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Chief Judge Charles S. Desmond

William J. Brennan Jr.
United States Supreme Court

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A VERY large legion indeed shares my bias for Chief Judge Desmond, my warm personal friend. Only today as I write this, I find the morning's New York Times editorializing that "For generations the Court of Appeals has been one of the most highly respected courts in the United States." A long line of "judges of the highest caliber," as the Times noted, has made that court's superior distinction a byword in and out of New York for over a century.

Judge Desmond has long held a secure place among that select number. His tenure as Chief Judge has only highlighted the qualities so evident since he first came to the court: massive common sense, downright forcefulness, an obvious lack of subtlety, and an abiding instinct for fair play. His career has been wholly faithful to his own definition of the good judge:

For better or for worse we have committed ourselves, we have given our lives and such abilities as we have to furthering the great cause of justice. I like to think that we are something more than just work-a-day practitioners. I think we are keepers of a dream for our time, one of the oldest, the best dreams of the human race, a dream that was old when the world was young, a dream that will never die, a dream of open courts dispensing equal justice, the dream of peace and good will through law.¹

The quarter century that Judge Desmond has graced the Court of Appeals has witnessed lively ferment for the improvement of judicial administration. He has been and continues to be in the forefront of the valiants who have recognized that our modern complex economy and society demands sometimes novel tools of judicial management; the cause of prompt efficient justice in the free courts of a free society, he has said, "should be central to the democratic aspirations of Americans."² It is not coincidence that during his tenure as Chief Judge the New York Legislature changed his title from Chief Judge of the Court of Appeals to Chief Judge of the State of New York, a recognition of the vital role of the new order of judges, the administrative judges who are respected for accomplishments in bettering justice through administration as well as for judicial accomplishments in the field of substantive law. Because New York has "the most complicated court system of any jurisdiction in the world,"³ his suggested remedies have been bold and farsighted. Perhaps his program for eliminating civil jury trials has the farthest reach. Many, like me, have reservations whether this most drastic change would be the answer to mounting calendars and protracted delays in the disposition of civil causes, particularly automobile accident suits. But the serious debate the proposal has stimulated throughout the country is the measure of the respect and regard for its source.

His search for better methods has not been limited to his own state. Over the past decade, I have had the privilege of participating with him in New York

1. Desmond, "Musings," 54 L. Library J. 29, 34 (1961).
 2. 18 Bar Bulletin, N.Y. County Lawyers Ass'n, 135, 137 (1961).
 3. Desmond, "Musings," 54 L. Library J. 29, 32 (1961).

University Law School's Seminar for Appellate Judges. This Seminar attracts two dozen judges annually, one man from a court, from the highest state and federal courts and for two weeks, as he has said, "provides for a brand-new kind of friendly exchange of ideas among judges from the farthest part of this country."⁴ I have also had the privilege of participating with him in exchanges with British judges to canvass the appellate and criminal procedures of our two countries.

But improved judicial administration is only one of his interests. He has also urged bar integration as a proved technique for maintaining high professional standards. He has stirred a debate over the adequacy and fairness of bar examinations. He has even challenged the law teachers to bring law school curricula abreast of changing law by extending law school training to four years if need be. In sum, his contributions have marked many trails so well as to challenge his successors to mark them better.

These wide ranging activities reflect his deep conviction that our federalism cannot function effectively unless every state has a strong state bench and a strong state bar. But he recognizes that sometimes the federal courts also have a role in state litigation, that the state and federal courts "are not foreign to each other . . . [they are] courts of the same country, having jurisdiction partly different and partly concurrent."⁵ Thus he has not been disturbed by the extension of federal constitutional standards affecting state criminal prosecutions which has occurred during his quarter century on the Court of Appeals. Indeed he has said: "There has been too much ranting by those, sometimes in the judiciary, who regard every such activity of a federal court as a mortal affront to a state . . ."⁶ He is, however, an outspoken critic of the federal habeas corpus jurisdiction as applied to state convicted prisoners. He has proposed the repeal of that remedy. He believes that the federal remedy as interpreted and applied today implies the assumption that federal court protection is needed because of the inadequacy of state court protection of rights secured by the federal constitution. He emphatically rejects this as a reason for the remedy. He has said: "Every conscientious state court judge is irked by the covert suggestion that he needs to be watched closely lest he deviously steal away the citizen's rights,"⁷ and he has asked "Where did the idea come from that the state court judges are less sensitive to these questions? . . . [That] the federal district judges take much more seriously the protection of fundamental human rights because the state courts in many instances are manned by persons not so persuaded."⁸

I can fully appreciate this point of view; indeed I shared it when I was a state judge. But I no longer agree with it. Perhaps it is because from my present

4. *Id.* at 31.

5. *Clafin v. Houseman*, 93 U.S. 130, 137 (1876).

6. Desmond, *Federal Habeas Corpus Review of State Court Convictions*, 50 *Georgetown L.J.* 755, 757 (1962).

7. Desmond, *Federal Habeas Corpus Review of State Court Convictions—Proposals for Reform*, 9 *Utah L. Rev.* 18, 25 (1964).

8. Desmond, *Federal Habeas Corpus*, 9 *Utah L. Rev.* 43 (1964).

vantage point the vista of all fifty states seems different. New York is only one of a bare dozen of states which provide a post conviction procedure for state prisoners at least as broad in scope as the federal remedy. Thus state procedures which are simply and easily invoked, which are sufficiently comprehensive to embrace all federal constitutional claims, which eschew rigid and technical doctrines of forfeiture, waiver or default, which provide for fact hearings to resolve disputed factual issues, which provide for decisions supported by opinions or fact findings and conclusions of law, and which disclose the grounds of decision and the resolution of disputed facts, are, unfortunately; the exception and not the rule. Of course no judge, federal or state, can view with satisfaction the channeling of a large part of state criminal business to federal trial courts. But the states have not generally adopted remedies which would minimize the flow. If adequate state procedures were generally adopted, much would be done to remove the irritant of participation by the federal district courts in state criminal procedure. However, without the federal remedy, our boast that our system of justice will not tolerate denial of a state prisoner's meritorius constitutional claims would too often be "merely empty rhetoric, sounding a word of promise to the ear, sure to be disappointing to the hope."⁹ As I see it, if the evolution in the coverage of the fourteenth amendment and in the scope of federal habeas corpus is not to pull the federal judiciary increasingly into state criminal administration, not just some but all of the states must provide broader procedures more hospitable to the federal constitutional claims of state prisoners.

I conclude as I began. This scholarly, gentle man is the complete jurist. I congratulate New York on the good fortune that has commanded his distinguished and devoted services for a quarter century. I am grateful to the Buffalo Law Review for affording me the privilege of joining in the richly deserved tribute paid him today.

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9. *Baker v. Carr*, 369 U.S. 186, 270 (1962).