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ARTICLES

This is a speech delivered by The Honorable Stanley Mosk, Justice of the Supreme Court of California, at the T.C. Williams School of Law's eighth annual Emroch Lecture. Among his many achievements, Justice Mosk has authored some of California's most constructive legislative proposals in the crime and law enforcement fields, including the measure creating the Commission on Peace Officers Standards and Training.

THE ROLE OF STATE CONSTITUTIONS IN AN ERA OF BIG GOVERNMENT

The Honorable Stanley Mosk

I am certain there are a number of future judges in this impressive audience. I will not embarrass you by asking you to identify yourselves. However, lest you are under the impression that everywhere judging is a quiet, reflective and reclusive vocation, let me cite some figures recently released by the International Commission of Jurists, based in Geneva.¹

In the year 1990-1991, at least 532 judges and lawyers around the world were murdered, detained, or officially harassed. Of that number, 55 were killed, 103 were detained, 42 were attacked, 65 were threatened and 8 disappeared.

For example, in Columbia alone, thirty-seven judges and lawyers were murdered. In the Sudan, all non-fundamentalist judges were dismissed after the June 1989 coup, the bar association was banned, and seventeen lawyers were sent to prison without trial or even any charges. In Yugoslavia, in one province 180 ethnic Alba-

1. INT'L COMMISSION OF JURISTS NEWS. Jan. 1992.

nian judges and prosecutors were removed. In Peru, ten jurists were killed and twenty-six others were victims of violence or threats. In China, eleven jurists were jailed for their pro-democracy sympathies. In Myanmar, Ghana, Nigeria, Pakistan, and Tunisia, all civilian judges were summarily removed and replaced by military or special tribunals. And even in France and Italy, activities of some judges were curtailed when they were deemed to be getting too close to sensitive political issues.

To those of you who will be lawyers in the future, one of your most unpleasant experiences will be lawyer bashing. This is a relatively new phenomenon employed by stand-up comedians and, most recently, by Vice President Dan Quayle. Is there any validity to the complaints about lawyers, and particularly about the United States having too many of them?

Of course there are a few bad apples in our barrel, but disciplinary agencies take rather good care of them with disbarment or sanctions. Most of the other current charges do not withstand analysis.

Take, for example, a recent statement by Dan Quayle that "the legal system . . . now costs Americans an estimated \$300 billion a year." Where did that figure come from? It was cited by the self-styled *Agenda for Civil Justice Reform* prepared by the so-called Council on Competitiveness, chairman Dan Quayle.² Where did the Council get that \$300 billion figure? From an article in *Forbes* magazine.³ And what was *Forbes'* source? A book by Peter Huber, whose career has been as a prolific author of tort-bashing books and articles.⁴

But here is what Huber actually wrote in his 1988 book entitled *Liability: The Legal Revolution and Its Consequences*; equating tort liability with:

a tax that directly costs American individuals, businesses, municipalities, and other government bodies at least \$80 billion a year, a figure that equals the total profits of the country's top 200 corporations. But many of the tax's costs are indirect and unmeasurable. . . . The extent of these indirect costs can only be guessed at.⁵

2. PRESIDENT'S COUNCIL ON COMPETITIVENESS, *AGENDA FOR CIVIL JUSTICE REFORM IN AMERICA* (Aug. 1991).

3. Ronald Bailey, *Legal Mayhem*, *FORBES*, Nov. 14, 1988, at 97.

4. PETER W. HUBER, *LIABILITY: THE LEGAL REVOLUTION AND ITS CONSEQUENCES* 4 (1988).

5. *Id.*

So from an unmeasurable sum, to a guessed-at figure, the Vice President tells the people of the United States, as a fact, that the legal system is costing them \$300 billion a year.

I suggest that instead of lawyer bashing, we may need some politician bashing.

The oft-repeated statement that there are too many lawyers is also disturbing. Dan Quayle and others have declared that we have some seventy-five percent of the lawyers in the world.⁶ Once again, exaggeration replaces reality. Without obtaining data from much of Eastern Europe, Africa, the Middle East, Southeast Asia, and Latin America, documents on file at the Institute for Legal Studies at the University of Wisconsin establish that we have approximately thirty-four percent of the world's lawyers and the figure will be lower when information is obtained from the other countries. One-third does not appear to be an unreasonable percentage for the world's greatest economic and industrial nation.

We have had a number of bicentennials these past several years. There was the bicentennial of the adoption of the Constitution, the bicentennial of the adoption of the Bill of Rights, and in 1990, the bicentennial of the United States Supreme Court as it became a reality when President Washington appointed the first justices.

The original Court was to begin its work on February 1, 1790, but there were two problems. First, only three of the six justices showed up, not enough to constitute a quorum. And more importantly, there was not a single case on the calendar.

Justice William Cushing of Massachusetts appeared in a powdered wig, a British custom that failed to catch on in the new nation. On February 2nd, Justice John Blair of Virginia arrived and a quorum was realized. The term, however, lasted only two days. Still no cases.

The Court did not announce its first decision until 1792. Therefore, we may now note the bicentennial of the working and productive Supreme Court.

6. David G. Savage, *Senate to Enter Fray on Products Liability Issue; Bush Campaign: Attack on Trial Lawyers Will Get Test in Debate on Bill to Preempt State Laws. Drugs, Medical Devices are Involved.*, L.A. TIMES, Sept. 7, 1992, at A28 (reporting that "Quayle repeatedly has cited . . . that 70% of the world's lawyers live in the United States. . .").

The first Chief Justice, John Jay, found life in the capital to be "intolerable" and he soon took off for other more exciting and rewarding duties, ultimately as Governor of New York.

Of course, much has changed in the past two centuries. These days, the Court term lasts nine months and involves more than 5000 petitions for hearing. The Court announces about 150 decisions each term. Since 1935, the Court has had its own imposing building. Since 1981, members of the Court no longer address each other as "Mr. Justice." That ended when Sandra Day O'Connor joined the bench. These days we no longer only have heroes; we also have sheroes.

It was not until John Marshall became our third chief justice that the Court took on many monumental cases. His Court handled a calendar of nearly a thousand cases. But before you deem that to be significant, consider the state supreme court on which I sit. Last year we handled 5537 matters; a monthly average of 461 cases. This is where the action is — at the state level. I will talk more about this in a moment.

As we approach our annual Law Day, we cannot overlook the unbelievably significant events that have recently taken place. Certainly these years will go down in history as among the most momentous since the American and French revolutions.

There is no question, as the President declared in his State of the Union address: "this has been a dramatic and deeply promising time in our history."⁷ He was referring, of course, to the remarkable changes in the former Soviet Union and throughout Eastern Europe. Country after country disavowed regimes that denied individual rights, and opted for adoption of democratic values. Most of them did not achieve the full spectrum of guarantees of individual rights to which Americans have aspired over the past 200 years; but there can be no question that the movement has been in that direction.

Never in our wildest dreams did we imagine the progress toward human rights that 1991 produced. We could not have conceived of a place like Lithuania, not only declaring its independence, but ordering the release from prison of all who had been convicted on the basis of KGB-induced confessions. True, some evil people, includ-

7. President George Bush, Address Before a Joint Session of the Congress on the State of the Union (Jan. 28, 1992), 28 WEEKLY COMP. PRES. DOC. 170 (Feb. 3, 1992).

ing former Nazi collaborators, obtained their freedom; but the principle was established that imprisonment could not be justified on the basis of forced confessions.

It is truly ironic that just a few months preceding that time, the United States Supreme Court held in *Arizona v. Fulminante*⁸ that a forced confession did not require reversal per se. A five-justice majority, Rehnquist, O'Connor, Scalia, Kennedy and Souter, held that the harmless error rule applies to coerced confessions. The remarkable rationale of Chief Justice Rehnquist was that introduction of a coerced confession is simply "a classic trial error"⁹ that does not "transcend . . . the criminal process."¹⁰

The harmless error doctrine apparently had its origin in *Chapman v. California*.¹¹ But that very Court cautioned that "there are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error."¹² Those circumstances enumerated were: right to counsel,¹³ biased judges,¹⁴ and coerced confessions.¹⁵ Subsequent to *Chapman*, the Supreme Court added three other serious errors not subject to the harmless error rule. These were: exclusion of members of the defendant's race from the grand jury,¹⁶ the right to represent oneself at trial,¹⁷ and the right to a public trial.¹⁸

Refusal to tolerate coerced confessions had its origin in Anglo-American jurisprudence nearly 400 years ago. *Bram v. United States*¹⁹ described a case decided in 1616, quoting Lord Coke: "[T]he human mind under the pressure of calamity is easily seduced, and is liable, in the alarm of danger, to acknowledge indiscriminately a falsehood or a truth, as different agitations may prevail. . . . [The] law will not suffer a prisoner to be made the deluded instrument of his own conviction."²⁰

8. 111 S. Ct. 1246 (1991).

9. *Id.* at 1264-65.

10. *Id.* at 1265.

11. 386 U.S. 18 (1967).

12. *Id.* at 23.

13. *Gideon v. Wainwright*, 372 U.S. 335 (1963).

14. *Tumey v. Ohio*, 273 U.S. 510 (1927).

15. *Payne v. Arkansas*, 356 U.S. 560 (1958).

16. *Vasquez v. Hillery*, 474 U.S. 254 (1986).

17. *McKaskle v. Wiggins*, 465 U.S. 168 (1984).

18. *Waller v. Georgia*, 467 U.S. 39 (1984).

19. 168 U.S. 532 (1897).

20. *Id.* at 547 (quoting *Burrowes v. High Comm'n Court Bulst* 49 (1616)).

Subsequent case after case, prior to *Fulminante*, decried the use of coerced confessions.²¹

With a sweep of the pen, the fundamental right recognized by years of unbroken precedent was swept aside by the bare majority in *Fulminante*, apparently out of misguided zeal to convict one they believed to be guilty.

So, as Lithuania, one of the newest professed democracies in the world, was freeing prisoners convicted on the basis of coerced confessions, the United States of America, the world's oldest democracy, was finding coerced confessions could be harmless. How ironic.

This kind of calculated damage to the principle of stare decisis is disturbing. Retired Justice Lewis Powell recently wrote on the importance of stare decisis.²² The doctrine is, he wrote, "essential to the rule of law."²³ He quoted Justice Frankfurter, who aptly noted the critical importance of stare decisis which he described as the principle "by whose circumspect observance the wisdom of this court as an institution transcending the moment can alone be brought to bear on the difficult problems that confront us."²⁴

Justice Powell reduced the merits of stare decisis to three simple specifics:

- (i) The first is one of special interest to judges: it makes our work easier. As Justice Cardozo put it: "[T]he labor of judges would be increased almost to the breaking point if every past decision could

21. See *Chambers v. Florida*, 309 U.S. 227 (1940); *Rose v. Clark*, 478 U.S. 570, 587 (1986) (Stevens, J., concurring); see also *Lyons v. Oklahoma*, 322 U.S. 596, 605 (1944) ("A coerced confession is offensive to basic standards of justice . . . declarations procured by torture are not premises from which a civilized forum will infer guilt."); *Spano v. New York*, 360 U.S. 315, 320-21 (1959) ("[I]n the end life and liberty can be as much endangered from illegal methods used to convict those thought to be criminals as from the actual criminals themselves."); *Blackburn v. Alabama*, 361 U.S. 199, 206-07 (1960) ("As important as it is that persons who have committed crimes be convicted, there are considerations which transcend the question of guilt or innocence. Thus, in cases involving involuntary confessions, [the] Court enforces the strongly felt attitude of our society that important human values are sacrificed where an agency of the government, in the course of securing a [confession], wrings a confession out of accused against his will."); *Rogers v. Richmond*, 365 U.S. 534, 540 (1961) ([C]onvictions following admission into evidence of confessions which are involuntary . . . cannot stand.").

22. Lewis F. Powell, Jr., *Stare Decisis and Judicial Restraint*, 1991 J. SUP. CT. HIST. 13.

23. *Id.* at 17.

24. *Id.* at 15 (quoting *Green v. United States*, 355 U.S. 184, 215 (1957) (Frankfurter, J., dissenting)).

be reopened in every case, and one could not lay one's own course of bricks on the secure foundation of the courses laid by others who had gone before him." . . . It cannot be suggested seriously that every case brought to the Court should require reexamination on the merits of every relevant precedent.

(ii) *Stare decisis* also enhances stability in the law. This is especially important in cases involving property rights and commercial transactions. Even in the area of personal rights, *stare decisis* is necessary to have a predictable set of rules on which citizens may rely in shaping their behavior.

(iii) Perhaps the most important and familiar argument for *stare decisis* is one of public legitimacy. The respect given the Court by the public and by the other branches of government rests in large part on the knowledge that the Court is not composed of unelected judges free to write their policy views into law. Rather, the Court is a body vested with the duty to exercise the judicial power prescribed by the Constitution. An important aspect of this is the respect that the Court shows for its own previous opinions.²⁵

Another egregious violation of *stare decisis* occurred when the Supreme Court in June 1991, directly overruled its own decisions rendered a mere two and four years earlier. I speak of *Payne v. Tennessee*,²⁶ in which Chief Justice Rehnquist and a majority overruled *Booth v. Maryland*²⁷ and *South Carolina v. Gathers*.²⁸ *Booth* and *Gathers* merely held that whether a defendant in a capital case receives death or a lesser penalty should depend on the circumstances of the offense and a weighing of aggravating and mitigating factors in the defendant's life. The opinions of surviving family members are irrelevant. Now under *Payne*,²⁹ members of the victim's grieving family may tearfully demand of the judge and jury that the culprit be put to death to atone for their loss. Justice Marshall, in dissent, undiplomatically noted that the new decision was the result of a change in Court personnel.³⁰ He wrote, "Power, not reason, is the new currency of this Court's decision-making."³¹ He expressed the fear that the Court now "sends a clear signal that

25. *Id.* at 15-16 (footnote omitted).

26. 111 S. Ct. 2597 (1991).

27. 482 U.S. 496 (1987).

28. 490 U.S. 805 (1989).

29. 111 S. Ct. 2597.

30. *Id.* at 2619 (Marshall, J., dissenting).

31. *Id.*

scores of established constitutional liberties are now ripe for reconsideration."³²

Before someone grumbles that, as Dickens wrote in *Oliver Twist*, "the law is a ass"³³ and often needs to be rejected, I will concede that there are occasions when human progress requires reversing prior court opinions. Certainly *Brown v. Board of Education*,³⁴ which specifically overruled *Plessy v. Ferguson*,³⁵ cannot be criticized today. I also have no trouble justifying *Baker v. Carr*,³⁶ the reapportionment case, which overruled *Colegrove v. Green*,³⁷ or *Taylor v. Louisiana*,³⁸ which removed the restrictions on women serving as jurors that had been imposed in *Hoyt v. Florida*.³⁹

Nevertheless, with the foregoing type of rational exceptions, I must agree in general with Justice Powell that "[i]n the long run, restraint in decision-making and respect for decisions once made are the keys to preservation of an independent judiciary and the guardian of rights."⁴⁰

Let me now briefly review some legal history, so we can better comprehend how we got ourselves into what I believe to be retrogression at the national level, how we find ourselves going backward just as the rest of the western civilized world moves forward, and what is being done about it.

For 173 of the first 200 years of this republic, a relentless tide of judicial authority flowed from the states to the federal government. From John Marshall's opinion in *Marbury v. Madison*⁴¹ in 1803 to comparatively recent days, the highest courts in the several states were often reduced to the status of intermediate appellate tribunals, mere bus stops on the route from trial courts to the Supreme Court.

I do not say this necessarily in criticism. Indeed, before 1953, state courts were guilty of a dismal performance in enforcing provi-

32. *Id.*

33. CHARLES DICKENS, *THE ADVENTURES OF OLIVER TWIST* 399 (Oxford University Press 1966) (1837).

34. 349 U.S. 294 (1955).

35. 163 U.S. 537 (1896).

36. 369 U.S. 186 (1962).

37. 328 U.S. 549 (1946).

38. 419 U.S. 522 (1975).

39. 368 U.S. 57 (1961).

40. Powell, *supra* note 22, at 18.

41. 5 U.S. 137 (1803).

sions of their own constitutions. At the same time the federal judiciary tolerated an era that was characterized by a benign acceptance of racism, political malapportionment, disability of the poor, an intolerant approach to sexual matters, denial of universal suffrage, egregious imposition on the rights of the criminally accused. Under Chief Justice Warren and his merry men, perhaps encouraged by the civil rights movement of the 1950s, the Supreme Court abandoned an apathetic approach to overt injustice in society and elected to employ the Federal Constitution to achieve a liberating and egalitarian impact in the areas of political opportunity, criminal justice, and racial equality.

The states were compelled to fall in line; some of them were dragged kicking and screaming. Despite protests over some of the decisions, notably in the areas of reapportionment and protection of the rights of criminal defendants, state courts swallowed their provincial prejudices and obediently embarked on the designated new course. The nation and the states truly experienced legal evolution.

The states ultimately adapted their rulings, in particular their criminal law techniques, to the High Court's requirements and in general a satisfactory accommodation was achieved, sort of a judicial detente. Police officers were taught how to lawfully enforce the law; trial judges became reconciled to admitting only legally obtained evidence. Only the press and some headline-hunting politicians spoke about reversals on technicalities, as if constitutional guarantees are a mere technicality.

Just as an era of peaceful coexistence seemed imminent, the post-Warren period began. There have been vast changes in the High Court.

What then can reasonably be expected of state courts? Are they to create doctrines of state authority one year and then abandon them the next year as the tides on the Potomac ebb and flow? I think not. Such inconsistency is confusing to the bench and bar, counterproductive to law enforcement and demeaning to the judicial process.

A few illustrations come to mind. Consider the simple requirement that counsel be present at lineups. This rule was adopted by the Supreme Court in 1967 in *United States v. Wade*⁴² and *Gilbert*

42. 388 U.S. 218 (1967).

*v. California*⁴³ under the frequently articulated theory that adversary criminal proceedings begin not in the courtroom but at the police station.⁴⁴

The court in *Wade* emphasized the importance of the presence of counsel at "critical confrontations"⁴⁵ and firmly declared that "we scrutinize . . . pretrial confrontation of the accused."⁴⁶ And in *Stovall v. Denno*,⁴⁷ the Court added unequivocally that "counsel is required at *all* confrontations" for identification.⁴⁸

That sounded clear and emphatic. State courts obediently followed directions from above. Manifestly, it seemed to most states, "any" pretrial confrontation and "all" confrontations for identification implied no limitation.

But along came *Kirby v. Illinois*⁴⁹ in 1972 and suddenly the High Court found it to be "firmly established" that the right to counsel attaches only at the time judicial proceedings have been initiated.⁵⁰ "Any" and "all" lost something in the translation. They now mean "very few," for post-indictment lineups are rarely held, and when they are, it is to refresh identifications previously made. Alaska⁵¹ and Pennsylvania⁵² specifically refused to follow *Kirby*.

Take the murky field of obscenity. What test does the Supreme Court require?

For years federal and state courts grappled with the *Roth*⁵³ rule. To some judges the problem was simple. An Ohio judge adopted this pragmatic test: "That the material acts as an aphrodisiac can almost be determined physically . . . a judge or juror should be able to estimate that rather closely by the reaction he himself has to the material."⁵⁴ I can hear his jury instruction now: "Ladies and

43. 388 U.S. 263 (1967).

44. See, e.g., *Escobedo v. Illinois*, 378 U.S. 478 (1964).

45. *Wade*, 388 U.S. at 224.

46. *Id.* at 227.

47. 388 U.S. 293 (1967).

48. *Id.* at 298 (emphasis added).

49. 406 U.S. 682 (1972).

50. *Id.* at 688.

51. See *Blue v. State*, 558 P.2d 636 (Alaska 1977).

52. See *Commonwealth v. Richman*, 320 A.2d 351 (Pa. 1974).

53. *Roth v. United States*, 354 U.S. 476 (1957) (finding that a lack of precision in federal obscenity statute does not offend constitutional safeguards or fail to give adequate notice of what is prohibited).

54. *City of Cincinnati v. Walton*, 145 N.E.2d 407, 413 (Ohio 1957).

gentlemen of the jury: in the final analysis what is obscene is whatever turns you on.”

Just as the states, one way or another, were adjusting to *Roth*, in 1973 the rules of the game were abruptly changed in *Miller v. California*.⁵⁵ Whereas previously the High Court declared in *Roth* and reaffirmed in *Jacobellis v. Ohio*⁵⁶ that “the constitutional status of an allegedly obscene work must be determined on the basis of a *national* Constitution we are expounding,”⁵⁷ in the *Miller* test, courts are to apply “contemporary *community* standards.”⁵⁸

There are many more illustrations of federal vacillation, but time limitations and your patience forbid recitation.

When the Supreme Court truck careens from one side of the constitutional road to the other, state courts have one of two alternatives. They can shift gears and once again change directions, thus resuming the course upon which they were originally embarked pre-Warren, or they can retain existing individual rights by reliance on the independent nonfederal grounds found in the several state constitutions. A growing number of states have adopted the latter course. They have accepted Justice Brennan’s cordial invitation in *Michigan v. Mosley*;⁵⁹ he reminded us that each “state has power to impose higher standards governing police practices under state law than is required by the Federal Constitution.”⁶⁰

You may wonder how these “higher standards” apply in actual practice. Do the states have a genuine rationale when they afford their states’ citizens more than the bare minimum of rights afforded under our national charter? Let me offer some examples of how state constitutions have been employed to differ with federal constitutional interpretations.

If a person is stopped by a police officer for a simple traffic infraction, the motorist may be subjected to a full body search, all parts of his vehicle searched, and all containers opened and examined. No constitutional violation, said the United States Su-

55. 413 U.S. 15 (1973).

56. 378 U.S. 184 (1964).

57. *Id.* at 195 (“[T]he constitutional status of an allegedly obscene work must be determined on the basis of a *national* standard. It is, after all, a national Constitution we are expounding.”).

58. *Miller*, 413 U.S. at 37 (emphasis added).

59. 423 U.S. 96 (1975).

60. *Id.* at 120 (Brennan, J., dissenting).

preme Court in *Robinson*⁶¹ and *Gustafson*.⁶² But many states found such police conduct offended state constitutional provisions unless the officer has articulable reasons to suspect other illegal conduct.

A police officer or a public prosecutor may walk into a bank and, with no authority of process, demand to examine the bank records of a named individual or corporation. No constitutional violation, said the United States Supreme Court in *United States v. Miller*.⁶³ But in a California case involving a lawyer, we observed that one's cancelled checks, loan applications, etc., are a mini-biography; that one expects his bank records to be used only for internal bank processes and therefore an examination of them violates the state constitutional right of privacy, unless the records are obtained by a warrant or subpoena.⁶⁴

In *Swain v. Alabama*⁶⁵ the U.S. Supreme Court declared there can be no restrictions whatever on the use of peremptory challenges of jurors. California agreed in principle, but declared an exception under state constitution principles: the challenges may not be used for a racially discriminatory purpose.⁶⁶ Ultimately the Supreme Court unanimously reversed *Swain* and finally agreed with the position our court had taken eight years earlier.⁶⁷

The U.S. Supreme Court held in *Pennsylvania v. Ritchie*⁶⁸ that the mental health records of an accuser in a rape case could be submitted only to the trial court for an in camera review. The Massachusetts high court held, to the contrary, that the accuser's entire mental health records were to be given to the defense counsel without any prior review by the trial judge.⁶⁹ It might have been interesting if William Kennedy Smith and Mike Tyson had been tried in Massachusetts.

There is a growing tendency to allow a child victim to testify by means of videotape, outside the presence of the defendant. The

61. *United States v. Robinson*, 414 U.S. 218 (1973).

62. *Gustafson v. Florida*, 414 U.S. 260 (1973).

63. 425 U.S. 435 (1976).

64. *Burrows v. Superior Court*, 529 P.2d 590 (Cal. 1974).

65. 380 U.S. 202 (1965).

66. *People v. Wheeler*, 583 P.2d 748 (Cal. 1978).

67. *Batson v. Kentucky*, 476 U.S. 79 (1986).

68. 480 U.S. 39 (1987) (Children and Youth Services child abuse investigative file could only be submitted to the trial court for an in camera review).

69. *Commonwealth v. Stockhammer*, 570 N.E.2d 992 (Mass. 1991).

U.S. Supreme Court would undoubtedly permit testimony in this manner, under *Maryland v. Craig*.⁷⁰ The Indiana Supreme Court held that under its state constitution a defendant has the right to meet his accuser face to face.⁷¹ A videotape presentation would not meet the state constitutional requirement.⁷²

Although sobriety roadblocks would undoubtedly be approved by the United States Supreme Court, since it found no problem with inspection of everyone on a bus, the Supreme Court of Rhode Island found such roadblocks, without particularized suspicion, to be violative of its state constitutional right of privacy.⁷³

Federal courts, and indeed most state courts, would hold that a witness' privilege against self incrimination is waived once he testifies to part of the subject matter as to which the privilege is asserted. However, Maryland holds that even if there has been a waiver of a federal right and partial testimony, a witness may still assert privilege under article 22 of the Maryland Declaration of Rights. The court indicated that only that state and New Jersey follow what it described as the English rule.⁷⁴

In *Penry v. Lynaugh*⁷⁵ the Supreme Court held that the execution of mentally retarded persons does not violate the Eighth Amendment. The Georgia Supreme Court held that "although the rest of the nation might not agree, under the Georgia Constitution the execution of the mentally retarded constitutes cruel and unusual punishment."⁷⁶

Garbage bags left on the curb for collection; no right of privacy held the United States Supreme Court in *California v. Greenwood*.⁷⁷ The New Jersey Supreme Court held there is an expectation of privacy and that a search warrant is necessary before the garbage bag may be inspected.⁷⁸

How about a dog sniff to ferret out narcotics? Not a search, held the U.S. Supreme Court in *United States v. Place*.⁷⁹ The New

70. 497 U.S. 836 (1990).

71. *Brady v. State*, 575 N.E.2d 981 (Ind. 1991).

72. *Id.*

73. *Pimental v. Rhode Island Dept. of Transp.*, 561 A.2d 1348 (R.I. 1989).

74. *Choi v. State*, 560 A.2d 1108 (Md. 1989).

75. 492 U.S. 302 (1989).

76. *Fleming v. Zant*, 386 S.E.2d 339, 342 (Ga. 1989).

77. 486 U.S. 35 (1988).

78. *State v. Hempele*, 576 A.2d 793 (N.J. 1990).

79. 462 U.S. 696 (1983).

Hampshire Supreme Court held that it is indeed a search under the state constitution subject to the rules of reasonable suspicion.⁸⁰ Query: must the dog get a search warrant?

In *Patton v. Yount*,⁸¹ the Supreme Court held there is a presumption of correctness to be afforded a trial court's ruling on a motion for change of venue. In a capital case, the Georgia Supreme Court declared a "better and surer" rule was needed, and held that a change of venue had to be granted if the defendant makes a substantial showing of the likelihood of prejudice by reason of extensive pretrial publicity.⁸²

In North Carolina, a former dean of a state university sued on a theory that he had been removed in retaliation for his exercise of his right to free speech. The defendants insisted there was sovereign immunity under 42 U.S.C. § 1983 and prevailed below. The North Carolina Supreme Court reversed on the ground that freedom of speech under the state constitution was paramount. The court noted with some pride that the state constitutional convention of 1776 adopted a state Declaration of Rights prior to such rights being written into the Federal Constitution, thus manifesting its primacy.⁸³

In Minnesota, the police, in the course of apprehending a suspect, damaged property of a third person.⁸⁴ In the resulting lawsuit, the defense was that there was no taking under the Federal Constitution.⁸⁵ The Minnesota Supreme Court held that there was, in effect, a taking under the state constitution,⁸⁶ that otherwise it would be unfair to allocate the entire risk of loss to an innocent homeowner for the good of the general public.⁸⁷

In *Traylor v. State*⁸⁸ the Florida Supreme Court emphatically declared the primacy of its state constitution in a criminal law case. The issue involved the admissibility of confessions to out-of-state crimes.⁸⁹ The court began by noting that, to be admissible,

80. *State v. Pellicci*, 580 A.2d 710 (N.H. 1990).

81. 467 U.S. 1025 (1984).

82. *Jones v. State*, 409 S.E.2d 642, 643 (Ga. 1991).

83. *Corum v. University of N.C.*, 413 S.E.2d 276 (N.C. 1992).

84. *Wegner v. Milwaukee Mut. Ins. Co.*, 479 N.W.2d 38 (Minn. 1991).

85. *Id.* at 40.

86. *Id.* at 41-42.

87. *Id.* at 42.

88. 596 So.2d 957 (Fla. 1992).

89. *Id.* at 961.

the confessions had to pass under both the state and federal constitutions; only if they were admissible under the Florida Constitution, was it necessary to address federal law.⁹⁰ The Florida court observed that, as of 1986, eleven states had interpreted the self-incrimination provisions of their own state constitutions independently of federal Fifth Amendment jurisprudence.⁹¹ Those states include: Alaska, California, Georgia, Hawaii, Louisiana, Massachusetts, Michigan, New Hampshire, Pennsylvania, Vermont and Wyoming.⁹² The court observed that state constitutions had traditionally served as the prime protectors of their citizens' basic freedoms, and further wrote that, if the Federal Constitution represented the "floor" for basic freedoms, the constitutions of the states represented the "ceiling."⁹³ Thus, in looking to the provisions of Florida's Declaration of Rights, the court was bound to construe its text in order to maximize the protections afforded an individual against government intrusion or overreaching.⁹⁴

In *California v. Acevedo*⁹⁵ and *United States v. Ross*,⁹⁶ the Supreme Court held in effect that there is a diminished expectation of privacy in a container placed inside an automobile. The Vermont Supreme Court declined to buy that concept. It held that the efficient performance of law enforcement officers does not trump individual rights.⁹⁷ Thus, Vermont decided the case on the basis of the defendant's expectation of privacy, which, it said, was protected more broadly under the state constitution than in the Fourth Amendment.⁹⁸

In recent years Vermont has become a staunch defender of state constitutionalism. In *State v. Blow*,⁹⁹ the court held that the Vermont Constitution prohibited warrantless monitoring of defendant's conversations with a police informant in a defendant's home on the ground that one had a reasonable expectation of privacy in his own home. I should mention that in a companion case, the

90. *Id.*

91. *Id.* at 961 n.2.

92. *Id.*

93. *Id.* at 961-62.

94. *Id.* at 963.

95. 111 S. Ct. 1982 (1991).

96. 456 U.S. 798 (1982).

97. *State v. Savva*, 616 A.2d 774 (Vt. 1991).

98. *Id.*

99. 602 A.2d 552 (Vt. 1991).

court held this same expectation of privacy did not apply to conversations in a shopping center parking lot.¹⁰⁰

Utah came up with an unusual case. Its supreme court found that enumerating categories of dangerous dogs did not violate the state constitution's equal protection clause. A city adopted a regulation affecting certain breeds of canines, such as bull terriers, staffordshire terriers, etc., and owners of those animals complained of the canine discrimination.¹⁰¹ The supreme court found no violation of the state's equal protection clause, holding the evidence of the dangerousness of the named breeds to be sufficient to justify restrictions for public safety.¹⁰²

In *United States v. Leon*,¹⁰³ the Supreme Court created a "good faith exception" to the warrant requirement even when the warrant was ultimately found to be invalid. Oregon refused to apply *Leon* in excluding evidence obtained by a warrant that the authorities would not have obtained had they obeyed the constitution.¹⁰⁴ New York¹⁰⁵ and New Jersey¹⁰⁶ have flatly refused to follow *Leon*.

*Illinois v. Gates*¹⁰⁷ established a two-prong test for determining the validity of a warrant. It is interesting how the states have divided on accepting the High Court version. Nineteen states have adopted *Gates*, eleven have rejected it, eight as a matter of state constitutional law.¹⁰⁸

As a final example, consider a commonly recurring factual situation. A small orderly group of citizens undertakes to pass out leaflets, or to solicit signatures on petitions, in a privately owned shopping center. The shopping center owners seek to prohibit that activity. "Shut up and shop" is their philosophy.

Obviously there is a built-in tension between two constitutional guarantees. On the one hand, the citizens assert their right of freedom of speech and the right to petition their government for a redress of grievances. On the other hand, the shopping center owners

100. *State v. Brooks*, 601 A.2d 963 (Vt. 1991).

101. *Greenwood v. City of N. Salt Lake*, 817 P.2d 816, 817 (Utah 1991).

102. *Id.* at 821.

103. 468 U.S. 897 (1984).

104. *State v. Kosta*, 748 P.2d 72 (Or. 1989).

105. *People v. Bigelow*, 488 N.E.2d 451 (N.Y. 1985).

106. *State v. Novembrino*, 519 A.2d 820 (N.J. 1987).

107. *Illinois v. Gates*, 462 U.S. 213 (1983) (establishing the totality of the circumstances test).

108. BARRY LATZER, *STATE CONSTITUTIONS AND CRIMINAL JUSTICE* 58 (1991).

assert their right to possess and control private property and to exclude all non-business related activity. In that conflict which right is to prevail?

The Supreme Court of California held in 1970 that unless there is obstruction or undue interference with normal business operations, title of the property owners does not outweigh the substantial interest of individuals and groups to engage in peaceful and orderly free speech activities on the premises of shopping centers open to the public.¹⁰⁹

On four occasions the shopping center owners sought certiorari and rehearing from denial of certiorari, and in each instance they were rebuffed by the High Court, with no votes noted to grant. We had every reason to believe *Diamond v. Bland* was the law.

Two years later, however, the Supreme Court took over an identical case from Oregon, and in *Lloyd v. Tanner*¹¹⁰ held that the owners had the right to prohibit distribution of political handbills unrelated to the operation of the shopping center.

Then, in 1979 our court decided in *Robins v. Pruneyard* that the free speech provisions of the California Constitution offer "greater protection than the First Amendment now seems to provide."¹¹¹ We flatly refused to follow *Lloyd v. Tanner*.

The United States Supreme Court granted certiorari in *Robins v. Pruneyard*, and I must confess we sensed doom to our theory of state constitutionalism. But, to our delight, the Supreme Court agreed with us, 9-0.¹¹² Justice Rehnquist wrote the opinion that declared the reasoning in *Lloyd v. Tanner* "does not *ex proprio vigore* limit the authority of the State to exercise its police power or its sovereign right to adopt in its Constitution individual liberties more expansive than those conferred by the Federal Constitution."¹¹³

An Oregon court was faced with a criminal prosecution initiated by a shopping center owner against a group seeking signatures on initiative petitions. The court observed that:

109. *Diamond v. Bland*, 477 P.2d 733 (Cal. 1970).

110. 407 U.S. 551 (1972).

111. *Robins v. Pruneyard Shopping Ctr.*, 592 P.2d 341 347 (Cal. 1979), *aff'd*, 447 U.S. 74 (1980).

112. *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74 (1980).

113. *Id.* at 81 (citations omitted).

[w]hen the people adopted the initiative and referendum, there were ample opportunities to collect signatures. Parks, town squares and courthouses were common gathering places, and store entrances were usually directly off public sidewalks. The people could meet and conduct their legislative business on public property.

Today, the situation has substantially changed. Parks and courthouses are not the only, or even primary, foci of modern life. Many people who seldom go to those places now congregate at shopping centers. Privately owned stores and shopping centers typically are connected to privately owned parking areas, and stores are constructed so that entrances open on private property rather than on public sidewalks. Every part of a store or shopping center where it is feasible to seek signatures for initiative or referendum petitions is often privately owned.¹¹⁴

The court noted that the shopping center's

invitation to the public was broad and for more than just commercial activity. Its premises, by reason of the owner's invitation, became a forum for assembly by the community. Notwithstanding the company's apparent policy against allowing petitioners on its property, there is no evidence that defendants' activities substantially interfered with [the owner's] commercial activity, had a serious economic impact on the company or interfered with its 'reasonable investment backed expectations.'¹¹⁵

While Colorado agreed in principle,¹¹⁶ I must concede that Iowa, Wisconsin, Massachusetts and Michigan have reached contrary results under their state laws.¹¹⁷

If you need a prime example of how state justices are more understanding of the realities of life, consider the recent case out of Texas involving Leonel Herrera, convicted of murder.¹¹⁸ After losing his appeals below,¹¹⁹ he sought review in the United States Su-

114. *State v. Cargill*, 786 P.2d 208, 211 (Or. Ct. App. 1990).

115. *Id.* at 214.

116. *See Bock v. Westminster Mall Co.*, 819 P.2d 55 (Colo. 1991).

117. *See, e.g., State v. Lacy*, 465 N.W.2d 537 (Iowa 1991).

118. *See Herrera v. State*, 682 S.W.2d 313 (Tex. Crim. App. 1984), *cert. denied*, 471 U.S. 1131 (1985), *habeas corpus denied*, 904 F.2d 944 (5th Cir. 1990), *cert. denied*, 111 S. Ct. 307 (1990).

119. *See id.*

preme Court. It takes four votes to grant a hearing, and he received four affirmative votes.¹²⁰

However, his date of execution was approaching. It takes five votes to grant a stay. None of the five justices who did not vote for the hearing would budge an inch to stay his execution.¹²¹ Thus the pragmatic fact appeared to be that Herrera would get a hearing, but would be executed before he could learn the result. A strange concept of justice by the highest court in the land.

Fortunately there were two justices of the state court in Texas who were understanding. Minutes before Herrera's execution they granted the stay which had been denied by Justices Rehnquist, White, Scalia, Kennedy, and Thomas. Once again, a state judiciary shows the way to justice.

How pervasive have state constitutional law cases been in the various states? The National Association of Attorneys General publishes a monthly bulletin on cases decided strictly on the basis of state constitutions, and found the distribution over the past four years to be the following: California produced forty-nine such cases, New York and Florida twenty-six each, Massachusetts twenty-five, Washington twenty-two, Pennsylvania twenty-one, Oregon eighteen, North Carolina seventeen, Utah fifteen, and others lesser amounts. Virginia was cited six times. Only South Dakota rated a total blank.¹²²

On the general subject of federalism, in passing I must note a certain dichotomy between promises and performance. Every candidate for President, and every candidate for Congress, promise to reduce the federal government and to return controls to the states. No sooner do they get elected, and get off the airplane at Dulles Airport than they devise measures to increase federal authority over activities within the states. The usual means is federal preemption. Over the past decade alone, more than twenty-five new major preemptive statutes were passed by the Congress and approved by Presidents Reagan and Bush.¹²³ I cite this merely to indicate that while Washington tries to legislatively dominate the

120. See *Herrera v. Collins*, 112 S. Ct. 1074 (1992).

121. *Id.*

122. NATIONAL ASSOCIATION OF ATTORNEYS GENERAL, STATE CONST. L. BULL., Vol. V, No. 1 (Oct. 1991).

123. See Timothy J. Conlan, *And the Best Goes On: Intergovernmental Mandates and Preemption in an Era of Deregulation*, 21 PUBLIUS 43, 52 (1991).

states, and it generally succeeds in the regulatory area, it cannot control the states when they employ their state constitutions in assuring their citizens broader individual rights.

No doubt there is a growing interest in true federalism. There was a time when states' rights were associated with Orval Faubus and George Wallace barring the entrance of blacks to public schools. We are long past that confrontational period.

Last year the high court of Texas forthrightly declared that when interpreting its state constitution, it "will not be bound by Supreme Court decisions . . . [w]e recognize that state constitutions cannot subtract from the rights guaranteed by the United States Constitution, but they can provide additional rights to their citizens. 'The federal constitution sets the floor for individual rights; state constitutions establish the ceiling.'"¹²⁴ The court added that "state courts can better respond to local interests. . . . Our society is at once homogeneous, and heterogeneous and our legal culture should correspondingly be homogeneous (national) and heterogeneous (state). Moreover, the very concept of federalism embraces such an approach."¹²⁵

Thus, today states' rights are associated with increased, not lessened, individual guarantees. There is every indication, particularly since *Pruneyard*, that the Rehnquist court will defer to the states when they rely on state constitutional provisions.

At the top of any agenda on this subject must be James Madison's words in *The Federalist* (No. XLIV):

The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the state governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce, with which last the power of taxation will, for the most part, be connected. The powers reserved to the several states will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people and the internal order, improvement, and prosperity of the state.¹²⁶

Sound policy 200 years ago. Sound policy today.

124. *Heitman v. State*, 815 S.W.2d 681, 690 (Tex. Crim. App. 1991) (quoting *LeCroy v. Harlon*, 713 S.W.2d 335, 338 (Tex. 1986)).

125. *Id.* at 687.

126. *THE FEDERALIST* No. 44, at 174 (James Madison) (William B. Munro ed., 1914).