Book Reviews


In the Hollywood film Judgment at Nuremberg Spencer Tracy played the role of an American judge who initially had great misgivings about imposing a victor's justice upon the Nazi defendants. What changed his mind was not the legal argumentation presented before the Nuremberg tribunal, but rather the mass of specific evidence displaying in great detail the Nazi atrocities committed upon Jews and other captives in concentration camps. Part of the actual captured Nazi film footage relating to these atrocities is used in the film, and the audience is thereby persuaded, along with Spencer Tracy, that the penalty of death by hanging meted out to the Nazi defendants was an act of charity by the International Military Tribunal.

The human mind is probably like that. We can read all kinds of general statements and descriptions about brutalities and war crimes in a remote area like Vietnam and yet not be more than partially moved, in our busy day-to-day living, to protest against this war. Perhaps motivated in part by an understanding of this psychological necessity to drive home concrete details to an apathetic public, one of the world's greatest living philosophers, Bertrand Russell, sponsored a "tribunal" which heard extensive evidence—witnesses, commission reports, films, etc.—in Stockholm and Copenhagen and then summarized the testimony in one of the books under review. Against the Crime of Silence: Proceedings of the Russell International War Crimes Tribunal is grisly reading. But unpleasant as it may be, Americans should be aware of the kinds of details present in the work as indicated by the following examples.

Item: In An Hoa, South Vietnam, helicopter leaflets were dropped on October 2, 1964, threatening the people with reprisals if they continued to refuse to abandon their homes and move to strategic hamlets. The next day a reconnaissance plane dropped smoke bombs in the Communal School courtyard. The teacher of a kindergarten class of sixty children tried to get them out of the classroom, but rockets burst into the room killing several children and blocking the exit. He then carried a number of children out the window, making ten trips under rocket and machinegun fire. Wounded before he could finish the job, he urged the children who were left to climb out

---

1. French Existentialist philosopher, novelist, playwright, and political theorist.
the window, but they replied that the window was too high. Then the school was napalmed, killing the children remaining in it. On the outside, the children came out of their dugouts because they were afraid and tried to run home. The American helicopters hunted them down and machine-gunned them.²

**Item:** The internationally known Hansen’s disease hospital at Quynh Lap in Nge An province, North Vietnam, was bombed 39 times.³ The famous Quinh Lap leprosarium—a regular city, not a hospital—was repeatedly bombed on June 12 and 13, 1965, after numerous reconnaissance flights in May 1965. There were thirteen bombing attacks in all up to June 21, 1965.⁴ “Why bomb a model leper colony?” Mary McCarthy asks in her book *Hanoi.*⁵ The answer, she suggests, is that the surviving lepers had to be distributed to ordinary district and provincial hospitals “where they are, to put it mildly, a problem, a pathetic menace to public health.”⁶

**Item:** In bombing North Vietnam, American planes made extensive use of “mother bombs,” a bomb that splits in the air ejecting 640 “ball bombs” which each explode sending 300 steel pellets in all directions.⁷ There is testimony throughout the Russell proceedings of the widespread use of antipersonnel bombs such as these in North Vietnam.⁸

**Item:** American officers interrogated a Viet Cong prisoner by placing field telephone wires on his sexual organs and then hand-cranking the telephone generator.⁹ This latter item is from the personal testimony of Peter Martinsen, former prisoner-of-war interrogator with the 541st Military Intelligence Detachment in Vietnam.¹⁰

The foregoing items are not isolated instances. Inquiry Commissions made up of doctors, lawyers, and scientists of various countries summarized their reports of the American bombing of North Vietnam in an appendix to the book under review.¹¹ The following types of medical establishments, many clearly marked by a red cross, were bombed and strafed: twelve province hospitals, seven specialized hospitals, 22 district hospitals, 29 village infirmary-maternity homes, and ten others.¹² Up to the end of 1966 the following types of schools had been attacked: 301 schools of the first and second degree, 24 schools of the third degree, 29 kindergarten schools, ten primary schools, 20 secondary schools, and three universities.¹³ The re-

---

² **Against the Crime of Silence:** *Proceedings of the Russell International War Crimes Tribunal 560-61* (J. Duffet ed. 1968) [hereinafter cited as *Tribunal Proceedings*].
³ *Id.* at 162.
⁴ *Id.* at 181-82.
⁶ *Id.*
⁷ *Tribunal Proceedings, supra* note 2, at 260.
⁸ *Id.* at 135, 156, 162-66, 186, 221, 249, 251, 254, 257-58, 270-71.
⁹ *Id.* at 427.
¹⁰ *Id.* at 425.
¹¹ *Id.* at 312a.
¹² *Id.* at 312g.
¹³ *Id.* at 312i.
connaissance flights, the vaunted pin-point accuracy of American bombing, and the widespread use of antipersonnel bombs indicate that this type of bombing, in violation of the international laws of warfare, could not be "accidental" as the American hierarchy has claimed.

Of course, many can claim that the evidence presented to the Russell tribunal was not subject to cross-examination or other verification techniques, so that the entire "mock trial" should be discounted as a propaganda gimmick. In fact, Russell invited American and British leaders to send representatives to the proceedings to contest the evidence and cross-examine the witnesses, but he received only refusals from the British leaders and no answer at all from the American leaders.

The allegation of "mock trial" is weakened if one compares the Russell tribunal with the actual proceedings at Nuremberg or in the Far East after the Second World War. In these famous trials, despite the trappings of judicial procedures, "judicial notice" was taken of a great mass of evidence—all the evidence, in fact, that was submitted "officially" by any of the Allied powers. Moreover, the judges took the fairly realistic position that even if some evidence was not authenticated, or even if many witnesses were being reported by deposition and not by testimony in court, nevertheless the very massiveness of the testimony, the repeated examples of war crimes, and the detail of the evidence were persuasive as to the guilt of the defendants. Along these lines, the Russell tribunal does not suffer much by comparison in its detailed and massive treatment of the available evidence. Finally, at Nuremberg and in the Far East, the greatest scrutiny of the evidence, understandably, occurred when war crimes were being linked to a particular Nazi defendant or to a particular Japanese warlord; there the question of intent had to be proved. The Russell hearings, properly concerned not with individual persons but with a pattern of warfare, should not be unfavorably compared with a criminal proceeding in which the rights of specific individuals are at stake.

On the other hand, the Russell tribunal clearly got carried away with itself. It handed down "verdicts" condemning the United States Government for "genocide against the people of Vietnam" and for "acts of aggression against Vietnam." Members of the panel often asked witnesses to make legal conclusions or to testify about irrelevant matters. There was no sense of restraint about the hearings; everything was thrown in which could make the American forces look bad, including evidence of racial discrimination among American soldiers. As a result, the entire effort has appeared to world public opinion as highly biased. Russell and his colleagues

15. TRIBUNAL PROCEEDINGS, supra note 2, at 18-26.
16. Some of the witnesses were, indeed, held prisoner in Allied countries so that the defense could not question them or impeach their testimony.
17. TRIBUNAL PROCEEDINGS, supra note 2, at 650.
18. Id. at 309.
19. E.g., id. at 535.
would have been much more effective, even if propaganda was their purpose, to stick to precise evidence of war crimes and to withhold all judgments, leaving it to the reader and world public opinion to draw their own conclusions.

At the end of the presentation of evidence, Jean-Paul Sartre presented a statement “On Genocide” which has been reprinted verbatim in the second book under review. He, too, does not leave it to the reader to draw conclusions. Rather, his statement is a well-written argument based upon evidence presented at the tribunal pointing to his conclusion that the United States is guilty of “imperialist genocide” in Vietnam.

One might hope that Sartre’s statements would also contain some new insights into the American involvement in Vietnam. Perhaps Sartre, a man who has written with such psychological incisiveness into the motivations of men, can articulate a single factor which throws great light on the reason for American participation in the Vietnamese civil war. Perhaps he can focus on an underlying reason where most experts see only the trees. In my opinion Sartre has accomplished this, even though the essence of what he says was previously stated by Bernard B. Fall in 1965.

Sartre explicitly challenges the prevailing American view, espoused at every turn in frequent moments of candor by Washington officials, that we have blundered into Vietnam as the result of a series of political mistakes and kept escalating just to make the best of a bad situation and end it quickly. In the opinion of Sartre, and Fall before him, the American involvement in Vietnam is an explicit product of the capitalist-imperialist system that is attempting to set a pro-stability example to would-be liberators in other lands where we have economic interests. Sartre writes:

In other words, this war has above all an admonitory value, as an example for three and perhaps four continents. (After all, Greece is a peasant nation too. A dictatorship has just been set up there; it is good to give the Greeks a warning; submit or face extermination.) This genocidal example is addressed to the whole of humanity. By means of this warning, six per cent of mankind hopes to succeed in controlling the other ninety-four per cent at a reasonably low cost in money and effort.

The trouble with Sartre’s essay is that its own logic carries it too far. His thesis may explain American presence in Vietnam, but it does not necessarily follow, as Sartre concludes, that total genocide is an unavoidable concomitant of that involvement. While the best example to dampen the causes of guerrillas of the future might be set by wiping Vietnam off the map.

---

20. Id. at 612-26.
22. “What we are buying is an example—for Latin America and other guerrilla-prone areas. What we’re really doing in Viet-Nam is killing the case of ‘wars of liberation.’” B. FALL, LAST REFLECTIONS ON A WAR 225 (1967).
23. Id.
24. J.P. SARTRE, supra note 21, at 71.
25. Sartre concludes that the best example the United States can set to dampen the causes of guerrillas of the future is to wipe Vietnam off the map. Unless there is total genocide, “someone might think that Vietnam’s submission had been attributable to some avoidable weakness.” Id.
there are countervailing, limiting pressures and considerations at work on United States policy. One of these is a desire to avoid the use of nuclear weapons, either from a fear of an all out nuclear war with Russia or more probably out of an unwillingness to set a further precedent for the use of such weapons. We have not used nuclear bombs—the cheapest and most dramatic “example”—against North Vietnamese cities despite suggestions by some militarists. Another limitation is our desire to avoid spreading the conflict to open warfare with China or Russia. This may account for our reluctance to bomb certain areas of North Vietnam such as the harbor of Haiphong because of the danger of hitting Russian or Red Chinese ships.

There is another mechanism—not explicitly considered by Sartre—which might help to explain our actions in Vietnam. Like Sartre, I do not think we blundered into Vietnam as the result of political mistakes and kept escalating just to make the best of a bad situation and end it quickly. Mistakes of this magnitude are unlikely in the real world even though many central participants may sincerely feel that things just moved along without conscious design. Rather, national decisions are made because certain decisionmakers have been selected by the system to be in a position to make the decisions and they have been psychologically conditioned, because of their successful selection, to make the “right” decisions for the system. The system which sets up these decisionmakers in the United States is one based on capitalism, getting the most out of a dollar, and status quo security. Politicians who are profoundly sympathetic to these values, whether they know it or not, tend to rise to the decisionmaking hierarchy, while those who have other values do not get beyond the intermediate administrative level.

Sartre, as well as Russell, may have drawn a clear bead on American imperialism, but they somehow seem insensitive to countervailing Soviet and Chinese imperialism. These countries, who profess to be more socialistic than we are, also have their internal imperialist logic. Indeed, judging from their amazing restraint, they may secretly be delighted that the United States is setting an example in Vietnam for the rest of the world.

Such deficiencies, however, should not blur the importance of the efforts of Sartre and Russell. They have at least engineered a hearing on the issue of war crimes and Vietnam. What have American lawyers and political scientists done about it? Law students by now could have set up hearings and tribunals, taking eye-witness testimony from the many American veterans of Vietnam combat service. They could have done this with no preconceptions but simply with a desire to investigate what their country is doing militarily in an underdeveloped land where American mass media are only permitted to report and view scenes that have been officially cleared. Short of this, we should at least consider the evidence which Russell and Sartre have presented.

It will be interesting to see whether, as this country begins to disengage from Vietnam, popular unrest will begin to come to the forefront in Latin America, Spain, Greece, and South Africa. If so, Vietnam’s admonitory value—to accept Sartre’s thesis—will have been short-lived. Hopefully,
however, Russell and Sarte have helped to convince us never to replay the Vietnam disaster elsewhere; hopefully they have written works of history rather than of current politics.

Anthony A. D'Amato*

THE FUTURE OF FEDERALISM. Edited by Samuel I. Shuman. Detroit: Wayne State University Press. 1968. Pp. 120. $4.95.

Americans have long been taught that theirs is a government of limited power; that under their system the sovereign states retain residual authority to act in all matters not delegated to the federal government by the Constitution. This theory is, in its main outline, no longer accurate. To be sure, the enumeration of powers delegated to the federal government remains a part of the Constitution. But when the power to regulate interstate commerce has been so liberally interpreted that it now includes the ability to regulate agricultural production for use on the farm,1 and to control restaurants selling to a largely local clientele,2 it is difficult to see the grant of power as more than theoretically limited. Other sections of the Constitution such as the general welfare clause and the enabling section of the fourteenth amendment have also provided constitutional bases for legislation concerning matters once governed by the states; and federal courts have employed the equal protection and due process clauses to extend the limits of federal authority even without statutory sanction. Even land use—a matter thought to be so much within the exclusive realm of state law as to be exempted from federal control during the reign of Swift v. Tyson3—is now subject to national regulation through rediscovery of a statute based on the enforcement provision of the fourteenth amendment.4 In short, there is little that the federal government cannot do if it so chooses, and there has been an increasing propensity for all branches of the government to exercise this power.

In light of this seemingly irreversible trend toward the dominance of

---

* A.B., Cornell University, 1958; J.D., Harvard University, 1961; Ph.D., Columbia University, 1968. Assistant Professor of Law, Northwestern University.

3. 41 U.S. (16 Pet.) 1 (1842). In interpreting the Federal Judiciary Act of 1789, now embodied in 28 U.S.C. § 1652 (1964), Swift v. Tyson held that federal courts exercising jurisdiction on diversity of citizenship grounds were not required, in matters of general law, to apply the unwritten law of the state as declared by its highest court but were free to exercise an independent judgment as to what the common law of the state was or should have been. They were required to apply only strictly local state laws such as positive statutes and rules relating to real property located in the state. This meant that federal courts in diversity cases applied federal substantive law and state procedural law until the rule was reversed in 1938 by Erie R.R. v. Tompkins, 304 U.S. 64 (1938).
the central government over the states, writing and publishing essays on the future of federalism may seem to be an exercise in futility. Yet this is not quite the case. Although the theoretical basis of states’ rights has been seriously eroded, state sovereignty has not disappeared entirely. Federal laws of divorce and murder may be feasible or even inevitable, but for the moment the states retain much power, although it may only be what Judge J. Skelly Wright of the Court of Appeals for the District of Columbia Circuit terms "a tenancy at will, terminable at Washington’s pleasure." Examination of the future of federalism, then, must proceed in the context of the increasing and potentially overwhelming power of the central authority. It must necessarily focus on what the federal government should or will allow the states to do, with little attention given to the rights of states deriving from the simple fact of their sovereignty. In large part, this attitude informs the essays written for the Law Center Dedication Series of Wayne State University and collectively entitled The Future of Federalism.

An approach to state-federal relations which ignores states’ rights as an end and concentrates on the question of what governmental unit can best implement a particular goal is a form of pragmatism with deep roots in the American experience. In The Federalist No. 45, Madison anticipated the rationale of the present trend toward centralization when he wrote: “[A]s 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.”

Today, the “happiness” of so many groups is best served by centralized power that the application of Madison’s dictum seems almost to sound a death knell for the states. Indeed, the fundamental assumption of federalism that territorial distribution of power to a fixed number of political entities will protect socially valuable interests seems doubtful. In a complex urban society, the fixed and often inappropriate geographical limits of state sovereignty seem to impede rather than aid in the solution of problems. Moreover, the economic or ethnic bases of many major interest groups ordinarily bear no relationship to particular geographic areas, thus reducing the effectiveness of the states in advancing the concerns of these groups.

In the first essay of the collection former Secretary of Housing and Urban Development Robert Weaver, discussing the urban crisis from the viewpoint of the executive branch, suggests just such failures of federalism. For some problems the state is too small a unit economically or too provincial in its outlook to deal effectively with regional problems encompassing a multistate area. In other matters the states are too large and too unresponsive to the needs of the cities they contain. Occasionally the state may provide a conveniently sized unit for administering a given program, but this

is less a tribute to the federal system than a simple recognition and utilization of an existing agency that could otherwise be created with little difficulty.

Professor Paul Freund of Harvard University employs a similar pragmatic approach in his essay addressed to problems of federalism faced by the Supreme Court in recent years. Just as Weaver suggests that some failures of federalism may be attributed to the inappropriate size of the states for solving important problems, Freund would seem to attribute other failures to the emergence of problems concerning class, race and economic status that bear no relation to geographic territories at all. Freund’s analysis is presented in terms of the Court progressing toward the original ends of federalism, such as the protection of minority rights, but he makes it clear that when federalism itself is no longer an important tool for achieving these historic goals, his concern is with the ends rather than the now defunct means.  

The other essayists, with the exception of Judge Desmond of the New York court of appeals, reveal similar attitudes, expressed with varying degrees of courtesy toward the concept of state autonomy. Thomas Kuchel, formerly a Senator from California, is less adamant than Judge Wright, who advocates a new federal common law that would apparently extend to every matter now controlled by state courts; but both Kuchel and Wright see the federal government as the prime mover in the years ahead since it is the only body able to bring to bear the resources necessary to solve pressing domestic problems.

The first assumption generally shared by these essays, then, is that distribution of power between the federal and state governments should reflect their respective ability to deal effectively with particular problems. This hardly seems a startling revelation, yet it does represent a significant movement away from the traditional formulation of the states’ rights doctrine, a theory that still retains strong support in certain regions. Even the more sophisticated analysis of some of these essays occasionally allows it vitality. Senator Kuchel, for example, asserts, “I would oppose short circuiting state governments by direct federal grants to local agencies. The states ought not to be circumvented.” Unfortunately, Kuchel provides no reason why the state deserves to remain a middleman in the federal program he discusses, and his claim must be seen as an unnecessarily doctrinaire approach to a practical problem.

One reason for leaving certain matters in the hands of the states is the inability of the federal government to devise appropriate uniform rules within the bounds of existing political constraints. Assertion of federal power often requires the coordination of the executive and legislative branches of government—a task which may prove impossible when political debts, alliances and loyalties prevent general agreement upon national priorities. Moreover, political considerations may dictate a solution that continues to involve the

---

states. Notwithstanding the vast potentials of national power, political parties retain a state-oriented structure; congressmen concern themselves with state constituencies; and the electoral college system forces even presidential campaigns into state-oriented strategies. These and other factors may be labeled historical accident in an age when most issues cut across state lines, but the accident remains a significant one.

It is a sense of this political reality rather than an ideology of states' rights that tempers the essential nationalism of some of the essays, particularly those of Freund and Weaver, and provides a basis for comparison with the others, notably Wright's, which takes a polar position in favor of centralism, and Desmond's, which takes the strongest states' rights position of the five.

Freund sees the Supreme Court in the role of supervisor of the mechanisms through which state governments act: Decisions concerning reapportionment, equal voting rights and interrogation procedures are all examples of federal controls that make state activity more palatable without imposing specific substantive solutions that might further impinge upon what the states consider their prerogatives. Not only does Freund recognize implicit limits on federal control imposed by surviving state power, but he also sees limitations upon the ability of a single branch of the federal government to impose national solutions to a problem. For example, in discussing a case in which the state of Delaware sued to prevent the use of unit voting in presidential elections he notes: “The method of counting a state’s votes is only a variable satellite in a solar system that includes some stellar objects fixed by Constitutional mandate. . . . The Supreme Court sits to do justice, but justice by halves may be the worst kind of injustice.”

While he clearly does not oppose revision of national election laws, Freund does see a future for federalism until comprehensive reform is feasible; reform of a type that could not be undertaken by the judiciary alone.

The whole concept of funding state agencies to deal with local problems presents a nonjudicial illustration of the adaptation of federal activity to the continued existence and political power of the states. Both Weaver and Kuchel advocate various use of state administrative channels largely, it would seem, as a form of accommodation to the status quo. Whether this be called creative federalism or cooperative federalism, it shows how federal power must be tailored to the practical impediments presented by state governments whose leaders retain national power because of the fragmented, state-oriented nature of our political parties.

Judge Wright's essay is the only one of the five that attempts to make an original contribution to the concept of federalism. Although the essay takes an extreme position, its central notion—that federal-question jurisdiction should and will be broadened to include many problems now within the domain of the states—seems sound. But Wright apparently fails to appreciate the magnitude of his proposal. State law is still so vast, and the fields of federal law so dependent upon state underpinnings, that the changeover would be more a revolution than a continuation of current trends. To make

10. Freund, supra note 8, at 46.
federal rather than state law the basic governing institution involves not only a redistribution of the power to make new laws, but also the elimination of the thousands of precedents that form the background for judicial change in any jurisdiction.\textsuperscript{11}

If Wright's position is seen not as a realistic proposal for immediate reform, but as a loosely woven argument for greater judicial receptivity to federal common law expansion, it seems persuasive both as argument and prognostication. Federal law generally, and constitutional law particularly, seems destined to continue expanding. What was once a common law tort, for example, may now be remediable under the civil rights acts, and what was once common law libel or slander may now be protected by the first amendment. The advantage of federal substantive control of additional areas of the law lies in achieving the very uniformity which Swift v. Tyson attempted to provide under diversity jurisdiction. Wright's proposal would essentially revive Swift v. Tyson under the aegis of federal question jurisdiction. Under Wright's scheme, the problems which prompted the Court to overrule Swift v. Tyson in Erie R.R. v. Tompkins\textsuperscript{12} no longer obstruct the development of a federal common law. He would solve the problems of forum shopping and diverse treatment of similar primary activity by imposing his uniform federal law upon the states. To the extent that the Erie decision rested on the Court's conclusion that Congress could not control the matters to which the federal courts had laid claim, that rationale no longer seems valid since it is difficult to conceive of a matter beyond the reach of a willing Congress. This leaves only part of Brandeis' third justification: "We . . . declare that in applying the doctrine of Swift v. Tyson this Court and the lower courts have invaded rights which in our opinion are reserved by the Constitution to the several States."\textsuperscript{13} Acceptance of this argument standing alone, however, would revive the ideological approach to states' rights which seems unjustified and inconsistent with other Supreme Court decisions.

Wright, then, seems correct in his conclusion that the continued existence of 50 separate common laws is neither theoretically required nor practically justified in the light of the growth of a national economy, and the existence of national goals which properly take precedence over local interests. To this extent, his reasoning reflects the pragmatic approach to federalism which has led inexorably to the demise of states' rights. But where the pragmatism of Freund and Weaver leads them to temper their conclusions

\textsuperscript{11} "Federal law is generally interstitial in its nature . . . . [This] is significantly true today, despite the volume of Congressional enactments, and even within the areas where Congress has been very active. Federal legislation . . . builds upon legal relationships established by the states, altering or supplanting them only so far as necessary for the special purpose. Congress acts, in short, against the background of the total corpus juris of the states in much the same way that a state legislature acts against the background of the common law, assumed to govern unless changed by legislation." H.M. Hart & H. Wechsler, The Federal Courts and the Federal System 435 (1953).

\textsuperscript{12} 304 U.S. 64 (1938).

\textsuperscript{13} \textit{Id.} at 80.
with recognition of the continued vitality of the states as political and juridical entities, and to turn their attention to the problem of accommodation, Wright offers no compromise. Notwithstanding the appeal of his logic, this advocacy of a federal common law that would ultimately control all legal arrangements makes his essay appear to be more wishful thinking than realistic analysis of the future of federalism. It is peculiar, too, that he makes no mention of the various uniform laws that have brought a new measure of certitude to interstate transactions. Since much of the demand for federal private law arises from the need for uniformity rather than a desire for the better quality of justice provided in federal courts, this would appear to be a serious omission. A doctrinaire nationalism is as unjustified as an ideology of states’ rights when it fails to consider an eminently practical solution to a difficult problem.

While Judge Wright’s failure to consider the complexity and political difficulty of his proposal leads him to an unrealistic centralism, Judge Desmond’s assessment of the nature of federal and state law leads him to an unrealistic states’ rights position. Desmond’s attitude toward the future of federalism is difficult to discern because it is interspersed with criticism of recent Supreme Court opinions—criticism that contains more invective than reasoning. Desmond has the habit of attempting to disarm the reader by promising not to make the commonplace arguments against the Supreme Court and then proceeding to do precisely that. A sample of this technique may be drawn from his discussion of recent obscenity cases: “I am not going to view with alarm the prosperous traffic in pornography or bemoan the lowering of standards.” 14 And two pages later: “[O]ur local courts are unable to prevent the public portrayals of the sexual act or to prevent the public sale of books which are notable only for the sickest kind of sexuality or filthy, cynical, disgusting narratives of sordid amours or perversity, or mixes of sex, sadism, violence, and crime.” 15

Aside from this type of criticism, and the somewhat more persuasive comments upon Court efforts to impose codes of procedure on the states, Desmond does reveal certain basic assumptions about federalism which are worthy of consideration. The ultimate question posed is that of the value of decentralization, with federalism being only one among the possible methods of diffusing the decisionmaking process.

Despite the variety of matters upon which Desmond touches, the problem of localism seems to be the theme with which he is most concerned: “Let us take a long, hard new look at the idea that only the United States Supreme Court can or will protect rights which are valued by all of us, even local jurists and jurors.” 16 In a sense, however, Desmond misses the heart of the issue—the question of whether we should sanction local judicial autonomy involving the power to do wrong as well as right. Desmond assumes

15. Id. at 102-03.
16. Id. at 103.
that state court judges share the values of the Supreme Court, and that interference with state criminal processes is therefore a gratuitous assertion of power where it was totally unnecessary. He asserts that the rights of convicted criminals are safe with the state judges he knows, and that local juries are competent to apply acceptable standards to allegedly obscene material without being second guessed by higher courts. But the picture of the Supreme Court seizing power from right-minded local citizens is simply inaccurate. Brown v. Mississippi, 17 one of the cases which started the Supreme Court on its way to Miranda v. Arizona, 18 is not so far in the past that Desmond should have forgotten that Brown’s conviction was affirmed by the highest court of Mississippi even though it was based upon a confession known to have been extracted by lengthy and inhuman physical torture. Such abuses compel one to doubt the value of local autonomy in those fields where state disregard of constitutional rights has not been uncommon. The theory that local institutions, including courts, need leeway to make mistakes and learn from them, to be experimental laboratories for social innovation, is only persuasive in those areas where there is potential value in disagreement and where final solutions have not yet been devised. There are, however, matters where debate is properly foreclosed and uniform national policy reflecting values transcending regional interests should be imposed. The ban on racial discrimination clearly embodies such a value, and other Supreme Court decisions reflect similar conclusions. Whether or not one agrees that a particular issue should be removed from debate and resolved by the Court, it should be recognized that recent decisions controlling state practices represent attempts to define new standards for local officials; they are not the inexplicable assertions of power hypothesized by Desmond.

One’s attitude toward the decline of judicial interest in preserving states’ rights will be largely determined by one’s position on the substance of the matters considered. Those who doubt the propriety of recent rulings in areas such as criminal interrogations may favor a continued variety of solutions on a state level. Those who see the Supreme Court’s conclusion as correct are unlikely to consider the loss of state sovereignty as particularly significant. Some, of course, may find the Court’s standards desirable but unjustified because of the interference with state autonomy, but again, this attitude reflects an embrace of states’ rights for their own sake that has little merit today.

Although this conclusion provides no neutral principle by which to assess the trend of centralization, the same must be said of arguments in favor of localism. Once the ideology of states’ rights is abandoned by the federal courts on pragmatic grounds, neutrality becomes meaningless since there is no guide except the ultimate question of whether national interests are sufficiently important to justify uniform imposition of new rules upon the states. The question of localism versus centralism will, therefore, be resolved upon substantive grounds, and this, recent history tells us, leads almost inevitably

17. 297 U.S. 278 (1936).
to further centralization of judicial authority.

Desmond's essay deals exclusively with the decline of states' rights in fields controlled by the judiciary. The arguments he presents, however, have broader implications for the political system as a whole. The increased activity of Congress and the executive branch in the last several decades has also been implemented at the expense of state power. The argument analogous to Desmond's would here assert that local solutions to severe social problems have been unnecessarily precluded by federal action. Again the proper response would be that Congress has for political reasons reached the same conclusion that the Court has reached on constitutional grounds: That many problems require national solutions, and that in many areas—minimum wages, social security, civil rights legislation and others—diversity is no longer valued.

Desmond's essay remains a significant reminder of the disadvantages of the rather harsh attitude toward states' rights that is here expressed with regard to both judicial and nonjudicial issues. Even if one does not agree with Desmond that federal activity to date is dangerous, increasing federal power may cause difficulty in the future. Neither state courts nor state legislatures have a monopoly on poor judgment, and even the most ardent federalist might see some utility in preserving the state structure so that it may be revived if needed. Many different situations could arise which might cause those who now favor national solutions to fall back upon the power of the states. A recent report in The New Republic illustrates this point. "The coincidence of interests between the pesticide manufacturers . . . and pertinent regulatory agencies of the federal government has only made state action that much more inevitable as the specter of ecological disaster becomes more visible."19 As the article recognizes, the clumsy and inefficient processes of state government provide a far from ideal counterweight to federal power, but they may be the only one available in the foreseeable future. It will be the mere existence of state power rather than its traditional role of protecting territorial state interests which may prove to be valuable.

Persuasive as this argument may be with regard to the general possibility of a revival of the states, it should have little effect on the outcome of actual cases before the Supreme Court. To sacrifice the quality of justice today in order to preserve it against certain contingencies in the future makes little sense unless the future threats are far more serious than the present inequities being corrected. There may exist, then, a presumption that a valuable substantive rule should be imposed uniformly unless some reason to the contrary can be found beyond the mere litany of states' rights. No longer should cases be determined on the simple basis that deference to the federal system calls for a particular result. Instead, courts should ask what values in the federal system are being preserved, and what function they serve.

The burden of providing a future for federalism thus shifts to the states. The national government has the constitutional power to act in nearly any

situation, and has, through its courts and legislature, acted in ever-enlarging spheres of interest. But the states retain sovereign power to improve upon national laws in all areas where preemption does not exclude them. How they respond to the problems which face the nation today will determine the likelihood of their meaningful survival.

*Philip L. Graham, Jr.*


*Miami and the Siege of Chicago* is Norman Mailer’s account of the 1968 Republican and Democratic Conventions. Reporting the conventions for *Harper’s Magazine*, Mailer brings to journalism the same eloquent style that characterizes his novels. Miami, site of the Republican Convention, is sketched in scenes of rain beating against asphalt, fighting to break through to the swamp below. Chicago, outlined in images of Sandberg, is depicted as a city of butchery with the blood of the people bringing drama to the fore.

Mailer’s account of the Republican and Democratic Conventions differs little if at all from that of the Establishment press. Mailer speaks of both the Republican and Democratic Conventions in terms of the predictable, the controlled, and the fixed. The conventions were predictable because Nixon through four years of work at the local level of the Republican Party had accumulated sufficient political obligations to be assured the nomination and because Humphrey’s nomination was guaranteed by Johnson’s overbearing control of the Democratic Party. The Miami convention was controlled because Nixon and the Republican Party leadership, remembering the Goldwater defeat of 1964, were not about to permit an open convention in 1968. Likewise, the Democratic Party bosses desired to maintain control of the party structure regardless of the outcome in November, and Humphrey’s nomination would guarantee this. Although the Democratic Convention was more blatantly manipulated, manipulation was also apparent at the

---

1. Already famous for his novels such as *The Naked and the Dead*, *An American Dream*, and *Barbary Shore*, Mailer has in recent years gained notoriety in the field of politics and political reporting. Most notable is his treatment of the 1967 march on the Pentagon in *The Armies of the Night*, a book which is in many ways similar to the book under review. He has championed the liberal cause in debate with William Buckley and recently as a candidate for Mayor of New York City.


3. Humphrey contingents had front seats. *N. Mailer, Miami and the Siege of Chicago* 116 (1968). Humphrey delegates had better microphones. *Id.* at 115. *TV*, press, and radio reporters were restricted in number. *Id.* at 116. Delegates were
Republican Convention in Nixon's deal with the South over selection of his vice presidential running mate which prevented any southern rush to Reagan.4

Both conventions were robbed of their significance for Mailer by Robert Kennedy's death which was a deep and personal loss. Kennedy's romantic figure and his charismatic air appealed to Mailer, the artist. He was attracted by Kennedy's "admixture of idealism plus willingness to traffic with demons, ogres, and overlords of corruption."5 Mailer could not get excited about the only other liberal candidates, Rockefeller and McCarthy. Rockefeller, who had not entered the primaries, was still trying to clarify his position. Although he would have been the ideal candidate for liberal Republican and Democratic voters, he did not stand a chance of gaining the nomination. With regard to McCarthy, although Mailer admired McCarthy's stand in New Hampshire and his integrity, he could not respond to his "deadness of manner, blankness of affect."6

Mailer's essay on Miami is in the tradition of news reporting by the political observer, with the addition of the artist's perceptions and the novelist's language.7 His much longer essay on the siege of Chicago is the epitome of the reporter as participant. Looking at Mailer's participation, one can gain insight not only into the historical events but also into the process of political radicalization.

When Mailer first arrived in Chicago he identified himself both with the street people and with the supporters of Robert Kennedy. He recognized his vested interest in maintaining the system that had provided his fame and fortune:

[I]t [the Establishment] had allowed him to write—it had even not deprived him entirely of honors, certainly not of an income. He had lived well enough to have six children, a house on the water, a good apartment, good meals, good booze, he had even come to enjoy wine. A revolutionary with taste in wine has come already half the distance from Marx to Burke; he belonged in England dragged from the convention floor. Id. at 178. Convention galleries were stacked by Daley people using phoney plastic passes. Id. at 199.

4. Id. at 72-73.
5. Id. at 93.
6. Id.
7. "It was possible, even likely, even necessary, that the Wasp must enter the center of our history again. They had been a damned minority for too long, a huge indigestible boulder in the voluminous ruminating government gut of every cow-like Democratic administration, an insane Republic minority with vast powers of negation and control, a minority who ran the economy, and half the finances of the world, and all too much of the internal affairs of four or five continents, and the Pentagon, and the technology of the land, and most of the secret police, and nearly every policeman in every small town, and yet finally they did not run the land, they did not comprehend it, the country was loose from them, ahead of them, the life style of the country kept denying their effort, the lives of the best Americans kept accelerating out of their reach. They were the most powerful force in America, and yet they were a psychic island. If they did not find a bridge, they could only grow more insane each year, like a rich nobleman in an empty castle chasing elves and ogres with his stick. They had every power but the one they needed—which was to attach their philosophy to history: the druggist and the president of the steel corporation must finally learn if they were both pushing on the same wheel." Id. at 62.
where one's radicalism might never be tested . . . .

Yet for all the good wine, Mailer also conceived of himself as a revolutionary. It was this tension between attaining success in society and seeing that society is corrupt and decayed which was the key to Mailer's participation and development.

When Mailer first came to Chicago he was afraid of the violently repressive force the Yippies might trigger: "The Yippies might yet disrupt the land—or worse, since they would not really have the power to do that, might serve as a pretext to bring in totalitarian phalanxes of law and order." Despite these fears, during the Chicago convention Mailer departed from his role of reporter and became a participant in the street happenings. Seeing his friends attacked by the police, he felt compelled to take personal action. He addressed a meeting of the demonstrators and was pleased by the enthusiastic response he received for what he considered a "relatively quietistic" speech.

Fearful that his participation in the march following the meeting would result in his being beaten or arrested, Mailer instead went drinking with his press buddies. Later that day, when he became aware of the vicious beatings that had occurred on the march, he realized that he "would be driven yet to participate or keep the shame in his liver." Imbued with guilt, Mailer "inspected" the National Guard. He challenged their collective authority by staring each individual in the eye "and felt as if he had joined some private victory between one part of himself and another."

His next speech was hardly quietistic. He addressed the demonstrators as "fine troops" and lauded them for "having the courage to live at war for four days in a city run by a beast." Furthermore, he promised them that he would try to deliver 300 delegates to march with them the following day. Unable to fulfill his promise, he failed to appear before them and they were again "massacred."

Mailer ended his participation with another "inspection" of the National Guard. He was detained and almost arrested for this action but his name saved him.

By the end of the convention, Mailer's attitude towards the protesters had clearly changed. He had started out criticizing the radicals as being

---

8. Id. at 187.
9. Id.
10. Id. at 190.
11. Id. at 188.
12. Id. at 192.
13. Id. at 194.
14. Mailer uses the term "massacre" because the attack "was sudden, unprovoked, and total . . . it opened the specter of what it might mean for the police to take over society. They might comport themselves in such a case not as a force of law and order, not even as a force of repression upon civil disorder, but as a true criminal force, chaotic, improvisational, undisciplined, and finally—sufficiently aroused—uncontrollable." Id. at 175.
15. Id. at 216-19.
“too full of kicks and pot and the freakings of sodium amytol and orgy, the howls of electronics and LSD.”16 After joining with them, Mailer saw them through different eyes: “[T]he universe was not absurd to them; like pilgrims they looked at society with the eyes of children: society was absurd. Every emperor who went down the path was naked, and they handed flowers to policemen.”17 Finally, after the days of marches, protests, and beatings he concluded: “The children were crazy, but they developed honor every year, they had a vision not void of beauty; the other side had no vision, only a nightmare of smashing a brain with a brick.”18

Mailer, like many social critics, including some lawyers and law professors, has become successful and financially secure by analyzing and describing the turmoil of American society. However, unlike many others, he is honest enough to recognize that his success has prejudiced his analysis, and that his lack of “street” involvement has dimmed his perceptions. It was this honesty and his overwhelming ego which led to his participation in the demonstrations. His decisions to speak before the demonstrators, to march with them, and to confront the National Guard, like his decisions not to act, were primarily personal, not political.

However, his participation in the demonstrations did radicalize his views so that the Mailer at the end of the book who endorses Eldridge Cleaver for President19 is not the same man who earlier sipped martinis at cocktail parties and concerned himself with reporting the arrival of the Republican mascot, Ana the elephant from Anaheim. The Mailer who embraced the “Politics as Property” theory20 in Chicago would not have described the Republican Convention in traditional terms. The man who developed the theory of police as repressed criminals21 in Chicago would not have ignored three deaths in the riot of Miami.

As Mailer became a participant, the predictable and controlled convention faded into the background, for it was on the streets of Chicago that he

16. Id. at 63.
17. Id. at 140.
18. Id. at 214.
19. Id. at 223.
20. See id. at 105-09. “Politics is property. You pick up as much as you can, pay the minimum for the holding, extract the maximum, and combine where you may . . . .” Id. at 107.
21. “There have been few studies on the psychological differences between police and criminals, and the reason is not difficult to discover. The studies based on the usual psychological tests fail to detect a significant difference. . . . The criminal attempts to reduce the tension within himself by expressing in the direct language of action whatever is most violent and outraged in his depths; to the extent he is not a powerful man, his violence is merely antisocial, like self-exposure, embezzlement, or passing bad checks. The cop tries to solve his violence by blanketing it with a uniform. That is virtually a commonplace, but it explains why cops will put up with poor salary, public dislike, uncomfortable working conditions and a general sense of bad conscience. They know they are lucky; they know they are getting away with a successful solution to the criminality they can taste in their blood.” Id. at 174.
found the historical events which would shape tomorrow.

*Stanley J. Zaks*

* B.A. 1964, University of California, Berkeley; J.D. 1967, Columbia University. Member of the California Bar. Instructor of Law, Lincoln University, San Francisco.