FORGOTTEN LAW AND JUDICIAL DUTY

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I. INTRODUCTION

It was an honor to be invited to attend the Symposium and sit on the panel for *The Reemergence of State Constitutional Law and the State High Courts in the 21st Century*. I enjoyed the panel discussion very much and believe that our work will result in the development of state law that will be helpful to state courts in addressing issues that the coming decades will likely thrust upon the judiciary.

It is said that "[t]here is nothing new except what is forgotten."[1] In examining the reemergence of state law, we are exploring forgotten law. This idea of forgotten law is illustrated by an Arkansas case concerning what constitutes "an 'infamous crime' for purposes of removing an elected official from office."[2] The appellee relied on federal cases in arguing that a crime is infamous only if it is punishable by more than one year of imprisonment.[3] However, the origin of the federal rule argued by the appellee is a United States Supreme Court case[4] decided in 1885, more than ten years after adoption of the most recent Arkansas Constitution, and after an infamous crime had already been defined in Arkansas.[5] In response to the appellee's argument, the State offered earlier state

* Chief Justice of the Arkansas Supreme Court. This is a summary and expansion on comments I made at the symposium on the *Reemergence of State Constitutional Law and the State High Courts in the 21st Century* held at Albany Law School on February 16, 2007. I wish to express my appreciation for the assistance and hospitality shown to me by the Albany Law School, and I wish to extend a special thanks to Jerald A. Sharum, Editor-in-Chief, *Albany Law Review*, and Paul D. Trumble, Executive Editor for State Constitutional Commentary, *Albany Law Review*, for making my visit so enjoyable. I also wish to thank my law clerk Richard C. Thomas for assisting me in preparing this Article.

[1] HOYT'S NEW CYCLOPEDIA OF PRACTICAL QUOTATIONS 561 (Kate Louise Roberts ed., 1940) (attributing the quotation to Mademoiselle Bertin, Milliner to Marie Antoinette).

[2] State v. Oldner, 206 S.W.3d 818, 819 (Ark. 2005).

[3] *Id.* at 823.

[4] *Ex Parte* Wilson, 114 U.S. 417, 429 (1885).

[5] *Oldner*, 206 S.W.3d at 823.

law, including language from state constitutions dating to 1836.[6] This law provided that it was the nature of the crime rather than the length of imprisonment imposed that made it infamous.[7] The State prevailed.[8] Thus, while one may be predisposed by familiarity with federal law to apply it, state law may instead properly determine the question.

The wonderment attending the occasional decision of a state high court perceived as affirming a former federal interpretation of a right, or expanding a right, also illustrates that applicable state law has been forgotten. The obligation of state courts to interpret and apply law is obvious; the perception giving rise to wonderment results from the federal courts being seen since the 1950s and 1960s as the primary legal forum for the development of several areas of the law. It must be remembered that federal courts only apply what is mandated by federal law; other law is available and applicable in state courts.

In 1977, Justice William J. Brennan, Jr., concluded that undue state reliance on federal law arose when decisions of the United States Supreme Court during the 1960s "federalized" many rights and liberties.[9] According to Justice Brennan, this resulted in state courts failing to see any reason to consider what protections might be afforded under state law.[10] What Justice Brennan characterized as "federalized" largely finds its genesis in a determination by the United States Supreme Court that the challenges the Court faced in the 1950s and 1960s required that it apply the Fourteenth Amendment as it had not been applied before.[11] He describes this as the Court having "returned to . . . fundamental promises."[12] Thus, the United States Supreme Court did then just as we are doing today—examining new legal issues in light of all the applicable law.

Justice Brennan warned that "state courts cannot rest when they have afforded their citizens the full protections of the [F]ederal Constitution."[13] He cautioned against unthinking reliance on

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[6] *Id.* at 824–25.
[7] *Id.* at 825.
[8] *Id.* at 826.
[9] William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 495 (1977).
[10] *Id.*
[11] *Id.*
[12] *Id.* at 490.
[13] *Id.* at 491.

federal law.[14] The Arkansas Supreme Court recently stated that "[w]ithout question, a slavish following of federal precedent would render this court's opinions merely a mirror image of federal jurisprudence, which would carry with it a certain abrogation of our duty to interpret our own state constitution and follow our own state law."[15] As Chief Justice Shirley Abrahamson of the Wisconsin Supreme Court noted in 1982, the language in state constitutions is often drawn from the language in constitutions of other states rather than from the language of the Federal Constitution.[16] This necessarily means that the language in state constitutions is typically different than that found in the Federal Constitution. Different language may result in a different outcome. Further, rights granted under state constitutions may be greater than similar rights granted under the Federal Constitution, and rights may be granted in state constitutions that are entirely absent in the Federal Constitution.

There are two tendencies apparent in state appellate decisions that give rise to concern on the issue of undue reliance on federal law. First, there is a tendency in cases concerning an exclusively state issue to defer to the analysis and decisions of the United States Supreme Court on any issue ruled upon by that Court without regard to whether that decision is correct or applicable under the circumstances. Too often, independent analysis and application of state law have been forgotten.

Second, and a dangerous corollary to the first tendency, is the judicial inclination to ignore rights granted in state constitutions because those rights have neither been found in the Federal Constitution nor discussed by the United States Supreme Court. As noted, greater rights may be found in the state constitutions than in the Federal Constitution; however, there is a certain level of judicial discomfort sometimes apparent when ideas vary from the principles laid out in federal law. Yet, law requiring variance exists. For example, the Arkansas Constitution includes a provision protecting "Individual Liberty," declaring certain "inherent and inalienable rights."[17] These include "enjoying and defending life and liberty; of acquiring, possessing and protecting property, and reputation; and

[14] *Id.*
[15] State v. Brown, 156 S.W.3d 722, 729 (Ark. 2004).
[16] Shirley S. Abrahamson, *Reincarnation of State Courts*, 36 SW. L.J. 951, 955 (1982).
[17] ARK. CONST. art. II, § 2.

of pursuing . . . happiness."[18] This wording is markedly different from that found in the United States Constitution.

Such rights set out in the Arkansas Constitution may now be more relevant than ever. We live in an age of unsurpassed technology where thermal imaging analyzes what is occurring within a home based upon the heat emanating from the exterior of its walls.[19] Computer advances now allow collection and organization of virtually limitless information on individuals, which may be kept in perpetuity. Often this can be done with very little effort, at virtually no cost, and may be available on the Internet or subject to disclosure by those who are all too often successful at breaking into supposedly secure computer systems. Where abuses occur, parties might well look to provisions in state constitutions that provide greater and more specific direction and protection.

I believe that in this Symposium we are encouraging the search for forgotten law and the rediscovery of forgotten judicial duty; therefore, I much prefer the characterization "Reemergence of State Constitutional Law" to "New Federalism." My preference is based on the concern that our goal not be misunderstood. Federalism is not new, and yet its definition bears constant attention lest we fall into the trap of ignoring state law when we bear an obligation to apply it. Under federalism, applicable federal court decisions are binding on state courts when considering issues affected by federal law. At the same time, federal courts applying state law must follow the precedent set by state courts.[20] With respect to rights granted under federal law, state law may not more narrowly interpret those rights because the rights to that extent are determined by federal law; however, a state's law may well grant greater rights.[21] I fear that the term "New Federalism" implies something new and novel is afoot when it is not. This could lead to a misunderstanding of what we are about. Our intent is not to create[22] law from whole cloth but rather to apply all available law to

[18] *Id.*

[19] *See* Kyllo v. United States, 533 U.S. 27, 29–30 (2001).

[20] *See* Wisconsin v. Mitchell, 508 U.S. 476, 483 (1993) ("There is no doubt that we are bound by a state court's construction of a state statute."); Dyer v. Sims, 341 U.S. 22, 28 (1951) (stating that "for exclusively State purposes," the highest state court is the ultimate tribunal).

[21] *See* Cooper v. California, 386 U.S. 58, 62 (1967) ("Our holding, of course, does not affect the State's power to impose higher standards on searches and seizures than required by the Federal Constitution if it chooses to do so.").

[22] I consider the term "create," in this context, to be a judge's interjection of his or her opinion of public policy or his or her bias. When that occurs, predictability is lost, stare decisis is abandoned, and the bar is reduced to speculation and conjecture in trying to analyze

the problems presented.

It is not the courts alone that are predisposed to apply only federal law. Perhaps as a consequence of law school curriculum, attorneys enter practice with a significant knowledge of federal law and a paucity of knowledge of state law. State law is then often ignored in practice, meaning that the state law issue is never raised in the trial court; therefore, the issue cannot be discussed or considered by the appellate court. It is up to the bar to raise the issue of state law in the trial court, to fully develop the issue there, and to obtain a ruling that will allow meaningful appellate review and development of the law.

II. STATE LAW MAY DIFFER SIGNIFICANTLY FROM FEDERAL LAW AND SHOULD BE CAREFULLY EXAMINED BY ATTORNEYS

A. Prison Garb

A case in point on forgotten state law arose in Arkansas on the issue of trial in prison garb. In 1970, the Arkansas Supreme Court declared that a person may not be tried in prison garb absent a waiver of his or her right to be tried in regular clothing.[23] Six years later, the United States Supreme Court held that a criminal defendant could not be compelled to be tried while wearing prison garb.[24] Thus, under Arkansas law, a person has to waive his or her right to be tried in regular clothing while under federal law a person may not be compelled to be tried in prison garb. Yet as the years passed, attorneys in Arkansas typically pled their cases under the holding in *Estelle* and ignored state law. In 2002, the Arkansas Supreme Court considered the rule declared in 1970:

> The U.S. Supreme Court's decision in *Estelle* was first noted by this court in *Holloway, Welch & Campbell v. State*. We have never altered our original holding in *Miller*. The court of appeals in *Washington v. State* stated, "the rule in *Estelle* was adopted by the Arkansas Supreme Court in *Holloway, Welch and Campbell v. State*." The court of appeals is in error. In *Holloway*, this court noted *Estelle*, but did not overrule *Miller*. This court held in *Miller* in 1970 that absent

what decision a court might make.

[23] Miller v. State, 457 S.W.2d 848, 849 (Ark. 1970).

[24] Estelle v. Williams, 425 U.S. 501, 507–08 (1976).

> a waiver, a criminal defendant may not be tried in prison garb. The rule in Arkansas remains that the accused may not be forced to trial in prison garb absent a waiver.[25]

The basis for this holding was article II, section 8 of the Arkansas Constitution.[26]

B. Search Warrant

The requirements for issuance of a search warrant also differ significantly between federal and state courts. For example, in one Arkansas case, a law enforcement officer observed two men driving down a remote rural road at night and followed them.[27] The men stopped their car.[28] The officer used night-vision goggles to observe the men leave their car to water plants.[29] The men returned to their car and the officer followed their car to the home of one of the men.[30] He questioned both individuals regarding their activities, but they stated they were only hunting frogs.[31] The plants were later seized and determined to be marijuana.[32] A search warrant was obtained based on the assumption that because the men were growing marijuana in the woods, incriminating evidence would likely be found at their homes.[33] Indeed, incriminating evidence was found at each man's residence.[34]

Appellants, however, challenged the search warrants because there was no evidence to support reasonable cause to believe contraband or evidence of a crime would be found in the homes;[35] the State relied on federal cases.[36]

The United States Court of Appeals for the Ninth Circuit held that the magistrate issuing the search warrant "need only conclude that it would be reasonable to seek the evidence in the place indicated in the affidavit."[37] The United States Court of Appeals for

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[25] Box v. State, 71 S.W.3d 552, 557 (Ark. 2002) (citations omitted).

[26] *Id.* at 556; *see also* Flores v. State, 85 S.W.3d 896, 902–03 (Ark. 2002) (reaffirming that "the accused should not be forced to trial in prison garb").

[27] Yancey v. State, 44 S.W.3d 315, 318 (Ark. 2001).

[28] *Id.*

[29] *Id.*

[30] *Id.*

[31] *Id.*

[32] *Id.*

[33] *Id.* at 318, 320.

[34] *Id.* at 318.

[35] *Id.* at 317.

[36] *Id.* at 321–23.

[37] United States v. Peacock, 761 F.2d 1313, 1315 (9th Cir. 1985).

the First Circuit held that the test is whether it is reasonable to search the place identified, stating:

> The nexus between the objects to be seized and the premises searched need not, and often will not, rest on direct observation, but rather "can be inferred from the type of crime, the nature of the items sought, the extent of an opportunity for concealment and normal inferences as to where a criminal would hide [evidence of a crime]. . . . " [38]

The United States Court of Appeals for the Ninth Circuit concluded that "[i]n the case of drug dealers, evidence is likely to be found where the dealers live."[39] The United States Court of Appeals for the Seventh Circuit held that "[a]n issuing court is entitled to draw reasonable inferences about where evidence is likely to be kept, based on the nature of the evidence and the type of offense."[40] This reasoning has been criticized.[41]

The difference between the rule in the federal courts and the rule in Arkansas turns on the distinction between "reasonable to believe" and "reason to believe." In some federal courts, a search warrant is issued where it is reasonable to believe that a criminal will keep contraband or evidence of a crime in a place police would like to search; in other words, issuance of a search warrant is based on society's common experience in where criminals keep things.[42] In Arkansas, issuance of a search warrant depends on whether there is reason to believe that contraband or evidence of a crime is likely to be found in the place to be searched; in other words, the warrant is based not on common experience of what criminals do, but rather it is based on evidence that the items to be seized will likely be found

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[38] United States v. Feliz, 182 F.3d 82, 88 (1st Cir. 1999) (alteration in original).

[39] United States v. Pitts, 6 F.3d 1366, 1369 (9th Cir. 1993) (alteration in original) (internal quotation marks omitted).

[40] United States v. Lamon, 930 F.2d 1183, 1188 (7th Cir. 1991) (internal quotation marks omitted).

[41] *See Yancey*, 44 S.W.3d at 322; Guth v. Commonwealth, 29 S.W.3d 809, 812 (Ky. Ct. App. 2000); State v. Thein, 977 P.2d 582, 588 (Wash. 1999) (en banc).

[42] The United States Court of Appeal for the Sixth Circuit seems to have rejected the notion that a search warrant may be issued based on common experience regarding how criminals typically behave. *See* United States v. Schultz, 14 F.3d 1093, 1097–98 (6th Cir. 1994). The court stated that "[w]hile an officer's 'training and experience' may be considered in determining probable cause, it cannot substitute for the lack of evidentiary nexus." *Id.* at 1097 (citations omitted). The court noted that "[t]o find otherwise would be to invite general warrants authorizing searches of *any* property owned, rented, or otherwise used by a criminal suspect—just the type of broad warrant the Fourth Amendment was designed to foreclose." *Id.* at 1098; *see also* United States v. Orozco, No. 02-CR-1164, 2004 WL 1152854, at *1, *2 (N.D. Ill. May 21, 2004).

in the place to be searched.[43] Greater protection against unlawful search and seizure is thus granted under Arkansas law than under federal law.[44]

C. Warrantless Searches

Recent application of the Arkansas constitutional protection against warrantless search and seizure has been ably discussed before;[45] however, it warrants continued discussion and exploration because the principles being developed under state law in this area are in flux. It also serves as an example of the reemergence of state constitutional law. Prior to 2002, one finds in the opinions of the Arkansas Supreme Court on unlawful search and seizure a steady refrain illustrated by one case: "The wording of each document is comparable, and through the years, in construing this part of the Arkansas Constitution, we have followed the Supreme Court cases."[46] This approach is troubling for two reasons. First, it implies that the court's analysis ends when the court determines that the wording is comparable. The issue is broader than that. The issue is what rights are afforded under the Arkansas Constitution, not what rights are afforded under the United States Constitution. Second, the conclusion implies that the analysis might never reach beyond comparing the wording. As noted earlier, the Arkansas Supreme Court has recently rejected this "slavish" approach.[47]

In 2002, the Arkansas Supreme Court declared that its interpretation of the state constitutional provision on unlawful search and seizure no longer mirrored the interpretation of the United States Supreme Court on the Fourth Amendment.[48] This departure came because of the "knock and talk," which is a procedure used by law enforcement officers to "openly and peaceably, at high noon, . . . walk up the steps and knock on the front door of any man's 'castle' with the honest intent of asking questions of the occupant thereof—whether the questioner be a

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[43] *See* Griffin v. State, 67 S.W.3d 582, 585 (Ark. 2002).

[44] *See id.* at 593 (Corbin & Hannah, JJ., concurring).

[45] *See* Robert L. Brown, *Expanded Rights Through State Law: The United States Supreme Court Shows State Courts the Way*, 4 J. APP. PRAC. & PROCESS 499, 507 (2002).

[46] Stout v. State, 898 S.W.2d 457, 460 (Ark. 1995); *see also* Fultz v. State, 972 S.W.2d 222, 224 (Ark. 1998) ("Notably, Article 2, section 15 of the Arkansas Constitution provides the same degree of protection as the Fourth Amendment.").

[47] State v. Brown, 156 S.W.3d 722, 729 (Ark. 2004).

[48] *Griffin*, 67 S.W.3d at 593 (Corbin & Hannah, JJ., concurring).

pollster, a salesman, or an officer of the law."[49] However, asking questions is often no longer necessarily the primary purpose of a knock and talk. Often it is not one officer, but two or more who approach the door.[50] Many times, the intent in going to a citizen's door is not to talk but to obtain consent to search. Common practice is illustrated by the testimony of one law enforcement officer who, when asked about action taken on an anonymous tip, stated, "People call in and tell us, and we go and check. And if they wanna let us in we do. Eighty percent of 'em just let us come in and look."[51] Law enforcement utilizes the knock and talk in lieu of a warrant when they recognize that they do not have probable or reasonable cause to obtain a search warrant.[52] This misuse of a knock and talk causes concern that the protections against warrantless searches are being eroded. The United States Court of Appeals for the Sixth Circuit stated that "[w]hen the police go to a home with the intention of searching for evidence, they may not forgo a warrant."[53] Yet, that is the very purpose of many knock and talk encounters today.

Further, a knock and talk is used to obtain consent by none too subtle intimidation, which further illustrates that it is not simply being used to ask questions at the door as anyone might do. Law enforcement typically arrives late at night.[54] The person might be in bed.[55] Law enforcement may arrive either by driving up to the dwelling with multiple cars so that many bright headlights hit the house,[56] or by stealth, walking through the property to arrive at the door without warning.[57] Multiple officers may arrive for the knock and talk.[58] In Arkansas, the occupant of a dwelling must now be informed of his or her right to refuse consent to a search before consent is valid.[59] This decision was made under article II, section 15 of the Arkansas Constitution.[60]

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[49] Davis v. United States, 327 F.2d 301, 303 (9th Cir. 1964).

[50] *See, e.g.*, *Griffin*, 67 S.W.3d at 587; Keenom v. State, 80 S.W.3d 743, 744 (Ark. 2002).

[51] *Griffin*, 67 S.W.3d at 589. The officer later qualified his answer as "fifty to eighty percent." *Id.*

[52] In *Keenom*, the officer testified that he knew he could not obtain a warrant based on the information he had so he did a "knock and talk." 80 S.W.3d at 744.

[53] United States v. Chambers, 395 F.3d 563, 565 (6th Cir. 2005).

[54] *See Griffin*, 67 S.W.3d at 587; *Keenom*, 80 S.W.3d at 744.

[55] *See, e.g.*, *Keenom*, 80 S.W.3d at 745.

[56] *See, e.g.*, *id.*

[57] *See, e.g.*, *Griffin*, 67 S.W.3d at 587.

[58] *See, e.g.*, *id.*

[59] State v. Brown, 156 S.W.3d 722, 732 (Ark. 2004).

[60] *Id.*

D. Freedom and Independence Provision in the Arkansas Constitution

Another provision of the Arkansas Constitution has also been the source of litigation recently. Article II, section 2 of the Arkansas Constitution provides:

> All men are created equally free and independent, and have certain inherent and inalienable rights; amongst which are those of enjoying and defending life and liberty; of acquiring, possessing and protecting property, and reputation; and of pursuing their own happiness. To secure these rights governments are instituted among men, deriving their just powers from the consent of the governed.[61]

Citing this and other constitutional provisions, the court in 2002 held that the fundamental right of privacy implicit in Arkansas law protects all private, consensual sexual intimacy between adults and that the Arkansas sodomy law was unconstitutional.[62] It was not until the next year that the United State Supreme Court held a Texas sodomy law unconstitutional under the Fourteenth Amendment.[63]

Many other issues might arise from the Freedom and Independence provision of the Arkansas Constitution. For example, in the 1990s, a central child maltreatment registry was created under the direction of the Arkansas Department of Human Services (DHS).[64] In one recent case, a nineteen year old was placed on the registry for having sex with a minor.[65] He appealed to the Arkansas Supreme Court, arguing placement on the registry under the facts was unconstitutional under the Federal Constitution.[66] His placement on the registry was affirmed.[67] Shortly thereafter, the same issue was presented in another case where a foster parent was placed on the list and lost her foster children because she had used

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[61] ARK. CONST. art. II, § 2.

[62] Jegley v. Picado, 80 S.W.3d 332, 334 (Ark. 2002).

[63] Lawrence v. Texas, 539 U.S. 558, 578–79 (2003).

[64] 1991 Ark. Acts 1208.

[65] C.C.B. v. Ark. Dep't of Health & Human Servs., No. 06-554, 2007 WL 184798 (Ark. Jan. 25, 2007).

[66] *Id.*

[67] *Id.*

physical punishment contrary to oral instructions from DHS.[68] The injuries to the child were described by the administrative law judge as transient pain and temporary marks.[69] DHS argued that the foster parent's interest in her reputation and problems caused by placement on the registry were slight.[70] The foster parent argued a violation of the Federal Constitution, noting her loss of reputation;[71] however, under the Federal Constitution, injury to reputation alone is not subject to due process—there must be stigma plus loss of liberty or property.[72]

Reputation is specifically protected under article II, section 2 of the Arkansas Constitution.[73] The issue of what protection is afforded reputation under article II, section 2, however, has not been litigated. Reputation is of no small importance in life. One's reputation may determine whether one obtains or retains a job. Loss of reputation may deprive a person of life, liberty, and the pursuit of happiness. William Blackstone described the interest in the security of reputation as a right to which every person is entitled because without it, "it is impossible to have perfect enjoyment of any other advantage or right."[74]

III. THE COMMON LAW

I wish to also note a discussion of res judicata and double jeopardy that concerns application of state common law. A defendant was prosecuted for crimes arising from an altercation involving a firearm; a charge of felon in possession of a firearm was severed from the other charges and tried first.[75] The defendant was acquitted, resulting in a finding that he possessed no firearm.[76] At the later trial on the battery with a firearm charges, he pled res judicata.[77] Although federal law was discussed, the court relied on res judicata as developed in the common law of Arkansas,[78] stating

[68] Dep't of Health & Human Servs. v. R.C, No. 06-858, 2007 WL 416776 (Ark. Feb. 8, 2007).

[69] *Id.*

[70] *Id.*

[71] *Id.*

[72] *See* Paul v. Davis, 424 U.S. 693, 711–12 (1976).

[73] *See supra* notes 17–18 and accompanying text. Other state constitutions have similar provisions. *See, e.g.*, N.D. CONST. art. 1, § 1; PA. CONST. art 1, § 1.

[74] WILLIAM BLACKSTONE, 1 COMMENTARIES *134.

[75] Mason v. State, 206 S.W.3d 869, 873 (Ark. 2005).

[76] *Id.*

[77] *Id.* at 871.

[78] *See* ARK. CODE ANN. § 1-2-119 (2004). Section 1-2-119 discusses the common law as

that "[o]ur own common law on *res judicata* remains viable and relevant."[79] Thus, state common law also must not be forgotten.

IV. CONCLUSION

"State constitutions . . . are a font of . . . liberties."[80] Justice Brennan counseled that sole reliance upon federal law is misplaced, that we must also consider our state constitutions, our state statutes, and our state common law.[81] Under our system of federalism, the courts of the states are no less protectors of freedom than the federal courts. To the contrary, on a state level we deal more directly with the day-to-day lives of our citizens. This puts state courts in closer proximity to the events that affect our citizens' lives. State courts should be most aware of the threats to citizens' freedom and liberty, and our state laws also often afford our citizens greater rights and protection than federal law. State courts are uniquely positioned and responsible to apply our state law to improve the lives of our citizens and guarantee life, liberty, property, and happiness.

follows:

> The common law of England, so far as it is applicable and of a general nature, and all statutes of the British Parliament in aid of or to supply the defects of the common law made prior to March 24, 1606, which are applicable to our own form of government, of a general nature and not local to that kingdom, and not inconsistent with the Constitution and laws of the United States or the Constitution and laws of this state, shall be the rule of decision in this state unless altered or repealed by the General Assembly of this state.

Id.

[79] *Mason*, 206 S.W.3d at 875.

[80] Brennan, *supra* note 9, at 491.

[81] *Id.* at 503.