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Even the casual student of public law cannot fail to be aware that the work of the United States Supreme Court involving review of criminal cases has increased greatly in the past two or three decades. Two factors have contributed to this growth: (1) the constantly expanding number of federal criminal cases as Congress rapidly adds to the list of federal crimes;[1] and (2) review of the criminal cases de-

[1]The Judiciary Act of 1789 contained no provision for review of federal criminal cases, either by circuit courts or the Supreme Court. 2 STAT. 59 (1802) gave the circuit courts power to certify questions, upon division of opinion, to the Supreme Court, thus affording a limited form of review. Appeal as of right by writ of error from the district courts to the circuit courts was allowed by an 1879 statute, 20 STAT. 354. In 1891 appeal directly from the district court to the Supreme Court was permitted in all cases of "infamous crimes," 26 STAT. 827. Since the Court *In re* Claasen, 140 U.S. 200 (1891), construed this phrase as inclusive of all crimes for which a person might be sentenced to a penitentiary, the Supreme Court found itself immediately overburdened with the review of petty crimes. The right of appeal to the Supreme Court was therefore limited to capital crimes in 1897, 29 STAT. 492; and in 1911 even this limited right was abolished, 36 STAT. 1157. Such a limitation was acceptable because the circuit courts of appeal, created in 1891, afforded a medium of review. There is now no appeal as of right to the United States Supreme Court in federal criminal cases except when the party relies on a state statute which has been held by the court of appeals to be invalid under the Constitution, laws, or treaties of the United States, 28 U.S.C. §1254(2) (Supp. 1950).

Since 1925 appeal as of right from decisions of state courts in criminal cases is possible only when the validity of a state act under the Federal Constitution is challenged and sustained or when a federal statute or treaty is involved and its validity denied by the state court, 28 U.S.C. §1257(1), (2) (Supp. 1950). Prior to 1925 a defendant could take an appeal as of right to the Supreme Court from the decision of the highest state court in a considerable number of cases.

At the present time review of criminal cases, of both federal and state origin, is permitted principally on certiorari. The basis for writs of certiorari to state

cided by state courts to insure compliance by states with the nebulous requirements of the due process clause of the Fourteenth Amendment and the more specific prohibitions of the United States Constitution applicable to state criminal procedure.[2]

The task of the Court in its review of federal criminal decisions is, as compared with review of state judgments, a relatively simple one. First, the Court in interpreting the acts of the Congress[3] is not limited to a determination of whether a constitutional guarantee has been infringed,[4] whereas it must accept the interpretation by state courts of state statutes.[5] Further, in acting on federal criminal cases the Court has the advantage of being able to review cases tried under a single code of criminal procedure applicable to the entire federal criminal system.

There are areas of justifiable concern for the student of public law who investigates the operations of the Court in reviewing federal criminal cases.[6] This article is immediately concerned, however, with the role that the United States Supreme Court plays in the infinitely more complex area of the review of criminal cases that have originated in the various state courts.

Numerous decisions,[7] including the recent and dramatic case of *Wolf v. Colorado*,[8] evidence clearly that the Court holds that all of

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courts is contained in 28 U.S.C. §1257 (3) (Supp. 1950). See ORFIELD, CRIMINAL APPEALS IN AMERICA 244-248 (1939).

[2]See *e.g.*, the restrictions against ex post facto laws and bills of attainder, U.S. CONST. Art. I, §10.

[3]For a discussion of the Court's consideration of federal criminal appeals see Fraenkel, *The Supreme Court as Protector of Civil Rights: Criminal Justice*, 275 ANNALS OF AMER. ACADEMY OF POL. & SOC. SCIENCE 86, 95 (1951).

[4]*See* District of Columbia v. Little, 339 U.S. 1, 3 (1950).

[5]*See* Skiriotes v. Florida, 313 U.S. 69, 79 (1941); Hebert v. Louisiana, 272 U.S. 312, 316 (1926).

[6]*E.g.*, the writer finds the decision in United States v. Rabinowitz, 339 U.S. 56 (1950), particularly disturbing because of its allowance of power to federal officers making searches incident to arrest. In his dissent Mr. Justice Frankfurter pointed by far the better rule in aid of the preservation of the historic constitutional right of privacy. The writer would agree with Frankfurter that the "progress is too easy from police action unscrutinized by judicial authorization to the police state." *Id.* at 82. *But cf.* United States v. Jeffers, 72 Sup. Ct. 93 (1951).

[7]*E.g.*, Twining v. New Jersey, 211 U.S. 78 (1908); Hurtado v. California, 110 U.S. 516 (1884).

[8]338 U.S. 25 (1949). In the tradition of the *Wolf* case is the case of Stefanelli v. Minard, 72 Sup. Ct. 118 (1951).

the guarantees of the first eight amendments to the Constitution have not been incorporated into the Fourteenth Amendment. The attempt of Mr. Justice Black, represented in his dissent in *Adamson v. California*[9] and other cases, to blanket into the Fourteenth Amendment the protections of the first eight amendments has not received substantial support from the bench or the bar.

Nor does the Fourteenth Amendment compel consistency of criminal processes, either as between the states[10] or among the states and the Federal Government.[11] A state is free to regulate the criminal procedure of its courts unless in so doing it violates some fundamental principle of justice.[12] This is true even though a federal right is being defended in the state court.[13] The violation of a fundamental principle of justice, however, runs athwart the due process clause of the Fourteenth Amendment.[14] In such cases the burden falls on the Supreme Court to resolve the demands of the United States Constitution and the intricate and varied criminal law procedures of the states. The problems facing the Court as it seeks a solution are both mechanical and substantive.

The Court's Discretionary Jurisdiction

The Court is faced every year with an increasing number of applications for certiorari to review state criminal convictions.[15] The

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[9]332 U.S. 46 (1947).

[10]*See* Carter v. Illinois, 329 U.S. 173, 175 (1946); Palko v. Connecticut, 302 U.S. 319, 324 (1937).

[11]Bute v. Illinois, 333 U.S. 640 (1948).

[12]*See* Snyder v. Massachusetts, 291 U.S. 97, 105 (1934).

[13]*E.g.*, in Loftus v. Illinois, 334 U.S. 804 (1948), the Court in a per curiam opinion stated that it is a matter for local procedure whether the right should be vindicated in action for habeas corpus rather than by a writ of error. It is a settled principle of law that the states are not bound, as a part of due process, to accord appellate review of criminal convictions, Andrews v. Swartz, 156 U.S. 272 (1895). A discriminatory denial of the right, however, is a violation of the 14th Amendment, Dowd v. United States *ex rel.* Cook, 340 U.S. 206 (1951).

[14]Dowd v. United States *ex rel.* Cook, 340 U.S. 206 (1951).

[15]These include many *in forma pauperis* petitions. In 1930, 22 petitions for certiorari *in forma pauperis* were filed. In 1946 the number was 528, and in the 1948-1949 term 455. Chief Justice Vinson noted in an address before the American Bar Association on Sept. 7, 1949: "Many, if not most, of the cases in which the Court has spelled out the requirements of a fair trial under the Due Process clause of the Fourteenth Amendment have come up as *in forma pauperis* petitions." 69

time that the Court can allot to reviewing criminal cases is limited; it cannot hear them all. Many lack any basis upon which review might be granted. It is a most difficult task to choose among the many issues presented by the remaining applications. Since the granting of a petition for a writ of certiorari is a matter of discretion and not of right, the granting or denying of a petition frequently involves an estimate by the Court of the relative importance of the problem presented by a particular case.[16]

A petition is granted upon the approval of four justices. The deaths of Justices Murphy and Rutledge reduced the group of four which had granted certiorari in many criminal cases involving alleged violations of civil rights. The number of cases of this type in which certiorari was granted decreased immediately. Appraising this situation, Professor John P. Frank said in his review of the 1949-1950 term of court:[17]

> "The most important fact about the five criminal procedure cases, four of which were decided against the defendant, was

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Sup. Ct. v, viii (1949).

[16]Chief Justice Vinson emphasized this in saying: "During the past term of Court, only about 15% of the petitions for certiorari were granted, and this figure itself is considerably higher than the average in recent years. While a great many of the 85% that were denied were far from frivolous, far too many reveal a serious misconception on the part of counsel concerning the role of the Supreme Court in our federal system. . . . Those of you whose petitions for certiorari are granted by the Supreme Court will know . . . that you are, in a sense, prosecuting or defending class actions; that you represent not only your clients, but tremendously important principles, upon which are based the plans, hopes, and aspirations of many people throughout the country. Lawyers might be well-advised, in preparing petitions for certiorari, to spend a little less time discussing the merits of their cases and a little more time demonstrating why it is important that the Court should hear them. . . . What the Court is interested in is the actual, practical effect of the disputed decision — its consequences for other litigants and in other situations. A petition for certiorari should explain why it is vital that the question involved be decided finally by the Supreme Court. If it only succeeds in demonstrating that the decision below may be erroneous, it has not fulfilled its purpose." 69 Sup. Ct. v, vi (1949).

[17]*The United States Supreme Court: 1949-50,* 18 U. OF CHI. L. REV. 1, 25 (1950). It is interesting to note that this premonition of Professor Frank's appears to have been borne out in Agoston v. Pennsylvania, 340 U.S. 844 (1950). Justices Black and Douglas, who with Murphy and Rutledge had constituted the block of four who most commonly agreed to take certiorari for the purpose of considering matters of this kind, dissented, saying that the police should not be allowed to

that in four of the five, the certioraris were granted *last* year, while the fifth was apparently taken for the purpose of overruling the Murphy opinion of two years ago in a matter of searches and seizures.

"In other words, the former Court had an interest in criminal procedure, both state and federal, which left an inheritance now disposed of by this Court. Since January 1, 1950, certiorari has been granted in only two cases involving the constitutional aspects of criminal law. It seems safe to predict that this branch of the law will for a time be swept under the rug of certiorari denied."

While Professor Frank's forebodings have not, fortunately, been completely realized, one must note that the number of criminal cases involving constitutional issues has been substantially reduced by the later Court. Only flagrant disregard of constitutional rights has caused the later Court to reverse state decisions.[18] Thus, although this branch of law has definitely not been swept "under the rug of certiorari denied," the number of such cases heard has become appreciably smaller.

The Court has repeatedly emphasized that refusal to grant certiorari in no way implies an expression on the merits of the decision of the lower court. Nevertheless one of the effects of such refusal is to discourage the filing of future or further applications that involve related problems. This gives to the refusal the aspect of an "affirmance."[19] The reduction of cases heard becomes tremendously

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substitute their system of inquisition or protective custody for the safeguards of a hearing before a magistrate.

[18]As in Shepherd v. Florida, 341 U.S. 50 (1951). The judgment of the Florida Supreme Court was reversed on the basis of Cassell v. Texas, 339 U.S. 282 (1950), in a per curiam opinion. The inference is that the Negroes in the *Shepherd* case had been denied a fair trial by an impartial jury because of the deliberate exclusion of members of the colored race. The case involved the rape of a white girl by Negroes in Lake County, Florida, an act which caused great emotional tension and riot, resulting in the calling out of the National Guard. On the basis of the situation it would appear that the separate opinion of Mr. Justice Jackson, with whom concurred Justice Frankfurter, is by far the better analysis of the situation. In effect he points out that the mob violence factor made any semblance of a fair trial impossible. No Negro, even had one been placed on the jury, would have dared vote for acquittal.

[19]In Agoston v. Pennsylvania, 340 U.S. 844 (1950), Mr. Justice Frankfurter filed

significant, therefore, in assessing the role of the high tribunal as a court of criminal appeals. The total number of opinions rendered by the present Court has not been great when compared with the number in the days of Holmes, Brandeis, and Cardozo. This fact makes it fairly apparent that the Court is seeking to keep its docket at a low volume. It has accomplished this restrictive process mainly through the denial of certiorari. It is thus probable that the goal of a reduced number of cases has been an important factor in lessening the number of state as well as federal criminal decisions reviewed. The priority on the docket awarded criminal cases[20] is of slight importance if the Court refuses to grant certiorari.

Another factor of importance in considering the role of the Court is the trend of the present Court toward the use of per curiam opinions. Undoubtedly the use of this device can be explained as another of the incidents of the burden of the docket. Nevertheless, such opinions fail to articulate the grounds of the holding and frequently result in misunderstanding and doubt among lower courts.[21]

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a memorandum pointing out in some detail what the denial of certiorari means: "The Court has stated again and again what the denial of a petition for writ of certiorari means and more particularly what it does not mean. Such a denial, it has been repeatedly stated, 'imports no expression of opinion upon the merits of the case.' . . . A denial simply means that as a matter of 'sound judicial discretion' fewer than four members of the Court deemed it desirable to review a decision of the lower court. . . . Obviously it [the denial] does not imply approval of anything that may have been said by the lower court in support of its decision." See also the statement of Justice Frankfurter in Maryland v. Baltimore Radio Show, Inc., 338 U.S. 912, 927 (1950), to the same effect.

[20]Criminal cases are accorded priority over all others on the Supreme Court docket except those as to which the United States is a party and "such other cases as the Court may decide to be of public importance." 28 U.S.C. §2102 (Supp. 1950).

[21]See, *e.g.*, Dye v. Johnson, 338 U.S. 864 (1949), *reversing* 175 F.2d 250 (3d Cir. 1949). In Collins v. Johnston, 237 U.S. 502 (1915), the Court had held that the 8th Amendment prohibiting cruel and unusual punishments operated on the Federal Government and not on the states. Chief Judge Biggs held in Johnson v. Dye, 175 F.2d 250 (3d Cir. 1949), that the 14th Amendment prevents the states from inflicting cruel and unusual punishment on their prisoners and that the chain gang, at least as applied in this case, was exactly within that prohibition. The per curiam opinion of the Supreme Court reversing Judge Biggs tells absolutely nothing about the grounds of reversal. The net result is that the lower federal courts are free to draw their own conclusions. See Application of Middlebrooks, 88 F. Supp. 943 (S.D. Cal. 1950), in which a district judge relied on *Johnson v. Dye* in finding that use of a chain gang constituted cruel and unusual punishment.

STATE-FEDERAL JUDICIAL COMITY

The mechanical problem of fitting cases involving important and far-reaching questions into available time is difficult but not impossible of solution. A compromise with the demands of time can be effected. Of far greater difficulty is the situation occasioned by the nature of the relationship between the federal and state courts. Mr. Justice Frankfurter, dissenting in *Uveges v. Pennsylvania,* has well recognized the nature and delicacy of this problem:[22]

> "Intervention by this Court in the administration of the criminal justice of a State has all the disadvantages of interference from without. Whatever short-cut to relief may be had in a particular case, it is calculated to beget misunderstanding and friction and to that extent detracts from those imponderables which are the ultimate reliance of a civilized system of law. After all, this is the Nation's ultimate judicial tribunal, not a super-legal-aid bureau. If the same relief, although by a more tedious process, is available through a State's self-corrective process, it enlists the understanding and support of the community. Considerations rooted in psychological and sociological reason underlie the duty of abstention by this Court from upsetting convictions by State courts or their refusal to grant writs of *habeas corpus* to those under State sentences, where State action may fairly be attributed to a rule of local procedure and is not exclusively founded on denial of a federal claim. When a State court explicitly rests its decision on a State ground it is easy sailing. But even when a State court summarily disposes of a case without spelling out its ground,

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Be it noted that other issues that were raised in the *Johnson* case were left equally unsettled by the Supreme Court.

Professor Frank is much disturbed by the fact that the Court appears to be using its discretionary power to eliminate consideration of many civil liberties problems that troubled previous courts. Far from seeing the Court as the great protector of civil liberties, he sees it as loving "liberty most when it is under pressure least." Frank, *supra* note 17, at 20, 40.

[22]335 U.S. 437, 449 (1948). To the same effect *see* Jennings v. Illinois, 72 Sup. Ct. 123, 127 (1951), and Williams v. Kaiser, 323 U.S. 471, 481 (1945) (dissenting opinions); see also statement of Justice Pitney in Frank v. Mangum, 237 U.S. 309, 329 (1915).

> led to do so, as is this Court in many cases, by the burden of its docket, it is our duty not to attribute to the State court flouting of the United States Constitution but to infer regard for its own law . . . ."

Federal judicial intervention in the criminal procedures of state courts is presented in particularly acute form by petitions for writ of habeas corpus following state convictions. It was in 1867 that allowance was first made for applications for habeas corpus to federal courts whenever the detention violated the Constitution, laws, or treaties of the United States. This provision, substantially incorporated into later law, in effect gave to the Court, however, another method of review, the scope of which expanded with the passing years. Thus it became possible, in effect, for federal district courts to serve in many cases as appellate tribunals reviewing the decisions of state courts, though it had long been settled that habeas corpus could not be a substitute for a writ of error.[23] This perplexing circumstance led to widespread criticism.[24]

The device was widely used in the 1930's and early 1940's. In 1943, 1944, and 1945 there were 1570 petitions for writ of habeas corpus from state prisoners filed in the lower federal courts, a number sufficient to impose a strain on federal judges and threaten "harmonious relations between state and federal judiciaries."[25] The allegations of the various petitions were in many cases wholly specious, but each petitioner had to receive the opportunity to prove them.[26] Any person "willing to make oath he had been denied a fair trial" had the right to attempt to prove the fact.[27]

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[23]Collins v. Johnston, 237 U.S. 502 (1915).

[24]See ORFIELD, CRIMINAL APPEALS IN AMERICA 249 (1939); STERN AND GRESSMAN, SUPREME COURT PRACTICE 265-269 (1950).

[25]Parker, *Limiting the Abuse of Habeas Corpus,* 8 F.R.D. 171, 172 (1948); Fraenkel, *The Function of the Lower Federal Courts as Protectors of Civil Liberties,* 13 LAW & CONTEMP. PROB. 132, 135 (1948).

[26]Tomkins v. Missouri, 323 U.S. 485 (1945); Smith v. O'Grady, 312 U.S. 329 (1941). Federal District Judge Goodman felt in 1947 that the writ was being subjected to abuse through the filing of large numbers of nonmeritorious and repetitious petitions. His jurisdiction included Alcatraz, source of large numbers of such petitions. See Goodman, *Use and Abuse of the Writ of Habeas Corpus,* 7 F.R.D. 313 (1948). For a comment on the legal ramifications involved in allegations of abuse of the writ see 2 U. OF FLA. L. REV. 148 (1949).

[27]Parker, *supra* note 25.

As a consequence, the new judicial code of 1948 provided:[28]

> "An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.
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> "An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented."

The effect of these provisions, coupled with interpretation by the Court, has been principally to

> ". . . provide that review of state court action be had so far as possible by the Supreme Court of the United States, whose review of such action has historical basis, and that review not be had by lower federal courts, whose exercise of such power is unseemly and likely to breed dangerous conflicts of jurisdiction."[29]

Thus the proper remedy, when the petitioner is finally denied relief by the state courts, is an application for certiorari to the United States Supreme Court.[30] The purpose of adhering to this procedure is to avoid review of state decisions by lower federal courts.

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[28]28 U.S.C. §2254 (Supp. 1950).

[29]Parker, *supra* note 25, at 176. See Stonebreaker v. Smyth, 163 F.2d 498 (4th Cir. 1947).

[30]A question, now apparently settled, revolved around the issue of whether, as a part of the "exhaustion of state remedies," it was necessary to apply for certiorari from the Supreme Court to the highest state court. *Ex parte* Hawk, 321 U.S. 114 (1944), had held that application for certiorari was a necessity before habeas corpus might be invoked. The case of Wade v. Mayo, 334 U.S. 672 (1948), indicated that the reverse might be true. Mr. Justice Murphy, who wrote the majority opinion, felt that there had been no abuse by federal district judges of their power to grant petitions of habeas corpus filed by state prisoners and that application to the United States Supreme Court for certiorari was not properly a part of the exhaustion of state remedies. Justice Reed wrote the dissenting opinion, at p. 684, concurred in by Chief Justice Vinson and Justices Jackson and

PARTICULAR ISSUES IN STATE CRIMINAL APPEALS

In answering the question of whether state courts have violated the Constitution, the Supreme Court has ranged beyond the confines of the record of the trial. Thus in *Moore v. Dempsey*[31] on a review of a dismissal of a petition for habeas corpus the Court declared that mere compliance with the forms of due process was not enough and that a fundamental principle of justice had been denied because

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Burton. See United States *ex rel.* White v. Walsh, 174 F.2d 49 (7th Cir. 1949), *rev'd,* 338 U.S. 804 (1949). In Miller v. Hudspeth, 176 F.2d 111 (10th Cir. 1949), the *Wade* rule was followed.

In 1950 the minority position of Justice Reed in the *Wade* case became the position of the Court in Darr v. Burford, 339 U.S. 200. Justice Reed, for the new majority, held that Ex parte *Hawk* stated the settled rule, and specifically overruled *Wade v. Mayo.* It was Reed's contention that the Judiciary Act of 1948 gave expression to the rule of Ex parte *Hawk.* Justice Frankfurter dissented, with Justices Black and Douglas agreeing with his view. He said pungently that the great writ of liberty "ought not to be treated as though we were playing a game." *Id.* at 225.

Professor Frank, *supra* note 17, at 26, feels that this rule "puts another blind alley in the labyrinth of procedures already confronting the convicted." Fraenkel, *supra* note 25, at 136, said, after the decision in Ex parte *Hawk* and before the decision in *Wade v. Mayo*:

> ". . . the rule that application must first be made to the state courts in effect destroys the right to apply to the lower federal courts at all. If the state court grants a hearing and decides the facts against the contention of the convicted man, no other court is likely to review this determination or grant another hearing. If the state court refuses a hearing on the ground the claim made by the accused raises no constitutional issue and the Supreme Court refuses to review on certiorari, it is pretty certain no lower federal court will thereafter grant relief and most unlikely that the Supreme Court will then take the case. It is only where the state court confesses itself powerless under state procedure to grant relief that direct application to federal courts is possible. This is seldom likely to happen; hence the right to apply to a lower federal court has become an illusory one."

It would most certainly appear that, although Fraenkel may state the case too strongly, the burden of the petitioner is incomparably more difficult under the present rule. In Frisbie v. Collins, 72 Sup. Ct. 509, 511 (1952), Mr. Justice Black said of the rule of *Darr v. Burford*: ". . . this general rule is not rigid and inflexible; the district court may deviate from it and grant relief in special circumstances. Whether such circumstances exist calls for a factual appraisal by the court in each special situation."

[31]261 U.S. 86 (1923).

of mob pressure during trial. Earlier, in *Frank v. Mangum,*[32] the Court took jurisdiction under somewhat similar circumstances but arrived at an opposite result on the merits. Holmes, who was to write the opinion in *Moore v. Dempsey,* made the famous *Frank* case the occasion for a strong dissent.

The Court has frequently said that a conviction based on a confession obtained by coercion, brutality, and violence constitutes a violation of due process.[33] It has been held that a penal statute creating a new offense must be sufficiently explicit to inform those subject to it what conduct will render them liable to its penalties or it will be deemed repugnant to due process.[34] State laws that create unreasonable presumptions have been stamped as unconstitutional.[35] The Court has held that the Fourteenth Amendment forbids states to discriminate systematically against any racial or religious groups in the make-up of juries,[36] although the "blue ribbon" jury practice of New York State was held valid on the ground that no discrimination had been established.[37]

A brief consideration of the issue of right to counsel[38] illustrates

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[32]237 U.S. 309 (1915).

[33]Turner v. Pennsylvania, 338 U.S. 62 (1949); Watts v. Indiana, 338 U.S. 49 (1949); Haley v. Ohio, 332 U.S. 596 (1948); Ashcraft v. Tennessee, 327 U.S. 274 (1946); Malinski v. New York, 324 U.S. 401 (1945); Ward v. Texas, 316 U.S. 547 (1942); Chambers v. Florida, 309 U.S. 227 (1940); Brown v. Mississippi, 297 U.S. 278 (1936). A recent discussion of the issue is found in Gallegos v. Nebraska, 72 Sup. Ct. 141 (1951). In Rochin v. California, 72 Sup. Ct. 205 (1952), the Court held invalid as a violation of due process a conviction resulting from the use of evidence "brutally and forcefully" obtained by inducing vomiting so that the accused expelled two capsules of morphine which he had swallowed in an unsuccessful attempt to conceal them from searching officers. Justices Black and Douglas concurred separately, arguing that obtaining evidence in such a manner compelled the accused to incriminate himself in violation of the Fifth Amendment. They would incorporate the restraints of the Fifth Amendment into the due process clause of the Fourteenth. *Id.* at 211, 212. Logic would say, if the Court did not, that this is an instance where confession was "coerced."

[34]Lanzetta v. New Jersey, 306 U.S. 451 (1939). The New Jersey statute, Laws 1934, c. 155, §4, in essence made it an offense to be a "gangster."

[35]Pollock v. Williams, 322 U.S. 4 (1944); Taylor v. Georgia, 315 U.S. 25 (1942); Manley v. Georgia, 279 U.S. 1 (1929); Bailey v. Alabama, 219 U.S. 219 (1911).

[36]Cassell v. Texas, 339 U.S. 282 (1950); Patton v. Mississippi, 332 U.S. 463 (1948). *But cf.* Akins v. Texas, 325 U.S. 398 (1945).

[37]Moore v. New York, 333 U.S. 565 (1948), 1 U. OF FLA. L. REV. 448 (1948); Fay v. New York, 332 U.S. 261 (1947). Four judges dissented in each case.

[38]For definitive articles on the right to counsel, see Fellman, *The Constitutional*

well the Court in the process of acting as a court of criminal appeals. *Powell v. Alabama*[39] established the principle that, at least in capital cases, the accused has a right to counsel of his own choice. Thus, in proceedings in a state court by which a 17-year-old boy was arraigned, tried, and convicted on a plea of guilty and sentenced to life imprisonment for first degree murder, all in the same day and without assistance of counsel or advice as to right of counsel, without an explanation of the consequences of a plea of guilty and without evidence in his own behalf or cross-examination of the state's witnesses, the Court had no difficulty in saying that the accused had been denied due process.[40] Lack or denial of counsel to an inexperienced youth[41] or to one incapable of adequately defending himself,[42] or the obtaining of a guilty plea by misrepresentation from one without counsel,[43] even in noncapital cases, has been held to violate due process.

Betts v. Brady,[44] however, rejects the contention that the Fourteenth Amendment automatically requires counsel.[45] The majority upheld the conviction at a trial in which the state refused to provide counsel for an accused indicted for robbery, on the ground that it

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Right to Counsel in Federal Courts, 30 NEB. L. REV. 559 (1951), *The Federal Right to Counsel in State Courts*, 31 NEB. L. REV. 15 (1951).

[39]287 U.S. 45 (1932).

[40]DeMeerleer v. Michigan, 329 U.S. 663 (1947).

[41]Uveges v. Pennsylvania, 335 U.S. 437 (1948) (accused not advised of his right to counsel and no attempt made by trial court to make him understand the consequences of his plea of guilty to crimes of burglary carrying a maximum sentence of 80 years).

[42]Williams v. Kaiser, 323 U.S. 471 (1945); Palmer v. Ashe, 72 Sup. Ct. 191 (1951). This issue is discussed in Gibbs v. Burke, 337 U.S. 773 (1949); Townsend v. Burke, 334 U.S. 736 (1948); Gryger v. Burke, 334 U.S. 728 (1948).

[43]Smith v. O'Grady, 312 U.S. 329 (1941).

[44]316 U.S. 455 (1941).

[45]Quicksall v. Michigan, 339 U.S. 660 (1950); Bute v. Illinois, 333 U.S. 640 (1948) (guilty plea from uncounseled defendant); Foster v. Illinois, 332 U.S. 134 (1947) (defendants pleaded guilty after being informed of the consequences, but no offer of counsel was made by court); Carter v. Illinois, 329 U.S. 173 (1946), follow the principle of *Betts v. Brady*. In the *Quicksall* case the defendant pleaded guilty to first degree murder. He made no request for counsel and none was offered by the trial court. The Supreme Court felt that the fact that the defendant was intelligent, mature, and had "prior court experience" made him well aware of what was transpiring; therefore due process was not violated. In the *Carter* case the Court held that the defendant knew what he was doing when he pleaded guilty without advice of counsel; hence there was no infringement of due process.

was the practice to furnish counsel for indigent defendants only in prosecutions for murder or rape. The intelligence of the accused and his ability to present his defense are material elements of the decision. Justices Black, Murphy, and Douglas dissented. Justice Black's view was that the Fourteenth Amendment made the Sixth applicable to the states, an opinion consistent with his oft-repeated views on the subject.[46] Later, in *Gibbs v. Burke*[47] and dissenting in *Foster v. Illinois*,[48] he was to state the view that *Betts v. Brady* should be overruled.

The Court is thus seen as taking a pragmatic approach which considers all of the circumstances in each case. The guiding principle which the Court applies when the right of counsel is raised as an issue is one of whether the lack of counsel injected an ingredient of unfairness which operated actively in the process that resulted in conviction.

Conclusion

Thus in a variety of areas we see the Court developing standards applicable to state procedure in criminal proceedings — serving precisely the function of a high court of criminal appeals. Chief Justice Vinson's words in speaking of the work of the Supreme Court generally are applicable to this immediate discussion:[49]

> "The Supreme Court is not, and never has been, primarily concerned with the correction of errors in lower court decisions. In almost all cases within the Court's appellate jurisdiction, the petitioner has already received one appellate review of his case. . . . The function of the Supreme Court is, therefore, to resolve conflicts of opinion on federal questions that have arisen among

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[46]The requirement of counsel guaranteed in the 6th Amendment is, of course, applicable in federal criminal proceedings, Johnson v. Zerbst, 304 U.S. 458 (1938).

[47]337 U.S. 773, 782 (1949).

[48]332 U.S. 134, 139 (1947). In the *Foster* case, at p. 140, Justice Black said of *Betts v. Brady*: "That case is precedent for this one. But it is the kind of precedent that I had hoped this Court would not perpetuate." Mr. Justice Douglas, dissenting in Bute v. Illinois, 333 U.S. 640, 682 (1948), called *Betts v. Brady* "ill-starred" and suggested that it was the "need for counsel that establishes the real standard for determining whether the lack of counsel rendered the trial unfair."

[49]69 Sup Ct. v, vi (1949).

> lower courts, to pass upon questions of wide import under the Constitution, laws, and treaties of the United States, and to exercise supervisory power over lower federal courts. If we took every case in which an interesting legal question is raised, or our *prima facie* impression is that the decision below is erroneous, we could not fulfill the Constitutional and statutory responsibilities placed upon the Court. To remain effective, the Supreme Court must continue to decide only those cases which present questions whose resolution will have immediate importance far beyond the particular facts and parties involved."

It is possible to mark certain trends of the Supreme Court in the review of state criminal judgments. The tendency to restrict the grant of certiorari, limitations on the granting of the writ of habeas corpus by federal courts, the qualifications placed on the right to counsel in trials before state courts — these are concrete indications that the Court in the immediate future may not be so greatly concerned with criminal matters raising constitutional issues as it has been in the past.

The ultimate problem is one of American federalism — the nature of the relationship between state and federal courts. The members of the Supreme Court must not fall into the habit of shedding unwelcome responsibility by a too frequent use of the shield of "comity in the federal system." But if the justices sometimes appear to err by the dismissal of appeals from criminal proceedings in state courts on technical grounds, the idea of comity will explain, if it will not justify, such dismissals.