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*by Justice Stanley Mosk**

PROFESSOR HUNTER, JUSTICE Stewart, Justice Dickson, Professor Schmeiser, colleagues and friends, I am delighted to be here from the province of California. A number of years ago I had the opportunity to be part of a team that went to Great Britain to make a study of comparative appellate procedure. Our group consisted of Justice Desmon of New York, Justice Schaeffer of Illinois and Archibald Cox. We were particularly interested in the fact that in Great Britain judges always announce their decisions immediately from the bench until Lord Denning told us of an experience of a colleague of his who had heard a lengthy lawsuit and arguments that went on for several days and immediately announced his decision. The judge went back to the chambers where his clerk helped him off with the wig and the robe and suddenly the judge stopped and paused and shook his head, wiped his brow and slapped his side and said, "There I go, I did it again. I said plaintiff when I meant defendant."

It was Chief Justice Hughes who wrote in *Cochran* v. *Louisiana State Board of Education*[1] that individual interests are aided only as the common interest is safeguarded. Thus perhaps the most productive role of the United States Court is to protect the individual by helping to make safe the society in which he lives. That too as I understand it, is the role of the Canadian Court. Chief Justice Deschênes of Quebec recently wrote in a book of his, "The problem of the supervision by the judiciary over the public administration is basically the problem of the freedom of the individual in an increasingly dominating society."[2] Thus, realistically, we must recognize there are frequent conflicts between the individual and society. In that circumstance, under the United States system a written Constitution intervenes to protect the individual even as against his own government.

When a court intervenes to protect an individual against an overbearing government agency it is often accused of being activist as if that is a perjorative term. The court that declares a woman may control her own body, that a person has an expectation of privacy in his luggage, that a search warrant may not be open-ended even if pornography is involved, that an accused may demand a closed pretrial hearing if necessary to minimize prejudicial publicity, or that the people's environment is to be

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[1] 281 U.S. 370 (1930).

[2] J. DESCHÊNES, THE SWORD AND THE SCALES 27 (1979).

protected despite the fact that a massive construction project must be deferred, even if given a conservative label by some will be considered activist by others.

Most of the issues involved in that type of case are decided on a constitutional basis. In that area I suggest that there is a significant development that should be noted on both sides of the border. There has long been a generally accepted belief of distinguished scholars that when one speaks of constitutional law his only frame of reference is the Constitution of the United States. Today, however, a new body of constitutional law is emerging from the constitutions of the several states. Indeed there is a clearly discernible trend toward state's rights, almost a phoenix-like resurrection of federalism. This was mentioned in passing this morning by Professors Russell and Tribe.

If I correctly read recent decisions it seems probable that a majority of the present membership of the United States Supreme Court will in more cases and in more fields in the future accept the finality of state court determinations. The doctrine of abstention appears to be a conscious effort by the federal courts to yield to state jurisdiction. This suggests to me the rediscovery of the Tenth Amendment of the Constitution of the United States. To refresh your recollection the Tenth Amendment provides very simply that the powers not delegated to the United States by the Constitution nor prohibited by it to the states, are reserved to the states respectively or to the people. This elementary declaration of state's rights has always been part of the fundamental law of our land. Nevertheless 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*[3] in 1803 to recent days, the highest courts of the several states were often reduced to the status of intermediate appellate tribunals, mere wayside stations on the road from trial courts to the Supreme Court of the United States.

I do not want to suggest for one moment that this was entirely unnecessary or indeed undesirable. In 1951 one commentator reviewed the rather dismal performance of state courts in enforcing provisions of their own constitutions and made this observation, "If our liberties are not protected in Des Moines the only hope is in Washington."[4]

Well, that observation became a prophecy. The Supreme Court beginning in 1953 served as the midwife to a new design of constitutional law. The previous era had been characterized by a benign acceptance of racism, political rotten boroughs, disability of the poor, a Victorian approach to sexual matters, denial of universal suffrage, and egregious imposition upon the rights of the criminally accused. In the new period following 1953 the United States Supreme Court abandoned a pathetic

[3] 5 U.S. 137, 1 Cranch 137 (1803).

[4] Paulsen, *State Constitutions, State Courts and First Amendment Freedoms*, 4 VAND. L. REV. 620, 642 (1951).

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.

In this post-1953 era all the states were compelled to fall in line despite the furor over many of the decisions, notably in the areas of reapportionment of political districts and protection of the rights of criminal defendants. State courts abandoned the dictates of stare decisis and obediently embarked upon the new course that came from Washington. This was particularly evident in the field of criminal law. Police officers were taught how to lawfully enforce the law; trial judges became reconciled to admitting only legally obtained evidence.

But just as an era of peaceful coexistence seemed imminent, a somewhat judicial counter-revolution began. No one can deny that there have been some alterations in previous rules, that is a subject on which I intend to pass no judgment today. Perhaps it is inevitable that years of hypertension be followed by a period of lowered expectations. The problem has been in defining the responsibility of state courts which had conformed state decisions to previous requirements of the United States Supreme Court. Are they to alternately create and then abandon doctrines of state authority as the tides ebb and flow on the Potomac?

State courts have had two alternatives. They can shift gears and once again change directions, thus resuming the course upon which they were previously embarked or they can retain existing individual rights by reliance upon the independent non-federal grounds found in several state constitutions. A growing number of states have adopted the latter course. Indeed in December, 1975 Justice Brennan cordially invited the states to do so. In a separate opinion in *Michigan v. Mosley*[5] 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."[6] He enumerated at that time several states which had done so. Since that time the list has increased substantially.

Now, to avoid any misunderstanding I wish to emphasize that states may not reduce protection of individual rights below that provided in the federal charter. They may only expand upon those rights. For illustration let me hastily mention a superficial sampling from my own experience of the type of cases affecting government and individuals that the state courts are handling these days, decisions based on state constitutions, and decisions sometimes at odds with federal interpretations of the United States Constitution. The cases include: (1) Cases challenging the power of an administrative agency created by the legislature to declare an act of the Legislature unconstitutional. (2) Cases challenging the right of a judge to seal a report of the Grand Jury because he believes it contains matters beyond the scope of Grand Jury inquiry, raising the issue

[5] 423 U.S. 96 (1975).
[6] *Id.* at 120.

whether grand jurors have freedom of speech rights? (3) Cases challenging the ability of local communities to develop and announce a master plan without being subject to inverse condemnation. (4) Cases challenging the use of zoning by a local community to discourage or prevent the influx of new residents. (5) Cases challenging the authority of an administrative agency to require, in order to grant a permit to conduct an entertainment business, that the business police not only its premises but the public area outside its facility. (6) Cases challenging the right of the public prosecutor to use his preemptory challenges for racially discriminatory purposes. (7) Cases challenging the power of a state agency to quantify from a stream of water to which there are previously unused riparian claims. (8) Cases challenging the reasonableness of prison administration regulations banning prisoners' union meetings which outside officers and members would attend.

In each of these eight examples the courts were called upon to decide the limits of governmental agency authority as against individual rights. Judicial determination was necessary in the public interest to prevent or to resolve conflict. If that is judicial activism then I believe it is essential.

The use of state constitutions in these and other examples is no sport designed to thwart federal review, although parenthetically much can be said for hastening the finality of court decisions. Nor is there anything inappropriate in state courts deliberately seeking adequate non-federal grounds upon which to base opinions. I find no impropriety whatsoever when the highest court of the state evaluates state legislation, state administration action or the conviction of a defendant in a state prosecution pursuant to the provisions of the state constitution. Indeed logic would seem to compel that course. If the result is fragmentation of a national consciousness I believe it is justified in furtherance of an expanded liberty.

The bottom line is that federal institutions do not have all the solutions. If the fifty states are encouraged to experiment, to retain their historic individuality, to seek innovative responses to problems of protecting individual liberty, ultimately some worthwhile results may be produced.

I suggest that today this type of innovation is increasingly necessary. We have a computerized society which presents one of the gravest dangers to the preservation of individuality. Machines and computers are now used for every conceivable person-saving purpose. Eight-year old children use computers instead of learning mathematics. Business firms use computers to select programs. Law firms are beginning to use machines in place of solid library research. The result is that the dignity of individuality is constantly being demeaned.

While I suppose there no longer is any alternative other than to do everything necessary to live with automation and to try to govern it, I hope we will never allow our minds to become automated, to think merely when programmed or to operate only on selective inputs of information. We can do what machines can never do: we can think majestically and we

can dream great dreams. A computerized society today not only discourages innovative thought but it threatens one of our most precious liberties as individuals: the right to privacy.

Many persons today are increasingly concerned over the banks of government data compiled about every one of us—our activities, our associations, our personal habits. In the United States, Blue Cross has over eighty-four million Americans in its computer banks. TRW, Incorporated has personal data on seventy million Americans who have bought anything on credit anywhere in the country.

An individual's right to privacy while of course not mentioned specifically in the Bill of Rights of the United States Constitution, is found in my own state constitution in California. California now specifically recognizes privacy among our most precious inalienable rights.

It was in 1928 Justice Brandeis first described his concept in these terms: The authors of the Constitution "conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men."[7]

The concept of a constitutional right of privacy remains largely undefined, but at least three facets have been revealed. The first is the right of the individual to be free in his private affairs from governmental surveillance and intrusion. The second is the right of an individual not to have his private affairs made public by the government. The third is the right of an individual to be free in action, thought, experience and belief from governmental compulsion. Obviously none of these rights as so stated is absolute.

The question then is to what extent government may properly intrude upon these rights. That it does so is obvious. How much intrusion is necessary, how much is desirable and how much is permissible will be the concern of all of us more and more in the years ahead.

Let me give you one illustration. As a general proposition I think we would agree one ought to be able to ply his trade with a minimum of governmental interference. Our founding fathers accepted restrictions on the practice of law and medicine but they would be aghast today to learn that in many parts of the country official approval is required of aspiring beekeepers, embalmers, lightning rod salesmen, septic tank cleaners, taxidermists, and tree surgeons before they may seek the public's patronage. California is the most restrictive of all states. We have 178 licensed occupations. I think a cynic might conclude virtually the only people who remain unlicensed in at least one of the United States are clergymen and university professors, presumably because neither of them is taken very seriously.

Of course I accept the view that some occupations require quality control to protect the uninformed against blatant incompetents and wily charlatans, but everything is a matter of degree. While it is comforting to

[7] Olmstead v. United States, 277 U.S. 438, 478 (Brandeis J., dissenting 1927).

know that lawyers and surgeons and structural engineers must pass scrutiny by experienced persons knowledgeable in their discipline, it is absurd that elaborate mechanisms are set up as precautions against one being dissatisfied with the way his or her hair has been cut, toenails trimmed, muscles toughened, hearing aids fitted or drains unclogged. Only the credulous can conclude that licensure in many fields is designed to protect the public rather than to benefit those who have been licensed or do the licensing.

Back again to the right of privacy: it remains largely undefined probably because it is undefinable. Indeed, it may be only another version of the freedom of the individual. Or perhaps it extends beyond the individual to the household. Thomas Jefferson declared that happiness lies outside the public realm, "in the lap and love of my family, in society of my neighbors and my books, in the wholesome occupation of my farms and my affairs," in short in the privacy of an enclave upon which the public has no claim.

The dangers to our right of privacy are inherent in the very nature of the right. The task of protecting one individual's privacy against invasion by another individual or group is assigned to the government. The responsibility of protecting an individual's privacy against invasion by the government is also assigned to the government. Thus a significant problem is how to contain the government which is its own regulator.

I am concerned when the government, with approval of the Supreme Court, says it is quite all right for a police department to circulate to business establishments in a community a photograph describing an individual as a shoplifter even though he had never been convicted of shoplifting. We should be worried when approval is given to law enforcement agencies to randomly probe through an individual's bank records without a subpoena or search warrant in the fond hope of finding something incriminating. We have to be concerned about press gag orders, court files sealed without statutory authority, Grand Jury indictments returned without a defendant being given the basic right to be present with counsel, to confront and cross-examine witnesses and produce exculpatory evidence of his own.

Privacy is just a factor of decency and civility, but decency and civility are waning elements in a society where sadism and violence constitute our primary form of entertainment, where guns are freely available and energy is scarce, where courtesy is regarded as an expendable commodity, where language is debased and where one who insists upon grammatical accuracy is culturally biased, where learning is deemed valueless if it is not practical, where reason is suspect and emotion is king. In such a tortured society I suppose it is inevitable that the right of privacy would be endangered.

Chief Justice Warren once expressed the fear that our Bill of Rights, if voted on today, would not pass. I doubt that it could get out of a Congressional Committee. I do not mean to conclude with a serious note but I do suggest we must constantly remind ourselves of our traditional values:

why a free press and free speech even for those with whom we disagree are so essential to the functions of democracy; why procedural safeguards in arrest, trial and confinement protect the innocent even as they may at times protect the guilty; why protection against unlawful searches and seizures, against denial of right to counsel, against self-incrimination are vital to every one of us.

So I think our ideal on both sides of the border must be the kind of contemplative and peaceful marketplace of individual ideas for which Socrates sipped hemlock and Cicero debated in the Forum. It was for this principle that the free men of England met at Runnymede more than seven and a half centuries ago to wrest the Magna Carta from King John. It was to win the right of peaceful self-determination of individuals that tattered, largely illiterate New Englanders stood their ground at Lexington and Concord. I hope we are equal to a similar mission, circa 1979.