁷ To assess the impact of state-federal disagreement, he tabulated rejections and adoptions of U.S. Supreme Court reasoning in criminal procedure cases by state supreme courts on grounds of state constitutional law. His database assumed that a seventy-five percent agreement or disagreement warranted a conclusion of conformity with, or opposition to, the Supreme Court rulings in criminal case procedures.⁴⁸

Following those guidelines, the ten most active, hence liberal, states, which relied on their own state constitutions as opposed to Supreme Court rulings, were: California, New Hampshire, Oregon, Florida, Pennsylvania, Montana, West Virginia, Connecticut, Alaska, and New Jersey.⁴⁹ The ten least active, hence conservative, states within this "New Federalism" movement were: South Carolina, Arkansas, Nevada, Alabama, Indiana, Minnesota, New Mexico, Virginia, Georgia, and North Dakota.⁵⁰ There is also a table based upon the broader continuum of all fifty states, and the degree to which they rejected or adopted given Supreme Court procedural maxims by percentages.⁵¹

⁴⁵ *People v. Anderson*, 493 P.2d 880 (Cal. 1972). It is significant because the death penalty is *both* cruel and unusual; the former because of painful death, the latter because it is rarely carried out.

⁴⁶ LATZER, *supra* note 1, at 137.

⁴⁷ *Id.* at 160-64.

⁴⁸ *Id.* at ch. 8.

⁴⁹ *Id.* at 162, tbl. 2.

⁵⁰ *Id.* at 162, tbl. 3.

⁵¹ *Id.* at 164, tbl. 4. The legal contests between the several states and the national government are as old as the Union itself, whether in criminal or civil law. One of the best known is *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824). Others include *Pensacola Telegraph v. Western Union Telegraph*, 96 U.S. 1 (1878), *Hammer v. Dagenhart*, 247 U.S. 251 (1918), and *NLRB v. Jones and Laughlin Steel Corp.*, 301 U.S. 1 (1937). In criminal law, the *actus reus*, or prohibited conduct, can and does vary in degree, interpre-

The "New Federalism" can be an ambiguous political-legal phenomenon, and Latzer admits this, but his book is important for all judges, attorneys and constitutional scholars, not only for its message, but for its implications. For much of our national history, for example, there has existed what might be termed a "Jeffersonian apprehension"⁵² over a national Supreme Court, which has extended judicial activism at times to the perceived usurpation of legislative prerogatives, both state and federal. The ancient maxim, "*Jus Dicere et non Jus Dare*,"⁵³ comes to mind.

The author implies new movement in the increasingly legal ambiguity of criminal law jurisprudence between state and federal courts, but there is a positive legal and constitutional antidote. He correctly points out that there exists both vertical and horizontal legal threads in the national web of criminal law, which tend to modify each other. The vertical pressure exerted is from the Supreme Court to state courts to adopt the federal positions,⁵⁴ and the horizontal counterpoint comes from the sheer volume of state cases. In a given year, especially during the current decade, the fifty "state supreme courts render thousands of decisions while the one U.S. Supreme Court resolves fewer than three hundred . . . Thus, verti-

tion, and punishment from state to state. Fifty states have fifty distinct criminal justice systems. Add to this the federal codes, the Uniform Code of Military Justice, the traditions of common law, and two centuries of American precedent, and the explanation for state/federal variances becomes clear. Indeed, there is no single unified United States criminal justice system.

⁵² One of the fundamental arguments of the Constitutional Convention was the extent of federal judicial power. Delegates such as John Rutledge and Luther Martin specifically opposed judicial review, and while the Framers discussed this concept, they did not include it in Article III. The power was assumed in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), by the brilliant reverse logic of Chief Justice John Marshall during Thomas Jefferson's first administration. Jefferson's response was immediate and vociferous in his insistence that negative review would, in effect, give the Supreme Court veto power over the Congress, fatally weakening Article I and the legislative prerogatives. A stunned Jefferson called Marshall that "crafty chief judge" and claimed that with the *Marbury* decision, the Supreme Court had made of the Constitution ". . . a thing of wax," which could be shaped to the Court's will. See SAUL PADOVER, *JEFFERSON: A GREAT AMERICAN'S LIFE AND IDEAS* (1952) and ROSCOE POUND, *THE FORMATIVE ERA OF AMERICAN LAW* (1960). Dean Pound wrote, "The American Colonial Republic was hostile to all things English . . . the whole idea of professions like law, was repugnant to the mass egalitarianism of the Jeffersonian era." POUND, *supra* at 7. The Jeffersonian distaste for national judges making policy also stemmed from the fight against British Crown Judges vetoing legislation by the Virginia House of Burgesses prior to the Revolution. The Tenth Amendment also later reflected the insistence upon states' rights against intrusive federal authority. This amendment may indeed be resurfacing in Latzer's "New Federalism" thesis if his premise is correct, but hopefully, in a positive, rational, and democratic manner.

⁵³ "To declare the law, not to make it." BLACK'S LAW DICTIONARY 859 (6th ed. 1990).

⁵⁴ LATZER, *supra* note 1, at 167.

cal federalism's most potent weapon—Supreme Court review—is *limited by the vastness of the state court output.*"⁵⁵

The criminal justice system thereby remains viable, even as the thrust of the "New Federalism" is developing. The liaisons between state and federal courts continue, including ongoing debates over constitutional issues, an elaboration which this volume provides. It is a balanced analysis that offers hope for the individual states within the possible increasing centralism of federal jurisprudence. Perhaps a corollary study is also needed of the relationships between state courts and the federal district courts. Latzer points out that few books exist on "New Federalism"; the majority of work on this issue is published in law journals. As such, this study is a definitive step forward and constitutes an excellent reference for graduate research in both political science and law. The six appendices and specialized bibliography are also especially helpful for a condensed overview of sources on "New Federalism."

⁵⁵ *Id.* at 168 (emphasis added).