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THE TREND TOWARDS THE "DENATIONALIZATION" OF CIVIL LIBERTIES

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There is reason to believe, and seriously to consider, that the majority in the United States Supreme Court as reconstituted by the addition of its newly appointed members [1] is, under the leadership of Mr. Justice Frankfurter, undoing the revolution in the "nationalization" of civil liberties that has been taking place since 1920. The principle at stake is the Court's interpretation of those fundamental freedoms guaranteed by the due process clause of the Fourteenth Amendment.

One could detect signs of the Court's tendency to move in this direction as early as 1941 in the *Meadowmoor* case.[2] Here the question that the majority sought to answer was whether a state court could issue an injunction to enjoin acts of pickets which in themselves were peaceful. It was felt that because of the early history of this particular dispute, the picketing still carried with it an implied threat of violence and that therefore the forbiddance of such picketing did not infringe upon the Fourteenth Amendment. What was especially significant about the case was the Court's refusal to make any independent evaluation of the testimony in the case. The majority declared that the Court would not intrude upon the realm of policy making by substituting its own judgment for that of the state courts.

This anachronistic bit of reasoning brings to mind *Frank v. Mangum* [3] and other such decisions [4] rendered prior to 1920 when due process had come to guarantee only property rights [5] and had not yet reached the point of protecting civil liberties. The opinion of the majority in the *Frank* case in 1915 paralleled that of the Court in the very famous *Slaughter-House Cases*.[6] In that historic decision Mr. Justice Miller had revealed less concern over the intention of the framers of the Fourteenth Amendment and more of his faith in our dual system of government in general, and in the maintenance of the sovereignty of the states in particular. He had feared that the consequences of nationalizing the "Bill of Rights" would be to substitute Congressional discretion for state legislation, and to "constitute the court as a perpetual censor upon all legislative rights of citizens." Mr. Justice Pitney, speaking for the majority

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1. Those members appointed to the Court since 1945.
2. Milk Wagon Drivers Union v. Meadowmoor Dairies, Inc., 312 U. S. 287 (1941).
3. 237 U. S. 309 (1915).
4. Hurtado v. California, 110 U. S. 516 (1884); Maxwell v. Dow, 176 U. S. 581 (1900).
5. Chicago, Burlington & Quincy Ry. Co. v. Chicago, 166 U. S. 266 (1897).
6. 16 Wallace 36 (U. S. 1873).

in the *Frank* case, reiterated this fear of Mr. Justice Miller by declaring that we would destroy the harmonious relationship existing between the state and Federal Governments if we were to subject the administration of justice in the state courts to the constant supervision of the federal courts. He concludes therefore that the decision of the state's highest court, which had examined the facts objectively in a completely unbiased atmosphere, must be taken as final.

However, Justices Holmes and Hughes took issue with the majority on this point and thus presaged the future. They maintained that when a question of fact becomes the conclusive factor as to the determination of a fundamental right guaranteed by the Constitution, it is the duty of the federal courts to re-examine such facts. It appeared to both dissenting justices that from the evidence submitted there could be no doubt but that the jury in the making of its decisions in this case had responded to the passions of the mob. Beginning with the *Moore* case [7] in 1923, the Court itself declared in effect that it would reexamine the findings of even the highest state court to ascertain whether constitutional guarantees had been violated. Any consideration of the many cases that have since followed in the wake of the *Moore* decision would lead one to conclude that this issue had been laid to final rest.

The recent decision of *Carter v. Illinois*,[8] however, belies any such conclusion. Mr. Justice Frankfurter, speaking for a majority of five, now declared that the Court could not consider factors like "the racial handicap of the defendant, his mental capacity, his inability to make an intelligent choice [or his] precipitancy in the acceptance of a plea of guilty" [9] because they were not in the common law record, which was all that had been placed before the Supreme Court of Illinois. Thus not only did the Supreme Court of Illinois refuse to go beyond the record, an allowable fact according to Mr. Justice Frankfurter, but so, too, did the Supreme Court of the United States.

Recent decisions have also rescinded other guarantees heretofore asserted by the Court to be part of the protection of the due process clause. In the *Powell* case [10] in 1932 the Court had stated:

> Even the intelligent and educated layman . . . lacks both the skill and knowledge adequately to prepare his defense, even though he has a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.

In a whole series of such cases the Court had seen fit to demand that adequate counsel be assigned to persons charged with serious crimes. In *White v.*

7. Moore v. Dempsey, 261 U. S. 86 (1923).
8. 329 U. S. 173 (1947).
9. 329 U. S. 173, 179 (1947).
10. Powell v. Alabama, 287 U. S. 45 (1932).

Ragen,[11] for example, it ruled that a defendant on trial upon a serious criminal charge and unable to defend himself was denied his constitutional right to a fair trial when deprived of effective assistance of counsel. This right was extended even further when in another case [12] Mr. Justice Black stated for the Court that even where a defendant pleaded guilty he was still entitled to the benefits of counsel despite the fact that he had not requested such counsel. He reasoned that it was sufficient to know that a defendant charged with a serious offense was incapable of defending himself adequately.[13] At about the same time in the *Williams* case [14] it was held that a layman needs the aid of counsel lest he be the victim of over-zealous prosecutors or of his own ignorance or bewilderment. It did not seem to be an unwarranted assertion to students of constitutional development to conclude that the Court was incorporating that part of the Sixth Amendment which provides for counsel into the Fourteenth Amendment as a limitation upon the states.

The Court, however, departing from the logic of such decisions, has recently reverted to *Betts v. Brady* [15] for a defense of its position. In that strange decision the Court oddly enough held that appointment of counsel was not a fundamental right essential to a fair trial. At that time Mr. Justice Black, speaking for the dissent, declared that practices which subjected innocent persons to increased dangers of conviction because of their poverty could not be reconciled with our fundamental concepts of fairness and decency. From 1943 to 1947 *Betts v. Brady* was never cited by the Supreme Court as controlling and it appeared as if the Court had repented for its action in that case. In 1947, however, Mr. Justice Black once again had occasion to condemn severely the decision of the *Betts* case which was resurrected in *Foster v. Illinois*.[16] The majority held in the latter case that it was not for the Court to suggest the desirability of offering aid of counsel to every accused person who wished to plead guilty. A brief examination of the facts involved in this case might help to explain the strong conflict of opinion between the majority of five and the minority of four. The accused, Foster, had been charged with burglary and larceny and, after being handed a copy of the indictment, had been arraigned. The minority maintained that the technical aspects of pleading guilty to crimes involving penalties of anywhere from one year to life necessitated having skills far beyond those possessed by any layman. Mr. Justice Rutledge condemned a "presumption of regularity" where the records disclosed that in-

11. 324 U. S. 760 (1945).
12. Rice v. Olsen, 324 U. S. 786 (1945).
13. See also House v. Mayo, 324 U. S. 42 (1945). Here the defendant, a young, uneducated man, who was a stranger in the town was forced to plead guilty within a few minutes after receiving a copy of the information in the absence of his attorney.
14. Williams v. Kaiser, 323 U. S. 471 (1945). See also Tompkins v. State of Missouri, 323 U. S. 485 (1945), expressing the same view.
15. 316 U. S. 455 (1942).
16. 332 U. S. 134 (1947).

digent and ignorant persons unable to afford legal aid were denied the basic rights of counsel. He believed that the courts owed more than a negative duty to the protection of fundamental rights.

The common denominator that one detects in these cases decided by the 1947 term of the Court is a decided aversion on the part of the majority to upsetting state decisions. Mr. Justice Frankfurter has gone so far as to urge that the Due Process Clause not be made "a destructive dogma in the administration of systems of criminal justice" which might "open wide the prison doors of the land." [17] The criterion appears to be not whether a man's constitutional liberties had been violated, but rather that of administrative expediency. Mr. Justice Black replied to this contention of Mr. Justice Frankfurter with the flat declaration that even prison doors must be opened if constitutional rights have been infringed. The setting up of legal technicalities in the *Carter* [18] and *Gayes* cases [19] as justification for what Mr. Justice Murphy has referred to as a "pretense of ignoring plain facts . . . upon which a man's very life or liberty could depend," [20] certainly bodes stormy weather for civil liberties in a time of reaction where liberties are being menaced on every side. It was this state of affairs and the refusal of the Court once again to include under the protection of due process, the right against self-incrimination,[21] that caused Mr. Justice Black to declare, "We cannot know what Bill of Rights provision will next be attenuated by the Court. We can at least be sure that there will be more, so long as he Court adheres to the doctrine of this [*Foster* case] and the *Adamson* case." [22]

Indeed, a logical extension of the Frankfurter philosophy of allowing localities to use their own discretion in the settlement of local problems might, now that this viewpoint has become pretty much that of the majority, affect the entire concept of freedom of speech and religion. A brief review of the reasoning of the then dissenters in cases involving freedom of speech and religion might help to clarify the position of this newly formed majority. In *Martin v. Struthers* [23] the Court struck down a municipal ordinance which forbade "any person to knock on doors, ring doorbells, or otherwise summon to the door occupants of any residence for the purpose of distributing to them handbills or circulars." Mr. Justice Black declared for the Court that freedom to distribute information to every citizen whenever he might desire to receive it was clearly vital to the preservation of a free society. This was as significant,

17. *Id.* at 139.
18. Carter v. Illinois, 329 U. S. 173 (1947).
19. Gayes v. New York, 332 U. S. 145 (1947).
20. Carter v. Illinois, 329 U. S. 173, 183 (1947).
21. Adamson v. California, 332 U. S. 46 (1947).
22. Foster v. Illinois, 332 U. S. 134, 140 (1947).
23. 319 U. S. 141 (1943).

he asserted, for political and labor activities as for religious activities. Mr. Justice Murphy was prompted to announce: [24]

> It is our proud achievement to have demonstrated that unity and strength are best accomplished not by enforced orthodoxy of views but by diversity of opinion through the fullest possible means of freedom of conscience and thought.

Justices Frankfurter and Reed dissented on the grounds that it was perfectly proper for a state legislature to decide that its citizens did not wish to tolerate such annoyances. The dissent raised the issue once more of the right of localities to settle their own local problems as they see fit. Mr. Justice Jackson also took the majority of the Court to task for the decision in this particular case. In his dissent, too, in the *Douglas* case,[25] Mr. Justice Jackson scoffed at high constitutional principles which permitted Jehovah's Witnesses to come to the threshold of a man's home and thrust upon him literature calling his church a "whore" and his faith a "racket." Such undesirable practices he could only see as a very questionable use of religious freedom.[26] He concludes as follows:[27]

> I should think that the singular persistence of the turmoil about Jehovah's Witnesses, one which would seem to result from the work of no other sect, would suggest to this Court a thorough examination of their methods to see if they impinge unduly on the rights of others. Instead of that, the Court has in one way after another, tied the hands of all local authority and made the aggressive methods of this group the law of the land.[28]

It would seem that Mr. Justice Jackson reverses his position in the *Barnette* case [29] where he had observed that, "The very purpose of the Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied in the court." [30] In this particular instance it would appear that he was now willing to place such fundamental liberties within the reach of majorities and officials of local governments so that they might exercise their police powers.

The Court has not tied the hands of local authorities in dealing with

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24. *Id.* at 150.
25. Douglas v. City of Jeanette, 319 U. S. 159 (1943).
26. *Id.* at 175, where Mr. Justice Jackson quotes from CHAFEE, FREEDOM OF SPEECH IN THE UNITED STATES 407: "I cannot help wondering whether the Justices of the Supreme Court are quite aware of the effect of organized front-door intrusions upon people who are not sheltered from zealots and imposters by a staff of servants or the locked entrance of an apartment house."
27. *Id.* at 181.
28. The right of Jehovah's Witnesses to distribute religious literature to the public may not be restricted by a locality simply because such locality is a privately owned company town or a federal housing project, regardless of state laws or regulations to the contrary. See Marsh v. Alabama, 326 U. S. 501 (1946); Tucker v. Texas, 326 U. S. 517 (1946).
29. West Virginia State Board of Education v. Barnette, 319 U. S. 624 (1943).
30. *Id.* at 638.

actual breaches of the peace as seen in the *Cox* [31] and *Chaplinsky* [32] cases. In this respect the Jehovah's Witnesses were held to have the same liability as any other persons of the community. Nevertheless an ordinance prohibiting canvassing, which might prevent distasteful intrusions, might also destroy a very fundamental right of expression. To say that the American people must leave it to legislative wisdom to decide whether or not to restrict such freedom is to miss the real meaning of democracy. Whatever else it means, democracy implies in addition to majority rule the protection of the rights and privileges of the minority. In the realm of civil liberties the Supreme Court stands as a symbol of protection against the encroachment by the majority upon the rights of a minority.

It might be worthwhile here to examine the basis of difference between the majority and minority opinions of the Court in recent years. The Frankfurter viewpoint expresses the belief that local problems may best be solved by the community in which they arise, and that it is not for the Supreme Court to interfere with this legislative discretion.[33] Mr. Justice Jackson in the *Fay* case [34] has even gone so far as to make analogous the Court's present position with that of the Holmes and Brandeis school. The question arises, then, whether both these schools of thought really are the same. The answer, in the writer's opinion, must be in the negative.

Justices Holmes and Brandeis had applied this kind of reasoning to cases where the Court had struck down legislation aimed at eliminating some of the inequities of our society.[35] Certainly one cannot compare legislation which limits hours of labor of women and children or regulates public utilities with legislation which prohibits an individual from expressing his opinion to other individuals, or denies to him adequate counsel when he is fighting for his very life and freedom. Such a right becomes too fundamental to entrust to a local

31. Cox v. New Hampshire, 315 U. S. 569 (1941). The Court upheld the state law which subjected to a fine anyone who failed to procure a license for any parade or procession even when this was applied to the Jehovah's Witnesses. The defendants had marched in groups from fifteen to twenty in close single files along the sidewalk of a crowded business district carrying placards with informational inscriptions.

32. Chaplinsky v. New Hampshire, 312 U. S. 568 (1942). *Held*, that the appellations "damned racketeer" and "damned fascist" would provoke a breach of the peace.

33. Professor Commager defends the Frankfurter position as being in the best traditions of Jeffersonion democracy. COMMAGER AND STEELE, MAJORITY RULE AND MINORITY RIGHTS (1943). For a reply to Commager's contentions, see Boudin, *Majority Rule and Constitutional Limitations*, 4 LAW. GUILD REV. 1 (March-April 1944).

34. Fay v. New York, 332 U. S. 261 (1947).

35. A keen analysis of this problem is presented by Prof. Samuel Konefsky in his recently published work on Chief Justice Stone wherein he states: "It is in the civil liberty sphere that Justice Stone would draw a distinction between the Court's limited role in reviewing legislation affecting business activities and its much more penetrating scrutiny of measures which operate to repress 'freedom of the human mind and spirit.' Fundamentally this contrast was implicit in the Holmes-Brandeis theory of toleration of legislation. Justice Holmes deviated more frequently than did 'Brother Brandeis.' But, though he deferred to the legislative judgment more often than not, neither Justice hesitated to restrain the legislature when he was convinced that 'liberty of the mind' was at stake." KONEFSKY, CHIEF JUSTICE STONE AND THE SUPREME COURT 269 (1945). See Kent, Book Review, 2 MIAMI L. Q. 251 (1948).

majority which is, after all, but a small minority of all the people of the United States. "The appeal is, therefore, to the Bill of Rights which represents the will of a majority of the entire nation, and to the Supreme Court as the representative of the entire nation, to reverse, in the name of the majority of our people, a local legislature and a local court, who have because of some local prejudice or local interests defied the will of the entire nation as expressed in the Constitution." [36] One might go even a step further than Mr. Boudin and argue that even the majority of the people of the nation has no right to transgress upon the liberties of the minority. They are protected from the majority by having been placed in the Constitution and can be changed only by the amending process. The Supreme Court has the sacred duty of protecting such fundamental freedoms from majority and minority alike.

Part of the great controversy within the Court in recent years has been the struggle of the dissenting justices today to have the majority accept the Fourteenth Amendment as the embodiment of the "Federal Bill of Rights." This was first brought to life by Justices Black, Douglas and Murphy in *Betts v. Brady* [37] and has been a bone of contention in the most recently decided cases. The minority insists that it was the intention of the framers of the Fourteenth Amendment to include the Bill of Rights in that amendment, a conclusion concurred in by this writer in his report on the "Nationalization of Civil Liberties." The majority position can best be explained by examining the *Palko* case.[38] In that celebrated opinion Mr. Justice Cardozo had stated that the inclusion in the Fourteenth Amendment of some of the privileges and immunities guaranteed by the Federal Bill of Rights was based on the belief of the Court that neither liberty nor justice could exist without them. On the other hand, he explained that the exclusion of certain of its immunities was similarly based on an appreciation of the essential implication of liberty and not upon any arbitrary reasoning. In the *Malinski* decision [39] and in its most recent decisions, the Court has reaffirmed its faith in this construction of the Due Process Clause of the Fourteenth Amendment. Similarly in the *Adamson* case, Mr. Justice Frankfurter in a separate opinion, in reply to Mr. Justice Black, denied that the Fourteenth Amendment was meant historically to include the Bill of Rights. He drew largely from judicial sources and argued that the most distinguished jurists in the history of the Court had held this position. They were "mindful of the relation of our federal system to a progressively democratic society and therefore duly regardful of the scope of authority that was left to the States ever after the Civil War." [40]

There is a difference of opinion even among the dissenting justices as to

36. BOUDIN, *op. cit. supra* note 33, at 11.
37. 316 U. S. 455 (1942).
38. Palko v. Connecticut, 302 U. S. 319 (1937).
39. Malinski v. New York, 324 U. S. 401 (1935).
40. Adamson v. California, 332 U. S. 46, 62 (1947).

what the Due Process Clause should mean. Justices Murphy and Rutledge agree with Justices Black and Douglas that it should contain the "Bill of Rights," but they do not want to prevent the Court from including additional guarantees within the concept of due process. It is the opinion of this writer that the controversy about the Fourteenth Amendment and its relationship to the Bill of Rights ordinarily would have been an academic question if the majority of the Court had not refused to ignore fundamental rights included in the first eight amendments. It would make very little difference to posterity whether the rights under the first eight amendments were included within the concept of due process because of being part of the "code of civilized standards," or as part of the "Bill of Rights." I agree that the Fourteenth Amendment should not be limited to the "Bill of Rights," because freedom is too vital and dynamic a concept to be forever fixed by any immutable laws. To this degree I would concur with the present majority, but I am unable to conclude that due process could not continue to have these qualities even *with* the inclusion of the Bill of Rights. As a matter of fact I am inclined to believe that its inclusion would strengthen and give meaning to the foundation upon which due process rests. At the very least it would assure a minimum number of specifically enumerated guarantees that would not be dependent upon the whims of the justices. I would agree with Mr. Justice Murphy that the "natural law" theory of exclusion and inclusion degrades the constitutional safeguards of the Bill of Rights, and actually forces the Court to pass on legislative wisdom.

The freedoms of the Bill of Rights, no more than the freedoms of the Fourteenth Amendment need not be fixed and immutable, despite the few inflexible requirements of a twelve-man jury, the right to have counsel, and protections against double jeopardy and self-incriminations.

If there is anything that men have learned as a result of the struggle for freedom, it is that the destruction of liberty of any individual must in the end lead to the destruction of liberty for all persons. If democracy is to survive, if it is to face and conquer the crucial problems of the days ahead, it must guard these channels of expression without which democracy must wither and die. To the Supreme Court of the United States has been dedicated this vital task of safeguarding our civil liberties.[41]

This responsibility gives to the Court a dual task. On the one hand it is demanded of the Court that it be on the alert constantly for any transgressions of our most fundamental liberties, while, on the other hand, it is demanded of this very same Court that it maintain an admirable self-restraint, lest it inter-

41. "Men have rebelled against arbitrary power because they collided with it in their work and in the enjoyment of their faculties. So while the constitutional means to liberty are, in the main, a series of negatives raised against the powerful, the pursuit of liberty is a great affirmation inspired by the positive energies of the human race." LIPPMANN, THE GOOD SOCIETY 353 (1943).

fere with the will of the majority in the solving of the problems of state.[42] The Frankfurter school of thought as displayed in recent decisions confuses the issue by its failure to distinguish between two different functions of the Court. This difference was stated rather sharply in the *Barnette* case when Mr. Justice Jackson declared:

> The right of a State to regulate, for example, a public utility, may well include, so far as due process is concerned, power to impose all of the restrictions which a legislature may have a "rational basis" for adopting. But freedoms of speech, and of press, and of assembly, and of worship may not be infringed on such slender grounds. They are susceptible of restriction only to prevent grave and immediate danger to interests which the State may lawfully protect.[43]

It is not merely a question of whether state problems are to be solved locally rather than nationally.[44] Our civil liberties are equally protected from the tyranny of both local and national governments. Democracy connotes a sacred area of civil liberties which is safeguarded from the action of both majorities and minorities.

> Now that the Court sees no incompatibility between the rights of a private property and public control of business enterprise, a similar laissez-faire attitude toward measures restrictive of civil rights may itself encourage intolerance. The Court has an opportunity to contribute to the solution of a major conundrum of the twentieth century: Can a government bent on assuring economic security to the masses be relied on to respect their civil and political rights.[45]

CONCLUSION

The Court must guard against allowing itself, as it has but too often allowed itself in the past, from becoming a party to the repressions of our fun-

42. A rather striking and ingenious reconciling of these two conflicting duties of the Court is offered by Professor Macmahon in the following quotation: "Whatever may be the future hesitations of the Court amid the dilemma of our time, it can be said generally of the notable judicial fruitage of recent years that while the Fourteenth Amendment has been weakened as a substantive restraint on the power of the states to legislate on economic matters, it has been given content as a guarantee of civil liberties, including rights of agitation. . . . In the latter application it is technically a substantive restriction but in a more fundamental sense the whole structure and method of popular, responsible government—including the right of individual belief, access of information, and use of the means of group agitation—may be considered a mighty procedure." Macmahon, *Taking Stock of Federalism in the United States*, 7 CANADIAN JOURNAL OF ECONOMICS AND POL. SCI. 196, 199 (May 1941).

43. West Virginia State Board of Education v. Barnette, 319 U. S. 624, 639 (1943).

44. In answering the argument of the majority, in Screws v. United States, 325 U. S. 91 (1945), that local authorities sometimes could not be relied upon to act because of prejudices of one sort or another, the minority declared, "If it be significantly true that crimes against local law cannot be locally prosecuted, it is an ominous sign indeed. In any event, the cure is a reinvigoration of State responsibility. It is not an undue incursion of remote federal authorities into local duties with consequent debilitation of local responsibility." *Id.* at 160.

45. KONEFSKY, CHIEF JUSTICE STONE AND THE SUPREME COURT 274 (1945). A penetrating and scholarly analysis of the ideological differences that beset the Court at present is given by the author in Chapters VI and VII.

damental liberties. It must stand as a citadel of freedom during those times of strain and stress when hysteria reigns and emotions replace reason. Unfortunately, it would appear that the present day decline of judicial review is not limited exclusively to the field of economics but already has affected the sphere of civil liberties and promises even further development in the near future. The fear that the United States Supreme Court will atrophy is indeed a novel twist to constitutional history, and one which, taking into consideration not only human nature, but judicial nature, may appear to be somewhat exaggerated. Nevertheless, it would appear that the time is ripe for the Court to reevaluate its functions lest it undo the progress that has been achieved in protecting personal liberties in the past twenty-five years through the interpretation of the Due Process Clause of the Fourteenth Amendment.