THE SUPREME COURT, THE FOURTEENTH AMENDMENT AND STATE CRIMINAL CASES

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DECISIONS of the United States Supreme Court are frequently greeted with outbursts from eminent members of the *Quo Vadis* school of constitutional law. Judging from past experience, two recent opinions[1] seem destined to meet a reception of this kind. Important in themselves due to popular interest in the fate of the persons involved, they assume even greater prominence in the light of their bearing on perplexing problems of state and federal relations. With the *Schechter* case[2] a recent memory, with murmurs in the air of a constitutional amendment granting the federal government power to act in national economic emergencies,[3] a re-examination of principles long viewed as basic seems imminent. The proper scope of state activity in the administration of criminal justice, though temporarily overshadowed by more pressing matters arising from the depression, must form an important part of such an inquiry. A consideration of the extent to which supervision of state courts in this field has already been carried thus becomes timely.

In approaching the question, the fact that considerations much different from those involved in a discussion of the commerce or full faith and credit clauses in relation to state action are material, is, perhaps, too obvious to be mentioned. Though many crimes have interstate aspects, the trial of the apprehended criminal is without national significance in the sense that it reacts on the economic relations of the several states or makes for diversity of decision in cases where uniformity is desirable. Perhaps more than in any other field, the manner of dealing with persons accused of crime is of concern to the state alone. The cases are not wanting in expressions of this pious sentiment. Thus Mr. Justice Holmes has said:

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[1] Norris v. Alabama, 55 Sup. Ct. 579 (1935); Mooney v. Holohan, 55 Sup. Ct. 340 (1935).

[2] Schechter Poultry Corp. v. United States, 55 Sup. Ct. 837 (1935).

[3] See New York Times, June 2, 1935, sec. 1, p. 1.

In so delicate a matter as interrupting the regular administration of the criminal law of the State .... too much discretion cannot be used, and it must be realized that it can be done only upon definitely and narrowly limited grounds.[4]

while in numerous other cases the reluctance of the Supreme Court to act has been indicated.[5] Reluctant though it may have been in general, however, the court has not hesitated in specific instances to assert its power of supervision even in the field of criminal law, the Fourteenth Amendment being the basis upon which interference has been predicated. Though the process has been accompanied by outspoken criticism,[6] it is believed that the cases reveal an increasing willingness on the part of the court to intervene in the conduct of criminal cases. The wisdom which has led that body to refrain from adopting a definition of "due process" in other connections[7] has apparently been carried over into the field under discussion. But a consideration of those things which as a result of the "process of inclusion and exclusion" have been determined to constitute or not to constitute due process may serve, however vaguely, to mark the boundaries between permissible state action and the reverse.

One may fairly begin with the assumption that due process of law in the trial of cases[8] includes as minimum requirements, notice and opportunity to be heard, and a fair hearing by an impartial tribunal having jurisdiction of the parties and the subject matter of the action. All of these factors may be lumped together in the general idea of "fair trial." With these generalizations it is difficult to quarrel, but the attempt to apply them in specific cases is fraught with danger and, it is believed, is rendered more perplexing by the decisions with which one must deal. At the outset it becomes necessary to distinguish between the "privileges

[4] Ashe v. Valotta, 270 U.S. 424, 426 (1926).

[5] See Allen v. Georgia, 166 U.S. 138, 140 (1897); Rogers v. Peck, 199 U.S. 425, 434 (1905); Gibson v. Mississippi, 162 U.S. 565, 591 (1896); *In re* Wood, 140 U.S. 278, 289 (1891).

[6] See Dunbar, The Anarchists' Case before the Supreme Court of the United States, 1 Harv. L. Rev. 307 (1888); Charles Warren, The New "Liberty" under the Fourteenth Amendment, 39 Harv. L. Rev. 431 (1926); Hannis Taylor, Due Process of Law 573, 576 (1917).

[7] Davidson v. New Orleans, 96 U.S. 97, 104 (1877).

[8] A consideration of the method of disposing of the so-called "common law crimes" is the primary object of this article. The power of the state to create new crimes and the attitude of the court toward legislation attempting to do so involve problems not conspicuously different from those connected with other state legislation. For example, the requirements of definiteness and certainty in such legislation seem to be virtually the same as in other types of enactments. See International Harvester Co. v. Kentucky, 234 U.S. 216, 221 (1914); United States v. Cohen Grocery, 255 U.S. 81, 89 (1921); Connally v. General Construction Co., 269 U.S. 385, 391 (1926); Cline v. Frink Dairy Co., 274 U.S. 445 (1927).

and immunities" which are guaranteed by the Fourteenth Amendment and the "liberties" which are also safeguarded by that portion of the Constitution. In spite of the decision in the *Slaughter House Cases*[9] which apparently disposed of the contention, the years from that time until after the close of the century witnessed a determined attempt on the part of various litigants to cause the court to rule that the privileges and immunities of citizens of the United States included those set out in the first eight amendments to the Constitution and were thus binding on the States.[10] Those efforts were uniformly unsuccessful, but the battle shifted to new ground, it being asserted that the amendments in question listed "liberties" which were also sacrosanct by virtue of the Fourteenth Amendment. This method of attack, as will be seen, proved more effective, but it introduced another complication. Whereas the abridgement of privileges and immunities was absolutely barred by the amendment, the deprivation of liberty was not prohibited unless accompanied by a denial of due process. As Mr. Warren has pointed out,[11] though the individual interests, protection of which is sought, remain the same, the crucial inquiry is as to the manner in which they have been curtailed.[12]

One finds little evidence in reviewing the decisions of an attempt on the part of the court to dictate any set form of procedure in the disposal of state criminal cases. The criterion of "fairness" seems to have allowed almost complete latitude in the determination of such matters as the manner of accusation,[13] so long as the accused has at least an opportunity to

[9] 16 Wall. (U.S.) 36 (1872).

[10] Spies v. Illinois, 123 U.S. 131, 166 (1887) (citing earlier cases); Brown v. New Jersey, 175 U.S. 172, 174 (1899); Maxwell v. Dow, 176 U.S. 581, 584 (1900); Barrington v. Missouri, 205 U.S. 483, 486 (1906); Twining v. New Jersey, 211 U.S. 78, 93 (1908).

[11] *Supra* note 6.

[12] The determination of what things constitute "liberties" within the meaning of the Fourteenth Amendment seems so inextricably entangled with the question of due process that it has not been attempted here as a separate matter. Mr. Warren, in the article referred to *supra* in note 6, has dealt with the question as satisfactorily as seems possible. As will appear later in the discussion, the denial of representation by counsel constituted a deprivation of liberty without due process of law. Powell v. Alabama, 287 U.S. 45 (1932). The court also seems to have reached the conclusion that free speech is a "liberty." Gitlow v. New York, 268 U.S. 652, 666 (1925). See Whitney v. California, 274 U.S. 357 (1927); Hughes, The Supreme Court of the United States 166 (1928).

[13] It was decided at a comparatively early date that a state was not precluded by the due process clause from substituting the information for the indictment in criminal cases. Hurtado v. California, 110 U.S. 516 (1884); Bolln v. Nebraska, 176 U.S. 83 (1899). Nor is indictment by a grand jury a privilege or immunity protected by the Fourteenth Amendment. Maxwell v. Dow, 176 U.S. 581 (1900). The court has also held that various formal errors in the indictment or information did not result in a denial of due process. Barrington v. Missouri, 205 U.S. 483 (1906); Hodgson v. Vermont, 168 U.S. 262 (1897); Caldwell v. Texas, 137 U.S. 692 (1890); *In re* Robertson, 156 U.S. 183 (1895).

secure a full statement of the charge against him,[14] arraignment,[15] the number[16] and qualifications of jurors,[17] challenges to jurors,[18] continuances,[19] changes of venue,[20] and procedure on appeal.[21] The general attitude with reference to procedural questions as evidenced by the decisions seems to support the statement of the court in *Rogers v. Peck* that:

> Due process of law, guaranteed by the Fourteenth Amendment does not require the state to adopt a particular form of procedure, *so long as it appears that the accused has had sufficient notice of the accusation and an adequate opportunity to defend himself in the prosecution.*[22]

It will be observed, however, that the italicized portion of the quotation virtually destroys the effect of the rest of the statement. "The Lord giveth and the Lord taketh away; blessed be the name of the Lord." The net result of the foregoing decisions seems to be that, though various procedural devices may not be in themselves objectionable, if their application results in a lack of notice and an opportunity to be heard by an impartial tribunal a denial of due process exists.[23] Thus it appears evident that the cases involving procedural questions, though apparently indicative of a tolerant attitude on the part of the court, actually are almost valueless in marking the boundaries within which the states may act in dealing with crime.

Of the various categories into which the cases fall, one of the most significant for the purposes of this investigation is that involving jury trial. The standard to be applied in determining the existence of due process in this connection may be stated with deceptive clearness. Though a state

[14] Hodgson v. Vermont, 168 U.S. 262 (1897).

[15] Garland v. Washington, 232 U.S. 642 (1914), overruling Crain v. United States, 162 U.S. 625 (1896) in so far as the latter decision held that a formal arraignment was necessary to due process.

[16] Maxwell v. Dow, 176 U.S. 581 (1900).

[17] Leeper v. Texas, 139 U.S. 462 (1890); Kohl v. Lehlback, 160 U.S. 293 (1895). See Jordan v. Massachusetts, 225 U.S. 167 (1912).

[18] Brown v. New Jersey, 175 U.S. 172 (1899), upholding a New Jersey statute providing for a "struck jury" in criminal cases; Ashe v. Valotta, 270 U.S. 424 (1926), holding in a *habeas corpus* proceeding that the petitioner would not be released because he had been tried on two different indictments at once, the indictments being for closely related crimes.

[19] Franklin v. South Carolina, 218 U.S. 161 (1910), holding a refusal to grant a continuance proper in the circumstances.

[20] Barrington v. Missouri, 205 U.S. 483 (1906).

[21] Lott v. Pitman, 243 U.S. 588 (1917); Duncan v. Missouri, 152 U.S. 377 (1894); Allen v. Georgia, 166 U.S. 138 (1897).

[22] 199 U.S. 425, 435 (1905). Italics are the writer's.

[23] *Cf.* Patterson v. Alabama, 55 Sup. Ct. 575 (1935); Rogers v. Alabama, 192 U.S. 226 (1904).

may, apparently, deny an accused person a jury trial entirely,[24] if one is granted, the selection of the jury must be conducted in a manner calculated to secure an impartial body from which no class of persons has been arbitrarily excluded.[25] In a long series of cases, rendered dramatic by deep seated emotional and racial prejudices, the court has had occasion to apply this standard. Though the results retain the appearance of consistency, it is believed that a marked change in attitude has taken place in the years since the problem was first presented. It was, of course, established at an early date that a state statute or constitutional provision excluding negroes from service either on the grand or petit jury because of their color, is violative of the Fourteenth Amendment,[26] and that phase of the question requires no further comment. The real difficulty, and one which still exists, has arisen in connection with cases in which it has been alleged that such exclusion has been practiced by officials acting under an unobjectionable statute. A somewhat detailed consideration of the cases seems necessary. *Virginia v. Rives*,[27] decided at the same term as the *Strunder* case[28] involved the validity of the action of a federal court in directing the removal of a criminal case from a state court on the ground of an alleged discrimination against negroes in the selection of juries. It was properly decided that a case for removal was not presented,[29] but certain language used by the court with reference to the showing of discrimination bears on the decisions in subsequent cases. Although the petition for removal alleged that negroes had never been allowed to serve on juries in the county in question,[30] it was stated by Mr. Justice Strong that in the absence of a showing that the exclusion was *because of their race or color*, there was no indication that a federal right had been denied.[31] In *Neal v. Delaware*,[32] the negro prisoner moved to quash the indictment because of discrimination in the selection of grand jurors and filed in support of his motion an affidavit setting forth the alleged systematic exclusion and containing the further allegation

[24] Maxwell v. Dow, 176 U.S. 581 (1900).

[25] Strauder v. West Virginia, 100 U.S. 303 (1879); Neal v. Delaware, 103 U.S. 370 (1880).

[26] Strauder v. West Virginia, 100 U.S. 303 (1879); Bush v. Kentucky, 107 U.S. 110 (1882). A discriminatory statute enacted prior to the adoption of the Fourteenth Amendment apparently does not operate as a denial of due process, it being presumed that it will not govern the selection of the jury. Bush v. Kentucky, 107 U.S. 110 (1882). See Neal v. Delaware, 103 U.S. 370 (1880). If the statute is not in terms discriminatory, but merely creates the possibility of discrimination in its application it apparently is not objectionable. Williams v. Mississippi, 170 U.S. 213 (1898). See Franklin v. South Carolina, 218 U.S. 161 (1910).

[27] 100 U.S. 313 (1879).

[28] 100 U.S. 303 (1879).

[29] See *infra*, page 255.

[30] 100 U.S. 313, 315.

[31] 100 U.S. 313, 322.

[32] 103 U.S. 370 (1880).

that the exclusion was because of race and color. The state apparently entered no denial of the facts set out and it was held to have consented to the use of the affidavit as evidence. Here, the overruling of the motion to quash was held to constitute a denial of a federal right. Thus it was definitely established that on a proper showing of exclusion because of race and color, the Supreme Court would intervene to prevent a denial of due process in the courts of the state.[33]

The decision, however, was of cold comfort to the accused persons who attempted to raise the point in several subsequent cases. In *Bush v. Kentucky*,[34] a motion to set aside the petit jury panel alleged that colored persons were excluded in the selection of the jury, but omitted the magic phrase "because of their race and color." In an opinion by Mr. Justice Harlan, the allegations of the motion were said to be too vague, inasmuch as the defendant was not entitled to a colored or a mixed jury but could only demand a jury from which his race was not excluded because of its color.[35] It would appear from the opinion that the denial of due process is to be determined, not from the systematic exclusion of colored persons for whatever reason, but by the subjective intent of the officer charged with the selection of the jury. This seems to have quieted efforts to secure reversals for some years. In 1896 two cases from Mississippi were decided. It seems clear that the point now under discussion was not properly raised in *Gibson v. Mississippi*,[36] but in *Smith v. Mississippi*[37] a motion to quash the indictment was filed. The motion was verified on information and belief and stated that the local officials wilfully and intentionally excluded negroes from the grand jury on account of their color. It was held that the motion was properly overruled since it was unsupported by competent evidence. *Neal v. Delaware*[38] was distinguished on the basis that in the latter case the state had consented to the use of the affidavit, while in the principal case such consent was not given. It does not appear from the report that the state denied the facts set out in the motion.

Carter v. Texas[39] was a case in which the bill of exceptions showed that

[33] As to the point in the proceedings at which interference is permissible, see *infra*, page 255.

[34] 107 U.S. 110 (1882).

[35] "The allegation that colored citizens were excluded, and that only white citizens were selected, was too vague and indefinite to constitute the basis of an inquiry by the court whether the sheriff had not disobeyed its order by selecting and summoning petit jurors with an intent to discriminate against the race of the accused. This motion was, therefore, properly overruled." 107 U.S. 110, 117.

[36] 162 U.S. 565 (1896).

[37] 162 U.S. 592 (1896).

[38] *Supra* note 32.

[39] 177 U.S. 442 (1900).

the negro defendant had not only filed a motion to quash, alleging discrimination in proper fashion, but also had requested permission to introduce evidence showing the truth of the allegations. It was held that the action of the court in overruling the motion without allowing the introduction of testimony constituted a deprivation of due process. In *Tarrance v. Florida*,[40] an affidavit similar to that in *Smith v. Mississippi*[41] was filed in support of a motion to quash the indictment, and motions were also filed to quash the venire and panels of the grand and petit juries for the same reasons as alleged in the motion to quash the indictment. The state moved to strike the motion to quash the venire and panels, which was sustained. The motion to quash the indictment was overruled. As to the latter motion, the court followed the decision in the *Smith* case, holding that the affidavit did not constitute independent proof of the facts alleged. The defendant contended that the motion by the state to strike the other motions was equivalent to a demurrer and admitted the truth of the allegations, so that further proof was unnecessary. The court refused to allow this contention, distinguishing *Neal v. Delaware*[42] on the ground that the agreement made by the state in that case was regarded as an admission of the truth of the facts stated, while in the principal case the motion to strike did not constitute an admission but was made for the reason that the question should have been presented by a plea in abatement rather than a motion to quash. *Brownfield v. South Carolina*[43] was disposed of on the ground that the record did not show any offer to prove exclusion of negroes from the grand jury, though this was alleged in a motion to quash the indictment. *Rogers v. Alabama*[44] presented a situation in which a motion to quash the indictment was filed and an offer of proof was made, but in response to a motion by the state was stricken from the files because of prolixity. This was held to constitute error. The court, speaking through Mr. Justice Holmes, denied the power of the state court to withdraw the question from its consideration on such a pretext.

The course of decision up to this time cannot fairly be said to reveal a burning desire on the part of the court to supervise the conduct of state criminal cases. Indeed, it might be asserted on the contrary that in view of the basic constitutional question involved, the arguments resorted to in an effort to sustain the state tribunals verge on unnecessary technicality. In all of the cases cited, the question was substantially the same, yet in only three, all of which represented extreme situations, were reversals

[40] 188 U.S. 519 (1903).
[41] *Supra* note 37.
[42] *Supra* note 32.
[43] 189 U.S. 426 (1903).
[44] 192 U.S. 226 (1904).

granted. Be that as it may, the following seems to be the net result of the cases: In order to constitute a deprivation of due process, the discrimination must exist and be practiced because of race and color. Apparently it must be alleged and proved that the officials charged with the selection of the jury were motivated by a desire to exclude for that reason. Given the proper allegations, a denial of due process exists where there is an admission or uncontradicted evidence of discrimination, or where the defendant, having properly raised the issue, has been denied a hearing thereon.

It will be noted that the case in which a hearing on the question has been held and it has been decided adversely to the defendant is not covered by the cases hitherto discussed. The matter is squarely raised by *Norris v. Alabama*,[45] in which the court entered into a detailed examination of the evidence and concluded as a result of that examination that there was a systematic exclusion of negroes and hence a denial of due process. Thus it appears that where the existence of discrimination is controverted, due process demands not only that there be a hearing on the question but also that it be *correctly decided.* The implications of this statement will be considered in more detail at another point. In addition to this holding, which of course represents an extension of, if not a departure from, the doctrine developed in the earlier cases, the court revealed a less rigid attitude as to the requirement that the intent of the officials must be specifically shown, by asserting:

> We think that the evidence that for a generation or longer no negro had been called for service on any jury in Jackson county, that there were negroes qualified for jury service, that according to the practice of the jury commission their names would normally appear on the preliminary list of male citizens of the requisite age but that no names of negroes were placed on the jury roll, and the testimony with respect to the lack of appropriate consideration of the qualifications of negroes, established the discrimination which the Constitution forbids.[46]

Thus it appears that the highly artificial requirement which was stated by the court in *Bush v. Kentucky*,[47] if it was ever intended to be applied literally, has been removed by this case.

Not only has the court been concerned with denials of due process prior to the commencement of the trial, but also it has had occasion to consider various matters arising during the course of the trial, as to which the violation of the Fourteenth Amendment has been claimed. Of these cases the two which seem to have aroused the greatest interest are *Frank v. Mangum*[48] and *Moore v. Dempsey*.[49] The literature produced has been

[45] 55 Sup. Ct. 579 (1935).
[46] 55 Sup. Ct. 579, 582, 583.
[47] 107 U.S. 110 (1882).
[48] 237 U.S. 309 (1915).
[49] 261 U.S. 86 (1923).

extensive,[50] and for that reason detailed comment seems unnecessary. Both cases involved the question of mob domination of the trial as a denial of due process, and in both it was recognized that due process is denied when a trial is in fact dominated by a mob. The chief significance of the cases lies in their bearing on the method to be used in raising the question and the effect of the determination of the state court on the point. A discussion of this problem will be found elsewhere in this paper.[51] Similarly, the decision in *Powell v. Alabama*,[52] may be mentioned here simply as indicating that due process requires that the accused shall have the aid of counsel in preparing and presenting his defence, while *Tumey v. Ohio*[53] shows that a trial by a judge having a direct pecuniary interest in the outcome of the case violates the Fourteenth Amendment. These cases, it is believed, are clearly instances in which that fair and impartial trial contemplated by the requirement of due process is lacking, and the only significant questions are as to the time and method of interference by the federal courts.

The decisions involving matters of evidence and presumptions in state criminal cases, however, present somewhat different considerations. If one may regard rulings as to the admission of evidence as determinations of state law it would seem that, even though erroneous, they do not involve a denial of due process.[54] The erroneous admission of evidence obviously does not in itself deny a fair hearing to the accused.[55] Due process has been held not to include the privilege against self incrimination,[56] nor, apparently, does it require an instruction on the presumption of innocence.[57] But if the accused is found guilty of a charge where there is no evidence to substantiate the verdict, a more difficult problem is presented. It seems possible to argue that if a proper hearing was accorded the defendant, the result of the trial, even if erroneous, would not operate to deny him due process within the purview of the Fourteenth Amend-

[50] Waterman and Overton, Federal Habeas Corpus Statutes and Moore v. Dempsey, 1 Univ. Chi. L. Rev. 307 (1933); 37 Harv. L. Rev. 247 (1923); 33 Yale L. J. 82 (1923); 73 Univ. Pa. L. Rev. 430 (1925); 9 Va. L. Rev. 556 (1923); 7 Minn. L. Rev. 513 (1923).

[51] *Infra*, page 254.

[52] 287 U.S. 45 (1932); noted in 7 So. Cal. L. Rev. 90 (1933); 31 Mich. L. Rev. 245 (1932); 81 Univ. Pa. L. Rev. 337 (1933); 19 Va. L. Rev. 293 (1933); 23 Jour. Crim. L. 841 (1932); 1 Geo. Wash. L. Rev. 116 (1933); 32 Col. L. Rev. 1430 (1932).

[53] 273 U.S. 510 (1927). *Cf. In re* Manning, 139 U.S. 504 (1891).

[54] See Hebert v. Louisiana, 272 U.S. 312 (1926); *In re* Converse, 137 U.S. 624 (1891).

[55] See Barrington v. Missouri, 205 U.S. 483 (1906).

[56] Twining v. New Jersey, 211 U.S. 78 (1908).

[57] Howard v. Fleming, 191 U.S. 126 (1903).

ment. In addition it might be said that a contrary holding would result in the practical difficulty of requiring the Supreme Court to investigate the weight of the evidence in state cases. Nevertheless, there seems to be ground for the belief that the supervision of the court might extend to this situation. In *Fiske v. Kansas*,[58] a criminal syndicalism statute of a type held constitutional in other cases[59] was, as applied, held to be violative of the Fourteenth Amendment, there being no evidence to show that the organization of which the defendant was a member advocated violent means of effecting industrial or political changes.[60] Not only does this appear to be true, but it also seems, in the light of the *per curiam* opinion in *Mooney v. Holohan*[61] that a conviction based on perjured testimony may be held violative of the Fourteenth Amendment, at least when the testimony was knowingly used by the prosecuting attorney.

Brief mention should be made of the power of the state to create presumptions operative in the trial of criminal cases. The recent case of *Morrison v. California*[62] invalidating a portion of the California Alien Land Law indicates that here, as well as elsewhere, the court has evinced a disposition to impose restrictions on state action by invoking the due process clause. The generalization is thus stated by Mr. Justice Cardozo:

> The limits are in substance these, that the state shall have proved enough to make it just for the defendant to be required to repel what has been proved with excuse or explanation, or at least that upon a balancing of convenience or of the opportunities for knowledge the shifting of the burden will be found to be an aid to the accuser without submitting the accused to hardship or oppression.[63]

This matter, involving as it does a specialized subject, has been dealt with by far more competent hands than those of the present writer[64] and is mentioned here simply for the purpose of indicating another field into which supervision by the Supreme Court has penetrated.

[58] 274 U.S. 380 (1927).

[59] Whitney v. California, 274 U.S. 357 (1927); Burns v. United States, 274 U.S. 328 (1927).

[60] "The result is that the Syndicalism Act has been applied in this case to sustain the conviction of the defendant, without any charge or evidence that the organization in which he secured members advocated any crime, violence, or other unlawful acts or methods as a means of effecting industrial or political changes or revolution. Thus applied the Act is an arbitrary and unreasonable exercise of the police power of the State, unwarrantably infringing the liberty of the defendant in violation of the due process clause of the Fourteenth Amendment." 274 U.S. 380, 387.

[61] 55 Sup. Ct. 340 (1935); noted in 25 Jour. of Crim. Law 943 (1935); 35 Col. L. Rev. 404 (1935).

[62] 291 U.S. 82 (1934). [63] 291 U.S. 82, 88, 89.

[64] Morgan, Federal Constitutional Limitations upon Presumptions Created by State Legislation, Harvard Legal Essays 321 (1934).

It seems evident that within the framework erected by the foregoing decisions may be included any act on the part of the state, whether done by the legislature, by administrative officials or by the court, the effect of which is to deprive the accused of what the Supreme Court of the United States may regard as a fair trial. If, for example, exclusion from juries may not be practised on the ground of race, it seems equally true that religious discrimination is objectionable.[65] If a state may not by statute deprive an accused person of the opportunity to be heard on a material issue, what is to be said of the arbitrary exclusion of his testimony by the trial judge? May not other matters, such as misconduct of the prosecuting attorney, evident bias of the judge, obvious partiality of a jury lawfully selected, or even complete incompetence of the defense attorney, if appointed by the court, be regarded in the light of a sufficiently strong showing as a denial of due process? That a fair trial in fact, rather than an opportunity for a fair trial under procedural forms, is now the test of due process, seems clearly indicated by the recent decisions. Thus it appears that in answer to the query made some years ago by an eminent authority, "Are there at present any enforceable restraints upon the powers of a state to regulate its procedure in criminal cases?"[66] One must assert that the power of the Supreme Court to investigate, and, if need be, to restrain state action is, in the light of the concept of due process developed by the course of decision previously traced, virtually unlimited. This conclusion is not surprising in view of the constantly expanding scope which the due process clause has been given by decisions in other fields.[67] One is not, however, disposed to apologize for what may seem an elaboration of the obvious, in view of the fact that little attention has hitherto been paid to the specific problem at hand.

Though the possibilities of federal supervision may be extensive, this is not to say that the Supreme Court is likely to interfere with the administration of justice by the states as a general rule. Certain voluntary restraints seem to have been imposed by the court in dealing with the matter. In the earlier cases one finds an extreme reluctance to interfere with the orderly course of state procedure. The first method in which it was sought to secure federal action seems to have been the attempt to remove cases from the state to the federal court on the ground that a

[65] See Searle v. Roman Catholic Bishop of Springfield, 203 Mass. 493, 89 N.E. 809 (1909). *Cf.* Swancara, Judicial Disregard of the "Equal Protection" Clause as it Affects the Non-Religious, 68 U.S.L. Rev. 309 (1934).

[66] Hannis Taylor, Due Process of Law 573 (1917).

[67] See Hough, Due Process of Law—Today, 32 Harv. L. Rev. 218 (1919).

federal right was being denied in the judicial tribunals of the state. In *Strauder v. West Virginia*[68] removal was held proper on the basis that race discrimination in the selection of a jury was required by statute. However an allegation of systematic discrimination by officials acting under an objectionable statute was held not to state grounds for removal in *Virginia v. Rives*[69] and it was ultimately established that the right to removal exists only when the denial of the federal right is shown by the constitution or statutes of the state and is not available for a denial of due process arising after the commencement of the trial.[70] So far as can be discovered, this device is no longer of any practical importance in relation to the problem at hand. The later cases involve the writ of *habeas corpus* as a means of securing federal intervention. Once again, generalization is both easy and deceptive. The reports abound in statements to the effect that *habeas corpus* is not to be used as a substitute for a writ of error,[71] and that it should be brought into play only when the remedies afforded by state procedure have been exhausted.[72] It seems clear, however, that any limitation on the power of the federal courts to issue the writ when a federal right is involved is imposed because of considerations of policy rather than by the compulsion of law. Thus, in *Cook v. Hart*[73] it is said that "comity" demands that the state courts should be appealed to in the first instance, while in *Ex parte Royall*[74] one finds the assertion that though jurisdiction to issue the writ exists, it will not be exercised in the absence of special circumstances until the state court has had an opportunity of determining the question. The "special circumstances" which the court had in mind were apparently limited to cases "involving the authority and operations of the general government, or the obligations of this country to, or its relations with, foreign nations."[75] In the main it seems evident that the limitations thus imposed have been ad-

[68] 100 U.S. 303 (1879). [69] 100 U.S. 313 (1879).

[70] Neal v. Delaware, 103 U.S. 370 (1880); Gibson v. Mississippi, 162 U.S. 565 (1895); Smith v. Mississippi, 162 U.S. 592 (1895).

[71] See Glasgow v. Moyer, 225 U.S. 420 (1912) (time for filing affidavit of prejudice of judge); *Ex parte* Spencer, 228 U.S. 652 (1913) (legality of sentence); Collins v. Johnston, 237 U.S. 502 (1915) (refusal to admit evidence); Felts v. Murphy, 201 U.S. 123 (1906) (alleged deprivation of due process because of inability of petitioner to hear testimony); Valentina v. Mercer, 201 U.S. 131 (1906) (instructions).

[72] *Ex parte* Royall, 117 U.S. 241 (1886); *Ex parte* Fonda, 117 U.S. 516 (1886); *In re* Wood, 140 U.S. 278 (1891); *In re* Shibuya Jugiro, 140 U.S. 291 (1891); Cook v. Hart, 146 U.S. 183 (1892); *In re* Frederich, 149 U.S. 70 (1893); New York v. Eno, 155 U.S. 89 (1894); Pepke v. Cronin, 155 U.S. 100 (1894); Whitten v. Tomlinson, 160 U.S. 231 (1895); Urquhart v. Brown, 205 U.S. 179 (1907); Markuson v. Boucher, 175 U.S. 184 (1899); *Ex parte* Spencer, 228 U.S. 652 (1913); United States v. Tyler, 269 U.S. 13 (1925).

[73] 146 U.S. 183 (1892). [74] 117 U.S. 241 (1885). [75] 117 U.S. 241, 252.

hered to in practice.[76] Two relatively early cases appear to be anomalies. In the case of *Medley, Petitioner*[77] an original application for a writ was brought to the Supreme Court, the petitioner alleging illegal detention because of his conviction and sentence under an *ex post facto* law. It does not appear that the case had been carried through the state courts on this point. The majority of the court was of the opinion that the law was *ex post facto* and that the prisoner was entitled to his discharge. But being unwilling to free the prisoner entirely, the court directed the warden of the state prison to notify the attorney general of the time at which he would be released, apparently in order that he might be rearrested and held for further proceedings. Again, in the case of *Minnesota v. Barber*[78] the Supreme Court affirmed an order of the circuit court discharging the petitioner, who had been convicted and sentenced by a justice of the peace for the violation of a statute which was held to be unconstitutional. There is no indication here that the appellate court of the state had been given an opportunity to rule on the validity of the statute, and in neither of the cases is the line of decisions exemplified by *Ex parte Royall*[79] referred to. The most recent decisions seem to indicate that the court is still disposed to hold its hand until after the state courts have been given every possible opportunity to rule on the question.[80]

The potentialities of federal supervision being, as indicated, almost boundless, it is believed that by far the most significant problem arising from the cases is not the limitations of due process, if such there are, but rather the question as to how much weight is to be given the determination of the state courts as to the existence of due process. If the Supreme Court is content to adopt the conclusions of the state tribunals it is apparent that little control will in fact be exercised over local administration of justice. It is believed that the early cases previously referred to contain little evidence of an attempt on the part of the federal courts to enter into an independent investigation of the facts alleged to show a

[76] See *In re* Loney, 134 U.S. 372 (1890) (involving perjury in contested election to seat in United States Congress); *In re* Neagle, 135 U.S. 1 (1890) (homicide committed in protecting federal judge from attack); Hunter v. Wood, 209 U.S. 205 (1907) (railway clerk acting in obedience to federal court injunction arrested for violation of state rate statute). For cases in which *habeas corpus* was held to be improper, see note 72, *supra*.

[77] 134 U.S. 160 (1889). [78] 136 U.S. 313 (1890). [79] 117 U.S. 241 (1885).

[80] Mooney v. Holohan, 55 Sup. Ct. 340 (1935). *Certiorari* has been denied in the following cases in which the lower federal courts have considered intervention by means of *habeas corpus* untimely: Hale v. Crawford, 65 F. (2d) 739 (C.C.A. 1st 1933); Bard v. Chilton, 20 F. (2d) 906 (C.C.A. 6th 1927); Dunn v. Lyons, 23 F. (2d) 14 (C.C.A. 5th 1927). Strangely enough, Hale v. Crawford has received unfavorable critical comment. 43 Yale L. J. 444 (1934); 33 Col. L. Rev. 1259 (1933). In addition to the above cases see Downer v. Dunaway, 53 F. (2d) 586 (C.C.A. 5th 1931); noted in 32 Col. L. Rev. 740 (1932).

denial of due process. Thus, the discrimination cases, as has been pointed out,[81] were decided for the most part on the basis of procedural questions and went no farther than to require a hearing where the existence of discrimination was denied by the state and proof to the contrary was offered. In *Spies v. Illinois*[82] the Supreme Court, although upholding state action did apparently examine the facts and for so doing was criticized for adopting a course tending to deprive the state of its necessary independence in the administration of local affairs.[83] As late as 1915, however, the majority of the court in *Frank v. Mangum*[84] was of the opinion that the determination of the state court on the question of mob domination was entitled to great, if not conclusive, weight.[85]

One perceives a markedly different attitude in the cases beginning with *Moore v. Dempsey*.[86] In that case, Mr. Justice Holmes, who had dissented in *Frank v. Mangum*,[87] spoke for the majority of the court. It was there decided that when facts alleged would, if true, make the trial void, it was the duty of the federal judge appealed to for a writ of *habeas corpus*, to examine the facts for himself. An entirely independent investigation and determination seems contemplated by the opinion. In *Fiske v. Kansas*[88] the court, in dealing with the application of a criminal syndicalism statute to the acts of the accused, adopted the rule previously applied in civil cases[89] that:

> . . . . this court will review the finding of facts by a state court where a federal right has been denied as the result of a finding shown by the record to be without evidence to support it; or where a conclusion of law as to a federal right and a finding of fact are so intermingled as to make it necessary, in order to pass upon the federal question, to analyze the facts.[90]

Powell v. Alabama[91] presents a case in which the Supreme Court determined from an examination of the record that there had been a substantial denial of the right to counsel, in the face of a contrary conclusion by the state court, and in *Norris v. Alabama*,[92] Mr. Chief Justice Hughes stated what seems to be the present position of the court in these words:

> That the question of denial of due process is one of fact does not relieve us of the duty to determine whether in truth a federal right has been denied. When a federal

[81] *Supra* page 250.
[82] 123 U.S. 131 (1887).
[83] Dunbar, *supra* note 6.
[84] 237 U.S. 309 (1915).
[85] 237 U.S. 309, 329.
[86] 261 U.S. 86 (1923).
[87] *Supra* note 84.
[88] 274 U.S. 380 (1927)
[89] Creswill v. Knights of Pythias, 225 U.S. 246, 261 (1912); Northern Pac. Ry. v. North Dakota, 236 U.S. 585, 593 (1915); Ward v. Board of Com'rs. of Love Cty., 253 U.S. 17, 22 (1920); Davis, Director General v. Wechsler, 263 U.S. 22, 24 (1923). For a later case see Ancient Egyptian Order v. Michaux, 279 U.S. 737, 745 (1929).
[90] 274 U.S. 380, 385.
[91] 287 U.S. 45 (1932).
[92] 55 Sup. Ct. 579 (1935).

right has been specially set up and claimed in a state court, it is our province to inquire not merely whether it was denied in express terms but also whether it was denied in substance and effect. If this requires an examination of evidence, that examination must be made. Otherwise, review by this court would fail of its purpose in safeguarding constitutional rights.[93]

The conclusion seems inevitable, then, that whether the question arises on *certiorari*, appeal or *habeas corpus*, when a denial of a federal right, *i.e.*, of due process under the Fourteenth Amendment, is properly alleged, it becomes incumbent on the court to enter if need be into an independent examination of the facts, which will not be influenced by the conclusion reached on the same facts by the state court. Granting that due process requires a correct decision as well as a hearing, the result appears necessary if the rights guaranteed by the Fourteenth Amendment are to be effectively safeguarded. It furnishes additional evidence, however, that the Fourteenth Amendment as interpreted by the court appears completely to dispose of state supremacy in the administration of criminal justice.

That this situation is a scandal to numerous observers is clear; that these cases, if the above analysis has been correct, greatly exceed the limits which the Fourteenth Amendment was designed to embrace is, perhaps, equally apparent. Whether one points with pride or views with alarm is dependent on one's views of broader principles underlying state and federal relationships than this paper was intended to include. It may be said, however, that criticism of the policy of extended federal control has at least three aspects. Of these, the one most frequently advanced and most often embodied in the early opinions, is the alleged disturbance of the traditional balance between state and nation, and the resulting subjugation of the former to a dictatorial and unsympathetic control by a remote central agency. This plaint is constant and raised in many tongues. As previously indicated it has at least this justification: there seems to be no controlling reason such as is found in the interstate commerce cases or in some of those arising under the full faith and credit clause,[94] why criminal procedure should be uniform in the several states. It is believed that in the absence of a definite constitutional sanction nothing but the most pressing necessity, which will usually be found to be economic, should cause the imposition of uniform rules upon unwilling local governments. Though crime, like the tariff, may not be "a local issue," the method of dealing with crime almost certainly is. Thus, if it

[93] 55 Sup. Ct. 579, 580.

[94] *Cf.* Supreme Council of the Royal Arcanum v. Green, 237 U.S. 531 (1915); Bradford Electric Co. v. Clapper, 286 U.S. 145 (1932). See Dodd, Power of the Supreme Court to Review State Decisions in the Field of Conflict of Laws, 39 Harv. L. Rev. 533 (1926).

can be said that the decisions of the United States Supreme Court have resulted in the establishment of federal control in the administration of criminal justice they are, in the opinion of the writer, to be deplored. However, it is submitted that they indicate the possibility of such control rather than the actuality. The process of counting noses is perhaps peculiarly worthless in this connection. But it will do no harm to observe that of the cases cited in the preceding pages, which are believed to be substantially all those on the subject in which the court has rendered opinions since the Civil War, only some ten have been determined to involve a denial of due process. The effect of this statement is largely destroyed, however, by the fact that four of them have been decided since 1915, which may be said to indicate a tendency toward more frequent intervention. What is more important is the relatively restricted scope of intervention as revealed by a classification of the opinions. Race discrimination in the selection of juries has been the concern of the bulk of the cases.[95] Aside from this, such rudimentary requirements of due process as the lack of pecuniary interest of a magistrate,[96] freedom from mob domination,[97] the right to representation by counsel,[98] the existence of some evidence to connect the accused person with the violation of a statute,[99] and, possibly, the requirement that one shall not be convicted on the basis of perjured testimony consciously used by the prosecuting attorney[100] have been insisted on. *The Morrison* case[101] may perhaps fairly be said to constitute an unjustified interference with the state. Aside from this, however, it is difficult to quarrel with the results which have been reached. The recent cases may reveal an increasing concern for the individual life as opposed to an insistence on the mechanical application of rules. Granting that the states should be unhampered in their usual methods of dealing with criminals it seems not too much to ask that elementary decencies should be observed. To this extent, supervision by a higher authority seems justified and it is submitted that for the most part this is all that has been required. To argue that the way is thus left open to complete federal control is to create false fears. The confidence which must necessarily be reposed in the "judicial statesmanship" of the court seems sufficient answer to forebodings, while, to borrow from Mr. Justice Cardozo,[102] the restraining power of that body

[95] See cases cited *supra* pages 248 ff.

[96] Tumey v. Ohio, 273 U.S. 510 (1927).

[97] Moore v. Dempsey, 261 U.S. 86 (1923).

[98] Powell v. Alabama, 287 U.S. 45 (1932).

[99] Fiske v. Kansas, 274 U.S. 380 (1927).

[100] Mooney v. Holohan, 55 Sup. Ct. 340 (1935).

[101] Morrison v. California, 291 U.S. 82 (1934).

[102] Cardozo, Nature of the Judicial Process 94 (1921). The reference has to do with the restraint of legislative activity, but the principle appears the same.

will tend to stabilize the action of state tribunals and cause, perhaps, a closer adherence to the standard of fair play than might otherwise be the case.

The other objections raise practical difficulties. Delay in the disposition of cases if scrutiny by the Supreme Court is to be countenanced seems unavoidable. To those who feel that the hanging of wrongdoers promptly is more important than a hanging according to Hoyle, this would appear to constitute a valid objection to the view just expressed. A conclusion which would preclude a review by the Supreme Court on that ground alone, however, seems little better than an advocacy of lynch law and may perhaps be disposed of without comment. A somewhat similar objection, but one which at least has about it an aura of respectability, is that the court, already heavily overburdened, is likely to be flooded with requests for action on state cases to an extent which would seriously impair its efficiency. The present discretionary character of review[103] seems an insufficient answer to the problem, since the task of disposing of requests for *certiorari* is in itself extremely burdensome. If, inspired by the recent decisions, defense counsel are to force the Supreme Court to decide whether or not to grant *certiorari* in a multitude of criminal cases, the results are likely to prove disastrous. The only solution, as Professors Frankfurter and Hart have pointed out,[104] seems to be a more thorough understanding of the proper function of the writ on the part of the bar, together with a decent restraint in invoking the jurisdiction of the court in hopeless cases. But here again, it is submitted that a problem of mechanics, however important, should not result in the complete denial of review. The nature of the interest to be protected precludes such action.

If one were to say that the most significant thing revealed by this study is that the attitude of the court toward testing criminal cases by the requirements of the Fourteenth Amendment has changed from one of doubt to one of determination he would not be far from the mark. A willingness to ascertain the existence or lack of due process by an independent examination of the facts has replaced the hesitant raising of procedural obstacles to avoid the task. Potentially, the field of supervision of state cases has become virtually unlimited. In practice, it is believed that the power thus asserted has been wisely exercised for the most part and that the future will reveal little restraint of the states as long as fundamental requirements of fairness are observed.

[103] 43 Stat. 937 (1925); 28 U.S.C.A. § 344(b) (1928).

[104] Frankfurter and Hart, The Business of the Supreme Court at October Term, 1933, 48 Harv. L. Rev. 238 (1934).