MONTEJO AND THE NEW JUDICIAL FEDERALISM

Laurent Sacharoff *

I. INTRODUCTION 599
II. NEW JUDICIAL FEDERALISM 602
III. THE TWO RIGHTS TO COUNSEL 604
IV. CURRENT STATE COURT DECISIONS ON *MONTEJO* 610
V. REASONS TO DEVIATE FROM FEDERAL CONSTITUTIONAL LAW: STATE INSTITUTIONS 612
A. Brennan Reasons 612
B. Attorney-Client Relationship 613
C. Uniformity 614
D. Miranda *&* Seibert 616
VI. BEYOND *MONTEJO* 619

I. INTRODUCTION

One of the United States Supreme Court's strangest doctrinal creations involves *two* types of right to counsel for indigent criminal defendants. The first is the Fifth Amendment right to counsel, a right created out of thin air by the Court in *Miranda v. Arizona*[1] and elaborated in *Edwards v. Arizona*.[2] This right, as expressed in the *Miranda* warnings, tells a suspect she has the right to appointed counsel once in custody, but the right only applies if the police seek to question her.[3] The second type is the Sixth Amendment right to counsel that begins after the criminal case itself has started with an indictment, a criminal complaint, or when the suspect otherwise becomes a defendant.[4] This right rests directly on the text of the Constitution: the right to counsel at a criminal trial.

In *Montejo v. Louisiana*,[5] the Court blurred the lines between these two types of right to counsel, at least when it comes to police interrogation.[6] It essentially applied the weaker Fifth Amendment right to counsel protections

---

* Associate Professor of Law, University of Arkansas School of Law, Fayetteville; J.D., Columbia Law School; B.A., Princeton University. The Author would like to thank Jonathan L. Marshfield for his thoughtful comments.

1. *See* Miranda v. Arizona, 384 U.S. 486 (1966).
2. *See* Edwards v. Arizona, 451 U.S. 477 (1981).
3. *See Miranda*, 384 U.S. at 472.
4. *See* Rothgery v. Gillespie Cty., 554 U.S. 191, 198 (2008).
5. Montejo v. Louisiana, 556 U.S. 778 (2009).
6. *See id.* at 797.

to the Sixth Amendment right, eroding what had previously been an important distinction between the two rights.[7] Numerous scholars and judges have criticized *Montejo*.[8] The decision affords too little protection for criminal defendants, they argue, and it ignores the basic premises of the adversarial system.[9]

But this Article is not directly about how the Court was wrong in *Montejo*. This Article uses the *Montejo* case to illustrate a larger point about constitutional interpretation and, in particular, state constitutional interpretation.[10] In other words, should state courts interpret their state constitutional right-to-counsel provisions as providing more robust protections than the Court did in *Montejo* under the federal Constitution?[11] And, if so, why?

This Article, therefore, considers what scholars have dubbed the New Judicial Federalism movement arising in the 1970s and how *Montejo* fits into that debate.[12] New Judicial Federalism says that state supreme courts should not reflexively interpret their state constitutions in the same way the federal Supreme Court has interpreted the corresponding federal constitutional right.[13] Rather, in appropriate cases, state courts should interpret a state constitutional right as affording more protection than the federal version.[14]

Proponents of New Judicial Federalism argue that state courts should develop a jurisprudence truly independent from the Supreme Court, rooted in the particular text, history, and structure of their own state constitutions.[15] But too often, state courts have failed to develop such independent principles. Instead, state courts continue to reflexively follow the Supreme Court.[16]

---

7. *See id.* Actually, the Court expanded the erosion from earlier cases such as *Michigan v. Jackson*, 475 U.S. 625 (1986), which applied standards developed to address a suspect's rights to a defendant's rights. *Montejo*, 556 U.S. at 797.

8. *See, e.g.*, *id.* at 802 (Stevens, J., dissenting); Andrew Guthrie Ferguson, *The Dialogue Approach to* Miranda *Warnings and Wavier*, 49 AM. CRIM. L. REV. 1437, 1449 (2012) (noting it is inappropriate and confusing to read a defendant *Miranda* warnings when he already has a lawyer).

9. *See Montejo*, 556 U.S. at 802 (Stevens, J., dissenting); Ferguson, *supra* note 8, at 1449.

10. *See infra* Parts V–VI (explaining how and why state courts might interpret the rule differently).

11. *See Montejo*, 556 U.S. at 783–85 (discussing the approach taken by the Louisiana Supreme Court as well as the rules applied in other states).

12. *See* G. Alan Tarr, *New Judicial Federalism in Perspective*, 72 NOTRE DAME L. REV. 1097, 1097–99 (1997); Louise Weinberg, *The New Judicial Federalism*, 29 STAN. L. REV. 1191, 1235–44 (1977).

13. Lawrence Friedman, *The Constitutional Value of Dialogue and the New Judicial Federalism*, 28 HASTINGS CONST. L.Q. 93, 95–96 (2000) (considering the "primacy" method of interpretation where a state court "undertakes an independent constitutional analysis, using all the tools appropriate to the task, and relying upon federal decisional law only for guidance"); James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. 761, 765–66 (1992).

14. As a practical matter, state courts will almost always provide *more* protection than federal courts. *See* Friedman, *supra* note 13, at 111. If a state court seeks to provide less protection, that argument would be moot, because states are bound to follow the federal Constitution. *See id.* (stating that advocates for the primacy method of interpretation argue for broader standards that exceed the United States Constitution's "minimum floor").

15. *See id.* at 106.

16. *See id.* at 102–03.

When state courts do deviate, they almost always do so for political, results-oriented reasons, usually substituting a more liberal, right-protective decision for a conservative Supreme Court decision.[17]

I do not disparage political decisions; a state court is free to interpret its constitutional provisions according to its political inclinations just as the Supreme Court does.[18] However, politically based decisions do not begin to develop a rich jurisprudence rooted in unique text, history, or structure of the particular state constitution.[19] It is simply a political disagreement. Those decisions, therefore, fail to meet the very goals scholars have set for the New Judicial Federalism.[20]

This Article uses *Montejo* to develop independent principles that state courts can rely upon to deviate from a Supreme Court decision—principles that surpass a mere political disagreement with the conservative nature of the *Montejo* decision.[21] It provides reasons rooted in the unique structure of a state's criminal procedure rules, its unique institutions, and perhaps even its history.

In particular, *Montejo* addresses a defendant's right to counsel.[22] It defines the scope of those protections and how a defendant's first appearance before a magistrate triggers those rights.[23] These questions are actually state law questions because the attorney-client relationship is a creation of state law. State law tells us how the relationship begins, the nature of its confidences and privileges, and how the right operates at trial.[24] State law governs a lawyer's ethical duties to his client and how these are balanced against his duties to the court. These laws and norms should therefore influence how a state court interprets its state constitutional right to counsel for indigent defendants.[25] And at least with respect to some of these rules, they differ from state to state in ways that will inform how a particular state should interpret its constitutional right-to-counsel provision.[26] Some states will have greater reasons to deviate from *Montejo* than others.

---

17. *See generally id.* at 104–05 (discussing several factors utilized by courts when determining whether to deviate from Supreme Court jurisprudence when interpreting their state constitutions).

18. *See id.* at 119–20.

19. *See generally* Gardner, *supra* note 13, at 772 (examining generally that state constitutional jurisprudence aimed wholly at achieving a political agenda is generally inappropriate).

20. WAYNE R. LAFAVE ET AL., 1 CRIMINAL PROCEDURE § 2.12(a) (3d ed. 2007) (summarizing critiques of new federalism in the criminal procedure realm as often results-oriented).

21. *See infra* text accompanying notes 99–105 (explaining the three possible rules deriving from *Montejo*).

22. *See* Montejo v. Louisiana, 556 U.S. 778, 783–85 (2009).

23. *See id.* at 786.

24. *See, e.g.*, TEX. DISCIPLINARY RULES PROF'L CONDUCT, *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G, app. A (West 2018). (STATE BAR OF TEX. 2016).

25. *See id.*

26. *See Montejo*, 556 U.S. at 783–84.

This Article proceeds in several parts. Part II sketches the New Judicial Federalism debate.[27] Part III summarizes the Fifth and Sixth Amendment rights to counsel and the *Montejo* case in particular.[28] Part IV summarizes those state courts that have deviated from *Montejo*.[29] In Part V, in the heart of the Article, a framework is developed for state courts to deviate from *Montejo* based on principles beyond political disagreement, principles rooted in the institution of counsel as a state creation.[30] Finally, Part VI suggests how state courts might rely upon this framework in other areas.[31]

II. NEW JUDICIAL FEDERALISM

New Judicial Federalism largely arose from Justice Brennan's 1977 article,[32] urging state courts to provide more protections in reaction to the Burger Court's chipping away of Warren-era protections.[33] State constitutions, he wrote, provide a completely independent source of rights.[34] But Brennan's argument had a significant flaw: it largely argued that liberals should have another bite at the apple on the state level.[35] The Burger Court decisions were wrong, and wrong in the conservative direction; state courts should interpret the same state provisions more liberally because the more liberal interpretation was normatively better. I simplify and exaggerate, but only slightly.[36]

Those scholars who sought to elaborate a New Judicial Federalism, in which state courts went their own way, largely agreed that these courts should not simply decide cases in a more liberal way because they disagreed with the more conservative Supreme Court decision.[37] Or rather, state courts are free to do so, but that principle cannot form the basis of a rich, new jurisprudence. Instead, these scholars have argued that state courts should develop a true state jurisprudence based upon the text, structure, and history of their own constitutions.[38]

---

27. *See* William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 489–90 (1977); Friedman, *supra* note 13, at 95–96.

28. *See Montejo*, 556 U.S. at 778; *infra* Part III (discussing the two rights to counsel).

29. *See* Commonwealth v. Blood, 507 N.E.2d 1029 (Mass. 1987); Friedman v. Comm'r of Pub. Safety, 473 N.W.2d 828 (Minn. 1991); *infra* Part IV.

30. *See infra* Part V (discussing reasons state institutions might deviate from federal constitutional law).

31. *See infra* Part VI.

32. *See* Brennan, *supra* note 27, at 490; Gardner, *supra* note 13, at 762 ("Brennan's article, which has been called the 'Magna Carta' of state constitutionalism, earned him the sobriquet of 'patron saint' of state constitutional law . . . ." (citations omitted)).

33. *See* Brennan, *supra* note 27, at 490.

34. *See id.*

35. *See* Friedman, *supra* note 13, at 93–94 (Brennan's approach "has suffered criticism for its programmatic, result-oriented cast").

36. *See* Brennan, *supra* note 27, at 490–91.

37. *See, e.g.*, Friedman, *supra* note 13, at 93–94.

38. *See id.* (summarizing scholarly approaches).

But as many scholars have pointed out, this project has in some ways faltered.[39] State courts have failed to develop truly independent state constitutional doctrines. Instead, state courts largely follow the Supreme Court or deviate occasionally in ways that do not represent any larger principle or process.[40] They may deviate because they disagree on political grounds and wish to take a more liberal stance, but often that is all.

For example, the Massachusetts Supreme Court says its search-and-seizure provision is more protective than the federal version;[41] it points to Massachusetts's special role leading up to the American Revolution, in part based upon unlawful British searches.[42] But the federal Fourth Amendment and the Massachusetts search-and-seizure provision share this history and tradition[43]—there is no *state-specific* reason to deviate.[44] The Minnesota Supreme Court held its state constitutional right to counsel attached earlier than the federal right; in doing so, it expressly said it was reversing the Burger Court "retrench[ment]" of the Bill of Rights and that it would continue the state trend of providing "greater protection for individual rights than that which the federal Constitution minimally mandates."[45] After all, the federal version came almost directly from the state version, and so one would expect they would provide the same protections.[46] Disagreements over politics are completely legitimate, and a state court should deviate when it disagrees politically—but that is obvious. It again gives little principle for a robust doctrine.

In the Parts that follow, this Article makes a small contribution to this debate by proposing, at least with respect to the constitutional right to counsel, a framework for when and why a state court might interpret its constitution differently—reasons that do not depend merely upon result-oriented political disagreements.[47]

---

39. *See* LAFAVE ET AL., *supra* note 20 (summarizing failures in the criminal procedure arena); Gardner, *supra* note 13, at 797.

40. *See, e.g.*, Gardner, *supra* note 13, at 827–30.

41. *See* Commonwealth v. Blood, 507 N.E.2d 1029, 1032 (Mass. 1987); *see also* Robert J. Cordy, *Criminal Procedure and the Massachusetts Constitution*, 45 NEW ENG. L. REV. 815, 819–23 (2011).

42. *See Blood*, 507 N.E.2d at 1035.

43. *See* Thomas K. Clancy, *The Framers' Intent: John Adams, His Era, and the Fourth Amendment*, 86 IND. L.J. 979, 981–82 (2011) (noting the close link between the Fourth Amendment and the Massachusetts search-and-seizure provision).

44. *See* Gardner, *supra* note 13, at 797 (Massachusetts's "opinions reveal no intelligible discourse of distinctness on which litigants could rely in order to build effective arguments concerning the ways in which the state and federal constitutions differ").

45. Friedman v. Comm'r of Pub. Safety, 473 N.W.2d 828, 830 (Minn. 1991).

46. *See* Brennan, *supra* note 27, at 501–02.

47. *See infra* Parts IV–V (explaining different state court implementations of *Montejo*).

III. THE TWO RIGHTS TO COUNSEL

In *Miranda v. Arizona*, the Court required police to read suspects a list of four rights before undertaking any custodial interrogation.[48] In addition, the suspect had to waive those rights before her answers would be admissible against her at trial.[49] The third right assures the suspect she has the right to counsel, and the fourth right assures that if she cannot afford one, the government will supply one.[50]

The Court wrote that these rights, their reading, and their waiver were required to dispel the inherently coercive atmosphere of the police stationhouse.[51] Without them, an in-custody interrogation would violate the Fifth Amendment.[52] As for counsel, the Court envisioned that the police would provide counsel for an indigent suspect during the interrogation.[53] The provided counsel, the Court imagined, would sit by the suspect's side, making sure she was not unduly coerced in answering questions and that her answers were accurate.[54]

Of course, the *Miranda* right to counsel—what we may also call the Fifth Amendment right to counsel—never developed as envisioned.[55] Once the police read a suspect her rights, if she asserted the right to counsel, the police will simply not question her.[56] Almost never will the police actually provide counsel so that they may question her. This follows for a couple of straightforward and practical reasons. First, any counsel who is appointed will advise the suspect not to answer any questions.[57] Because prosecutors, not police, make plea deals, there is no reason for a suspect to answer questions. Providing counsel means the suspect will not answer anyway, so why provide counsel?[58] Second, police generally have no means to provide counsel.[59]

Thus, the Fifth Amendment right to counsel is an illusion—at least as a right to counsel.[60] But it is not meaningless. Rather, it is another method a

---

48. Miranda v. Arizona, 384 U.S. 436, 444–45 (1966).
49. *Id.*
50. *Id.* at 444, 473.
51. *See id*. at 436.
52. *See id.* at 463.
53. *See id*. at 473.
54. *See id.* at 473–75.
55. *See* Paul G. Cassell & Bret S. Hayman, *Police Interrogation in the 1990's: An Empirical Study of the Effects of Miranda*, 43 UCLA L. REV. 839, 932 (1996).
56. *See id.* at 919.
57. *See* United States v. Wedra, 343 F. Supp. 1183, 1184 (S.D.N.Y. 1972) (laying out how counsel advises the suspect to remain silent).
58. *See* United States v. Montana, 958 F.2d 516, 517 (2d Cir. 1992) (discussing how a suspect refused to answer questions before he was provided with counsel).
59. *See Miranda*, 384 U.S. at 474 (stating that police stations do not need a lawyer present at all times).
60. *See id.*

suspect can use to end the questioning. That is, as soon as a suspect says, "I want a lawyer," the police must stop any questioning.[61]

Indeed, one of the most important powers *Miranda* affords suspects is the power to end the interrogation.[62] If a suspect says that she wishes to remain silent *or* that she wants a lawyer, the police must cease the questioning.[63] But in an odd twist of Court jurisprudence, each of these two triggers has a different consequence.[64] If the suspect ends the questioning by asserting a right to remain silent, the police can come back to the suspect to try to obtain a *Miranda* waiver and begin the questioning again if they do so later—though the law is a bit murky on this point.[65]

But if the suspect ends the questioning by asserting a right to counsel, a more powerful right is triggered.[66] Under *Edwards v. Arizona*,[67] the police may neither initiate any attempt to continue to interrogate nor obtain a *Miranda* waiver to do so unless counsel is present for that waiver.[68] Once the suspect expresses her desire to talk to the police only through counsel, the police may not obtain a waiver of that right unless counsel is present.[69] Otherwise, the Court has reasoned, the police will simply badger a suspect to renounce her earlier invocation of the right to counsel (really, the right to end the interrogation).[70]

Finally, a suspect must *unambiguously* assert the right to counsel to trigger this *Edwards* right to cut off questioning.[71] "Unambiguously" means expressly, such as "I want a lawyer."[72] But equivocation will not do, and a suspect who says, as did the defendant in *Davis v. United States*,[73] "[m]aybe I need a lawyer," has failed to invoke the right to counsel or the right to cut off questioning.[74] The police may continue to question after such an equivocal assertion.[75]

The Court developed all the foregoing factors in a particular context: a suspect, in custody, in the police stationhouse, *before* she has been formally

---

61. *See id.* at 444–45.
62. *See id.*
63. *See id.*
64. *See* United States v. Cummings, 937 F.2d 941, 946 (4th Cir. 1991) (discussing how a defendant voiced his right to remain silent, but later waived that right). *But see* Edwards v. Arizona, 451 U.S. 477, 482 (1981) (explaining how waiver of right to counsel is not as easy to establish as the waiver of the right to remain silent).
65. *See Cummings*, 937 F.2d at 946.
66. *See Edwards*, 451 U.S. at 482.
67. *Id.*
68. *See id.* at 484–85.
69. *See id.*
70. *See* Michigan v. Harvey, 494 U.S. 344, 350 (1990).
71. *See* Davis v. United States, 512 U.S. 452, 458–59 (1994).
72. *See id.* at 459.
73. *See id.*
74. *See id.* at 455, 459–60.
75. *See id.*

charged—that is, before the criminal case has begun.[76] As a result, both this right to counsel under *Miranda* and *Edwards* and its use as a means to terminate the interrogation fall under the Fifth Amendment right to counsel.[77] This follows because the Sixth Amendment right to counsel does not begin until the government has formally initiated the criminal case by filing an indictment, criminal complaint, or by some other means that marks the beginning of the adversarial process.[78]

Until *Montejo*, many viewed the Fifth Amendment right to counsel as a weaker right than the Sixth Amendment right to counsel.[79] The Fifth Amendment right arose by Court fiat in *Miranda* and, as noted above, is not even a right to counsel.[80] It is a right to end the questioning, with the adjunct right that the police cannot initiate a fresh attempt to obtain a *Miranda* waiver absent the presence of counsel.[81] The Sixth Amendment right to counsel, by contrast, is rooted in the text of the Constitution and provides the familiar important trial rights involving a lawyer's actual presence, presentation of witnesses, cross examination, and so on.[82]

At least in the context of trial, the difference between the Fifth and Sixth Amendment rights to counsel play out in how each can be waived.[83] For a defendant to waive the Sixth Amendment right to counsel and proceed to trial pro se, he must undergo careful scrutiny in open court, showing that he understands precisely the rights he is waiving and can represent himself.[84] By contrast, for a suspect in police custody to waive the Fifth Amendment right to counsel, he need only be read the *Miranda* warnings and understand them, meaning that he understands the words.[85] He need not expressly waive those rights, and merely by speaking he is deemed to have waived his right to counsel.[86]

Then came *Montejo*. In brief summary, *Montejo* harmonized these two rights, at least with respect to waiver in the face of the police desire to interrogate.[87] The Court could level up, or level down; it could apply the far-stricter waiver requirements for the Sixth Amendment right to counsel at trial to the weaker Fifth, or it could apply the weaker waiver requirements of the Fifth Amendment right to the Sixth. It chose the latter course.[88]

---

76. *See, e.g.*, *id.*

77. *See* Rothgery v. Gillespie Cty., 554 U.S. 191, 198 (2008).

78. *See id.*

79. *See, e.g.*, *supra* text accompanying notes 5–7 (explaining how *Montejo* applied the weaker Fifth Amendment protections to the Sixth Amendment protection).

80. *See supra* text accompanying notes 48–60 (discussing the Court's holding in *Miranda*).

81. *See* Edwards v. Arizona, 451 U.S. 477, 484–85 (1981).

82. *See* U.S. CONST. amend. VI.

83. *See, e.g.*, Davis v. United States, 512 U.S. 452 (1994); Faretta v. California, 422 U.S. 806 (1975).

84. *See Faretta*, 422 U.S. at 835.

85. *See Davis*, 512 U.S. at 458.

86. *See* Berghuis v. Thompkins, 560 U.S. 370, 385 (2010).

87. *See* Montejo v. Louisiana, 556 U.S. 778, 779–92 (2009).

88. *See id.* at 795–96.

But the particulars require a more detailed look. *Montejo* addressed the problem concerning the invocation of counsel as it dovetailed with the suspect's first appearance before a magistrate, the moment the suspect became a defendant, and the moment the investigation turned into a criminal case—roughly speaking.[89] Technically, the case might begin before the first appearance with the filing of a complaint or indictment, but we will assume, for our purposes, that the suspect's first appearance marks the shift.

This first appearance is the point at which the court typically determines whether there is probable cause to hold the defendant, reads the charges to the defendant, sets bail, and often appoints counsel.[90] We will assume a jurisdiction does all these functions at the first appearance for simplicity, noting important differences later.

The question *Montejo* addresses is as follows: Does this first appearance count as an *Edwards* invocation of counsel for the purposes of police questioning?[91] In other words, once the defendant receives appointed counsel at this first appearance, does *Edwards* preclude the police from approaching the defendant to seek a *Miranda* waiver and question him, assuming he remains in custody?[92] Or even after this first appearance and appointment of counsel, may the police still interrogate the defendant in custody by merely reading him his *Miranda* rights?[93]

The question becomes difficult because various states have different procedures. In some states, the defendant must ask for counsel, and the court will then appoint counsel.[94] But in other states, the court will *automatically* appoint counsel.[95] The first scenario resembles the *Edwards* situation because the defendant expressly asserted the right to counsel and, as noted above, the assertion of counsel under *Edwards* and *Davis* must be express and unambiguous.[96] But if the court appoints counsel automatically, then the

89. *See id.* at 786.

90. *See id.* at 801.

91. *See id.* at 782–84.

92. *See id.* at 789 (stating there is no reason to assume that a defendant who has done nothing to assert his or her Sixth Amendment right to counsel cannot speak with law enforcement without counsel present).

93. *See id.*; *see also* Berghuis v. Thompkins, 560 U.S. 370, 384 (2010) (holding that if a prosecutor shows that a defendant both received a *Miranda* warning and understood it, any non-coerced statement by the defendant impliedly waives his or her right to remain silent).

94. *See, e.g.*, CAL. PENAL CODE § 987 (West 2017) (defendant must request representation); HAW. REV. STAT. ANN. § 802-3 (West 2017); *cf.* DEL. CODE ANN. tit. 29, § 4602 (West 2016) (stating defendants may request counsel but also allowing *sua sponte* appointment by courts).

95. *See, e.g.*, CONN. GEN. STAT. ANN. § 51-296 (West 2016) (requiring appointment of counsel upon finding of indigency by public defender); KAN. STAT. ANN. § 22–4503 (West 2017); WIS. STAT. ANN. § 977.08 (West 2017).

96. *See* Davis v. United States, 512 U.S. 452, 561–62 (1994); Edwards v. Arizona, 451 U.S. 477, 484–85 (1981).

defendant, of course, has *not* asserted the right to counsel.[97] One could argue that the defendant has not invoked the right to counsel unambiguously under *Davis*, and therefore does not enjoy the *Edwards* right, which precludes the police from seeking a waiver.[98] On the other hand, one could argue the court's automatic appointment of counsel renders moot a defendant's independent assertion of his or her right to counsel.

These differences in state procedure lead to three main possible rules—three potential outcomes *Montejo* could have reached.[99] First, there could be a rule that the first appearance and appointment of counsel *always* triggers the *Edwards* right.[100] That is, the appointment is deemed to be tantamount to the defendant's assertion of counsel, and the police can therefore *never* approach a defendant to seek a waiver (outside counsel's presence).[101]

Second, at the other extreme, a rule could be created that the first appearance and appointment of counsel never triggers the *Edwards* rule, and the police may always approach a defendant to seek a waiver and interrogate, even outside the presence of counsel.[102]

Finally, a rule could be adopted in the middle, depending on the particular state's procedure or even the particulars of that defendant's first appearance.[103] If the defendant asked for counsel, either because that was required or simply out of an abundance of caution, then the defendant has triggered the *Edwards* protections.[104] On the contrary, if the court automatically appoints counsel and the defendant says nothing, then the defendant does not enjoy the *Edwards* protections.[105]

Montejo rightly rejected this last possibility.[106] It depends too much on the differences in state law, and too much on the particulars of an individual case.[107] It would require inquiry into whether this defendant actually asked

---

97. *See Montejo*, 556 U.S. at 785 (explaining that some states' statutes automatically appoint counsel to indigent defendants, and as a result, many defendants in those states do not affirmatively assert their right to counsel).

98. *See id.* at 787 (quoting *Edwards*, 451 U.S. at 484–85) ("[O]nce 'an accused has invoked his right to have counsel present during custodial interrogation . . . [he] is not subject to further interrogation by the authorities until counsel has been made available,' unless he initiates the contact.").

99. *See id.* at 783, 793–98 (describing the state-by-state procedure crafted by the Supreme Court of Louisiana to accommodate *Jackson* and the Court's decision to overrule and replace *Jackson* with the bright-line rule that the defendant does not trigger *Edwards* unless he affirmatively asserts his right to counsel). Justice Stevens argued in his dissent that, "[T]he existence of a valid attorney-client relationship" grants a defendant the full protection of the Sixth Amendment. *Id.* at 804 (Stevens, J., dissenting).

100. *See id.* (Stevens, J., dissenting).

101. *See id.* (Stevens, J., dissenting).

102. *See id.* at 793–98.

103. *See Edwards*, 451 U.S. at 484–85.

104. *See id.*

105. *See Montejo*, 556 U.S. at 789. This last possibility was largely the law coming into *Montejo*, under *Minnick v. Mississippi*, 498 U.S. 146 (1990). *See id.* at 793–94.

106. *See id.* at 789.

107. *See id.* at 783–85 (discussing how different state laws are inconsistent with a doctrine that serves to protect all defendants' rights).

for counsel at the first appearance. But that left the Court with a question: Should it harmonize and level up or level down?[108] Assuming, as the Court did, that *Edwards* is the appropriate measure for post-indictment cases,[109] should it bring all cases within *Edwards*' protection or none? Each rule misses some of the mark:[110] If *Edwards* never applies, those defendants who *did* expressly ask for counsel lose out. If it always applies, those defendants who never asked or even wanted counsel get a windfall, if you will.

The Court broke along political partisan lines to hold that first appearance *never* triggers the *Edwards* right.[111] In a situation in which it could have gone either way, the conservative wing of the Court chose the government over the defendant.[112] The liberals sided with the defendant.[113]

Of course, the liberals had additional arguments beyond simple partisan politics. Justice Stevens's dissent made a far more important argument: the Sixth Amendment right is different from the Fifth and does not need to conform to it.[114] Once the case begins, the police should never be able to seek a waiver on the simple grounds that such an attempt to continue the investigation outside the presence of counsel contradicts the principles of the adversarial system.[115]

In particular, the professional rules of responsibility prohibit a lawyer from talking directly to a party who is represented by counsel on that matter.[116] Applied here, it would be unethical for a prosecutor to talk to a defendant without the defendant's counsel present, and certainly, unethical to seek a waiver of that counsel's presence without the counsel present.[117] Essentially, Stevens said that when the police approach a defendant who is represented by counsel, the same rule should apply because the police are essentially investigating the case as agents of the prosecutor because the investigation is now part of an actual criminal case.[118]

The majority in *Montejo* rejected Stevens' argument, saying that it would not "constitutionalize" state professional rules of conduct.[119] Of course, Stevens was not really arguing that the Court should constitutionalize those rules directly; rather, he pointed to those rules to show that the Sixth Amendment right to counsel should be interpreted in light of those rules.[120]

---

108. *See id.* at 792.
109. *See id.* at 794–95.
110. *See supra* text accompanying notes 99–105 (discussing each rule).
111. *See Montejo*, 556 U.S. at 789.
112. *See* Jesse J. Holland, *Justices Reverse a Rule on Police Questioning*, WASH. POST (May 27, 2009), http://www.washingtonpost.com/wp-dyn/content/article/2009/05/26/AR2009052603147.html.
113. *See id.*
114. *See Montejo*, 556 U.S. at 812–13 (Stevens, J., dissenting).
115. *See id.* at 786.
116. *See id.* at 793 n.4.
117. *See, e.g.*, *id.* at 794–95.
118. *See id.* at 811–14.
119. *Id.* at 788, 800.
120. *See id.* at 812–14.

Put another way, the Court should give effect to the Sixth Amendment right to counsel in the context of the adversarial nature of a case and not simply graft the weaker Fifth Amendment counsel rules from the non-adversarial, police-interrogation phase into the later phase.[121]

IV. CURRENT STATE COURT DECISIONS ON *MONTEJO*

A handful of state courts have expressly addressed whether to follow or deviate from *Montejo* based upon their interpretation of their state constitutional provision for the right to counsel.[122] Three states have departed: Kentucky,[123] West Virginia,[124] and Kansas.[125] A few others, such as Wisconsin,[126] have decided to follow *Montejo*.[127] From those departing court decisions, one can begin to cull reasons particular to state law on which to build a principled framework for such departures and build out, at least, a principled corner for New Judicial Federalism.[128]

On the one hand, those courts that decided to depart from *Montejo* did so in part because they simply disagreed with *Montejo*.[129] *State v. Lawson* pointed out that, after the first appearance, the suspect becomes a defendant entitled to a stronger Sixth Amendment right to counsel—precisely the argument Stevens made in his *Montejo* dissent.[130] *Keysor v. Communication* similarly echoed the dissent in *Montejo* by rejecting Scalia's "pay its way" formula.[131]

On the other hand, the state courts also departed from *Montejo* for reasons resting upon the nature of state law.[132] The court in *State v. Bevel*, for example, pointed out that *Montejo* rested in large part on the differences between states; it could not retain the *Michigan v. Jackson* rule because it led to inconsistent results across cases.[133] But the court in *Bevel* noted that this problem does not exist within any given state.[134] That state, and its highest

---

121. *See id.*

122. *See, e.g.*, State v. Lawson, 297 P.3d 1164, 1173–74 (Kan. 2013); Keysor v. Commonwealth, 486 S.W.3d 273, 280–82 (Ky. 2016); State v. Bevel, 745 S.E.2d 237, 242–44 (W. Va. 2013); State v. Delebreau, 864 N.W.2d 852, 864 (Wis. 2015).

123. *Keysor*, 486 S.W.3d at 280–82.

124. *Bevel*, 745 S.E.2d at 242–44.

125. *Lawson*, 297 P.3d at 1173–74 (resting on statutory right to counsel but relying on arguments congruent with the constitutional ones).

126. *Delebreau*, 864 N.W.2d at 864.

127. *See, e.g.*, *id.*

128. *See Lawson*, 297 P.3d at 1174; *Keysor*, 486 S.W.3d at 282; *Bevel*, 745 S.E.2d at 247.

129. *See Lawson*, 297 P.3d at 1168–69; *Keysor*, 486 S.W.3d at 279.

130. *See Lawson*, 297 P.3d at 1170.

131. *See Keysor*, 486 S.W.3d at 278–79.

132. *See Bevel*, 745 S.E.2d at 246.

133. *See id.* at 245.

134. *See id.* at 246.

court, know whether courts appoint counsel at the first appearance automatically or whether the defendant must ask.[135]

The *Bevel* court noted that on the facts before it, at the initial appearance, the defendant Bevel checked a box that said, "I want an attorney appointed to represent me."[136] Therefore, Bevel did assert his right to counsel triggering the *Edwards* and *Jackson* rule (if *Montejo* is put aside).[137] The court held that the police violated Bevel's right to counsel under the state constitution by seeking to question him after the first appearance by merely obtaining a *Miranda* waiver.[138]

The court in *Keysor* pointed to the nature of the attorney-client relationship as a state institution established by its state constitution and statutes, read together.[139] When the police approach a defendant who is represented by counsel, they interfere with that attorney-client relationship and therefore violate the state right-to-counsel provision.[140] Even on policy grounds, the court said, such conduct "place[s] a wedge" between counsel and client.[141]

The state courts also deviated from *Montejo* based upon state supreme court stare decisis.[142] For example, the court in *Lawson* noted that Kansas had previously adhered to the United States Supreme Court's holding in *Jackson*.[143] *Montejo* overruled *Jackson*.[144] The court in *Lawson* said it would not abandon its own stare decisis in following *Jackson*.[145] "In other words, having followed the United States Supreme Court into the clearing, the Kansas Supreme Court refused to follow the higher Court's dive back into the forest."[146]

A further wrinkle should be pointed out: the three state courts that deviated from *Montejo* merely went back to *Jackson*.[147] Each court said it would determine whether the defendant had requested counsel at first appearance, triggering the *Edwards* right, or whether counsel had automatically been appointed.[148] In each of the three cases, the defendant

---

135. *See id.*
136. *Id.* at 240.
137. *See id.* at 247.
138. *Id.*
139. *See* Keysor v. Commonwealth, 486 S.W.3d 273, 280–81 (Ky. 2016).
140. *See id.* at 281.
141. *Id.*
142. *See id.* at 279–80; State v. Lawson, 297 P.3d 1164, 1172 (Kan. 2013); *Bevel*, 745 S.E.2d at 246–47.
143. *See Lawson*, 297 P.3d at 1169.
144. *See* Montejo v. Louisiana, 556 U.S. 778 (2009).
145. *See Lawson*, 297 P.3d at 1169–70.
146. *Id.* at 1170.
147. *See id.* at 1164; *Keysor*, 486 S.W.3d 273; *Bevel*, 745 S.E.2d 237.
148. *See Bevel*, 745 S.E.2d at 246 (stating the decision was bound by stare decisis); *see also Lawson*, 297 P.3d at 1169–70 (applying *Jackson* to remand the case for a new trial); *Keysor*, 486 S.W.3d at 280 (finding *Jackson* to be in accord with the right to counsel).

had expressly requested counsel.[149] But those courts did not discuss what happens if different counties have different procedures, whether in writing or simply by practice.[150] In other words, the potential disparity between states in *Montejo* could simply replicate itself at the state level across counties.[151] This is an interesting objection, but it will be ignored in developing a more general principle for New Judicial Federalism. That is, this Article will assume states are uniform across counties—as they often will be, at least according to state-wide written procedures.[152]

V. REASONS TO DEVIATE FROM FEDERAL CONSTITUTIONAL LAW: STATE INSTITUTIONS

This Part outlines concrete reasons for which a state court may deviate from *Montejo*. It first considers the Brennan, second-bite-at-the-apple approach based simply on re-litigating *Montejo* on its merits—mostly to set up a contrast with the next Section.[153] The Sections point to reasons that surpass a mere political disagreement and are rooted in the structure of a state's institutions, in particular, the institution of the attorney-client relationship.[154]

A. Brennan Reasons

A state court could follow Stevens's dissent and simply hold that *Montejo* was wrongly decided.[155] The argument would parallel that dissent: the Sixth Amendment right to counsel, triggered by an indictment, should provide more robust protections than the weaker and largely invented Fifth Amendment right to counsel.[156] Once the government has commenced an adversarial case, it should not talk to the defendant without counsel present, and it should not obtain a waiver without counsel present.[157]

A state may reach this result in part based simply upon a political disagreement about the balance between the state and a criminal defendant; different judges will assess that balance differently.[158] Indeed, political

149. *Lawson*, 297 P.3d at 1168; *Keysor*, 486 S.W.3d at 275; *Bevel*, 745 S.E.2d at 239.

150. *Compare Bevel*, 745 S.E.2d at 240 (providing an example of a county with a policy in which the defendant had to fill out a form to request counsel), *with Keysor*, 486 S.W.3d at 275 (providing an example of a county which does not require the defendant to fill out a form to request counsel).

151. *See* Montejo v. Louisiana, 556 U.S. 778 (2009).

152. *See infra* Part V.

153. *See infra* Part V.B (discussing state variations in the attorney-client relationship).

154. *See infra* Sections V.A–D (laying out the various reasons states may deviate from federal law).

155. *See Montejo*, 556 U.S. at 802 (Stevens, J., dissenting) (arguing the majority's holding damages the integrity of the Sixth Amendment right to counsel).

156. *See id.* (Stevens, J., dissenting).

157. *See id.* (Stevens, J., dissenting).

158. *See* Joshua B. Fischman & Tonja Jacobi, *The Second Dimension of the Supreme Court*, 57 WM. & MARY L. REV. 1671, 1676 (2016).

scientists look at criminal procedure cases in particular to discern the political leanings of a judge—very roughly speaking, siding with a criminal defendant counts as a liberal decision, and siding with the government counts as a conservative one.[159]

The line-up of the *Montejo* case reinforces this view. The conservative wing made up the majority—Justice Scalia (the author), Chief Justice Roberts, Justices Kennedy, Thomas, and Alito.[160] The dissent was entirely the liberal wing of Justices Stevens, Souter, Ginsburg, and Breyer.[161]

Politics form an inevitable part of criminal procedure decisions, and a state court may follow its own politics just as the United States Supreme Court may.[162] Nothing disparaging is intended by saying a state court may deviate from *Montejo* for political reasons. And "political" itself can become complex here quickly. What is meant is that such a decision provides little framework for an independent state constitutional jurisprudence because such a reason for departure will depend upon the personnel of each court at a particular time. We therefore now move to those reasons which are rooted in specific state interests and institutions.

B. Attorney-Client Relationship

State law and rules define the institution of lawyer, and the lawyer-client relationship, in numerous ways. First, they determine how the relationship is formed.[163] Second, they determine the scope of the relationship, its protections, and the duties of the lawyer during the relationship—such as, confidentiality and avoiding conflict.[164] Third, they determine the end of the relationship, including what happens if a lawyer sues her client for payment.[165]

Most states have the same rules as other states in creating this relationship and these duties. All states but California fashion their professional rules, for example, based upon the Model Code of Professional Responsibility.[166] Of course, states might vary in other ways, such as how

---

159. *See id.* at 1681 ("It is well established that much judicial behavior can be predicted on the basis of the standard left-right ideological divide . . . ."). The authors challenge this model by adding another dimension, "legal methodology," to explain outcomes more fully. *See id.* at 1677.

160. *Montejo*, 556 U.S. at 779.

161. *See id.*

162. *See* Fischman & Jacobi, *supra* note 158, at 1676.

163. *E.g.*, Falk v. Chittenden, 893 N.E.2d 116, 119 (N.Y. 2008); Moran v. Hurst, 822 N.Y.S.2d 564, 566 (N.Y. 2006); Arabzadegan v. State, 240 S.W.3d 44, 47 (Tex. App.—Austin 2007, pet. ref'd) (retained counsel relationship, even in a criminal case, formed by contract).

164. *See, e.g.*, TEX. DISCIPLINARY RULES PROF'L CONDUCT, *reprinted in* TEX. GOV'T CODE ANN. tit. 2, subtit. G, app. A (West 2018). (STATE BAR OF TEX. 2016). N.Y. RULES OF PROF'L CONDUCT (N.Y. STATE UNIFIED COURT SYS. 2009).

165. *See* MODEL RULES OF PROF'L CONDUCT r. 1.16 (AM. BAR ASS'N 2015).

166. *See Legal Ethics and Professional Responsibility*, LAW GUIDES (May 27, 2016), http://lawguides.scu.edu/c.php?g=5684&p=24950.

and when the privilege applies.[167] But for the purposes of this Article, the rules bear sufficient similarity that we can rank the institution of lawyering as a particular state interest, in general, rather than as an interest particular to a given state.[168] This state interest still affords a particularized reason to deviate from *Montejo*, but that reason distinguishes the state from the federal courts and not from each other.

Nevertheless, states have a particular interest in defining how a defendant may waive counsel and answer questions without counsel because the right to counsel is entirely a creature of state law.[169] It is a state institution.[170] Because the right to counsel provision incorporates the details of this institution, or at least many of them, a state may point to this reason as a somewhat general reason to depart.[171] That is, if there are other reasons to depart on the merits, the states' particular interest in their own institution supplies a rationale to support deviating.[172]

But the attorney-client relationship as a state-created institution only provides a background reason to depart, not a particular reason to depart from the *Montejo* rule. Below, some particular reasons are surveyed, rooted in a state's interests in its institution of lawyering but particular enough to help decide the case one way or the other.

C. Uniformity

The first reason comes from *Montejo* itself.[173] The *Montejo* Court said it would not apply the *Edwards* presumption that the police cannot even approach a defendant to seek a waiver once that defendant has asserted his right to counsel because each state handles the assertion or appointment of counsel differently.[174] To ensure uniformity among the states for the *federal* rule, the Court in *Montejo* simply eliminated the *Edwards* presumption and treated all defendants the same—as if they had not asserted the right to counsel.[175] The *Montejo* ruling allows the police to approach defendants.

But *within* a given state, the state supreme court obviously knows what that state's procedure is, and that state's procedure will often be uniform—at

---

167. *Compare* TEX. DISCIPLINARY RULES OF PROF'L CONDUCT R. 1.05, *reprinted in* TEX. GOV'T CODE ANN. tit. 2., subtit. G, app. A (West 2017). (STATE BAR OF TEX. 2016), *with* N.Y. RULES OF PROF'L CONDUCT r. 1.6 (N.Y. STATE UNIFIED COURT SYS. 2009).

168. *See Legal Ethics and Professional Responsibility*, *supra* note 166.

169. *See, e.g.*, N.Y. CRIM. PROC. LAW § 170.10 (McKinney 2017); TEX. CODE CRIM. PROC. ANN. Art. 1.051 (West 2017); Neil Colman McCabe, *The Right to a Lawyer at a Lineup: Support from State Courts and Experimental Psychology*, 22 IND. L. REV. 905, 907 (1989).

170. *See* McCabe, *supra* note 169, at 907, 925–28.

171. *See id.*

172. *See id.*

173. *See* Montejo v. Louisiana, 556 U.S. 778 (2009).

174. *Id.* at 789.

175. *See id.* at 787–89.

least on paper.[176] A given state may require a defendant to assert the right to counsel at first appearance expressly; according to *Montejo*, half the states do.[177] If so, then it makes sense to apply the *Edwards* rule somewhat directly: the police may not approach a defendant to seek a waiver of counsel in order to question him once he has invoked the right to counsel.[178] It is hard to see why the rule should be *weaker* after the first appearance than before it.[179]

The state rule, that a defendant must expressly invoke, is itself one of the complex state laws that together constitute the institution of counsel, the attorney-client relationship, and the right to counsel in a criminal case.[180] The rights that this assertion triggers should also be harmonized within a given state, and thus the state's internal make-up will determine its constitutional right to counsel provision.[181]

Other states may automatically appoint counsel at the first appearance.[182] In those states, a state court may decide to conform to *Montejo* and allow police to approach a defendant seeking a waiver to question him.[183] The *Edwards* rationale does not apply, in those states, because the defendant never invoked the right to counsel.[184]

But even in those automatic jurisdictions, other state-specific reasons may persuade a state court to deviate from *Montejo*.[185] For example, state ethics rules for lawyers prohibit a prosecutor from talking to a defendant who is represented by counsel.[186] Rule 4.2 of the Model Rules of Professional Conduct prohibits any lawyer from talking to a party who is represented by counsel.[187] The police are not the prosecutor; but once a case has begun and becomes adversarial, it makes far more sense to think of the police as essentially agents of prosecutors, continuing an investigation into a case that is pending.[188]

---

176. *See generally supra* Part IV (providing state court decisions that have either departed from or followed *Montejo* based on the state's constitutional provision for the right to counsel).

177. *See Montejo*, 556 U.S. at 783–84, 792.

178. *See id.* at 794–95.

179. *See id.* at 795 (discussing the Sixth Amendment protections before and after arraignment).

180. *See supra* Section V.B (explaining the role of states in defining the formation of the attorney-client relationship).

181. *See supra* Section V.B (discussing a state's role in the formation, scope, and end of the attorney-client relationship).

182. *Montejo*, 556 U.S. at 783.

183. *See id.* at 789.

184. *See id.* at 789–90; Edwards v. Arizona, 451 U.S. 477, 484–85 (1981).

185. *See* State v. Bevel, 745 S.E.2d 237, 246 (W. Va. 2013) (noting that *Montejo* conflicts with the West Virginia constitution); *see also* Keysor v. Commonwealth, 486 S.W.3d 273, 282 (Ky. 2016) (explaining that *Montejo* conflicts with the Kentucky constitution).

186. *See Montejo*, 556 U.S. at 808 n.4 (Stevens, J., dissenting).

187. MODEL RULES OF PROF'L CONDUCT r. 4.2 (AM. BAR. ASS'N 2015). "In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order." *Id.*

188. *See* Massiah v. United States, 377 U.S. 201, 204–05 (1964).

Of course, sometimes police will be investigating the crime to develop further suspects and not to develop further evidence against the defendant.[189] But distinguishing those two functions would become difficult quickly. And in this context—that is, deciding whether to suppress a statement at trial—the *results* of the interrogation are always about developing more evidence in this case against this defendant.[190] After all, the prohibition here against questioning does not literally prohibit such questioning; rather, it simply excludes from evidence anything the defendant says from the prosecution's case in chief against this defendant.[191]

Similarly, a state court may conclude, as did the court in *Keysor*, that the *government* overall interferes with the attorney-client relationship when the police attempt to question a represented defendant, even if we do not consider the police agents of prosecutors.[192] They remain government agents.[193] States have a particular interest in defining and protecting the attorney-client privilege, a state institution, and this affords a state court a reason independent of politics to depart from *Montejo*.[194]

D. Miranda *&* Seibert

We can cull a separate reason for state courts to depart from *Montejo* based upon the Supreme Court's invitation in *Miranda*.[195] In *Miranda*, the Court held that states could experiment with alternative warnings that were at least as effective as those the *Miranda* Court issued in apprising a suspect of her rights.[196] While it referred to states interpreting the federal Constitution, the same advice applies even more so to states applying their own provisions.[197]

So far, one aspect of *Montejo* has been discussed: the holding on whether a first appearance *triggers* the strong *Edwards* right against the police even approaching a represented defendant.[198] But *Montejo* contained a second holding: once we determine the police can approach a defendant, the *Miranda* warnings will constitute a sufficient notice of rights to support a finding that a defendant has waived his right to remain silent and, as relevant here, his right to have counsel present during the interrogation.[199]

---

189. *See id.* at 206.
190. *See id.*; *Keysor*, 486 S.W.3d at 275.
191. *See Keysor*, 486 S.W.3d at 282.
192. *See id.* at 280–81.
193. *See id.*
194. *See id.* at 282.
195. *See* Montejo v. Louisiana, 556 U.S. 778, 812–15 (2009) (citing Miranda v. Arizona, 384 U.S. 436, 467, 498–99 (1966)).
196. *Miranda*, 384 U.S. at 467, 498–99.
197. *See id.*
198. *See supra* text accompanying notes 91–105 (discussing whether first appearance counts as an *Edwards* invocation of counsel for the purposes of police questioning).
199. *Montejo*, 556 U.S. at 798–99 (citing Edwards v. Arizona, 451 U.S. 477, 485 (1981)).

One could imagine the Court requiring a higher level of warning before a defendant can be found to have waived his right to counsel, because in this setting, the adversarial process has begun. At trial, as noted above, a defendant cannot waive counsel absent far-clearer warnings and waivers in open court, usually accompanied by counsel.[200] The Court chose the far-weaker *Miranda* warnings, which can be waived by merely speaking.[201] A defendant does not need to say the words, "I waive counsel," for example.[202] But to argue a defendant should be afforded more rights is simply to re-argue *Montejo*.[203]

A state may find in *Miranda* invitation to discover its own warnings a state-specific reason to depart, drawing upon *Missouri v. Seibert*.[204] That case requires that any warnings, even the express *Miranda* warnings, must effectively apprise the defendant of her rights.[205] If the police create a context in which the warnings are no longer effective, then any statements must be suppressed.[206]

In *Seibert*, for example, the police obtained a confession from the defendant in violation of *Miranda*, then Mirandized him, and invited him to make the same confession.[207] The plurality held this procedure violated *Miranda*; the warnings did not effectively apprise the defendant of his right to remain silent because he had just confessed and the warnings failed to tell him this earlier confession would not be admissible against him.[208]

The *Montejo* holding creates precisely this problem with the right to counsel—a problem of effectively apprising a defendant of this right.[209] In a *Montejo* scenario, the defendant has appeared in court, has asked for counsel, and has been granted counsel by the court, expressly in open court.[210] The defendant may have even met with his counsel to discuss the case, bail, and so on.[211] Imagine what such a defendant is to think when, a few hours later, back in jail, the police approach him and read him his *Miranda* rights.[212] The last two warnings say that if he wishes to have a lawyer, he can, and if he

200. *See* Faretta v. California, 422 U.S. 806, 835 (1975).

201. *See* Berghuis v. Thompkins, 560 U.S. 370, 385 (2010); *Montejo*, 556 U.S. at 786–87.

202. *See Berghuis*, 560 U.S. at 385.

203. *See Montejo*, 556 U.S. at 785–87.

204. *See* Missouri v. Seibert, 542 U.S. 600, 608–17 (2004).

205. *Id.* at 608 ("Accordingly, . . . this Court in *Miranda* concluded that 'the accused must be adequately and effectively apprised of his rights and the exercise of those rights must be fully honored . . . .'") (quoting Miranda v. Arizona, 384 U.S. 436, 467 (1966)).

206. *Id.* ("*Miranda* conditioned the admissibility at trial of any custodial confession on warning a suspect of his rights: failure to give the prescribed warnings and obtain a waiver of rights before custodial questioning generally requires exclusion of any statements obtained.").

207. *Id.* at 604–05.

208. *Id.* at 611–14.

209. *See* Montejo v. Louisiana, 556 U.S. 778, 782, 786–87 (2009).

210. *See id.* at 781–83.

211. *See id.*

212. *See id.*

cannot afford one, one will be appointed.[213] The defendant will find these warnings highly confusing because he has already been appointed a lawyer.[214] The warnings make no sense. How can those warnings constitute effective notice of his rights, as required by *Seibert* and *Miranda*?[215]

A state may therefore conclude that it may go its own way as *Miranda* expressly provides, as long as the warnings are at least as effective.[216] In this situation, a court could deviate from *Montejo* by not imposing the per se *Edwards* prohibition against police seeking a waiver.[217] Rather, a state court could deviate from *Montejo* by requiring warnings clearer than the *Miranda* warnings approved by *Montejo*.[218]

A state court could require, under its own constitution, that the warnings explain to a suspect that he already *has* a lawyer, and that if he wishes to have that lawyer present during questioning, he may.[219] The warning might also tell him that he can consult with his lawyer, perhaps by phone, in deciding whether to waive counsel's presence and talk to the police.[220] Of course, we know what the lawyer will say to this, but that implacable fact should not mean a defendant should not receive such a straightforward and less confusing warning.[221]

These new, enhanced warnings and waiver requirements would be state-specific because they would be tailored to the state's precise method of first appearance and appointment of counsel.[222] Each state may have different particulars in how it appoints counsel, and the warnings, either at that moment, later, or both, could take those state-specific procedures into account.[223] The procedures in total, again, constitute the state's right to counsel as well as the state's institution of attorney-client relationship, and thus form a related example of how and why a state court might deviate in interpreting its state constitutional right-to-counsel provision.

---

213. Miranda v. Arizona, 384 U.S. 436, 473 (1966).

214. *See* Ferguson, *supra* note 8, at 1449 ("[A] defendant who has already been provided a lawyer and who is then informed *again* that a lawyer will be appointed for him might be confused about the repetition." (emphasis in original)).

215. *See* Missouri v. Seibert, 542 U.S. 600, 611–12 (2004) ("The threshold issue when interrogators question first and warn later is thus whether it would be reasonable to find that in these circumstances the warnings could function 'effectively' as *Miranda* requires."); *Miranda*, 384 U.S. at 467 ("[T]he accused must be adequately and effectively apprised of his rights and the exercise of those rights must be fully honored.").

216. *Miranda*, 384 U.S. at 490.

217. *See* Edwards v. Arizona, 451 U.S. 477, 484–85 (1981).

218. *See* Montejo v. Louisiana, 556 U.S. 778, 798–99 (2009).

219. *See Miranda*, 384 U.S. at 490.

220. *See id.*

221. *See Montejo*, 556 U.S. at 813–14 (Stevens, J., dissenting).

222. *See, e.g.*, Friedman v. Comm'r of Pub. Safety, 473 N.W.2d 828, 830 (Minn. 1992) (holding that Minnesota's state constitutional right to counsel attached earlier than the federal right and would provide "greater protection for individual rights than that which the federal Constitution minimally mandates").

223. *See* State v. Lawson, 297 P.3d 1164, 1171–74 (Kan. 2013); Keysor v. Commonwealth, 486 S.W.3d 273, 274–75 (Ky. 2016); State v. Bevel, 745 S.E.2d 237, 239–42 (W. Va. 2013).

VI. BEYOND *MONTEJO*

The foregoing suggests several reasons a state court might interpret its state right-to-counsel provision differently from the Supreme Court in *Montejo*. At least some of the reasons rely upon a particular principle: state courts may interpret their constitutions differently when the provision at issue involves an institution in which the state has a particular interest.[224] Any given state, and states in general, have a particular interest in the attorney-client relationship, an institution entirely of state creation.[225] A state court may therefore assess this institution and its particulars in interpreting its state's right-to-counsel provision.[226]

But we may very briefly consider other constitutional provisions.[227] Some will similarly involve institutions that a state may have a particular interest in.[228] Others may not, involving rights general enough that they should be the same whether state or federal.[229]

For example, the Second Amendment applies at least in part to militias, as well as an individual's right to self-defense.[230] A state constitution that contains similar language could well be interpreted in light of its own existing institution of the state militia.[231] Voting rights and districting *within* a state under the state constitution might similarly depart from the federal counterpart.[232]

On the other hand, many rights under the Bill of Rights seem not to relate to any specific state interest.[233] Search-and-seizure rights under the Fourth Amendment involve the right of an individual as against law enforcement. It seems to make little difference whether that law enforcement is a local police officer or the FBI.[234] A search is a search.

---

224. *See, e.g.*, Florida v. Jardines, 569 U.S. 1 (2013); Katz v. United States, 389 U.S. 347 (1967). *But see, e.g.*, Snyder v. Phelps, 562 U.S. 443 (2011) (addressing Freedom-of-Speech protections for group protesting "homosexuality, particularly in America's military" at a service member's funeral).

225. *See supra* text accompanying notes 163–68 (discussing the creation and scope of the attorney-client relationship at the state level).

226. *See Montejo*, 556 U.S. at 784–85.

227. *See* U.S. CONST. amends. II, IV; VA. CONST. art. I, § 13.

228. *Compare* U.S. CONST. amend. II (addressing the right to bear arms and well-regulated militias), *with* VA. CONST. art. I, § 13 (defining a well-regulated militia and discussing the right to bear arms).

229. *See* U.S. CONST. amend. IV; FL. CONST. art. 1, § 12. *But see Jardines*, 569 U.S. at 6–7 (holding that officers may legally search the curtilage of one's home if there is a customary invitation for the public to do so).

230. District of Columbia v. Heller, 554 U.S. 570, 596 (2008) (noting that the Second Amendment applies to and connotes "a [militia] already in existence," though not limited to that purpose).

231. *See* VA. CONST. art. I, § 13 ("That a well regulated militia, composed of the body of the people, trained to arms, is the proper, natural, and safe defense of a free state, therefore, the right of the people to keep and bear arms shall not be infringed . . . .").

232. *See id.*

233. *See, e.g.*, U.S. CONST. amend. IV.

234. *See, e.g.*, City of Indianapolis v. Edmond, 531 U.S. 32 (2000); Anderson v. Creighton, 483 U.S. 635 (1987).

But the Fourth Amendment measures a search, in part, by whether the police have trespassed upon the individual's property, and both property laws and trespass laws are state laws (or even custom).[235] As the Court pointed out in *Florida v. Jardines*, whether the police entering a person's front yard is a trespass and thus a Fourth Amendment search depends on local custom; though in the end, the Court adopted a per se rule that applies to all states and all localities.[236]

A state court, construing its own state search-and-seizure provision, could take into account the particularities of its own state property law and trespass law in interpreting whether certain police conduct constitutes a "search."[237] Any resulting state decision might deviate from federal constitutional law for reasons that are not a simple political disagreement but rooted in a recognition that a particular state's property and trespass laws lead to a different result.[238]

Even the more fluid privacy wing of Fourth Amendment analysis could respond to a particular state's statutory regime regarding privacy.[239] If we seek to root the Fourth Amendment test for "search" more concretely in positive law, a state could more easily do so based directly on its statutory privacy provisions—from state wiretap law, to medical records law, to law concerning license plate readers.[240] A state supreme court could draw conclusions about the general view of privacy in that particular state and draw upon that view in providing greater or lesser privacy protections under its state constitutional search-and-seizure provision.

Of course, as we move further away from a concrete state institution expressly mentioned in a provision, such as the right to counsel provision, the greater the risk that a state court will simply reach a desired result, mentioning as a make-weight some perceived state interest, culture, or institution.[241] The Massachusetts's high court has asserted that Massachusetts's has always zealously protected its citizens from unlawful search and seizure, and that it would therefore impose more enhanced protections than the federal counterpart.[242] And true, Massachusetts hosted the most salient historical precedents for the federal Fourth Amendment.[243]

---

235. *See* Florida v. Jardines, 569 U.S. 1, 12, 18 (2013) (Kagan, J., concurring) (Alito, J., dissenting).

236. *Id.* at 8–9. The majority avoided the precise term "trespass," but its discussion and reliance on local custom made clear it intended the local property concept of trespass. *See generally id.*

237. *See, e.g.*, *infra* text accompanying notes 240–42 (discussing Massachusetts' search-and-seizure law).

238. *See generally infra* text accompanying notes 240–42 (explaining how states could deviate from the federal constitution).

239. *See, e.g.*, Katz v. United States, 389 U.S. 347 (1967).

240. William Baude & James Y. Stern, *The Positive Law Model of the Fourth Amendment*, 129 HARV. L. REV. 1821, 1841 (2016).

241. *See id.* at 1852.

242. *See* Commonwealth v. Fini, 403 Mass. 567, 570 (Mass. 1988); *see also* Oregon v. Hass, 420 U.S. 714, 719 (1975).

243. *See* Clancy, *supra* note 43, at 481–82.

Nevertheless, I suppose every state claims to care equally about individual liberties.

My framework based upon *Montejo* thus provides both an illustration and a limit. It illustrates a clause truly rooted in a state institution, affording states a reason to interpret their state provisions differently in conformity with the state's institution of counsel.[244] But when a clause, such as the Free Speech Clause, seems to protect interests that transcend any particular state's institution, a court might be more reluctant to go its own way.[245] The right to protest a funeral, much to the annoyance of the bereaved,[246] does not seem to depend upon any state institution or other statutes.[247] Californians love their free speech as much as Arkansans.[248] As a result, my framework may show why New Judicial Federalism will continue to face challenges for many constitutional provisions: there is little reason to treat the federal and state versions differently, because they address the same interests from the same vantage point based upon the same text, history, and structure, and there is no state institution or statutory regime that itself suggests a reason to deviate.

244. *See supra* Part IV–V (laying out a framework for state courts to deviate from *Montejo* based on principles rooted in the institution of counsel as a state creation).

245. *See, e.g.*, Snyder v. Phelps, 562 U.S. 443 (2011).

246. *See id.* at 443.

247. *See id.* at 460–61.

248. *See Arkansas Tech University Expands Free Speech Zones*, U.S. NEWS & WORLD REP. (Aug. 18, 2017, 6:09 PM), http://www.usnews.com/new/best-states/arkansas/articles/2017-08-18/arkansas-tech-university-expands-free-speech-zones; Mike McPhate, *California Today: Berkeley's New Chancellor and a 'Free Speech Year'*, N.Y. TIMES (Aug. 22, 2017), http://www.nytimes.com/2017/08/22/us/california-today-berkeley-chancellor-free-speech.html.