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FEDERALISM AND INDIVIDUAL LIBERTIES— CAN WE HAVE BOTH?

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The Tyrrell Williams Memorial Lectureship was established in the School of Law of Washington University by alumni of the school in 1949, to honor the memory of a well-loved alumnus and faculty member whose connection with and service to the school extended over the period 1898-1947. This seventeenth annual lecture was delivered March 10, 1965.

The high standard set by my predecessors on this podium makes the invitation to deliver a Tyrrell Williams Lecture a distinguished honor, so when my friend, Arthur Freund, and Dean Lesar called on me I accepted with alacrity. The Lectureship was established, as I understand, not only in affection for a cherished friend and admired teacher but to continue the influence of his teaching, that the law is a continuous, changing, moving force for right and justice in society. This moving force is always present, though the scene changes. Since the sponsors of the Lecture have generously put no restrictions upon me in the choice of a theme, I have thought it appropriate to speak of one aspect of the perennial debate about our federalism, our system of dual sovereignties, national and state. I will examine with you the problem respecting the sometimes apparently conflicting claims of the states in a federal system on the one hand, and on the other the liberties of the individual. I will confine my discussion to the liberties pertaining to criminal due process, leaving for another day those involved in civil rights demonstrations, controversies over school prayers, reapportionment and like concerns.

For over fifty years after its adoption the due process clause of the fourteenth amendment was not applied as a check on state criminal procedures. Only within the last forty years, and with heightened acceleration in the last decade, have the federal courts extended the protections of this amendment to persons undergoing state prosecution. This application has

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resulted in an emphasis on and a definition of certain minimum standards of due process that are to be respected whenever a governmental power seeks to deprive any person of his liberty.

The development of these protections has provided new insights into our judicial process. Some have questioned why these protections are being recognized so tardily, while others are troubled by the effect of this trend on our federal system of government.

In a real sense this process is only the American phase of a long historic movement. A major theme of the history of the western world for several centuries has been the growing demand from men of all stations for protection against arbitrary exertions of power, whether private or public. An important difference between western brands of government and those of the Communists has been in their differing appraisals of these two sources of power. Communism, concerned chiefly with eliminating abuses arising from private power, abolished the source of such power, private property. Communism has not been as concerned to protect the individual against abuses of public power. The emphasis has been the reverse in the West where public power has been viewed as the major threat to individual liberty.

One of our most important safeguards against inroads by governmental authority has been the Supreme Court; yet that body is being roundly attacked. It is contended that in the process of reviewing state decisions in order to protect individual freedoms, the Court is impairing another valuable safeguard of freedom, that of federalism. Some critics of the Court would leave the administration of state criminal procedure virtually immune from any effective federal review. There are at the other extreme those who belittle the theory of state sovereignty in our federal system, treating it as an aged relic of an earlier, less enlightened, era. They would therefore give free reign to the court, even if the result were the sterilization of the states in the local administration of justice. As with any vigorous dispute in a democratic society, proponents of both positions press all the arguments they can marshal against enemy positions, no matter how secure the redoubt, hoping, in Hamilton's phrase, "to evince the justice of their opinions, and to increase the number of their converts, by the loudness of their declamations, and by the bitterness of their invectives."[1] Most thoughtful persons remain uncommitted to either extreme and hope for a workable rule that will preserve the values of our federal structure, yet effectuate the guarantees of the Constitution.

The interrelationship of the citizen, the state, and the national government

1. THE FEDERALIST No. 1 (Hamilton).

is at once the pride and the torment of our society. The resulting dilemma is highlighted in the area of state criminal law enforcement, which is among the most vital of all state powers. It is important to understand the role assigned to each of the characters to see if there is any upstaging of the others. As Holmes has emphasized, the role of the federal courts as a guardian of rights granted by the federal constitution to all citizens against their state governments is both its most important and its most criticized function.[2] The area of legitimate criticism can be narrowed considerably by the acceptance of the following principles, which should be axiomatic. First, it should be clear that the Constitution imposes some limits on state action. Second, it would seem that these limits must apply uniformly to all the states. Third, these limits can be effective and uniform only if they are authoritatively articulated by a single organ of government. These tenets, repeatedly affirmed in varying formulations, are too often forgotten or discussed in a way suggesting that there is still some doubt about their validity.

The legitimacy of the Supreme Court's role as protector of our people against unconstitutional assertions of state power was established, not by fiat of the Court, but by Congress itself 175 years ago. Though the grant of authority was unambiguous, we still hear the charge insistently repeated that the Court has usurped this function. Plainly, as a matter of history, this is not the case. By the Act of 1789, Congress authorized the Court to review all cases in which a citizen asserts that a state has violated his rights under the federal constitution and that the state court has failed to give him redress.[3] Congress thus clearly bestowed a power on the Court to limit state action long before John Marshall began to flex his judicial muscles. This enactment gave rise to an area of conflict between the principles of federalism and the protection of individual liberties by the federal judiciary against state governments.

Federalism—that peculiarly American provision for the coexistence of national and state sovereignties—has become one of the most misunderstood concepts in American political lore. It came into being as an expedient whereby truly heterogeneous states might be joined in a national union. The holders of state power were anxious to prevent the usurpation of their prerogatives by the federal government, and to protect their people against tyranny by that government. Protection against the abuse of state power was not uppermost in their minds, though it was indeed present, and remedy for such abuses was left largely to the states themselves until the passage of the Civil War Amendments.

The federal system bestows on the individual certain rights against the

2. HOLMES, SPEECHES 102 (1934).

3. Judiciary Act § 25, 1 Stat. 73, 85 (1789).

national government, and the fourteenth amendment grants him rights against the state. It is argued that the role of the Supreme Court in vindicating the individual's rights against the state has a tendency to weaken the state's role in maintaining a viable federal system. But a classic role of the Court is precisely to determine the boundaries between the lawful claims of the state and the rights asserted by the individual.

Political institutions, to survive, must, by one device or another, be elastic enough to meet the demands of an evolving society. With this necessity in mind the Founding Fathers gave us a written Constitution. But a written Constitution, while necessary for a union of separate states, could have been at the expense of the flexibility needed for a successful federal system. The danger of rigidity was increased when the Supreme Court decided, in the landmark decision of *Marbury v. Madison,*[4] that it was to be the final interpreter of this Constitution. Since Anglo-American judicial tradition has been built on precedent, the Constitution could easily have become encrusted with decisions, rigid and unyielding though based on transient conditions. Much discussion during the last 175 years has revolved around the problem of reconciling the demands of stare decisis under a written Constitution with the flexibility needed for survival in a changing world. Throughout this period of unabated discussion however, the system has worked astonishingly well.

Our Constitution established certain rights. In doing this the Founding Fathers struck a balance between competing interests that was to bind the Court in its decisions from that time forth. Such is the rule of law. But, inevitably, when rights are created, they will at times conflict. In such a situation all of the rights, declared in absolute terms and in disregard of the obverse liberties, cannot be enforced absolutely. Some accommodation must be made between them and often without guidance from the formulators of these rights as to the proper order of their precedence. An apt example is the occasional conflict between the right of the press to be free and the right of the individual to a fair trial. A balance must be struck in the particular case presented and any such balance will be legislative in character, even if it is only interstitial. Some decision must be made as to which right shall prevail and which shall yield. Such is the rule of men who are making a common sense judgment as to which arrangement will work in light of the particular circumstances.

Professor Paul Freund has likened the Constitution to a work of art in its capacity to respond through interpretation to changing needs, concerns, and aspirations. "In a larger sense" he says, "all law resembles art, for the mission of each is to impose a measure of order on the disorder of experience

4. 5 U.S. (1 Cranch) 137 (1803).

without stifling the underlying diversity, spontaneity, and disarray. . . . There are, I am afraid, no absolutes in law or art except intelligence."[5]

Not only is no useful purpose served by cries of usurpation and illegitimacy, but such contentions tend to shift the discussion away from the wisdom of the particular decision to irrelevant areas where dispute is fruitless.

Such then is the analysis that must be applied to federalism when it is contended that its foundations are being weakened if not destroyed by federal protection of persons from abuse of state police power. We must determine what interests federalism is designed to protect, what function it serves. Only then can we determine whether the Court is acting wisely when it upholds an individual's right, against a state, to due process or to be free from an illegal search and seizure.

As we have seen, federalism was an historical necessity, but many of the conditions that gave rise to that necessity have long since changed or disappeared. The primary political loyalty of our citizens is now directed toward the nation, rather than the state. Most of our people have left the farms and moved to the city, and enhanced mobility has resulted in a general intermixture of the population. Geographical diversity has been greatly diminished and our economy is now national in scope. Critics such as Harold Laski have gone so far as to suggest that federalism is an anachronism today because the states cannot cope with giant capitalism and because they are insufficiently positive in character.[6]

What then does a federal system achieve? It is not enough to say that federalism brings about a high degree of political freedom just because we have experienced such freedom. A two-party system or pluralism might have been more instrumental in achieving this freedom. Federalism is not the guarantee of either. Nor is it enough to point to the virtues of decentralization since a fragmenting of power is possible in a nonfederal state. What can validly be said of federalism is that in such a system local power is not conferred by the central authority, so it cannot be taken away when that government deems it expedient.

The significance of federalism is that it assures a source of governmental power outside and immune from the power of the national government. The purpose of such a bifurcation of power is to provide a barrier against a possible tyrannical take-over of the central government by a majority whose interests are contrary to those of the citizens of a particular state. Federalism is designed to serve as an insulator against the spread of oppression; it is essentially anti-majoritarian in nature.

A federal system can be justified only so far as it operates to maximize the

5. Freund, *New Vistas in Constitutional Law,* 112 U. PA. L. REV. 631, 646 (1964).
6. 99 NEW REPUBLIC 269 (1939).

liberty of persons as against the central government. The rights claimed by the states do not exist to protect the states as such, but through them to protect their citizens. The justification for their retaining certain powers is to protect and further the interests of their citizens. In the words of Madison, ". . . as far as the sovereignty of the states cannot be reconciled to the happiness of the people, the voice of every good citizen must be. Let the former be sacrificed to the latter."[7] Is it possible then that those who argue stoutly for the sanctity of a system that protects against abuses by the majority through misuse of national power argue just as strenuously against the institution that protects from the oppressive exercise of state power?

Both the Supreme Court and the states in a federal system are designed to be anti-majoritarian barriers against tyranny, and protectors of individual liberties. The two institutions are complementary, not contradictory. But while complementary in their role as guardians of individual rights, they are primarily concerned with different sources of danger to those rights. The doctrine of federalism looks askance at federal power while the Supreme Court, in the enforcement of the fourteenth amendment, is called upon to view the states as potential sources of oppression. State power is not an end in itself, and is not to be allowed to become a source of oppression instead of protection. It is important, however, that states shall be encouraged to take full responsibility for decisions in their own areas of competency, which includes the observance of all individual rights, whether arising under federal or state law. No free government, especially in a federal system, can work well unless each level, from the private citizen to the highest public official, resolves its share of society's conflicts in a responsible manner. To promote this local competence the federal courts should intervene in state judicial proceedings as infrequently as possible, consistent with the ineluctable duty the Constitution lays upon the federal courts.

In the area of criminal due process state courts have not always been anxious to fulfill their responsibilites, largely because the rights at issue are often asserted by persons guilty of revolting crimes. As Justice Frankfurter has commented, "It is a fair summary of history to say that the safeguards of liberty have frequently been forged in controversies involving not very nice people."[8]

For example, most of us hear only of instances where incriminating evidence has been produced by an illegal search, and recoil from letting an obviously guilty person go unwhipped of justice. Involved, however, is something deeper, having serious implications to public order. The prisoner at the bar is not the only one concerned. If we fail to respect his constitu-

7. THE FEDERALIST No. 45 (Madison).
8. United States v. Rabinowitz, 339 U.S. 56, 69 (1950) (dissenting opinion).

tional rights, the green light is given for invasions of privacy not limited to the guilty. Although the issue as to the legality of a search is not likely to arise in court unless the search has yielded damaging evidence, the more numerous instances of fruitless invasions of the privacy of innocent persons seldom come before a court. Such unwarranted searches happen all too often. It is not unknown for local police to make wholesale searches of slum areas without first securing the needed warrants. Only recently have innocent persons subjected to such searches sought injunctive relief in court. In one case it was alleged that in an effort to apprehend two men wanted for killing a policeman, over 200 innocent people were terrorized in their homes by groups of policemen roughly entering and searching their homes without bothering in a single instance to obtain a warrant.[9] You may make your own judgment as to what conditions would prevail in this land if policemen were the sole judges of the legality and reasonableness of their conduct.

To take another example, we cannot proclaim our belief in the constitutional rights of the individual, and at the same time insist that it is not possible for police to do their job successfully if they are forbidden to conduct secret interrogations of the accused in police headquarters in the absence of counsel. Witness the recent Whitmore episode in New York, in which such an interrogation produced a full confession, sufficient to convict the suspect of murder, but fortunately for him other evidence came to light proving the falsity of the confession.[10] This, we fear, is not an isolated instance.

There is less reason to attribute the increase in crime to the recent decisions of the Supreme Court than to ascribe it to disrespect for the law which arises when there is no redress for brutality and violations of law by police. Lack of citizen cooperation with the police, a complicating factor, may also stem from public concern with illegal police procedures.

At the same time even the most ardent believer in individual rights must give thoughtful recognition to the fact that, although modern technological advances assist police work in some respects, they have also vastly complicated the task of law enforcement. For example, the widespread use of wire tapping by the police has raised stubborn and unresolved problems. These should be considered with a sense of the realities of police and court administration. We must intently re-examine the situation of the police in the war on crime. The search must continue for procedures that will, without breaching constitutional commands, give the police adequate tools for their difficult and essential job. There are no easy answers.

Refusal by state courts to correct obvious abuses forces federal courts to

9. Lankford v. Schmidt, 240 F. Supp. 550 (D. Md. 1965).
10. Time, Feb. 5, 1965, p. 69.

perform their own duty. It is unjust to describe such a response as an innovation or usurpation. Though it is uniformly conceded in theory that federal law prevails over state law, some state judges have been overly reluctant to translate theory into action. To argue for a final interpretation of national rights by a body that has a national perspective is not to minimize the contribution that can be made by the state judges. Justices of the Supreme Court again and again have welcomed the insights of men viewing national rights from a local perspective. Admirers of the federal system are quick to point out the advantages accruing from a decentralized authority that is able to adapt national principles to local conditions; yet, many state courts have consistently failed to make the adjustment. They have often simply ignored federal protections.

There is a dilemma here. As we have already observed, the failure of states to fulfill their proper function forces federal courts to act. It may also be unfortunately true that the knowledge that the federal courts may intervene to vindicate constitutional rights has been used by some state courts as justification for ignoring the problem.

I cannot join with those who argue that this circle should be broken by federal abstention. Federal courts ought not to acquiesce in the sacrifice of rights in the mere hope that the state courts will eventually realize the injustice of their abdication of responsibility and act to correct it. Whenever the state system, acting under control of an intolerant majority, has denied constitutional due process the federal courts must be available. Otherwise an important protection to our liberties that the system is designed to afford will be lost.

Federal abstention is not warranted by the mere assertion of the doctrine that states should be left to experiment with local solutions of local problems. A wide measure of latitude is permissible to the states, and should be encouraged. The method of observing federal due process requirements may vary in detail from state to state. Yet states should not feel free to experiment in how unfair a system they can maintain without inviting the exercise of federal jurisdiction. There are certain standards of basic fairness that must be universally observed. When the states are referred to as experimental laboratories, what is really meant is that each is at liberty to decide for itself how fair a system it can evolve in light of local conditions. Under no reasonable concept of federalism is a state free to accord less than the fundamental fairness required by due process; and that, as we have seen, is ultimately a federal question. Progress of real consequence can and will be achieved by free experimentation in refining the processes of justice. A most recent example is seen in New York, which has inaugurated a system

for releasing, without bail, accused persons who are good risks, thus reducing the number of those held in prison pending trial simply because they are too poor to pay a bondsman's fee.[11] Another example is New Jersey's interesting reform in expanding discovery procedures in criminal trials.[12]

In various ways federal courts have done their part to encourage state agencies to assume their full responsibility. In an earlier era federal courts doubtless went too far in interfering with legitimate state action. State experiments in social legislation and economic regulation were repeatedly overturned with the hearty approval, we may be sure, of some who now admonish in the name of federalism that the Supreme Court abstain from ruling on matters said to be of state concern. Today federal interference with state taxation or economic regulation has virtually disappeared.

A similar enlargement of the state's area of competence is found in the increased federal deference to state decisions as to matters of state common law. For almost a century, under the doctrine of *Swift v. Tyson*,[13] federal judges construed state statutes and common law independently, treating state court decisions as little more than advisory. In 1938 the landmark decision in *Erie R.R. v. Tompkins*[14] was handed down, making state courts the final arbiters of state law. This was a massive infusion of vitality into the system of federalism.

The requirement of exhaustion of state remedies before proceeding to a federal court[15] is an example of how the federal courts have striven to afford state officials the widest opportunity to perform their function in criminal law enforcement. It was adopted by the federal courts long before being codified into a statutory requirement by Congress.[16] This deference has not proved of as much practical importance as one might have hoped, since states often decline to avail themselves of the opportunity presented.

In many instances post-conviction relief has been completely unavailable, or if available in theory it was denied in practice by describing the allegations of the petition as "non-jurisdictional"—failing to attack the jurisdiction of the trial court. Courts persisted in this narrow view even in states where the legislature had enacted post-conviction statutes. There are now gratifying signs that this judicial self-denial by state courts is being modified or abandoned. Questions of fact bearing on constitutional due process were

11. See Ares, *The Manhattan Bail Project: An Interim Report on the Use of Pre-Trial Parole*, 38 N.Y.U.L. REV. 67 (1963).

12. N.J. RULES 3:5-11.

13. 41 U.S. (16 Peters) 1 (1842).

14. 304 U.S. 64 (1938).

15. See, *e.g.*, *Ex parte* Hawk, 321 U.S. 114 (1944); Mooney v. Holohan, 294 U.S. 103 (1935).

16. 28 U.S.C. § 2254 (1958).

also denied review in state collateral proceedings. An assertion by the states of their proper role in this area would do more to restore the vitality of federalism than any constitutional amendment creating a super Supreme Court, or any cumbersome device like three-judge federal courts to hear habeas petitions.

Now let me mention something which may seem of only peripheral relevance to our subject, but I think it is worth noting. It has seemed to me that one of the most serious defects in the administration of the criminal law is the absence of appellate review of sentences. There is wide recognition of the right to a fair trial and we go to great lengths to assure fairness. We allow appellate review of a broad range of rulings made in the course of the trial, even when the issue of guilt or innocence is not close. Yet, contrary to the public understanding, the length of the sentence, whether it be for thirty days or thirty years is, with miniscule exceptions, not appealable, if it does not exceed the statutory maximum. Many of the appeals which burden federal and state courts and vex relations between the two judiciaries are really masked complaints, directed not so much against the denial of the conventional constitutional rights which they recite, as they are anguished protests against excessive punishment. We have not yet given substantial recognition to the guarantee against cruel and unusual punishment. It is fair to suggest that, apart from any constitutional question, suitable provision for limited review of state and federal sentences should be made in the interest of justice. I am far from saying that there should be general resort to federal courts for the correction of even extremely severe state sentences; I think, however, that some of the strain on federal-state relations would be eased if states provided the necessary machinery for sentence review, either in regular appellate courts or special tribunals.

Currently the most troublesome question in the supposed conflict between federalism and federal assertion of individual rights as against the states is how the federal court should treat a state's refusal to rule on an alleged violation of a federal right in a criminal trial because of the prisoner's failure to observe some valid state procedure. There is no longer any doubt about the federal court's duty to disregard a state decision that patently misinterprets its own established procedure in order to avoid adjudicating a federal claim on the merits. A problem arises, however, when there is even-handed enforcement of a rational state procedural requirement, such as limiting the time for appeal, or requiring objection to be made to inadmissible evidence at the time of its introduction, or insisting that the defendant pursue the prescribed collateral attack procedure.

The Supreme Court first considered this problem in 1953 in *Daniels v.*

Allen.[17] In that case the appellant had been sentenced to death, and the Supreme Court of North Carolina refused to review his claims of a coerced confession and of systematic exclusion of members of his race from the jury.[18] The reason for the court's refusal was the error of appellant's counsel in filing the notice of appeal one day late. The federal district court denied habeas corpus[19] and the Supreme Court affirmed,[20] holding that habeas corpus could not be substituted for an appeal.

The harsh result has been explained in three ways. It was said, first, that petitioner failed to exhaust a state remedy, although it was conceded that the state remedy was no longer available to him at the time of his habeas application. Second, the theory was that by failing to note the appeal in time the defendant waived his right to seek federal redress. Third, the failure to note a timely appeal was said to have created an adequate and independent state ground for his detention.

This case clearly demonstrated the inequities that can result from an undue emphasis on state procedural requirements. Plainly the petitioner had been arrested and tried without benefit of due process. As of that moment he was being held unconstitutionally; yet this fundamental defect was ignored and he could not obtain a new trial because his lawyer slipped up on a procedural nicety. Six years later the Supreme Court attained a more tempered result, but did so, not by changing its rule, but by circumventing it. In *Irvin v. Dowd*,[21] the petitioner claimed that he had been deprived of due process in his Indiana trial before a prejudiced jury inflamed by intense community hostility induced by a clamoring press. Irvin moved for a new trial, but while the motion was pending he escaped. The Indiana Supreme Court held that under state procedure, no action could be taken on behalf of a prisoner at large following an escape. The decision clearly stated that for this reason the defendant was not entitled to a review of the merits of his constitutional claim. However, it ventured to review the merits anyway, and concluded that there had been no deprivation of due process at the trial.[22] On appeal from a denial of federal habeas corpus relief,[23] the Supreme Court of the United States held that the state ground for denying relief constituted no bar to federal review, because relief had been denied by the

17. Reported *sub nom.* Brown v. Allen, 344 U.S. 443, 482-87 (1953).
18. State v. Daniels, 231 N.C. 17, 56 S.E.2d 2 (1949).
19. Daniels v. Crawford, 99 F. Supp. 208 (E.D.N.C. 1951).
20. Brown v. Allen, 344 U.S. 443 (1953), *affirming sub nom.* Daniels v. Allen, 192 F.2d 763 (4th Cir. 1951).
21. 359 U.S. 394 (1959).
22. Irvin v. State, 236 Ind. 384, 139 N.E.2d 898 (1957).
23. Irvin v. Dowd, 153 F. Supp. 531 (N.D. Ind. 1957).

Indiana court on the merits.[24] This has been criticized as a misreading of the state decision. Be that as it may, it allowed the Court to avoid the strict doctrines of exhaustion, waiver, and adequate state ground that had been invoked with such disastrous results in *Daniels v. Allen*. It did nothing, however, to lessen the tension between federalism and due process. It became increasingly clear that the problems raised in *Daniels* would have to be reconsidered at the earliest opportunity.

In 1963 the dilemma of Charles Noia gave the Court an opporunity to clear the air.[25] Noia and two others were convicted in New York of murder and sentenced to life imprisonment. The sole evidence at the trial was an allegedly coerced confession. While Noia did not appeal, his co-defendants did. Their convictions were affirmed,[26] but both were eventually released, one through federal habeas corpus[27] and the other by a state motion for reargument.[28] Noia's efforts in post-conviction proceedings before the New York courts were unsuccessful, denial of relief being based on the ground that he, unlike his co-defendants, had failed to appeal.[29] He sought federal habeas corpus[30] and on his appeal to the Supreme Court the rationale of *Daniels v. Allen* was met head on.

First, the Court squarely held that the exhaustion requirement relates only to remedies still available at the time the petitioner applies for federal relief. Second, the adequate state ground rule, in the words of the Court, is "not to be extended to limit the power granted the federal courts under the federal habeas statute."[31] And third, the Court determined that there was no "intelligent and understanding" waiver of the right to appeal since there was an acute risk that a death sentence might be imposed at the retrial if his appeal was successful.[32]

The waiver theory, always fictional, was debilitated. The idea that a prisoner waived his substantive federal claim by foregoing his procedural right to have the state hear his claim was totally unrealistic. The crucial

24. Irvin v. Dowd, 359 U.S. 394 (1959).

25. Fay v. Noia, 372 U.S. 391 (1963).

26. People v. Caminito, 265 App. Div. 960, 38 N.Y.S.2d 1019 (1942), *aff'd*, 291 N.Y. 541, 50 N.E.2d 654 (1943); People v. Bonino, 265 App. Div. 960, 38 N.Y.S.2d 1019 (1942), *aff'd*, 291 N.Y. 541, 50 N.E.2d 654 (1943).

27. United States *ex rel.* Caminito v. Murphy, 222 F.2d 698 (2d Cir.), *cert. denied*, 350 U.S. 896 (1955).

28. See People v. Bonino, 1 N.Y.2d 752, 135 N.E.2d 51, 152 N.Y.S.2d 298 (1956).

29. People v. Noia, 3 Misc. 2d 447, 158 N.Y.S.2d 683 (Sup. Ct. 1956), *rev'd*, 4 App. Div. 2d 698, 163 N.Y.S.2d 796 (1957), *aff'd sub nom.* People v. Caminito, 3 N.Y.2d 596, 148 N.E.2d 139, 170 N.Y.S.2d 799, *cert. denied*, 357 U.S. 905 (1958).

30. United States *ex rel.* Noia v. Fay, 183 F. Supp. 222 (S.D.N.Y. 1960).

31. Fay v. Noia, 372 U.S. 391, 399 (1963).

32. *Ibid.*

lapse or deliberate decision which is later described as a waiver, is in reality usually that of the defendant's counsel acting independently without explaining the consequences to the client. Still the Court has to balance federalism, that is the state's interest in the integrity of its procedure, against the petitioner's right to due process. This it did by stating that federal relief would be denied to anyone who "deliberately by-passed"[33] state procedures.

As applied, however, this standard has been called almost as unrealistic as the waiver theory. The new standard would and should have protected Daniels, who sincerely tried to appeal, though a day late, and any petitioner who could only gain by appealing, for in such cases there would have been no reason for him deliberately not to do so. As the new pronouncement was applied, however, it also protected Noia, who had, consciously and with calculation after consulting his lawyer, *refused* to appeal. We can only speculate as to the precise influence upon the Court's decision of the trial judge's portentous statement that he would have handed down a death sentence if it had not been for the intercession on the defendant's behalf by the judge's wife.[34]

So much for the waiver doctrine. More important perhaps, and certainly more complex, is the development of the adequate state ground doctrine. When Congress granted the federal courts jurisdiction to hear habeas corpus petitions attacking state trials, the writ was permitted to test only the jurisdiction of the state court; all substantive constitutional claims had to be heard on direct appeal to the Supreme Court and on such appeal the federal questions would not be heard if the adverse state decision rested on an adequate state ground. It soon became clear to the Court that it could not hear on direct appeal all the constitutional claims arising from state criminal proceedings. By judicial interpretation the habeas corpus writ was broadened to encompass all attacks on the constitutionality of the proceding.[35] Such attacks would be channelled to the Supreme Court through the lower federal courts. This doctrine was then incorporated into statutory law by Congress.[36]

Two questions remained. The first was whether, on direct appeal to the Supreme Court from the highest court of the state, a state procedural ground for decision was adequate to prevent review of the federal constitutionality of the proceedings. If so, the second question was, did this state-imposed limitation on the vindication of a federal right carry over to federal habeas

33. *Id.* at 438.

34. *Id.* at 396 n.3.

35. Johnson v. Zerbst, 304 U.S. 458 (1938).

36. 28 U.S.C. § 2241 (1958).

corpus. Both questions had been answered "yes" in *Daniels v. Allen* where relief was denied.

Fay v. Noia explicitly held that even if the substantive claim could not be heard on direct review in the Supreme Court because of a state procedural default, a federal court still had the power to hear the claim on habeas corpus. The federal claim is thus separated out of the case and the state procedural ground for denial of relief in the state court is not controlling. The court reached this result by explicitly weighing the demands of federalism against the individual right of the prisoner to be free from an unconstitutional restraint.

In considering the wisdom of this balance it is important to remember that the state procedure is not being voided; it remains as an absolute prerequisite for state relief. There is every reason to believe that a future defendant, if properly represented and made aware of his rights, will observe the state procedural rules, since by failing to do so he forfeits his right to state review which is usually much speedier than federal relief and furnishes an additional forum for his complaint. It is also necessary to keep in mind that the petitioner is asserting that he is held unconstitutionally and no state appellate court has reviewed the trial court's decision on the constitutional issues. Almost all state appellate courts have the authority to waive procedural defects in criminal cases, so in most instances strict observance cannot be of vital importance to the states.

From the nature of this accommodation it might be argued that it should be the same when the competing interests are balanced on direct appeal as when they are considered on habeas corpus. The validity of this idea was recently tested on direct appeal in *Henry v. Mississippi*,[37] where the defendant, complaining of an illegal search and seizure, had failed to make the proper objection at trial. The Court held that the state procedural ground would not prevent a review of the federal substantive question unless the procedure served a legitimate state interest. This formulation indicates, though it does not quite decide, that the interest of the state will be examined only to see if it is legitimate; it will not be independently measured against the individual's right to due process as was done in habeas corpus three years earlier in *Fay v. Noia*. No attempt was made to justify a distinction between direct appeal from the state court and appeal in federal habeas corpus.

The problems of federalism in criminal law enforcement are far from a final solution, but respect is due the sincere effort that is being made to maintain the vitality of the federal system while preserving individual freedoms, which are the end and purpose for which the whole enterprise was under-

37. 379 U.S. 443 (1965).

taken. Federalism has not been wounded and, despite the irritations of the present, it will emerge strengthened with the processes of justice improved, if the states will—as some are already doing—afford post-conviction remedies, broad in scope and as simple and free as possible from entangling technicalities; if proper assistance is made available to prisoners in the preparation of their petitions and if petitions, especially those written *pro se,* are read liberally to ascertain what they are meant to convey; if substantial constitutional questions are heard and decided on their merits, after evidentiary hearings where facts are in dispute, and not shunted aside by artificialities; and if the state courts will compile complete records of their proceedings. Federal courts, one may be sure, will not be tempted to duplicate work already done in the state courts.

It is a fallacy to speak of federalism and the enforcement of individual rights as irreconcilable. The states are not without a role—and an important one—in guarding individual rights, and federal courts are not bent on paralyzing police efforts at detection and arrest of criminals, nor do they aspire to supplant state courts. The difficulties are immense, for neither framers of constitutions nor judges have the prescience to make rules that will fit every possible circumstance. Decisions are made in cases as they arise in the hope that they will accord with the Constitution's command and be consistent with the lessons of experience. Doubtless in such a process the pendulum swings from side to side and formulations seemingly adequate when made need to be modified from time to time. Many may hope in the interest of certainty that the pendulum will come to rest and all problems will be finally solved. Perhaps, though, for the sake of justice, the quest should continue indefinitely and the pendulum never come to rest.

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