Supplementary Material

Chapter 7: The Republican Era—Criminal Justice/Due Process and Habeas Corpus

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Frank v. Mangum, 237 U.S. 309 (1915)

Leo Frank was a Jewish resident of Atlanta who managed a pencil factory. On April 27, 1913, Mary Phagan, a thirteen-year-old girl, was found strangled to death. Public attention focused on Frank, who as a Jew was considered an outsider in the South. Prominent anti-Semites circulated the "blood libel," the accusation that Jews murdered Christian virgins in order to use their blood to make matzo for Passover. Both national elites and local mobs mobilized after Frank was arrested. Frank hired two excellent criminal defense attorneys, but they faced large crowds both inside and outside the courtroom demanding that Frank be convicted and sentenced to death. After Frank was found guilty of a capital defense, the trial judge when stating that conviction asserted, "I am not thoroughly convinced that Frank is guilty or innocent," but that state officials "would not have enough troops to control the mob" if he ordered a new trial. The Supreme Court of Alabama denied Frank's appeal. Frank then asked for a writ of habeas corpus, claiming that both the trial environment and his absence from the courtroom (he was advised that he might be lynched after the verdict) denied him due process of law. Alabama courts rejected this plea. Frank appealed to the Supreme Court of the United States.[1]

The Supreme Court by a 7–2 vote refused to issue a writ of habeas corpus. Justice Pitney's majority opinion insisted that habeas corpus was about jurisdiction. In his view, the writ could not issue merely because a court had made legal errors. Why did Holmes disagree with this conclusion? Did he agree that habeas writs cannot issue because of legal errors? What if the court has made constitutional errors? Under what conditions should a federal court determine that a state trial was so unfair as to be the equivalent of no trial at all?

The Frank trial had a tragic aftermath. Confident that the true murderer would soon be discovered, Georgia Governor John Slaton commuted Frank's sentence to life in prison. A few days later, Frank was murdered by a lynch mob. The local paper proclaimed, "We regard the handing of Leo M. Frank . . . as an act of law abiding citizens." Seventy years later, strong evidence surfaced that Jim Conley, the janitor, was the murderer.

JUSTICE PITNEY delivered the opinion of the court:

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In dealing with these contentions, we should have in mind the nature and extent of the duty that is imposed upon a Federal court on application for the writ of habeas corpus under [federal law]. Under the terms of [the relevant] section, in order to entitle the present appellant to the relief sought, it must appear that he is held in custody in violation of the Constitution of the United States. . . . Moreover, if he is held in custody by reason of his conviction upon a criminal charge before a court having plenary jurisdiction over the subject-matter or offense, the place where it was committed, and the person of the prisoner, it results from the nature of the writ itself that he cannot have relief on habeas corpus. Mere errors in point of law, however serious, committed by a criminal court in the exercise of its jurisdiction over a case properly subject to its cognizance, cannot be reviewed by habeas corpus. That writ cannot be employed as a substitute for the writ of error. . . .

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[1] This paragraph relies heavily on Leonard Dinnerstein, *The Leo Frank Case,* rev. ed. (Athens: University of Georgia Press, 2008).

As to the "due process of law" that is required by the 14th Amendment, it is perfectly well settled that a criminal prosecution in the courts of a state, based upon a law not in itself repugnant to the Federal Constitution, and conducted according to the settled course of judicial proceedings as established by the law of the state, so long as it includes notice and a hearing, or an opportunity to be heard, before a court of competent jurisdiction, according to established modes of procedure, is "due process" in the constitutional sense. . . .

[W]e may not review irregularities or erroneous rulings upon the trial, however serious, and that the writ of habeas corpus will lie only in case the judgment under which the prisoner is detained is shown to be absolutely void for want of jurisdiction in the court that pronounced it, either because such jurisdiction was absent at the beginning, or because it was lost in the course of the proceedings. And since no question is made respecting the original jurisdiction of the trial court, the contention is and must be that by the conditions that surrounded the trial, and the absence of defendant when the verdict was rendered, the court was deprived of jurisdiction to receive the verdict and pronounce the sentence.

But it would be clearly erroneous to confine the inquiry to the proceedings and judgment of the trial court. The laws of the state of Georgia (as will appear from decisions elsewhere cited) provide for an appeal in criminal cases to the supreme court of that state upon divers grounds, including such as those upon which it is here asserted that the trial court was lacking in jurisdiction. And while the 14th Amendment does not require that a state shall provide for an appellate review in criminal cases, it is perfectly obvious that where such an appeal is provided for, and the prisoner has had the benefit of it, the proceedings in the appellate tribunal are to be regarded as a part of the process of law under which he is held in custody by the state, and to be considered in determining any question of alleged deprivation of his life or liberty contrary to the 14th Amendment.

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It follows as a logical consequence that where, as here, a criminal prosecution has proceeded through all the courts of the state, including the appellate as well as the trial court, the result of the appellate review cannot be ignored when afterwards the prisoner applies for his release on the ground of a deprivation of Federal rights sufficient to oust the state of its jurisdiction to proceed to judgment and execution against him. This is not a mere matter of comity, as seems to be supposed. The rule stands upon a much higher plane, for it arises out of the very nature and ground of the inquiry into the proceedings of the state tribunals, and touches closely upon the relations between the state and the Federal governments.

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[T]he due process of law guaranteed by the 14th Amendment has regard to substance of right, and not to matters of form or procedure; that it is open to the courts of the United States, upon an application for a writ of habeas corpus, to look beyond forms and inquire into the very substance of the matter, to the extent of deciding whether the prisoner has been deprived of his liberty without due process of law, and for this purpose to inquire into jurisdictional facts, whether they appear upon the record or not; that an investigation into the case of a prisoner held in custody by a state on conviction of a criminal offense must take into consideration the entire course of proceedings in the courts of the state, and not merely a single step in those proceedings; and that it is incumbent upon the prisoner to set forth in his application a sworn statement of the facts concerning his detention and by virtue of what claim or authority he is detained,—we proceed to consider the questions presented.

1. And first, the question of the disorder and hostile sentiment that are said to have influenced the trial court and jury to an extent amounting to mob domination.

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. . . Dealing with the narrative . . . , it is clearly appears to be only a reiteration of allegations that appellant had a right to submit, and did submit, first to the trial court, and afterwards to the supreme court of the state, as a ground for avoiding the consequences of the trial; that the allegations were considered by those courts, successively, at times and places and under circumstances wholly apart from the atmosphere of the trial, and free from any suggestion of mob domination, or the like; and that the facts were examined by those courts not only upon the affidavits and exhibits submitted in behalf of the

prisoner which are embodied in his present petition as a part of his sworn account of the causes of his detention, but also upon rebutting affidavits submitted in behalf of the state, and which, for reasons not explained, he has not included in the petition. As appears from the prefatory statement, the allegations of disorder were found by both of the state courts to be groundless except in a few particulars as to which the courts ruled that they were irregularities not harmful in fact to defendant, and therefore insufficient in law to avoid the verdict. . . .

Whatever question is raised about the jurisdiction of the trial court, no doubt is suggested but that the supreme court had full jurisdiction to determine the matters of fact and the questions of law arising out of this alleged disorder; nor is there any reason to suppose that it did not fairly and justly perform its duty. . . .

. . . [T]he essential question before us, . . . is not the guilt or innocence of the prisoner, or the truth of any particular fact asserted by him, but whether the state, taking into view the entire course of its procedure, has deprived him of due process of law. This familiar phrase does not mean that the operations of the state government shall be conducted without error or fault in any particular case, nor that the Federal courts may substitute their judgment for that of the state courts, or exercise any general review over their proceedings, but only that the fundamental rights of the prisoner shall not be taken from him arbitrarily or without the right to be heard according to the usual course of law in such cases.

We, of course, agree that if a trial is in fact dominated by a mob, so that the jury is intimidated and the trial judge yields, and so that there is an actual interference with the course of justice, there is, in that court, a departure from due process of law in the proper sense of that term. And if the state, supplying no corrective process, carries into execution a judgment of death or imprisonment based upon a verdict thus produced by mob domination, the state deprives the accused of his life or liberty without due process of law.

But the state may supply such corrective process as to it seems proper. Georgia has adopted the familiar procedure of a motion for a new trial, followed by an appeal to its supreme court, not confined to the mere record of conviction, but going at large, and upon evidence adduced outside of that record, into the question whether the processes of justice have been interfered with in the trial court. . . .

Such an appeal was accorded to the prisoner in the present case in a manner and under circumstances already stated, and the supreme court, upon a full review, decided appellant's allegations of fact, so far as matters now material are concerned, to be unfounded. Owing to considerations already adverted to (arising not out of comity merely, but out of the very right of the matter to be decided, in view of the relations existing between the states and the Federal government), we hold that such a determination of the facts as was thus made by the court of last resort of Georgia respecting the alleged interference with the trial through disorder and manifestations of hostile sentiment cannot, in this collateral inquiry, be treated as a nullity, but must be taken as setting forth the truth of the matter; certainly until some reasonable ground is shown for an inference that the court which rendered it either was wanting in jurisdiction, or at least erred in the exercise of its jurisdiction; and that the mere assertion by the prisoner that the facts of the matter are other than the state court, upon full investigation, determined them to be, will not be deemed sufficient to raise an issue respecting the correctness of that determination; especially not, where the very evidence upon which the determination was rested in withheld by him who attacks the finding.

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The Georgia courts, in the present case, proceeded upon the theory that Frank would have been entitled to this relief had his charges been true, and they refused a new trial only because they found his charges untrue save in a few minor particulars not amounting to more than irregularities, and not prejudicial to the accused. There was here no denial of due process of law.

We come, next, to consider the effect to be given to the fact, admitted for present purposes, that Frank was not present in the court room when the verdict was rendered, his presence having been waived by his counsel, but without his knowledge or consent. . . .

It is insisted that the enforced absence of Frank at that time was not only a deprivation of trial by jury, but was equally a deprivation of due process of law within the meaning of the Amendment, in that

it took from him at a critical stage of the proceeding the right or opportunity to be heard. But repeated decisions of this court have put it beyond the range of further debate that the 'due process' clause of the 14th Amendment has not the effect of imposing upon the states any particular form or mode of procedure, so long as the essential rights of notice and a hearing, or opportunity to be heard, before a competent tribunal, are not interfered with. Indictment by grand jury is not essential to due process. . . .

Our conclusion upon this branch of the case is, that the practice established in the criminal courts of Georgia that a defendant may waive his right to be present when the jury renders its verdict, and that such waiver may be given after as well as before the event, and is to be inferred from the making of a motion for new trial upon other grounds alone, when the facts respecting the reception of the verdict are within the prisoner's knowledge at the time of making that motion, is a regulation of criminal procedure that it is within the authority of the state to adopt. In adopting it, the state declares in effect, as it reasonably may declare, that the right of the accused to be present at the reception of the verdict is but an incident of the right of trial by jury; and since the state may, without infringing the 14th Amendment, abolish trial by jury, it may limit the effect to be given to an error respecting one of the incidents of such trial. The presence of the prisoner when the verdict is rendered is not so essential a part of the hearing that a rule of practice permitting the accused to waive it, and holding him bound by the waiver, amounts to a deprivation of 'due process of law.'

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JUSTICE HOLMES, dissenting,

JUSTICE HUGHES and I are of opinion that the judgment should be reversed. . . .

. . . [H]abeas corpus cuts through all forms and goes to the very tissue of the structure. It comes in from the outside, not in subordination to the proceedings, and although every form may have been preserved, opens the inquiry whether they have been more than an empty shell.

The argument for the appellee in substance is that the trial was in a court of competent jurisdiction, that it retains jurisdiction although, in fact, it may be dominated by a mob, and that the rulings of the state court as to the fact of such domination cannot be reviewed. But the argument seems to us inconclusive. Whatever disagreement there may be as to the scope of the phrase "due process of law," there can be no doubt that it embraces the fundamental conception of a fair trial, with opportunity to be heard. Mob law does not become due process of law by securing the assent of a terrorized jury. We are not speaking of mere disorder, or mere irregularities in procedure, but of a case where the processes of justice are actually subverted. In such a case, the Federal court has jurisdiction to issue the writ. The fact that the state court still has its general jurisdiction and is otherwise a competent court does not make it impossible to find that a jury has been subjected to intimidation in a particular case. The loss of jurisdiction is not general, but particular, and proceeds from the control of a hostile influence.

When such a case is presented, it cannot be said, in our view, that the state court decision makes the matter *res judicata*. The state acts when, by its agency, it finds the prisoner guilty and condemns him. We have held in a civil case that it is no defense to the assertion of the Federal right in the Federal court that the state has corrective procedure of its own—that still less does such procedure draw to itself the final determination of the Federal question. . . . We see no reason for a less liberal rule in a matter of life and death. When the decision of the question of fact is so interwoven with the decision of the question of constitutional right that the one necessarily involves the other, the Federal court must examine the facts. . . . Otherwise, the right will be a barren one. . . .

To put an extreme case and show what we mean, if the trial and the later hearing before the supreme court had taken place in the presence of an armed force known to be ready to shoot if the result was not the one desired, we do not suppose that this court would allow itself to be silenced by the suggestion that the record showed no flaw. To go one step further, suppose that the trial had taken place under such intimidation, and that the supreme court of the state, on writ of error, had discovered no error in the record, we still imagine that this court would find a sufficient one outside of the record, and that it would not be disturbed in its conclusion by anything that the supreme court of the state might have said. . . .

The single question in our minds is whether a petition alleging that the trial took place in the midst of a mob savagely and manifestly intent on a single result is shown on its face unwarranted, by the specifications, which may be presumed to set forth the strongest indications of the fact at the petitioner's command. This is not a matter for polite presumptions; we must look facts in the face. Any judge who has sat with juries knows that, in spite of forms, they are extremely likely to be impregnated by the environing atmosphere. And when we find the judgment of the expert on the spot,—of the judge whose business it was to preserve not only form, but substance—to have been that if one juryman yielded to the reasonable doubt that he himself later expressed in court as the result of most anxious deliberation, neither prisoner nor counsel would be safe from the rage of the crowd, we think the presumption overwhelming that the jury responded to the passions of the mob. Of course we are speaking only of the case made by the petition, and whether it ought to be heard. Upon allegations of this gravity in our opinion it ought to be heard, whatever the decision of the state court may have been, and it did not need to set forth contradictory evidence, or matter of rebuttal, or to explain why the motions for a new trial and to set aside the verdict were overruled by the state court. There is no reason to fear an impairment of the authority of the state to punish the guilty. We do not think it impracticable in any part of this country to have trials free from outside control. But to maintain this immunity it may be necessary that the supremacy of the law and of the Federal Constitution should be vindicated in a case like this. It may be that on a hearing a different complexion would be given to the judge's alleged request and expression of fear. But supposing the alleged facts to be true, we are of opinion that if they were before the supreme court, it sanctioned a situation upon which the courts of the United States should act; and if, for any reason, they were not before the supreme court, it is our duty to act upon them now, and to declare lynch law as little valid when practised by a regularly drawn jury as when administered by one elected by a mob intent on death.