BRENNAN LECTURE

STATES' RIGHTS—AND WRONGS

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INTRODUCTION

It may be repetitious for a Brennan lecturer to pay tribute to Justice Brennan. Nevertheless, I cannot resist saying a few words about a Justice whom I consider a role model and for whom I have deep admiration and affection.

A number of years ago, when I was the Attorney General of California, I had the opportunity to spend two weeks in the company of Bill Brennan, morning, noon, and night. We were part of a seven-person group sent to England under the direction of NYU Professor Delmar Karlen to make a comparative study of British judicial procedure. I not only formed a friendship, but I was able to realize the brilliance, the capacity, and the humanity of this great Justice. We have kept in distant contact in the succeeding years. During that time, my admiration for him, and for his contribution to American jurisprudence, has multiplied many fold.

Thus, you can imagine my delight at being invited to give the annual Brennan Lecture. I also commend New York University for sponsoring this yearly event in honor of the person I consider the greatest jurist of modern times. It is particularly significant to devote a lecture series to the importance of state constitutional law, as recognized by Justice Brennan. I also must relate how honored I am to follow the two outstanding previous Brennan lecturers: Chief Judge Judith Kaye of New York and Justice Stewart Pollock of New Jersey. They are difficult acts to follow.

I
IN DEFENSE OF HABEAS CORPUS

The first issue I wish to discuss is the degree to which habeas corpus is being undermined, legislatively and judicially. There is a tendency on the part of many judges to reject petitions for habeas corpus on procedural grounds—the petition is late, it is repetitive, or

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it is not in acceptable form. I firmly believe the Great Writ is judicially sacred. Its worth to our democracy has been recognized since our independence in 1776 and particularly since the classic debate between Patrick Henry and John Marshall in 1788. Habeas corpus preserves the sanctity of individual freedom from erroneous charges and convictions. As Chief Justice Chase said long ago, "The great writ of *habeas corpus* has been for centuries esteemed the best and only sufficient defence of personal freedom. . . . It was brought to America by the colonists, and claimed as among the immemorial rights descended to them from their ancestors."[1]

In more modern times, Chief Justice Earl Warren wrote in *Parker v. Ellis*,[2] "Habeas corpus, with an ancestry reaching back to Roman Law, has been over the centuries a means of obtaining justice and maintaining the rule of law when other procedures have been unavailable or ineffective."[3] Justice Cardozo, rather uncharacteristically, put it even more dramatically when he was on the New York Court of Appeals. In *People ex rel. McCanliss v. McCanliss*,[4] Cardozo wrote, "By immemorial tradition the aim of habeas corpus is a justice that is swift and summary. . . . The law does not wait upon these niceties of practice, it does not dally and dawdle . . . . It leaps to the rescue with the aid of its historic writ."[5]

It must never be overlooked that the Great Writ is recognized for its inviolable character in the Constitution of the United States. To refresh your recollection—and I wish I could refresh the memory of some legislators—Article I, section 9, clause 2 declares: "The privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."[6] Thus, there is no qualification, limitation, or avoidance other than rebellion or invasion, neither of which we are in danger of experiencing, hopefully, during our lifetime.

This past year Congress passed what it labeled the "Antiterrorism and Effective Death Penalty Act of 1996."[7] Strangely, the first subject covered in the Act was "Habeas Corpus Reform."[8] How a legislative body can "reform" a right guaranteed by the Constitution is simply

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1 Ex Parte Yerger, 75 U.S. (8 Wall.) 85, 95 (1868).

2 362 U.S. 574 (1960).

3 Id. at 583 (footnote omitted).

4 175 N.E. 129 (N.Y. 1931).

5 Id. at 129-30.

6 U.S. Const. art. I, § 9, cl. 2.

7 Pub. L. No. 104-132, 110 Stat. 1214 (1996) (to be codified in scattered sections of U.S.C.).

8 Id. at §§ 101-08, 110 Stat. 1217-26 (to be codified in scattered sections of 21, 28 U.S.C.).

beyond my comprehension—particularly when the first item in the so called reform is to decree a one-year period of limitation for the application of a writ of habeas corpus.[9]

Then, to make certain that a death penalty imposed in a trial court is not delayed, the new act provides that "[t]he ineffectiveness or incompetence of counsel during State or Federal post-conviction proceedings in a capital case shall not be a ground for relief."[10] Furthermore, if you think the hurdles for habeas corpus are initially high under the new federal law, take a look at what is required for mere consideration of a subsequent habeas petition. A federal district court may not entertain a petition until a circuit court gives its approval for the matter to be considered. Otherwise, the petition "shall" be dismissed.[11]

I do not doubt that petitions for writs of habeas corpus can be, and undoubtedly some are, used for the purpose of delay or evasion of justice. However, that speedy justice is on occasion thwarted does not justify eviscerating a fundamental, constitutionally guaranteed right. By the same token, the presumption of innocence does on occasion result in a denial of genuine justice. So does the burden of proof sometimes permit a malefactor to escape just punishment. The Fourth Amendment occasionally protects a criminal. So does almost every constitutional guarantee.

The question therefore is whether we want to eliminate, evade, or otherwise overlook constitutional guarantees in order to convict or execute more criminals. I devoutly hope we never reach the conclusion that our constitutional provisions are expendable—whether in a courtroom or in the halls of a legislative body, federal or state.

There is no doubt that Americans are fed up with crime. They want the three Rs: retribution, revenge, and retaliation. As a result, many courts find some technical basis for declaring a petition for habeas corpus procedurally defective and thus avoid reaching the underlying merits. I have in mind a recent Virginia case in which the state supreme court denied habeas corpus by a 5-2 vote, despite the fact that a prison inmate facing execution produced evidence that he was innocent and that another person committed the murder for which he had been convicted.

Fortunately, in that case, the Governor of Virginia, though a firm believer in the death penalty, granted a last-minute commutation of the sentence. If the court denied issuing a writ of habeas corpus be-

[9] See id. at § 101, 110 Stat. 1217 (to be codified at 28 U.S.C. § 2244).

[10] Id. at § 107(a), 110 Stat. 1222 (to be codified at 28 U.S.C. §§ 2261-66).

[11] See id. at § 106(b), 110 Stat. 1220 (to be codified at 28 U.S.C. § 2244).

cause it believed the petition lacked merit, that is one matter. But my understanding is that the petition was denied primarily because the court deemed it a last-minute effort—that is, it was simply untimely. Suppose a petition comes in years after conviction. They say surely it should be barred on procedural grounds. My answer is, if a petitioner can establish his innocence or invalid conviction years after conviction and imprisonment, no court in good conscience should deny him that opportunity. The alternative is to keep an innocent person in prison. Do we really want to do that on the altar of procedural neatness? If a petition lacks substance, it should be denied on that substantive ground. If not, it should be entertained.

I must concede that trifling with the Bill of Rights, and with the writ of habeas corpus in particular, is not an entirely new phenomenon, as history tells us. In 1798, a mere seven years after ratification of the Bill of Rights, John Adams persuaded Congress to pass the Alien and Sedition Acts, under which journalists and others were prosecuted and imprisoned for bringing the President and Congress into "contempt or disrepute."[12] It also must be remembered that Abraham Lincoln suspended the writ of habeas corpus during the Civil War.[13] And, furthermore, the imprisonment of thousands of our citizens of Japanese ancestry during World War II is a sad and indefensible chapter in our history.

Of course, under our federal system, the fate of defendants, even capital defendants, can vary from state to state. For example, the Supreme Court of New Jersey held in *State v. Martini*[14] that its state constitution required post-conviction review in every death penalty case.[15] By contrast, an Oregon court recently held in *Bryant v. Thompson*[16] that habeas corpus is not a matter of right, but a privilege; that it is not an obligatory aspect of capital cases, and that thus there is no mandate for the court to hear a habeas corpus petition.[17] Needless to add, I prefer the New Jersey approach.

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12 Sedition Act, ch. 74, 1 Stat. 596 (1798).

13 See Abraham Lincoln, Proclamation Suspending Writ of Habeas Corpus (Sept. 15, 1863), reprinted in 6 Collected Works of Abraham Lincoln 451 (Roy P. Basler ed. 1953).

14 677 A.2d 1106 (N.J. 1966).

15 See id. at 1111-12 (noting that New Jersey judiciary is integral part of administration of death penalty).

16 922 P.2d 1219 (Or. 1996).

17 See id. at 1223.

II
EXCESSIVE SENTENCING

Another subject that deeply concerns me is the inordinately long sentences imposed by many courts. A few years ago the Supreme Court of Arizona held that a forty-year prison sentence, with no possibility of parole, was cruel and unusual punishment under the Eighth Amendment to the United States Constitution. The case, *State v. Bartlett*,[18] involved a twenty-three-year-old man who had sex with two girls, one fourteen years and ten months old, the other fourteen and a half years old. The sex was entirely consensual and the defendant had no prior felonies and no record of molesting young children. Nevertheless, the forty-year sentence was mandatory under Arizona statutes. Citing "the realities of adolescent life," among other factors, the high court of Arizona found the sentence unconstitutional.[19]

Sentences like the foregoing suggest a newly devised theory: nothing succeeds like excess. In my state of California, sentencing courts have been in the forefront of pouring on the years, particularly when that ugly word "sex" is involved. The Arizona forty-year sentence is modest by California standards. On August 23 of last year, a trial judge in Pomona, California, sentenced a convicted rapist to 515 years in prison.[20] My court has denied petitions for habeas corpus in cases where defendants were sentenced to 129 years in prison,[21] 98 years,[22] 99 years and four months,[23] and 111 years.[24]

Even those sentences are commonplace. In 1990, the defendant in *People v. Lewis*[25] was sentenced to 155 years plus two consecutive life terms running concurrently with two additional life terms.[26]

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18 830 P.2d 823 (Ariz. 1992).

19 Id. at 829.

20 See 515 Years for Rapist, Fresno Bee, Aug. 25, 1996, at A4, available in 1996 WL 6820414.

21 See People v. Bestelmeyer, 212 Cal. App. 3d 520 (1985) (declaring trial court's sentence of 129 years for conviction on 25 sex crime counts does not constitute cruel and unusual punishment).

22 See People v. Carter, No. S029714, 1993 Cal. LEXIS 359 (Cal. Jan. 20, 1993) (denying petition for review). Justice Mosk dissented from denial of review. See id.

23 See In re Wheeler, No. S029171, 1992 Cal. LEXIS 6028 (Cal. Dec. 2, 1992) (denying petition for review).

24 See Belton v. Superior Court, No. S030305, 1993 Cal. LEXIS 516 (Cal. Jan. 27, 1993) (denying petition for review). Justice Mosk dissented from denial of review. See id.

25 No. S013891, 1990 Cal. LEXIS 1460 (Cal. Apr. 4, 1990).

26 See id. (denying petition for review).

George Anthony Sanchez was given 406 years[27] and Grace Dill received 405 years in prison,[28] both for child molestation.

I wondered what judge would be the first to make the Guinness Book of World Records by imposing a prison sentence of 1,000 years. I wonder no more. An Oklahoma City judge put us all to shame. On December 23, 1994, the press reported that "[a] judge weary of criminals serving only a portion of their time yesterday sentenced a child rapist to 30,000 years in prison."[29] I kid you not. The official sentence was for 30,000 years in prison. I wrote to Judge Daniel Owens,[30] and he confirmed he had imposed that sentence. Parenthetically, if the defendant could serve the entire sentence, at a minimum cost of $20,000 a year, it would cost the people of Oklahoma $600 million.

Another prize sentence was imposed this past month in Charlotte, North Carolina. Defendant Henry Louis Wallace was given nine death sentences—I thought of the nine lives of a cat—and to those were added ten life sentences and 322 years in prison.[31] If the death sentences are to be served concurrently, that might be handled properly. But if the judge had in mind nine consecutive death sentences, that would certainly create an insolvable problem.

Unquestionably, sex offenses are serious and often have a long-term residual effect on the victim. But it cannot be said that they are more serious, in permanent effect, than murder, mayhem, or manslaughter, all of which result in more rational penalties. Unfortunately, there appears to be an emotional aspect to sentencing for sex offenses, whether committed on an adult or a juvenile. All too often an irate judge responds to a defendant's egregious conduct by imposing a sentence of monstrous magnitude. The judge imposing such a sentence may believe he is dramatically demonstrating society's contempt for the defendant—and, incidentally, he is likely to obtain substantial media coverage. However, in actuality, such sentencing reflects on the lack of objectivity, and the dispassion, in the judicial process.

The question must always be whether the sentence imposed is viable—i.e., whether it is possible for a defendant to serve that precise

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27 See Rapist's Term: 406 Years, L.A. Times, June 7, 1989, at I-2.

28 See People v. Pitts, 273 Cal. Rptr. 757, 772 (Cal. Ct. App. 1990) (noting trial court's assignment of 405-year sentence for conviction on 57 child molestation counts). The conviction was overturned by the intermediate appellate court for prosecutorial misconduct. See id. at 806-07.

29 30,000 Year Sentence for Assault of Child, S.F. Chron., Dec. 23, 1994, at A3.

30 Oklahoma District Court, 7th Judicial District.

31 See Serial Killer Gets 9 Death Sentences, L.A. Times, Jan. 30, 1997, at A5 (describing sentencing hearing).

sentence. I am convinced a sentence that on its face is impossible for a human being to serve is per se "cruel or unusual" punishment under our state constitution[32] and "cruel and unusual" punishment under the Eighth Amendment to the United States Constitution.[33]

If a court were to impose as a condition of probation that a defendant report to his probation officer once a week for 200 or more years, courts would not hesitate to strike down that condition as impossible to meet. How can they nevertheless approve a prison sentence of that length? The Supreme Court has declared that "[t]he basic concept underlying the Eighth Amendment is nothing less than the dignity of man. While the State has the power to punish, the Amendment stands to assure that this power be exercised within the limits of civilized standards."[34] Thus, amendments prohibiting cruel and/or unusual punishment are aimed at something more than merely curbing punishment designed to inflict great physical pain. As Justice Marshall declared, "one of the primary functions of the cruel and unusual punishments clause is to prevent excessive or unnecessary penalties."[35] He further recognized that "a penalty may be cruel and unusual because it is excessive and serves no valid legislative purpose."[36]

A grossly excessive sentence can serve no rational legislative purpose, either under retributive or utilitarian theories of punishment.[37] It is gratuitously excessive and demeans the government inflicting the punishment as well as the individual on whom the punishment is inflicted. Such a punishment "makes no measurable contribution to acceptable goals of punishment."[38] Those who attempt to justify sentences of inordinate length remind me of an old, undoubtedly apocryphal courtroom tale:

> Judge: I sentence you to 200 years in state prison. After that you will be a free man.

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32 Cal. Const. art. I, § 6.

33 U.S. Const. amend. VIII. It is interesting that the Eighth Amendment prohibits "cruel and unusual" punishment, whereas our state constitution prohibits "cruel *or* unusual" punishment. This distinction was emphasized in People v. Anderson, 493 P.2d 880 (Cal. 1972): "Respondent [contends] . . . that a punishment is not unusual in the constitutional sense unless it is unusual as to form, or method by which it is imposed. We cannot accept this limitation of the meaning of 'unusual' . . . ." Id. at 897. Can it be doubted that a 200, 300, or 400-year term or a 30,000-year sentence is at least unusual?

34 Trop v. Dulles, 356 U.S. 86, 100 (1958).

35 Furman v. Georgia, 408 U.S. 238, 331 (1972) (Marshall, J., concurring).

36 Id.

37 See Malcolm E. Wheeler, Toward a Theory of Limited Punishment: An Examination of the Eighth Amendment, 24 Stan. L. Rev. 838, 846-53 (1972) (exploring limitations on punishment under retributivist and utilitarian theories).

38 Coker v. Georgia, 433 U.S. 584, 592 (1977) (plurality opinion).

Defendant: But, judge, I cannot possibly serve out that sentence and win my freedom.
Judge: Just do the best you can.

What, then, is the answer if a defendant is convicted of numerous counts—for example, five, ten, or more forcible rapes? The maximum sentence that should be imposed is one a defendant is able to serve: life imprisonment. In a particularly egregious case involving exceptionally numerous victims, the maximum conceivably could be life without possibility of parole. Once courts declare century-plus sentences invalid, I am confident state legislatures will act to provide appropriate life sentences. Such sentences would serve the purposes of punishment, would be constitutional, and would avoid making the judicial process appear oblivious to life expectancy tables.

III
THE ROLE OF STATE JUDICIARIES

I mentioned the "cruel *or* unusual" clause of the California Constitution, as distinguished from the Eighth Amendment prohibitions of "cruel *and* unusual" punishment.[39] This difference illustrates the necessity of always weighing an issue under a state constitution. As the distinguished former justice of the Oregon Supreme Court, Hans Linde, often directed: First, one should examine the statute, then the state constitution, and only as a last resort, the Federal Constitution.[40] That, he maintained, is the essence of true federalism. With that concept I fully agree.

There are some modern developments that have made employment of state constitutions in the interest of justice more important than ever before. For example, consider the unprecedented holding of the Supreme Court in *Arizona v. Fulminante*[41] that a forced confession does not require per se reversal of a conviction.[42] The remarkable rationale of Chief Justice Rehnquist was that the introduction of a coerced confession is simply "a classic trial error" that does not "transcend[ ] the criminal process."[43]

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[39] See supra notes 32-33 and accompanying text.

[40] See, e.g., Hans A. Linde, First Things First: Rediscovering the States' Bill of Rights, 9 U. Balt. L. Rev. 379, 384 (1980) ("[A] state court should put things in their logical sequence and routinely examine its state law first, before reaching a federal issue."); Hans A. Linde, Without "Due Process": Unconstitutional Law in Oregon, 49 Or. L. Rev. 125, 182 (1970) ("The logic of constitutional law demands that nonconstitutional issues be disposed of first, state constitutional issues second, and federal constitutional issues last.").

[41] 499 U.S. 279 (1991).

[42] See id. at 308-10 (holding admission of coerced confession subject to harmless error analysis).

[43] Id. at 309, 311.

The harmless error doctrine achieved its modern recognition in *Chapman v. California*.[44] 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."[45] The Court cited cases involving right to counsel,[46] biased judges,[47] and coerced confessions.[48] 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,[49] the right to represent oneself at trial,[50] and the right to a public trial.[51]

The refusal to tolerate coerced confessions has its origin in Anglo-American jurisprudence nearly four hundred years ago. One hundred years ago, in *Bram v. United States,*[52] the Court stated: "'The human mind under the pressure of calamity, is easily seduced . . . . [T]he law will not suffer a prisoner to be made the deluded instrument of his own conviction.'"[53]

Subsequent American case after case, prior to *Fulminante,* decried the use of coerced confessions. *Lyons v. Oklahoma*[54] held that "[a] coerced confession is offensive to basic standards of justice . . . [and] declarations procured by torture are not premises from which a civilized forum will infer guilt."[55] Said the court in *Rogers v. Richmond*,[56] "convictions following the admission into evidence of confessions which are involuntary . . . cannot stand."[57] And in *Spano v. New York*,[58] Chief Justice Warren wrote that "in the end life and liberty can be as much endangered from illegal methods used to convict those

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44 386 U.S. 18, 22 (1967) (holding that some constitutional errors are so unimportant and insignificant as to be harmless and do not require automatic reversal of conviction).

45 Id. at 23.

46 See Gideon v. Wainwright, 372 U.S. 335, 339 (1963) (establishing right to counsel for indigent defendants).

47 See Tumey v. Ohio, 273 U.S. 510, 523 (1927) (concluding that defendant is deprived of due process under Fourteenth Amendment when case decided by biased judge).

48 See Payne v. Arkansas, 356 U.S. 560, 567 (1958) (concluding that admission of coerced confession violated defendant's Fourteenth Amendment due process rights).

49 See Vasquez v. Hillery, 474 U.S. 254, 260-64 (1986) (holding intentional discrimination in selection of grand jury not subject to harmless error review).

50 See McKaskle v. Wiggins, 465 U.S. 168, 177 n.8 (1984) (holding denial of right of self-representation not amenable to harmless error analysis).

51 See Waller v. Georgia, 467 U.S. 39, 49 (1984) (recognizing that defendants do not have to prove specific prejudice in order to obtain relief for violation of public trial guarantee).

52 168 U.S. 532 (1897).

53 Id. at 547 (quoting Hawkins' Pleas of the Crown, § 3, ch. 46 (6th ed. 1787)).

54 322 U.S. 596 (1944).

55 Id. at 605.

56 365 U.S. 534 (1961).

57 Id. at 540.

58 360 U.S. 315 (1959).

thought to be criminals as from the actual criminals themselves."[59] *Blackburn v. Alabama*[60] made it clear that:

> 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, this 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 conviction, wrings a confession out of an accused against his will.[61]

With a sweep of the pen, the fundamental right recognized by years of unbroken precedent was swept aside by a bare majority in *Fulminante,* apparently out of misguided zeal to convict one they believed to be guilty. This kind of calculated damage to the principle of stare decisis is disturbing. In *Payne v. Tennessee*,[62] Justice Marshall, dissenting from the Court's decision overruling *Booth v. Maryland*,[63] undiplomatically characterized the new decision as simply the result of a change in Court personnel. He wrote: "Power, not reason, is the new currency of this Court's decisionmaking."[64] He expressed the fear that the Court "sends a clear signal that scores of established constitutional liberties are now ripe for reconsideration."[65]

Benjamin Franklin put it this way more than two centuries ago: "They that can give up essential liberty to obtain a little temporary safety deserve neither liberty nor safety."[66] When the Supreme Court truck careens from one side of the constitutional road to the other, state courts have two alternatives. They can shift gears and also change directions, thus achieving subservient consistency with Washington. Or, they can retain existing individual rights by reliance on the independent non-federal 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*[67] in which he reminded us that "[e]ach State has power to impose higher standards governing police practices under state law than is required by the Federal Constitution."[68]

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[59] Id. at 320-21.
[60] 361 U.S. 199 (1960).
[61] Id. at 206.
[62] 501 U.S. 808 (1991).
[63] 482 U.S. 496 (1987).
[64] *Payne*, 501 U.S. at 844.
[65] Id. at 845.
[66] See John Bartlett, Familiar Quotations 422 (14th ed. 1968).
[67] 423 U.S. 96 (1975).
[68] Id. at 120 (Brennan, J., dissenting).

You may wonder how these "higher standards" apply in actual practice. Do the states have a genuine rationale when they afford their citizens more than the bare minimum of rights afforded under our national charter? Let me offer a few brief examples of how state constitutional provisions have been interpreted differently from parallel federal constitutional provisions.

If a person is stopped by a police officer for a simple traffic infraction, the motorist may be subjected to a full body search, have all parts of his vehicle searched, and have all containers opened and examined. There is no constitutional violation, said the Supreme Court in *United States v. Robinson*[69] and *Gustafson v. Florida*.[70] Now, in a case decided in February, even passengers in the vehicle may be similarly examined.[71] I still believe, however, that such police conduct offends our state constitutional requirements unless the officer has articulable reasons to suspect illegal conduct.

Additionally, 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. This too involves no constitutional violation, said the Supreme Court in *United States v. Miller*.[72] But, in a case involving a lawyer, my court observed that one's deposits, canceled checks, and loan applications are a mini-biography, that one expects his bank records to be used only for internal bank processes, and that an examination of them violates the state constitutional right of privacy unless the records are obtained by a warrant or subpoena.[73]

I must confess perverse satisfaction when a state court declares a desirable rule long before the Supreme Court ultimately reaches a similar conclusion. For example, I have in mind the use of peremptory challenges to prospective jurors on an apparently discriminatory basis. At one time, the Supreme Court had an impressive record of criticizing deliberate omission from jury panels of women or particular racial groups. However, in *Swain v. Alabama*,[74] a majority of the Court declared there can be no restrictions whatsoever on the use of

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69 414 U.S. 218 (1973).

70 414 U.S. 260 (1973).

71 See Maryland v. Wilson, 117 S. Ct. 882, 883 (1997) (holding that officer making traffic stop may order passengers out of car pending completion of stop).

72 425 U.S. 435 (1976).

73 See Burrows v. Superior Court, 529 P.2d 590, 596 (Cal. 1975) (finding, inter alia, that accused's bank statements obtained by sheriff and prosecutor with consent of bank but without legal process were obtained as result of illegal search and seizure).

74 380 U.S. 202 (1965).

peremptory challenges of prospective jurors.[75] Not long thereafter, our court agreed in principle, but ordered an exception under the state constitution that challenges may not be exercised for an apparently racially discriminatory purpose.[76] Indeed, we broadened the exception to prohibit using peremptories to exclude any cognizable group.[77] Thus, a potential juror cannot be challenged solely on the basis of race, ethnicity, religion, sex, or possibly even age. The Supreme Court eventually reversed that part of its holding in *Swain* and agreed with the position our court had taken seven years earlier.[78]

For another example, consider a commonly recurring factual situation. A small and 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 to freedom of speech and their right to petition their government for a redress of grievances. On the other hand, the shopping center owners assert their right to possess and control private property and to exclude all non-business related activity. In this conflict, which right is to prevail?

Twenty-seven years ago, the California Supreme Court in *Diamond v. Bland*[79] held that "[u]nless there is obstruction of 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."[80] On four occasions the shopping center owners sought certiorari and rehearing from denial of certiorari, and in each instance they were rebuffed by the Supreme Court, with no votes noted to grant. We had every reason to believe *Diamond* was the law.

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[75] See id. at 219-22 (holding that total exclusion of blacks from venires by state officials does not create inference of discrimination where it is not shown that state is responsible for exclusion through peremptory challenges).

[76] See People v. Wheeler, 583 P.2d 748, 762 (Cal. 1978) (holding that use of peremptory challenges to remove prospective jurors on sole ground of group bias violates right to trial by jury drawn from representative cross section of community as guaranteed by state constitutional provision).

[77] Id. at 748-49.

[78] See Batson v. Kentucky, 476 U.S. 79, 89 (1986) (holding that Equal Protection Clause forbids prosecutor from challenging potential jurors solely on account of their race).

[79] 477 P.2d 733 (Cal. 1970).

[80] Id. at 741.

Two years later, however, the Supreme Court took over an identical case from Oregon and, in *Lloyd Corp. v. Tanner*,[81] held that the owners had the right to prohibit distribution of political handbills unrelated to the operation of the shopping center.[82] Nevertheless, in 1979 our court decided in *Robins v. PruneYard Shopping Center*[83] that the free speech provisions of the state constitution offered "greater protection than the First Amendment now seems to provide."[84] We flatly refused to follow *Lloyd Corp. v. Tanner.*

The Supreme Court granted certiorari in *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. Justice Rehnquist wrote the opinion that declared that the reasoning in *Lloyd Corp. 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 own Constitution individual liberties more expansive than those conferred by the Federal Constitution."[85] A number of states have now exercised this prerogative.[86]

In addition to their different interpretation of parallel constitutional decrees, state justices are sometimes more understanding of the

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[81] 407 U.S. 551 (1972).

[82] See id. at 570 (reasoning that there was no dedication of privately owned and operated shopping center to public use for First Amendment purposes).

[83] 592 P.2d 341 (Cal. 1979), aff'd, 447 U.S. 74 (1980).

[84] Id. at 347.

[85] PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 81 (1980). To be totally candid, I must report an unfavorable development. In 1990, an unsympathetic legislature persuaded the people of California to amend the state constitution to prohibit giving criminal defendants more rights under the state constitution than are prescribed by the federal constitution. See Cal. Const. art. I, § 24. It was a sad day, but the legislative process has a right to be wrong.

[86] See, e.g., Bock v. Westminster Mall Co., 819 P.2d 55, 56 & n.1 (Colo. 1991) (holding that state constitution protects distribution of pamphlets in a privately owned mall even though such activities are not protected under federal constitution); Batchelder v. Allied Stores Int'l, Inc., 445 N.E.2d 590, 592-96 (Mass. 1983) (same); New Jersey Coalition Against War in the Middle East v. J.M.B. Realty Corp., 650 A.2d 757, 760-62, 769 (N.J. 1994) (same); Lloyd Corp. v. Whiffen, 849 P.2d 446, 447, 449 (Or. 1993) (same).

One unanticipated effect of growing reliance on state court decisions is the vast increase in the length of state high court opinions. Apparently, state justices feel the need to be completely explicit in expressing conclusions and the reasons therefor. In my court, for example, the average opinion ran 2,539 words in 1965. Last year the average was 7,785 words. See Dick Goldberg, High Court Criticized for Lengthy Opinions, Daily Recorder (Sacramento), Jan. 24, 1997, at 1. Indeed, it has been said that some state court opinions are as verbose as a medical dictionary. As a result, lawyers now feel obligated to submit briefs that are unduly lengthy. The term "appellate brief" has become an oxymoron.

I offer no solution to this problem, if it is a problem. It may well be a result of increasing mechanization. No longer are there any Justice Learned Hands writing their opinions in long hand. Everyone now uses some form of mechanical device which makes multiplication of word totals easy, perhaps inevitable.

realities of life than are their Supreme Court counterparts. Consider a case out of Texas involving Leonel Herrera, convicted of murder. After losing his appeals below, he sought review in the Supreme Court. It takes four votes to grant a hearing, and he received four affirmative votes. However, his date of execution was approaching. It takes five votes to grant a stay. None of the five justices who voted against the hearing would budge an inch to stay his execution. 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 indeed.

Fortunately, there were two understanding justices of a state court in Texas. Minutes before Herrera's execution, they granted the stay which had been denied by Justices Rehnquist, White, Scalia, Kennedy, and Thomas.[87] A state judiciary pointed the way to justice.

As an aside, I also believe state justices may have more fun than their federal counterparts. How about the case of Edmond James Ramos, charged with first degree burglary—i.e., breaking and entering an occupied dwelling. When Ramos, a simple burglar, entered Virgil Wagner's home to steal whatever was available, he found Wagner very dead. The legal question, then, was an issue argued for centuries by spiritualists and naturalists: When a person dies in his home, does he still dwell therein? A state intermediate appellate court held that an occupied dwelling implies a live human being therein, not a corpse. The burglary was thus reduced from first to second degree.[88]

In my remarks I certainly do not intend to demean the Federal Constitution. I trust that most of us have always looked upon the United States Constitution with awe and veneration. Therefore, I must confess to being appalled at the flow of recent suggestions for amending our federal document. Whenever there is hesitancy, it seems, in getting legislation through Congress, some members thereof propose to amend the Constitution.

Balance the budget? Amend the Constitution.

Protect the rights of victims of crime? Amend the Constitution.

Require a supermajority to increase taxes? Amend the Constitution.

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[87] See Herrera v. Collins, 506 U.S. 390, 393 (1993) (denying Herrera's "actual innocence" as well as his Eighth Amendment and Fourteenth Amendment due process claims). The Supreme Court ultimately demonstrated a unique concept of justice. It declared that Herrera's post-conviction claim of innocence could not be the basis for a writ of habeas corpus. See id. at 416. How perplexing that must have been to the American people, who naively believe that determining innocence or guilt is a fundamental purpose of judicial proceedings.

[88] See People v. Ramos, 60 Cal. Rptr. 2d 523, 524-25 (Cal. Ct. App. 1997).

Permit school prayers? Amend the Constitution.

Set term limits for judges and legislators? Amend the Constitution.

Criminalize burning the flag? Amend the Constitution.

My annoyance stems from a feeling that these legislative proposals have a tendency to cheapen the Constitution. Fortunately, none of those mentioned have passed Congress as of yet, though the budget balancing measure failed by a whisker last year and is back for another try this year. John H. Pickering, Chairman of the American Bar Association Senior Lawyers Division, counted "almost 200 pending proposals for amendment which died with the 104th Congress on January 3, 1997."[89] I hope the public will convince legislators that they must not confuse legislative proposals with the fundamental commands of our Constitution. In modern times we have had experience in that minefield; remember Prohibition and the Eighteenth Amendment?

CONCLUSION

I conclude by noting that we revere a Justice Brennan not only because he is great, but because he is unique. There are so few, if any, like him in quality and stature.

When I look back on the origins of our nation, I feel both a deep sense of pride and a sense of apprehension for the present and the future. Bear in mind that the original thirteen states consisted of a mere 2,205,000 people, not much more than the current population of many metropolitan areas. That tiny pool of inhabitants produced Washington, Jefferson, John and Samuel Adams, Hamilton, Franklin, Tom Paine, Madison, Monroe, John Marshall, John Jay—all cultured, articulate, intellectually brilliant men. They had studied and understood the principles of democracy, and lived with respect for democracy. Now look around us, in this nation more than one hundred times larger, with more than 250 million people. We search in vain for leadership of that intellectual quality. One is impelled to ask, as Archibald MacLeish did so plaintively: "Where has all the grandeur gone?" Sorry, I have no answer.

[89] John H. Pickering, Stop Trivializing the Constitution, Experience (publication of ABA Senior Lawyers Division), Spring 1997, at 4.