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NOTHING SUCCEEDS LIKE EXCESS¹

Stanley Mosk *

Last year 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*²—involved a twenty-three-year-old man who had sex with two girls, one fourteen years and ten months old, the other fourteen and one-half years old. There was no question that the sex was entirely consensual. The defendant had no prior felonies and no instances of molesting young children. Nevertheless, the forty-year sentence was mandatory under Arizona statutes. Citing “the realities of adolescent life,”³ among other factors, the high court of Arizona found the sentence unconstitutional.

Sentences like the foregoing suggest a newly devised theory: Nothing succeeds like excess. California sentencing courts have been in the forefront of pouring on the years, particularly where that ugly word “sex” is involved. The Arizona forty-year sentence is modest by California standards.

In January of this year my colleagues denied a petition for habeas corpus in a case in which the defendant was sentenced to 129 years in prison.⁴ And on the same day they denied a hearing for a defendant who was sentenced to ninety-eight years.⁵ Last November they denied habeas corpus after the court of appeal approved a sentence of ninety-nine years, four months,⁶ and in January a 111-year sentence was approved.⁷

Even those sentences are commonplace. In 1990 the defendant in *People v. Lewis*⁸ was sentenced to 155 years plus two consecutive life terms running concurrently with two additional life terms. George Anthony Sanchez, known as the “ski mask rapist,” was given 406 years

* Justice, California Supreme Court.

1. Keynote address delivered by Justice Stanley Mosk at the Symposium on the California Judiciary held at Loyola Law School on March 19, 1993.

2. 830 P.2d 823 (Ariz.), *cert. denied*, 113 S. Ct. 511 (1992).

3. *Id.* at 829.

4. *In re Bestelmeyer*, No. S030174, 1993 Cal. LEXIS 354 (Sup. Ct. Jan. 20, 1993).

5. *People v. Carter*, No. S029714, 1993 Cal. LEXIS 359 (Sup. Ct. Jan. 20, 1993).

6. *In re Wheeler*, No. S029714, 1992 Cal. LEXIS 6028 (Sup. Ct. Dec. 2, 1992).

7. *Belton v. Superior Court*, No. S030305, 1993 Cal. LEXIS 516 (Sup. Ct. Jan. 27, 1993).

8. No. S013891, 1990 Cal. LEXIS 1460 (Sup. Ct. Apr. 4, 1990).

in prison for child molestation⁹ and Grace Dill received 405 years in prison for child molestation.¹⁰ The prize, at least momentarily awarded, goes to the Johnson and Cabarga defendants who were given terms of 537 and 208 years respectively in San Francisco Superior Court. What judge will be the first to make the *Guinness Book of World Records* by imposing a prison sentence of 1000 years?

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 in the second degree, providing a sentence of fifteen years to life;¹¹ mayhem, two, four or eight years in prison;¹² gross vehicular manslaughter while intoxicated, four, six or ten years;¹³ cruelty to a child likely to produce great bodily injury or death, two, four or six years;¹⁴ cruel or inhuman corporal punishment on a child, two, four or six years;¹⁵ acts of terrorism, three, five or seven years;¹⁶ placing a child in a house of prostitution, only a misdemeanor.¹⁷

Unfortunately there appears to be an emotional aspect to sex offenses, whether committed on an adult or a juvenile, producing an effect on the sentencing process. All too often an irate sentencing 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 the judge is likely to obtain substantial media coverage—but in actuality such a result reflects on the objectivity and dispassion of the judicial process.

The question must always be whether the sentence imposed is viable; in other words, whether it is possible for a human being to serve that precise 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 Article I, section 17, of the California Constitution, and perhaps also under the Eighth Amendment to the United States Constitution.

9. Victoria Slind-Flor, *Prosecutor Gets to See Other Side*, NAT'L L.J., Sept. 17, 1990, at 8.

10. See Philip Hager, *Molestation Defendants to be Freed*, L.A. TIMES, Nov. 29, 1990, at A3.

11. CAL. PENAL CODE § 190(a) (West 1988 & Supp. 1993).

12. *Id.* § 204 (West 1988).

13. *Id.* § 191.5(c) (West 1988 & Supp. 1993).

14. *Id.* § 273a(1) (West 1988).

15. *Id.* § 273d (West 1988).

16. *Id.* § 11413(a) (West 1988).

17. *Id.* § 273f (West 1988).

Bear in mind that the Eighth Amendment requires a "cruel and unusual" punishment to be prohibited,¹⁸ whereas our California Constitution requires only that it be "cruel or unusual."¹⁹ This distinction was emphasized in *People v. Anderson*.²⁰ "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' . . ."²¹ Can it be doubted that a 200-, 300- or 400-year term is at least unusual?

There is no question that sex offenses are serious and deserve severe penalties, but not a penalty humanly impossible to serve. Such punishments cannot be acceptable law. If they are, they confirm Mr. Bumble's observation that "[i]f the law supposes that, . . . 'the law is a ass. . . .'"²²

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 United States 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."²³ Thus, cruel and/or unusual amendments are aimed at something more than curbing punishment designed to inflict great physical pain.

When we consider why [punishments involving torture] have been condemned, . . . we realize that the pain involved is not the only reason. The true significance of these punishments is that they treat members of the human race as nonhumans, as objects to be toyed with and discarded. They are thus inconsistent with the fundamental premise of the [Eighth Amendment] that even the vilest criminal remains a human being possessed of common human dignity.²⁴

18. U.S. CONST. amend. VIII (emphasis added).

19. CAL. CONST. art. I, § 17 (emphasis added).

20. 6 Cal. 3d 628, 493 P.2d 880, 100 Cal. Rptr. 152, cert. denied, 406 U.S. 958 (1972).

21. *Id.* at 653, 493 P.2d at 897, 100 Cal. Rptr. at 169.

22. CHARLES DICKENS, *OLIVER TWIST* 397 (G.F. Maine ed., 1954) (1838).

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

24. *Furman v. Georgia*, 408 U.S. 238, 272-73 (1972) (Brennan, J., concurring).

A sentence that is greater than a man's natural life is analogous to the punishment of revocation of citizenship condemned in *Trop v. Dulles*.²⁵ As with that case, an extra-life sentence does not inflict additional physical pain but is a symbolic violation of the person's dignity, "the total destruction of the individual's status in organized society."²⁶

As Justice Marshall has declared, "one of the primary functions of the cruel and unusual punishments clause is to prevent excessive or unnecessary penalties."²⁷ "[A] penalty may be cruel and unusual because it is excessive and serves no valid legislative purpose."²⁸

Here, an extra-life sentence can serve no rational legislative purpose, either under the retributive or utilitarian theories of punishment.²⁹ It is gratuitously excessive punishment that 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."³⁰

Those who attempt to justify sentences of inordinate length remind me of an old, undoubtedly apocryphal tale:

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

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 the legislature 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.

I mentioned the "cruel or unusual" clause of the California Constitution, as distinguished from the Eighth Amendment prohibition of

25. 356 U.S. 86 (1958).

26. *Id.* at 101.

27. *Furman*, 408 U.S. at 331 (Marshall, J., concurring).

28. *Id.* (Marshall, J., concurring).

29. See Malcolm E. Wheeler, *Toward a Theory of Limited Punishment: An Examination of the Eighth Amendment*, 24 STAN. L. REV. 838, 846-53 (1972).

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

“cruel *and* unusual” conduct. This illustrates the necessity, in lawyers arguing or judges deciding cases, of always weighing an issue against the California Constitution. As the former distinguished justice of the Oregon Supreme Court, Hans Linde, often declared: First, you examine the statute, then the state constitution, and only as a last resort, the federal constitution. That, he maintained, is the essence of true federalism. With that concept I fully agree, and have written a number of law review articles on the subject.³¹

There are some recent developments that have made employment of our state constitution in the interest of justice more important than ever before. Consider, for example, the unprecedented holding of the United States Supreme Court in *Arizona v. Fulminante*,³² that a forced confession does 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 the introduction of a coerced confession is simply “a classic ‘trial error’” that does not “‘transcend[] the criminal process.’”³³

The harmless error doctrine apparently had its modern origin in *Chapman v. California*.³⁴ 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.”³⁵ The circumstances enumerated were the rights to counsel,³⁶ nonbiased judges³⁷ and freedom from coerced confessions.³⁸ Subsequent to *Chapman*, the Supreme Court added three other serious errors not subject to the harmless error rule. These were the exclusion of members of the defendant’s race from the grand jury,³⁹ the right to represent oneself at trial⁴⁰ and the right to a public trial.⁴¹

31. See, e.g., Stanley Mosk, *The Power of State Constitutions in Protecting Individual Rights*, 8 N. ILL. U. L. REV. 651 (1988); Stanley Mosk, *State Constitutionalism: Both Liberal and Conservative*, 63 TEX. L. REV. 1081 (1985).

32. 111 S. Ct. 1246 (1991).

33. *Id.* at 1264-65.

34. 386 U.S. 18 (1967).

35. *Id.* at 23.

36. *Id.* at 23 n.8 (citing *Gideon v. Wainwright*, 372 U.S. 335 (1963)).

37. *Id.* (citing *Tumey v. Ohio*, 273 U.S. 510 (1927)).

38. *Id.* (citing *Payne v. Arkansas*, 356 U.S. 560 (1958)).

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

40. *McKaskle v. Wiggins*, 465 U.S. 168, 177 n.8 (1984).

41. *Waller v. Georgia*, 467 U.S. 39, 49 n.9 (1984).

Refusal to tolerate coerced confessions had its origin in Anglo-American jurisprudence nearly 400 years ago. *Bram v. United States*⁴² described a case decided in 1616, which quoted Lord Coke: "The human mind under the pressure of calamity, is easily seduced . . . [The] law will not suffer a prisoner to be made the deluded instrument of his own conviction."⁴³

Subsequently, prior to *Fulminante*, American cases decried consistently the use of coerced confessions. *Lyons v. Oklahoma*⁴⁴ held: "A coerced confession is offensive to basic standards of justice. . . . [D]eclarations procured by torture are not premises from which a civilized forum will infer guilt."⁴⁵ Said *Rogers v. Richmond*,⁴⁶ "[C]onvictions following admission into evidence of confessions which are involuntary . . . cannot stand."⁴⁷ And the Court in *Spano v. New York*⁴⁸ stated: "[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."⁴⁹

*Blackburn v. Alabama*⁵⁰ made it clear:

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.⁵¹

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.

This kind of calculated damage to the principle of stare decisis is disturbing. Retired Justice Lewis Powell recently wrote on the impor-

42. 168 U.S. 532 (1897).

43. *Id.* at 547 (citation omitted).

44. 322 U.S. 596 (1944).

45. *Id.* at 605.

46. 365 U.S. 534 (1961).

47. *Id.* at 540.

48. 360 U.S. 315 (1959).

49. *Id.* at 320-21.

50. 361 U.S. 199 (1960).

51. *Id.* at 206.

tance of stare decisis. The doctrine is, he wrote, "essential to the rule of law."⁵²

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 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. . . . [S]*tare 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. . . . An important aspect of this is the respect that the Court shows for its own previous opinions.⁵³

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*,⁵⁴ in which Chief Justice Rehnquist and a majority overruled *Booth v. Maryland*⁵⁵ and *South Carolina v. Gathers*.⁵⁶

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 the aggravating and mitigating factors in a defendant's life. The opinions of surviving family members are irrelevant. Now under *Payne*, 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 characterized the new decision as the result of a change in court personnel. He wrote, "Power, not reason, is the new currency of this Court's decisionmaking."⁵⁷ He expressed the fear that the Court now "sends a clear signal that scores of established constitutional liberties are now ripe for reconsideration."⁵⁸

52. Lewis F. Powell, Jr., *Stare Decisis and Judicial Restraint*, J. SUP. CT. HIST., at 17 (1991).

53. *Id.* at 15-16.

54. 111 S. Ct. 2597 (1991).

55. 482 U.S. 496 (1987), *overruled by Payne v. Tennessee*, 111 S. Ct. 2597 (1991).

56. 490 U.S. 805 (1989), *overruled by Payne v. Tennessee*, 111 S. Ct. 2597 (1991).

57. *Payne*, 111 S. Ct. at 2619 (Marshall, J., dissenting).

58. *Id.* (Marshall, J., dissenting).

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 change directions, thus achieving subservient consistency with Washington. 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 "[s]tate 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 brief 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, to having all parts of the vehicle searched and all containers opened and examined. No constitutional violation, said the United States Supreme Court in *United States v. Robinson*⁶¹ and *Gustafson v. Florida*.⁶² But many states found that 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 case involving a lawyer, our court observed that one's canceled checks, loan applications, et cetera, 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 United States Supreme Court declared there could be no restrictions whatsoever on the use of peremptory challenges of jurors. Our court agreed generally, but declared an exception under state constitution principles: The challenges may not be used for a

59. 423 U.S. 96, 120 (1975) (Brennan, J., dissenting).

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

61. 414 U.S. 218 (1973).

62. 414 U.S. 260 (1973).

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

64. *Burrows v. Superior Court*, 13 Cal. 3d 238, 529 P.2d 590, 118 Cal. Rptr. 166 (1974).

65. 380 U.S. 202 (1965), *overruled by* *Batson v. Kentucky*, 476 U.S. 79 (1986).

racially discriminatory purpose.⁶⁶ Ultimately the Supreme Court reversed *Swain* and finally agreed with the position our court had taken seven years earlier.⁶⁷

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

In 1970 the Supreme Court of California held in *Diamond v. Bland*⁶⁸ 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 that are open to the public.

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 certiorari. We had every reason to believe *Diamond* was the law.

Two years later, however, the Supreme Court took over an identical case from Oregon, and in *Lloyd Corp. v. Tanner*⁶⁹ held that the owners had the right to prohibit distribution of political handbills unrelated to the operation of the shopping center.

The United States Supreme Court granted certiorari in *Pruneyard Shopping Center v. Robins*,⁷⁰ and I must confess we sensed doom to our theory of state constitutionalism. But, to our delight, the Supreme Court agreed with us, nine-to-zero. Justice Rehnquist wrote the opinion that declared the reasoning in *Lloyd Corp.* "does not ex proprio vigore limit the authority of the State to exercise its police power or its sovereign

66. *People v. Wheeler*, 22 Cal. 3d 258, 583 P.2d 748, 148 Cal. Rptr. 890 (1978).

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

68. 3 Cal. 3d 653, 477 P.2d 733, 91 Cal. Rptr. 501 (1970), *cert. denied*, 402 U.S. 988 (1971).

69. 407 U.S. 551 (1972).

70. 447 U.S. 74 (1988).

right to adopt in its constitution individual liberties more expansive than those conferred by the Federal Constitution."⁷¹

If you need a prime example of how state justices are sometimes more understanding of the realities of life, consider the recent case out of Texas involving Leonel Herrera, convicted of murder.⁷² After losing his appeals below, he sought review in the United States Supreme Court.⁷³ 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 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.⁷⁴ Once again, a state judiciary pointed the way to justice.

Again the United States Supreme Court, in that very case, ultimately demonstrated its concept of justice. Post-conviction claims of innocence cannot be the basis for a writ of habeas corpus, declared the Court's majority.⁷⁵ How perplexed must be the American people who naively believe that determining innocence or guilt is the fundamental purpose of judicial proceedings.

Along that same line is the case of *United States v. Williams*.⁷⁶ In that five-to-four decision, the majority held a prosecutor is under no obligation to inform a grand jury about substantial exculpatory evidence of which he is aware.

For a brief moment let me inject a distantly related subject. Last year our court rendered opinions in thirty-three death cases. Thirty-three would seem like a substantial inventory, particularly because it was almost one-third of our total annual output. However, while we were rendering those thirty-three opinions, forty-six new death cases came in. That same scenario occurred in 1988 with thirty-six new death cases,

71. *Id.* at 81.

72. *Herrera v. State*, 682 S.W.2d 313 (Tex. Ct. App. 1984).

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

74. *Ex parte Herrera*, 828 S.W.2d 8 (Tex. Ct. App. 1992).

75. *Herrera v. Collins*, 113 S. Ct. 853 (1993).

76. 112 S. Ct. 1735 (1992).

thirty-eight in 1989, thirty-six in 1990, et cetera. This reminds one of the travail of Sisyphus pushing a boulder up the hill.⁷⁷

Some day we may get a governor, a legislature and an electorate that will take a truly dispassionate look at what the death penalty costs in treasure and in its effect on society and the judicial process and will objectively determine whether it is worth it.

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 other lesser amounts; Virginia was cited six times; only South Dakota rated a total blank.

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.

The high court of Texas forthrightly declared that when interpreting its state constitution, it would not be bound by Supreme Court decisions: "[S]tate constitutions cannot subtract from the rights guaranteed by the United States Constitution, [but they] can and often do provide additional rights for their citizens. The federal constitution sets the floor for individual rights; state constitutions establish the ceiling."⁷⁸ A Texas court of appeal added that "state courts can better respond to local interests Our society is at once homogeneous and heterogenous [sic] and our legal culture should correspondingly be homogenous [sic] (national) and heterogeneous (state). Moreover, the very concept of federalism embraces such an approach."⁷⁹

I conclude with James Madison's words in *The Federalist*:

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

77. HORACE, EPODES XVII, at 154, 156 (E.C. Wickham, D.D., trans., 2d ed. 1930).

78. *LeCroy v. Hanlon*, 713 S.W.2d 335, 338 (Tex. 1986).

79. *Heitman v. State*, 815 S.W.2d 681, 687 (Tex. Ct. App. 1991).

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.⁸⁰

Sound policy 200 years ago. Sound policy today.

80. THE FEDERALIST No. 45, at 313 (James Madison) (Jacob E. Cooke ed., 1961).