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## COMMENTS

### THE RELATIONSHIP OF STATE AND LOWER FEDERAL COURTS IN CRIMINAL CONSTITUTIONAL LITIGATION

J. RAND CLIFFE

Although a dual judicial system in America antedated the adoption of the Constitution,<sup>1</sup> the concept of coordinate, and often competing, courts between those systems was the unique product of that document. "The system has proved amazingly workable,"<sup>2</sup> but it has not been trouble-free. Even at this late date questions arise concerning the relative positions of state and lower federal courts. Perhaps the most important area in which these questions have arisen is that of federal question jurisdiction, especially the validity of state criminal statutes and federal constitutional rights, for these represent an area in which both the right of the sovereign state to regulate the conduct of parties within its boundaries and the right of those parties to be free from unconstitutional regulations of their conduct may be impinged. It is the purpose of this paper to expose the dangers of leaving unsettled the issue of what effect lower federal court judgments should have in subsequent state court cases.

#### THE GENESIS AND CRISIS OF THE STATE-LOWER FEDERAL COURT RELATIONSHIP

From the Constitutional Convention to Reconstruction the state-federal judicial conflict was a one-sided affair. The courts of the sovereign states were considered by many at the convention to be capable of handling the new jurisdiction and consequent increased caseload to be created by the Constitution.<sup>3</sup> As a compromise measure, it was decided that Congress could create a system of lower federal courts as it felt the need. This was done almost immediately in the Judiciary Act of 1789.<sup>4</sup> But the federal courts which were created were inferior in every aspect. Congress gave them no habeas corpus jurisdiction over state prisoners,<sup>5</sup> denied them federal question jurisdiction and it prohibited them from enjoining state court proceedings.<sup>6</sup> There was little reason

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<sup>1</sup> 1 J. MOORE, FEDERAL PRACTICE ¶ 0.6[2-1], at 207 (2d ed. 1959).

<sup>2</sup> *Id.* at 201.

<sup>3</sup> C. WRIGHT, LAW OF FEDERAL COURTS § 1, at 2 (2d ed. 1970) *citing* 1 FARRAND, THE RECORDS OF THE FEDERAL CONVENTION 104 (1911).

<sup>4</sup> Act of September 24, 1789, ch. 20, 1 Stat. 73.

<sup>5</sup> Act of September 24, 1789, ch. 20, § 14, 1 Stat. 82.

<sup>6</sup> Act of March 2, 1793, ch. 22, § 5, 1 Stat. 334.

for conflict between state courts and lower federal courts because there was little concurrent jurisdiction and no way for lower federal courts to either arrest a state court proceeding or nullify its judgment.

Although state courts steadfastly maintained the right to administer their own laws, it was recognized early that lower federal courts might assert the right to declare a state statute unconstitutional as an incident to one of its jurisdictional powers.<sup>7</sup> Real conflict did not appear, however, until Reconstruction, when fears of a possible deprivation of constitutional privileges of state defendants led to the enactment of the fourteenth amendment<sup>8</sup> and the extension of federal habeas corpus jurisdiction to include state prisoners.<sup>9</sup> The lower federal courts were empowered to temporarily enjoin the enforcement of a state statute,<sup>10</sup> even on an *ex parte* hearing, and in 1875 the lower federal courts were finally given original federal question jurisdiction.<sup>11</sup> The result of this eight year period of federal jurisdictional expansion was a shift of power from the state to the federal courts, making them the "primary and dominant instruments for vindicating rights given by the Constitution . . . ."<sup>12</sup>

The states still bitterly resisted federal intrusions, especially with regard to the enforcement of their criminal statutes. The reaction was immediate in 1908 when the Supreme Court in *Ex parte Young*<sup>13</sup> and *Hunter v. Wood*<sup>14</sup> held that a single federal judge could enjoin a state official from enforcing an alleged unconstitutional state statute<sup>15</sup> and that federal habeas corpus was a proper remedy for anyone prosecuted in violation of that injunction.<sup>16</sup> An abortive attempt was made that year to remove all original federal question jurisdiction from federal courts,<sup>17</sup> for this was the jurisdiction most often utilized to attack the constitutionality of the state statutes. This action failing, the state court interests rallied behind the well phrased dissent of Mr. Justice Harlan in *Ex parte Young* to force a compromise. Mr. Justice Harlan had stated:

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<sup>7</sup> II C. WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 96 (1922).

<sup>8</sup> U.S. Const. amend. XIV, § 1, ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law. . . ."

<sup>9</sup> Act of February 5, 1867, ch. 28, § 1, 14 Stat. 385 (now 28 U.S.C. § 2241 [1970]).

<sup>10</sup> Act of June 1, 1872, ch. 255, § 7, 17 Stat. 197.

<sup>11</sup> Act of March 3, 1875, ch. 137, § 1, 18 Stat. 470 (now 28 U.S.C. § 1331 [1970]). Lower federal courts were given federal question jurisdiction in 1801, Act of February 13, 1801, ch. 4, § 11, 2 Stat. 92, but the power was withdrawn almost immediately. Act of March 8, 1802, ch. 8, § 1, 2 Stat. 132.

<sup>12</sup> Frankfurter, *Distribution of Judicial Power Between United States and States Courts*, 13 CORNELL L.Q. 499, 509 (1928).

<sup>13</sup> 209 U.S. 123, 28 S. Ct. 441, 52 L. Ed. 714 (1908).

<sup>14</sup> 209 U.S. 205, 28 S. Ct. 472, 52 L. Ed. 747 (1908).

<sup>15</sup> *Ex parte Young*, 209 U.S. 123, 148, 28 S. Ct. 441, 449, 52 L. Ed. 714, 724 (1908).

<sup>16</sup> *Hunter v. Wood*, 209 U.S. 205, 210, 28 S. Ct. 472, 474, 52 L. Ed. 747, 754 (1908).

<sup>17</sup> See 42 CONG. REC. 4849 (1908).

[T]he courts of the States are under an obligation equally strong with that resting upon the courts of the Union to respect and enforce the provisions of the Federal Constitution as the Supreme Law of the Land . . . . We must assume—a decent respect for the States requires us to assume—that the state courts will enforce every right secured by the Constitution. If they fail to do so, the party complaining has a clear remedy . . . by writ of error to [the United States Supreme Court].<sup>18</sup>

Mr. Justice Harlan argued that if the decision of the majority were firmly established:

It would enable the subordinate Federal courts to supervise and control the official action of the states as if they were “dependencies” . . . [and] . . . would place the states of the union in a condition of inferiority never dreamed of when the Constitution was adopted . . . .<sup>19</sup>

The statute which resulted was a paragon of compromise. Thereafter, a single federal district judge was without jurisdiction to hear a request for injunctive relief from the enforcement of a state statute alleged to be unconstitutional. Rather, three judges, one of whom was a circuit judge, would be convened as a special district court with a right of direct appeal to the Supreme Court.<sup>20</sup> It was felt that this would not only prevent the possibility that a single improvident federal judge would nullify state legislation<sup>21</sup> but would also assuage the feelings of the state court supporters by having a court of higher dignity hear the suit.<sup>22</sup> The problem was settled; a special three-judge court was required to enjoin state enforcement of a state statute which that court declared to be unconstitutional, and their decision was determinative.<sup>23</sup>

The subsequent acquiescence of the state courts and prosecutors appears strange in light of the furor which followed *Young*. Regardless of its composition, the three-judge court was still only a district court.<sup>24</sup>

<sup>18</sup> *Ex parte Young*, 209 U.S. 123, 175, 28 S. Ct. 441, 460, 52 L. Ed. 714, 735 (1908).

<sup>19</sup> *Id.* at 175, 28 S. Ct. at 460, 52 L. Ed. at 735 (1908).

<sup>20</sup> Act of June 18, 1910, ch. 309, § 17, 36 Stat. 557, as amended, 28 U.S.C. §§ 1253, 2281, 2284 (1970).

<sup>21</sup> *Phillips v. United States*, 312 U.S. 246, 250, 61 S. Ct. 480, 483, 85 L. Ed. 800, 804 (1941); *Jacobs v. Tawes*, 250 F.2d 611, 614 (4th Cir. 1957); Frankfurter, *Distribution of Judicial Power Between United States and States Courts*, 13 CORNELL L.Q. 499, 510 (1928); Comment, *The Use of the Federal Injunction in Constitutional Litigation*, 43 HARV. L. REV. 426, 445 (1930).

<sup>22</sup> *Ex parte Collins*, 277 U.S. 565, 569, 48 S. Ct. 585, 586, 72 L. Ed. 990, 992 (1928); Comment, *The Use of the Federal Injunction in Constitutional Litigation*, 43 HARV. L. REV. 426, 445 (1930).

<sup>23</sup> 45 CONG. REC. 7258 (1910) (remarks of Sen. Overman of N.C.): “Whenever one judge stands up in a State and enjoins the governor and the attorney-general, the people resent it, and public sentiment is stirred, as it was in my State when there was almost a rebellion, whereas if three judges declare that a state statute is unconstitutional, the people would rest easy under it.”

<sup>24</sup> *Remick Music Corp. v. Interstate Hotel Co.*, 58 F. Supp. 523, 541 (D. Neb. 1944),

The suits it heard were usually pursuant to its federal question jurisdiction. Yet this jurisdiction was shared with the state courts, for the 1875 statute had failed to make it exclusive and the omission is interpreted as a consent to the concurrent jurisdiction of the state courts.<sup>25</sup> The effect was that after 1910, state courts were recognizing a superior right in a federal court of equal rank<sup>26</sup> to determine the constitutionality of the states' statutes merely because of a procedural alteration to a direct appeal and the addition of two members to the court.

In 1913 the state forces had succeeded in enacting a procedure whereby the state courts could become the primary adjudicators of the validity of their own criminal statutes by initiating a proceeding in the state court to determine the validity of the state statute.<sup>27</sup> Upon notice, the three-judge court would have to stay its proceeding pending the diligent disposition of the state court case. However, acceptance of federal court supremacy was demonstrated by the fact that this right was not invoked in any of the 108 *Young* suits heard from 1913 to 1926<sup>28</sup> and the statute is now deemed "virtually a dead letter."<sup>29</sup>

#### INTRODUCTION TO THE PROBLEM: THE REACTION TO LOWER FEDERAL COURT JUDGMENTS ON NON-CRIMINAL QUESTIONS

From 1910 to 1967 the states exhibited a particular respect for the decisions of three-judge courts.<sup>30</sup> During this period the question of what weight a lower federal court decision should have in state courts arose frequently. On principle, it may seem that if the Supreme Court has not spoken on a particular federal question, the decision of a lower federal court should be controlling.<sup>31</sup> But a majority of state cases held that decisions of lower federal courts on federal questions were not

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*aff'd*, 157 F.2d 744 (8th Cir. 1946), *cert. denied*, 329 U.S. 809, 67 S. Ct. 622, 91 L. Ed. 691 (1947).

<sup>25</sup> I. J. MOORE, FEDERAL PRACTICE ¶ 6(3), at 231 (2d ed. 1959); *Claffin v. Houseman*, 93 U.S. 130, 136, 23 L. Ed. 833, 838 (1876); *Houston v. Moore*, 18 U.S. (5 Wheat) 1, 25, 5 L. Ed. 19, 25 (1820).

<sup>26</sup> *Kline v. Burke Construction Co.*, 260 U.S. 226, 235, 43 S. Ct. 79, 83, 67 L. Ed. 226, 232 (1922). Referring to state courts and federal district courts, the Court stated: "The rank and authority of the courts are equal . . ."

<sup>27</sup> Act of March 4, 1913, 37 Stat. 1013 (now 28 U.S.C. § 2284[5] [1970]).

<sup>28</sup> Frankfurter, *Distribution of Judicial Power Between United States and States Courts*, 13 CORNELL L.Q. 499, 518 (1928).

<sup>29</sup> C. WRIGHT, LAW OF FEDERAL COURTS § 51, at 194 (2d ed. 1970).

<sup>30</sup> This writer was unable to find any instance during the period from 1910-1967 in which a state court defendant was prosecuted under a statute previously declared unconstitutional by a three-judge court. *But cf.* *Nobble v. Dibble*, 205 P. 1049 (Wash. 1922), one instance of state court disregarding a three-judge court as to a noncriminal state statute.

<sup>31</sup> "[P]ending review by the Supreme Court, the decisions of the subordinate federal courts on constitutional questions have the authority of the supreme law of the land and must be obeyed." *Bush v. Orleans Parish School Bd.*, 188 F. Supp. 916, 925 (E.D. La.), *aff'd*, 365 U.S. 569, 81 S. Ct. 754, 5 L. Ed.2d 806 (1961). *See* 20 AM. JUR. 2d *Courts* § 230 (1965).

binding upon them.<sup>32</sup> Perhaps the best reasoned argument is that state courts themselves form an integral part of the federal judicial system.<sup>33</sup> Not only do they have concurrent federal question jurisdiction but they are also bound under the supremacy clause to declare any of their statutes unconstitutional that they find to be so.<sup>34</sup>

Another argument forwarded was based upon the fact that state courts are not subject to appellate review by the lower federal courts.<sup>35</sup> Thus, they are coordinate courts with the lower federal courts and are not obliged to follow lower federal court decisions or to give them any more weight than the decisions of any other court which has no binding authority upon them. Such decisions would be merely persuasive, if well reasoned, and not binding.<sup>36</sup>

There were state courts which stated that decisions of lower federal courts are binding upon them, but they were not as unified in their reasoning as the courts which held the opposite way. Some stated that the binding authority of lower federal courts stems from the fact that federal courts have the ultimate right to decide a federal issue.<sup>37</sup> This reasoning apparently extended to lower federal courts the same aura of authority associated with the Supreme Court by virtue of their connection with that Court.<sup>38</sup> Other state courts offered no explanation as to why they felt bound, seemingly extending the analogy of state court supremacy with regards to state law to federal courts and the federal question field.<sup>39</sup>

<sup>32</sup> See *State v. Cissna*, 270 S.W. 963, 964 (Ark. 1925); *Rohr Aircraft Corp. v. County of San Diego*, 336 P.2d 521, 524 (Cal. 1959); *Colorado & S. Ry. v. Davis*, 127 P. 249 (Colo. 1912); *Kenna v. Calumet Hammond & S.E.R.R.*, 206 Ill. App. 17, 25 (1917), *aff'd*, 120 N.E. 259 (Ill. 1918); *Iowa Nat'l Bank v. Stewart*, 232 N.W. 445 (Iowa 1930), *rev'd on other grounds sub nom.*, *Iowa Des-Moines Nat'l Bank v. Bennett*, 284 U.S. 239, 52 S. Ct. 133, 76 L. Ed. 265 (1931); *Wells v. W. Union Tel. Co.*, 123 N.W. 371, 374 (Iowa 1909); *Brown v. Palmer Clay Prod. Co.*, 195 N.E. 122, 123 (Mass. 1935); *State v. Intoxicating Liquors*, 49 A. 670, 672 (Me. 1901); *Hangeliass v. Dawson*, 45 A.2d 392, 394 (Pa. 1946); *Harrison v. Barngrover*, 72 S.W.2d 971, 974 (Tex. Civ. App.—Beaumont 1934, writ ref'd), *cert. denied*, 294 U.S. 731, 55 S. Ct. 639, 79 L. Ed. 1260 (1955).

<sup>33</sup> *Kenna v. Calumet Hammond & S.E.R.R.*, 206 Ill. App. 17, 25 (1917), *aff'd*, 120 N.E. 259 (Ill. 1918).

<sup>34</sup> *City of Miami Beach v. Lachman*, 71 So. 2d 148, 150 (Fla. 1953), *appeal dismissed*, 348 U.S. 906, 75 S. Ct. 292, 99 L. Ed. 711 (1955).

<sup>35</sup> *Hanna v. Homes Ins. Co.*, 281 F.2d 298, 303 (5th Cir. 1962), *cert. denied*, 365 U.S. 838, 81 S. Ct. 751, 5 L. Ed. 747 (1961); *Young v. Wainwright*, 320 F. Supp. 80, 85 (S.D. Fla. 1970); *England v. Louisiana State Bd. of Med. Examiners*, 194 F. Supp. 521, 522 (E.D. La. 1961), *rev'd on other grounds*, 375 U.S. 411, 84 S. Ct. 461, 11 L. Ed.2d 440 (1964).

<sup>36</sup> *State v. Cissna*, 270 S.W. 963, 964 (Ark. 1925); *Rohr Aircraft Corp. v. County of San Diego*, 336 P.2d 521, 524 (Cal. 1959); *Colorado & S. Ry. v. Davis*, 127 P. 249, 250 (Colo. 1912); *Kenna v. Calumet Hammond & S.E.R.R.*, 206 Ill. App. 17, 26 (1917), *aff'd*, 120 N.E. 259 (Ill. 1918).

<sup>37</sup> "The question of whether a law enacted by the Legislature of a state contravenes the federal Constitution is ultimately a question for the federal courts to determine, and their decision upon that question is binding upon every state court." *Hofer v. Carson*, 203 P. 323, 325 (Ore. 1922); see *Massey v. War Emerg. Co-operative Ass'n*, 39 S.E.2d 907, 912 (S.C. 1946).

<sup>38</sup> Anderson, *The Line Between Federal and State Court Jurisdiction*, 63 MICH. L. REV. 1203, 1212 (1965).

<sup>39</sup> See *Breeding v. Tennessee Valley Authority*, 9 So. 2d 6, 7 (Ala. 1942); *Handy v. Good-*

But the issue has been further confused as to whether all lower federal court judgments are to be given the same effect or whether those dealing exclusively with the constitutionality of state criminal laws might not be of more weight. The reasoning of state courts feeling no constraint to follow the decisions of a lower federal court is not without merit. They simply do not want any authority less than the Supreme Court to effectively nullify the product of a sovereign state's legislative and judicial system.<sup>40</sup> But the lower federal courts have never presumed to establish themselves as superior in any theoretical order of procedure.<sup>41</sup> They are, however, the primary interpreters of a superior federal law and Constitution and as such their decisions have commanded respect.<sup>42</sup> But whether the same supremacy clause which places federal law and the Federal Constitution above state law also elevates lower federal court interpretations of that Constitution is the issue that has increasingly appeared since 1967.

There has been a new rash of state court assertions of independence, most notably with regard to decisions of three-judge courts. For the same arguments previously used against the necessity of following single federal district judges in the earlier general federal question cases has been extended to the previously stable field of three-judge courts and state criminal laws. The effort of the states to redefine their role in constitutional litigation may simply be an anomaly of federalism. But the effect is felt most by those whose rights under state criminal laws are left unsettled because the validity of the law is unsettled.

#### RECENT DEVELOPMENTS: STATE COURT INDEPENDENCE IN CRIMINAL PROSECUTIONS

In *United States ex rel. Lawrence v. Woods*<sup>43</sup> the United States Court of Appeals for the Seventh Circuit affirmed the denial of relator's writ

year *Tire & Rubber Co.*, 160 So. 530 (Ala. 1935); *Smith v. Cowell*, 92 P. 20, 24 (Colo. 1907); *Brenen v. Dahlstrom Metallic Door Co.*, 178 N.Y.S. 846 (A.D. 1919); *Waller v. Eanes' Adm'r*, 157 S.E. 721, 723 (Va. 1921); *Kuchenmeister v. Los Angeles & S.L.R.R.*, 172 P. 725, 726 (Utah 1918).

<sup>40</sup> *Brown v. Palmer Clay Prod. Co.*, 195 N.E. 122, 123 (Mass. 1935), *aff'd*, 297 U.S. 227, 56 S. Ct. 450, 80 L. Ed. 655 (1936); *cf.* *United States v. Bize*, 86 F. Supp. 939, 944 (D. Neb. 1949), stating that a statute which a federal district court has held unconstitutional, should not be regarded as void pending appeal. *Compare* *State v. Intoxicating Liquors*, 49 A. 670, 672 (Me. 1901), *with* *State v. Intoxicating Liquors*, 67 A. 317 (Me. 1907). *Compare* *Noble v. Dibble*, 205 P. 1049 (Wash. 1922), *with* *Douglas v. Noble*, 261 U.S. 165, 43 S. Ct. 303, 67 L. Ed. 590 (1923), *rev'g* 274 F. 672 (W.D. Wash. 1921).

<sup>41</sup> American Law Institute, *STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS* § 1373, at 13 (1968).

<sup>42</sup> *See* *England v. Louisiana State Bd. of Med. Examiners*, 375 U.S. 411, 415, 84 S. Ct. 461, 465, 11 L. Ed.2d 440, 445 (1964); *In re Sandhagen's Estate*, 107 N.Y.S.2d 73, 75 (Sur. Ct. 1951). That the federal courts are generally regarded as the primary interpreters of federal law and the Constitution but their decisions on federal questions are often considered as no more than "persuasive" or "of great weight" is but one of the obvious contradictions in this area.

<sup>43</sup> 432 F.2d 1072 (7th Cir. 1970), *cert. denied*, — U.S. —, 91 S. Ct. 1658, L. Ed.2d 148 (1971).

of habeas corpus. Lawrence had been convicted of violating a city ordinance which was declared unconstitutional by the federal district court in an unrelated case while his appeal was pending.<sup>44</sup> In his opinion Justice Swygert stated:

[B]ecause lower federal courts exercise no appellate jurisdiction over state tribunals, decisions of lower federal courts are not conclusive on state courts.<sup>45</sup>

The relator claimed that the supremacy clause of the Constitution required the state court in a subsequent case to follow the federal court's interpretation of the ordinance and its declaration of invalidity.<sup>46</sup> The court of appeals rejected this contention, citing *State v. Coleman*<sup>47</sup> in which the New Jersey Supreme Court held that a recent decision of the Court of Appeals for the Third Circuit declaring a constitutional right of due process in a criminal prosecution was not binding upon the states within the circuit.<sup>48</sup>

In passing on federal constitutional questions, the state courts and the lower federal courts have the same responsibility and occupy the same position; there is parallelism but not paramountcy for both sets of courts are governed by the same reviewing authority of the Supreme Court.<sup>49</sup>

In citing *Coleman* the court stated, "[W]e have found no federal court decisions dealing directly with the point . . ." of whether a state court is bound under the supremacy clause by a federal district court's ruling that a state statute or municipal ordinance is unconstitutional.<sup>50</sup> Thus *Lawrence* became the primary authority for the most recent line of cases. The court in *Lawrence*, however, overlooked *Owsley v. Peyton*<sup>51</sup> and chose to ignore *Commonwealth v. Negri*<sup>52</sup> in which the Pennsylvania Supreme Court, also in the Third Circuit, adopted the same interpretation which was rejected in *Coleman*. The Pennsylvania court declared that in absence of a Supreme Court opinion, the court of appeals is the ultimate forum of the state for all practical purposes.<sup>53</sup>

<sup>44</sup> *Landry v. Daley*, 280 F. Supp. 968 (N.D. Ill.), *appeal dismissed*, 393 U.S. 220, 89 S. Ct. 455, 21 L. Ed. 2d 392 (1968).

<sup>45</sup> *United States ex rel. Lawrence v. Woods*, 432 F.2d 1072, 1076 (7th Cir. 1970).

<sup>46</sup> *Id.* at 1075.

<sup>47</sup> 214 A.2d 393 (N.J. 1965), *cert. denied*, 383 U.S. 950, 86 S. Ct. 1210, 16 L. Ed.2d 212 (1966).

<sup>48</sup> *Id.* at 403.

<sup>49</sup> *Id.* at 403.

<sup>50</sup> *United States ex rel. Lawrence v. Woods*, 432 F.2d 1072, 1076 (7th Cir. 1970).

<sup>51</sup> 352 F.2d 804, 805 (4th Cir. 1965). "Though state courts may for policy reasons follow the decisions of the Court of Appeals whose circuit includes their state, (citation omitted) they are not obliged to do so." (Footnote omitted.)

<sup>52</sup> 213 A.2d 670 (Pa. 1965).

<sup>53</sup> *Id.* at 672.



The court reasoned that a rejection of the court of appeals' doctrine might result in a serious problem of forum shopping.<sup>54</sup>

The prosecution in *Lawrence* was under a city ordinance; thus, the state court was not opposing a judgment of a three-judge court.<sup>55</sup> However, the *Lawrence* cycle was repeated in Texas when the state court in *Pruett v. State*<sup>56</sup> affirmed appellant's sodomy conviction under a statute which had previously been declared unconstitutional by a three-judge district court.<sup>57</sup> The court in *Pruett* cited *Lawrence* as authority and further pointed out that the declaration of invalidity was not final because it was still on appeal.<sup>58</sup> The federal district court had held that the entire statute was void on its face and had issued an injunction against future prosecutions under the statute<sup>59</sup> but had also dismissed the claim of a party similarly situated to *Pruett*.<sup>60</sup>

The confusion is marked by other recent cases. In *State v. McCluney*<sup>61</sup> a state court again rejected the declaratory judgment of a three-judge court purporting to invalidate a state criminal law.<sup>62</sup> Citing *Lawrence*, the court asserted the *primary* responsibility which state courts have to interpret state laws and the *coordinate* position such courts share with lower federal courts on federal questions.<sup>63</sup>

But there has been no unanimity in the recent cases. In *People v. Stansberry*,<sup>64</sup> *Lawrence* was again cited as the state court affirmed the conviction of defendant based upon evidence procured in a manner previously declared unconstitutional by the court of appeals for that circuit. But the state court narrowed its reliance upon *Lawrence* and its reasoning. It expressed no absolute certainty that a state court is not bound by a lower federal decision. Rather, it noted "a lack of unanimity among the several States. . . ."<sup>65</sup> The court further noted that lower federal courts were in disagreement on the issue at hand and stated

<sup>54</sup> *Id.*

<sup>55</sup> *Cleveland v. United States*, 323 U.S. 329, 332, 65 S. Ct. 280, 281, 89 L. Ed. 274, 279 (1945). The three-judge court statute is inapplicable to suits challenging local ordinances or statutes having only local application.

<sup>56</sup> 463 S.W.2d 191 (Tex. Crim. App. 1970), *appeal dismissed*, — U.S. —, 91 S. Ct. 1379, 28 L. Ed.2d 643, *rehearing denied*, — U.S. —, 91 S. Ct. 2203, 29 L. Ed.2d 690 (1971).

<sup>57</sup> *Buchanan v. Batchelor*, 308 F. Supp. 729 (N.D. Tex. 1970), *vacated sub nom.*, *Wade v. Buchanan*, — U.S. —, 91 S. Ct. 1221, 28 L. Ed.2d 526 (1971).

<sup>58</sup> *Pruett v. State*, 463 S.W.2d 191, 194 (Tex. Crim. App. 1970), *appeal dismissed*, — U.S. —, 91 S. Ct. 1379, 28 L. Ed.2d 643, *rehearing denied*, — U.S. —, 91 S. Ct. 2203, 29 L. Ed.2d 690 (1971).

<sup>59</sup> The injunction issued was merely against future prosecutions by the district attorney of Dallas County. The effect of the court's judgment on all others was no greater than that of a declaratory judgment.

<sup>60</sup> *Buchanan v. Batchelor*, 308 F.Supp. 729 (N.D. Tex. 1970), *vacated sub nom.*, *Wade v. Buchanan*, — U.S. —, 91 S. Ct. 1221, 28 L. Ed.2d 526 (1971).

<sup>61</sup> 180 S.E.2d 419 (N.C. Ct. App. 1971).

<sup>62</sup> *Accord*, *Greene v. State*, 273 A.2d 830, 833 (Md. Ct. Spec. App. 1971).

<sup>63</sup> *State v. McCluney*, 180 S.E.2d 419, 421 (N.C. Ct. App. 1971).

<sup>64</sup> 268 N.E.2d 431 (Ill. 1971).

<sup>65</sup> *Id.* at 433.

that under *these circumstances*, the non-binding rule was the most logical.<sup>66</sup>

However, a Texas court was faced with a Fifth Circuit construction of a constitutional right without contrary holdings in other federal courts. Following the decision in *Robinson v. Beto*<sup>67</sup> the court in *Ex parte Griffith*<sup>68</sup> held that the federal court's interpretation was "now mandatory as a constitutional requirement. . . ."<sup>69</sup>

The federal courts also seem to be somewhat confused, as they might well be. What value is the special jurisdiction of the three-judge court when its decisions may be totally ignored by the state courts? The earlier case of *Owsley v. Peyton*<sup>70</sup> held that a court of appeals' decision interpreting a constitutional right of a state court defendant had no binding effect upon the states within its circuit. Yet following *Pruett*, another Texas district court proceeded upon the opposite assumption. In *Dawson v. Vance*<sup>71</sup> the court upheld the same sodomy statute previously declared unconstitutional in *Buchanan v. Batchelor*.<sup>72</sup> But the opinion of the court was completely oblivious to the many Texas cases<sup>73</sup> which had subsequently ignored *Buchanan v. Batchelor* although recognizing the sensitive nature of an invalidation of a state criminal law.

It is clear that a viable federalism would be seriously impaired, perhaps undermined in time, by precipitate [federal] equitable interference with state prohibition of heinous crimes. For instance: If an equity court declared such a statute unconstitutional for rhetorical overbreadth, could not the general wrong be committed with impunity prior to the redrafting of the statute . . . ?<sup>74</sup>

The answer of course is no; the state courts have demonstrated as much.<sup>75</sup> The problem thus raised is what is the effect of a declaratory judgment that a statute is invalid unaccompanied by an injunction prohibiting enforcement.

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<sup>66</sup> *Id.*

<sup>67</sup> 426 F.2d 797 (5th Cir. 1970).

<sup>68</sup> 457 S.W.2d 60 (Tex. Crim. App. 1970).

<sup>69</sup> *Id.* at 65.

<sup>70</sup> 352 F.2d 804 (4th Cir. 1965).

<sup>71</sup> 329 F. Supp. 1320 (S.D. Tex. 1971).

<sup>72</sup> 308 F. Supp. 729 (N.D. Tex. 1970), *vacated sub nom.*, *Wade v. Buchanan*, — U.S. —, 91 S. Ct. 1221, 28 L. Ed.2d 526 (1971).

<sup>73</sup> *Everette v. State*, 465 S.W.2d 162 (Tex. Crim. App. 1971); *Pruett v. State*, 463 S.W.2d 191 (Tex. Crim. App. 1970), *appeal dismissed*, — U.S. —, 91 S. Ct. 1379, 28 L. Ed.2d 643, *rehearing denied*, — U.S. —, 91 S. Ct. 2203, 29 L. Ed.2d 690 (1971); *Langston v. State*, 460 S.W.2d 909 (Tex. Crim. App. 1970); *Oliver v. State*, 459 S.W.2d 824 (Tex. Crim. App. 1970).

<sup>74</sup> *Dawson v. Vance*, 329 F. Supp. 1320, 1326 (S.D. Tex. 1971).

<sup>75</sup> *See Everette v. State*, 465 S.W.2d 162 (Tex. Crim. App. 1971); *Pruett v. State*, 463 S.W.2d 191 (Tex. Crim. App. 1970), *appeal dismissed*, — U.S. —, 91 S. Ct. 1379, 28 L. Ed.2d 643, *rehearing denied*, — U.S. —, 91 S. Ct. 2203, 29 L. Ed.2d 690 (1971); *Langston v. State*, 460 S.W.2d 909 (Tex. Crim. App. 1970); *Oliva v. State*, 459 S.W.2d 824 (Tex. Crim. App. 1970).

The three-judge court act antedated the Declaratory Judgment Act<sup>76</sup> and has not been substantially altered since. The three-judge court is thus still to be convened only when an injunction is sought,<sup>77</sup> but must consider independently a request for declaratory relief<sup>78</sup> and a declaratory judgment may be granted without an injunction.<sup>79</sup> This is in fact a favored method of doing justice to the parties while avoiding excessive conflict. Also, because an injunction is only to be issued when there is no adequate remedy at law,<sup>80</sup> some courts have held it a necessity to first issue the declaratory judgment without an injunction.<sup>81</sup> Then if the state persists in attempting to prosecute the party who has obtained the judgment, or any other party similarly situated, the federal court could enjoin the proceedings instituted against him.<sup>82</sup>

The effect, then, of a declaratory judgment invalidating a state criminal law is to allow further state prosecutions under the statute of only those persons who are not similarly situated to the party obtaining the judgment. Thus, the state may continue to prosecute those parties whose conduct is subject to proper regulation by the state,<sup>83</sup> for it is not enough that a statute is unconstitutional, it must be so as to the party who claims a deprivation of a constitutional privilege.<sup>84</sup>

In *Babbitz v. McCann*<sup>85</sup> the petitioner was granted a judgment declaring Wisconsin's anti-abortion law to be unconstitutional, but his request for an injunction against future prosecutions under the law was denied. The court expressed confidence that the state courts would vindicate Dr. Babbitz's constitutional rights and a reluctance to enjoin

<sup>76</sup> Declaratory Judgment Act, ch. 512, 48 Stat. 955 (1934) (now 28 U.S.C. §§ 2201-2202 [1970]).

<sup>77</sup> *Astro Cinema Corp. v. Mackell*, 422 F.2d 293, 298 (2d Cir. 1970).

<sup>78</sup> *Zwickler v. Koota*, 389 U.S. 241, 254, 88 S. Ct. 391, 399, 19 L. Ed.2d 444, 454 (1967).  
*But cf. Samuels v. Mackell*, — U.S. —, 91 S. Ct. 764, 27 L. Ed.2d 688 (1971).

<sup>79</sup> *Id.*

<sup>80</sup> *Terrace v. Thompson*, 263 U.S. 197, 44 S. Ct. 15, 68 L. Ed. 255 (1923); Act of Sept. 24, 1789, ch. 20, § 16, 1 Stat. 82.

<sup>81</sup> *Gregory v. Gaffney*, 322 F. Supp. 238, 240 (W.D.N.C. 1971); *Babbitz v. McCann*, 310 F. Supp. 293, 296 (E.D. Wis.), *appeal dismissed*, 400 U.S. 1, 91 S. Ct. 12, 27 L. Ed.2d 1 (1970); *Atkins v. City of Charlotte*, 296 F. Supp. 1068 (D.C. N.C. 1969).

<sup>82</sup> *See, e.g., Babbitz v. McCann*, 320 F. Supp. 219, 221 (E.D. Wis. 1970), *vacated*, — U.S. —, 91 S. Ct. 1375, 28 L. Ed.2d 643 (1971). *See also Moffman v. Lehnhausen*, 269 N.E.2d 465, 469 (Ill. 1971), stating, “. . . one of the consequences [of stare decisis] is that a legal doctrine established in a case involving a single litigant characteristically *benefits all others similarly situated.*” (Emphasis added.)

<sup>83</sup> *See, e.g., United States ex rel. Lawrence v. Woods*, 432 F.2d 1072 (7th Cir. 1970); *Everette v. State*, 465 S.W.2d 162 (Tex. Crim. App. 1971); *Pruett v. State*, 463 S.W.2d 191 (Tex. Crim. App. 1970), *appeal dismissed*, — U.S. —, 91 S. Ct. 1379, 28 L. Ed.2d 643, *rehearing denied*, — U.S. —, 91 S. Ct. 2203, 29 L. Ed.2d 690 (1971); *Langston v. State*, 460 S.W.2d 909 (Tex. Crim. App. 1970); *Oliva v. State*, 459 S.W.2d 824 (Tex. Crim. App. 1970).

<sup>84</sup> *United States v. Raines*, 362 U.S. 17, 21, 80 S. Ct. 519, 522, 4 L. Ed.2d 524, 529 (1960). “[O]ne to whom application of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional.”

<sup>85</sup> 310 F. Supp. 293 (E.D. Wis.), *appeal dismissed*, 400 U.S. 1, 91 S. Ct. 12, 27 L. Ed.2d 1 (1970).

state officers.<sup>86</sup> When the court was subsequently petitioned for further relief,<sup>87</sup> it found that the state planned to continue the prosecution of Dr. Babbitz and to regard the statute as constitutional until there was a decision to the contrary by the United States Supreme Court.<sup>88</sup> The court then issued an injunction against Babbitz's prosecution.<sup>89</sup>

The court noted that although its judgment might not be literally binding on the state courts, there also might never be a Supreme Court review of its opinion, in which case the state would totally ignore its decision.<sup>90</sup> In an argument reminiscent of the period which fostered the three-judge statute, the court stated:

Did the United States Supreme Court contemplate on the one hand that a federal three-judge district court *must* declare the constitutionality or unconstitutionality of a state statute and, on the other hand, that the state authorities may wholly dishonor such judgment?<sup>91</sup>

The confusion which exists in this area may well be an insoluble anomaly of federalism which must continue unanswered<sup>92</sup> with each question settled on a case-by-case basis.<sup>93</sup> Although it appears that the states may ignore a declaratory judgment, they may do so only when prosecuting one who is not protected by that judgment, or be faced with a federal injunction.<sup>94</sup> Lower federal courts have demonstrated a desire to avoid conflict with state courts out of a recognition that they are courts of concurrent jurisdiction, but they have further demonstrated an unwillingness to sacrifice a defendant's constitutional rights for the sake of comity.<sup>95</sup>

#### FEDERAL HABEAS CORPUS

The federal courts have the last word on any federal question, either upon direct review by the Supreme Court or consideration of a federal

<sup>86</sup> *Id.* at 296.

<sup>87</sup> *Babbitz v. McCann*, 320 F. Supp. 219 (E.D. Wis. 1970), *vacated*, — U.S. —, 91 S. Ct. 1375, 28 L. Ed.2d 643 (1971).

<sup>88</sup> *Id.* at 221.

<sup>89</sup> *Id.* at 223.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* at 223. (Emphasis added.)

<sup>92</sup> Comment, *Authority in States of Lower Federal Court Decisions on National Law*, 48 COLUM. L. REV. 943, 945 (1948). "[R]eview by the Supreme Court will result in an independent determination on the merits, and not in a holding that the state was or was not required to adhere to the federal court ruling as such." See *Stoll v. Gottlieb*, 305 U.S. 165, 167, 59 S. Ct. 134, 135, 83 L. Ed. 104, 106 (1938). Although the Court states that it can decide what effect lower federal court decisions will be given in state courts, the decision evidences that it will do so only as to an individual case.

<sup>93</sup> See *Stoll v. Gottlieb*, 305 U.S. 165, 167, 59 S. Ct. 134, 135, 83 L. Ed. 104, 106 (1938).

<sup>94</sup> See *Babbitz v. McCann*, 320 F. Supp. 219, 223 (E.D. Wis. 1970), *vacated*, — U.S. —, 91 S. Ct. 1375, 28 L. Ed.2d 643 (1971).

<sup>95</sup> *Bastida v. Braniff*, 321 F. Supp. 273, 283 (E.D. La. 1970), *aff'd*, 444 F.2d 396 (5th Cir. 1971).

habeas corpus application by a lower federal court.<sup>96</sup> The subject of federal habeas corpus is too extensive to be considered in detail here<sup>97</sup> but bears analysis with regard to the discussion of the role of lower federal courts in the administration of state criminal statutes. Rashly used, the federal habeas corpus power may serve as a source of deep resentment to the states.<sup>98</sup> But if it is exercised sparingly and with due regard for the interest of the state in administering its criminal statutes, the power may serve as the necessary threat of a federal remedy to state constitutional deprivations to ensure that state courts give due respect to lower federal court decisions while objectively construing their own statutes.

Federal habeas corpus jurisdiction over state prisoners was denied the federal courts until 1867.<sup>99</sup> This alone seems somewhat strange because the power has been called "a necessary consequence of the supremacy clause of the federal constitution."<sup>100</sup> Because due process under the Federal Constitution was not assured until the ratification of the fourteenth amendment in 1868,<sup>101</sup> there was no need for the power until that time.<sup>102</sup> The congressional grant of jurisdiction over state court prisoners did not alter the nature of the proceeding; the proceeding remains merely one to determine the issue of whether the relator has been afforded due process in his state trial.<sup>103</sup> The issue of guilt is not reached in the proceeding,<sup>104</sup> so there is no power in the federal court to reverse a state court conviction;<sup>105</sup> but the application of the supremacy clause by the federal court makes the "due process" requirement subject to the interpretations of a lower federal court in the absence of a Supreme Court opinion on the subject.<sup>106</sup> The federal district courts insist that because they exercise no appellate jurisdiction

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<sup>96</sup> The ultimate answer to the concurrent federal question jurisdiction conflict between state and lower federal courts was suggested before the Constitution was adopted. Hamilton recognized the power of Congress to establish the lower federal courts as appellate courts of the state courts on federal questions. *THE FEDERALIST* No. 82, at 517 (B. Wright ed. 1970) (A. Hamilton).

<sup>97</sup> See *Developments in the Law—Federal Habeas Corpus*, 83 *HARV. L. REV.* 1038 (1970); Leighton, *Federal Supremacy and Federal Habeas Corpus*, 12 *ST. LOUIS U.L.J.* 74 (1967).

<sup>98</sup> *Darr v. Burford*, 339 U.S. 200, 204, 70 S. Ct. 587, 590, 94 L. Ed. 761, 767 (1950).

<sup>99</sup> Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385; 28 U.S.C. § 2241 (1970).

<sup>100</sup> Leighton, *Federal Supremacy and Federal Habeas Corpus*, 12 *ST. LOUIS U.L.J.* (1967).

<sup>101</sup> *Adamson v. California*, 332 U.S. 46, 51, 67 S. Ct. 1672, 1675, 91 L. Ed. 1903, 1908 (1947); *Barron v. Mayor and City Council of Baltimore*, 32 U.S. (7 Pet.) 243, 247, 8 L. Ed. 672, 674 (1833).

<sup>102</sup> Leighton, *Federal Supremacy and Federal Habeas Corpus*, 12 *ST. LOUIS U.L.J.* 74, 77 (1967).

<sup>103</sup> *Id.* at 78.

<sup>104</sup> *United States ex rel. Elliott v. Hendricks*, 213 F.2d 922, 926 (3d Cir.), cert. denied, 348 U.S. 851, 75 S. Ct. 77, 99 L. Ed. 670 (1954).

<sup>105</sup> *Fay v. Noia*, 372 U.S. 391, 431, 83 S. Ct. 822, 844, 9 L. Ed.2d 837, 864 (1963); *Hanna v. Homes Ins. Co.*, 281 F.2d 298, 303 (5th Cir. 1960), cert. denied, 365 U.S. 838, 81 S. Ct. 751, 5 L. Ed.2d 747 (1961).

<sup>106</sup> *Brown v. Allen*, 344 U.S. 443, 500, 73 S. Ct. 397, 443, 97 L. Ed. 469, 511, rehearing denied, 345 U.S. 946, 73 S. Ct. 827, 97 L. Ed. 1370 (1953).

over the state courts, but are rather mere organs of the superior Federal Constitution, "[I]t is not a case of a lower court sitting in judgment of a higher court."<sup>107</sup> However, the allegations of federal interference are not in response to the rationale supporting federal habeas corpus but rather to the misapplication of the procedure.

Although a federal court of appeals may maintain that its interpretations of constitutional standards are not binding on the state courts within its circuit,<sup>108</sup> they are absolutely binding on the federal district courts in the circuit.<sup>109</sup> The end effect is that absent a Supreme Court decision reversing the court of appeals and federal district court, the state prisoner will be granted federal habeas corpus relief and the state will have to ultimately accept the court of appeals' standard.

In *Reed v. State*<sup>110</sup> the Delaware Supreme Court affirmed a conviction in which the court admitted evidence of a post-arrest identification of the defendant from photographs, in the absence of counsel. The Delaware Supreme Court noted<sup>111</sup> that the United States Court of Appeals for the Third Circuit had previously held that such identifications were procedurally unconstitutional as violative of the sixth amendment right to counsel under an extension of the *Wade* doctrine. However, the court further noted that the weight of authority held otherwise, citing opinions of the Supreme Courts of California and Illinois, and the United States Courts of Appeals for the Second, Fifth, Seventh and Tenth Circuits.<sup>112</sup> Reed then applied to the federal district court for habeas corpus relief.<sup>113</sup> The district court recognized the right of the state court to "pick and choose the applicable law from competing decisions of other state or federal appellate courts,"<sup>114</sup> noted further support for the Delaware ruling in decisions of the Court of Appeals for the Ninth Circuit and the Supreme Courts of Mississippi and Wisconsin and Washington State's Court of Appeals,<sup>115</sup> and then ordered the discharge of the relator.<sup>116</sup> The court stated that it was duty bound to follow the legal precedents of the Court of Appeals for the

<sup>107</sup> *Id.* at 510, 73 S. Ct. at 448, 97 L. Ed. at 517.

<sup>108</sup> *Ralph v. Warden, Md. Pen.*, 438 F.2d 786, 793 (4th Cir. 1970); *Owsley v. Peyton*, 352 F.2d 804, 805 (4th Cir. 1965). *Contra*, *Robinson v. Beto*, 426 F.2d 797, 798 (5th Cir. 1970).

<sup>109</sup> *United States ex rel. Reed v. Anderson*, 329 F. Supp. 15, 17 (D. Del. 1971); *United States v. Poston*, 312 F. Supp. 587, 598 (D.S.C. 1970).

<sup>110</sup> 281 A.2d 142 (Del. 1971).

<sup>111</sup> *Id.* at 145.

<sup>112</sup> *Id.* at 146.

<sup>113</sup> *United States ex rel. Reed v. Anderson*, 329 F. Supp. 15 (D. Del. 1971).

<sup>114</sup> *Id.* at 17.

<sup>115</sup> *Id.* at 19.

<sup>116</sup> *United States ex rel. Reed v. Anderson, Habeas Corpus No. 140* (D. Del. July 9, 1971) (unreported order of the court). However, the court did grant a stay of its order of discharge for a reasonable time pending appeal. *United States ex rel. Reed v. Anderson*, 329 F. Supp. 15, 19 (D. Del. 1971).

Third Circuit,<sup>117</sup> even where the controlling decision is by far in the minority.<sup>118</sup>

Similar reasoning was employed in *Ralph v. Warden, Maryland Penitentiary*<sup>119</sup> by the Court of Appeals for the Fourth Circuit. In its reversal of a denial of relator's habeas corpus application the court held that a death sentence was unconstitutionally excessive in rape cases where the victim's life is neither taken nor endangered.<sup>120</sup> Thus, unless reversed on appeal, the state would be forced to reduce the relator's sentence. Yet the court of appeals stated that its constitutional standards "do not 'prescribe a rule of constitutional application to prosecutions in state courts within this Circuit.' Instead they rest on our supervisory power over district courts."<sup>121</sup> Again, the deference paid to the sovereign state and its "coordinate courts" was entirely semantical.

The *Reed* example could work havoc with the *Lawrence* principle of the non-binding effect of a lower federal court's determination of the unconstitutionality of a state law. For when petitioned for habeas corpus relief following a state conviction, prosecution under an unconstitutional statute will be ground for issuing the writ,<sup>122</sup> even after a voluntary plea of guilty.<sup>123</sup> Thus the state is free to adopt the decision of the lower federal court—either at the first trial or at some subsequent trial of the same person following the federal court's nullification of the conviction.

Federal habeas corpus is not an appeal from a state court decision, for this might well be violative of the seventh amendment and the attorneys general of forty-one states failed to persuade the Supreme Court of this argument.<sup>124</sup>

<sup>117</sup> United States *ex rel.* Reed v. Anderson, 329 F. Supp. 15, 17 (D. Del. 1971).

<sup>118</sup> *Id.*

<sup>119</sup> 438 F.2d 786 (4th Cir. 1970).

<sup>120</sup> *Id.* at 793.

<sup>121</sup> *Id.* at 793. (Citation omitted.)

<sup>122</sup> *Minnesota v. Barber*, 136 U.S. 313, 10 S. Ct. 862, 34 L. Ed. 455 (1890), *aff'g In re Barber*, 39 F.641 (C.C.D. Minn. 1889); *Ex parte Siebold*, 100 U.S. 371, 375, 25 L. Ed. 717, 718 (1880); *United States ex rel. Williams v. Zelker*, 445 F.2d 451 (2d Cir. 1971); *United States ex rel. Swanson v. Reincke*, 344 F.2d 260, 261 (2d Cir.), *cert. denied*, 382 U.S. 869, 86 S. Ct. 144, 15 L. Ed.2d 108 (1965).

<sup>123</sup> *Coner v. Henry*, 394 F.2d 873 (7th Cir. 1968), *cert. denied*, 393 U.S. 847, 89 S. Ct. 132, 21 L. Ed.2d 118 (1969). *Compare State of Louisiana ex rel. Picard v. Allgood*, 273 F. Supp. 194, 195 (E.D. La. 1967), *aff'd*, 400 F.2d 887 (5th Cir. 1968), *cert. denied*, 394 U.S. 934, 89 S. Ct. 1208, 22 L. Ed.2d 464 (1969), stating that a voluntary plea of guilty forecloses federal habeas corpus inquiry into any alleged non-jurisdictional defects, *with Ex parte Siebold*, 100 U.S. 371, 375, 25 L. Ed. 717, 718 (1880), stating that prosecution under an unconstitutional statute is a jurisdictional defect. However, imprisonment under a statute which does not operate unconstitutionally in the case of the prisoner does not entitle him to habeas corpus relief, although the statute may be unconstitutional as to others. *Ex parte Touchman*, 24 F. Cas. 73 (No. 14,108) (E.D. Va. 1875).

<sup>124</sup> *United States ex rel. Elliott v. Hendricks*, 213 F.2d 922, 924 (3d Cir.), *cert. denied*, 348 U.S. 851, 75 S. Ct. 77, 99 L. Ed. 670 (1954). The court distinguished between the issues of guilt determined by the state court and the issues of due process determined by the federal court.

But the effect is the same.

Habeas corpus is in effect substituted for appeal, seriously disturbing the orderly disposition of state prosecutions and jeopardizing the finality of state convictions . . . .<sup>125</sup>

Federal habeas corpus necessarily involves federal judicial interference, even when properly exercised, for it imposes fourteenth amendment rights upon state trial courts only when they have been denied—even though the interpretative standard may be that of a lower federal court. Thus, the jurisdiction is an exception to the dual system concept of two distinct judicial hierarchies. It is a “great irritant to federal state relationships”<sup>126</sup> but in view of the purpose served, the “[e]nsuing irritation to the States is a price of federalism . . . .”<sup>127</sup> However, undue irritation must be avoided and the power is properly exercised when restrained to the Holmesian concept as a remedy to a state court’s denial of a fair trial not “of mere disorder, or mere irregularities in procedure, but of a case where the processes of justice are actually subverted.”<sup>128</sup>

The error complained of should constitute a gross miscarriage of justice before the writ should issue<sup>129</sup> to avoid the unseemliness of lower federal court review and the breeding of “dangerous conflicts of jurisdiction.”<sup>130</sup> The need, then, is for self-restraint in the exercise of the federal district courts’ discretionary power to issue the writ.

#### ADDITIONAL NEED FOR HARMONY

It is possible to simply dismiss the state-federal judicial conflict as an inevitable consequence of a dual judicial system and accept the

<sup>125</sup> *Fay v. Noia*, 372 U.S. 391, 446, 83 S. Ct. 822, 853, 9 L. Ed.2d 837, 873 (1963) (Clark, J., dissenting opinion).

<sup>126</sup> 1A J. MOORE, FEDERAL PRACTICE ¶ 0.230(2), at 2704 (2d ed. 1959).

<sup>127</sup> *Id.* at 2705.

<sup>128</sup> *Frank v. Mangum*, 237 U.S. 309, 347, 35 S. Ct. 582, 595, 59 L. Ed. 969, 988 (1914) (Holmes, J., dissenting opinion).

<sup>129</sup> *Chessman v. Teets*, 354 U.S. 156, 173, 77 S. Ct. 1127, 1136, 1 L. Ed.2d 1253, 1265 (1957) (Douglas, J., dissenting opinion).

<sup>130</sup> *Parker, Limiting the Abuse of Habeas Corpus*, 8 F.R.D. 171, 176 (1949). However, in 1889 one circuit court, in reference to the exercise of the federal habeas corpus jurisdiction over state prisoners, stated: “In the exercise of this jurisdiction there is no conflict between the authority of the state and of the United States. The state in such case is *subordinate*, and the national government paramount.” (Emphasis added.) *In re Neagle*, 39 F. 833, 843 (C.C. N.D. Cal. 1889), *aff’d*, 135 U.S. 1, 10 S. Ct. 658, 34 L. Ed. 55 (1890). The need for federal habeas corpus jurisdiction over state prisoners is evidenced infrequently but emphatically in cases such as *Bastida v. Braniff*, 444 F.2d 396 (5th Cir. 1971). The court affirmed issuance of *Bastida*’s second habeas corpus writ and remanded his case for his third trial in the Louisiana court of Judge Braniff. Judge Braniff had previously: denied him effective confrontation of witnesses, denied him effective counsel, referred to him as a “pimp and a church thief” in communications with the federal district court, refused to provide a transcript of the second trial to the district court, and used the threat of double prosecutions with consecutive sentences and the enticement of parole to dissuade *Bastida* from seeking further habeas corpus relief.



consequences. But insistence upon the Supreme Court as the arbiter of each conflict means a lengthy delay under an unsettled criminal statute. The individuals whose rights are thereby made uncertain by an unsettled abortion statute face a legal gamble of their constitutional rights, a decision to have or permit an unwanted child or risk imprisonment or loss of a medical license.

The direct appeal statute<sup>131</sup> was designed to facilitate a rapid resolution of such important constitutional issues but has provided instead an obstacle to rapid review of all Supreme Court matters. For while there were 108 three-judge cases heard in the first sixteen years following the enactment of the three-judge statute, there now are almost that many heard in the Fifth Circuit alone in one year.<sup>132</sup> The Supreme Court has stated that since the direct appeal is contrary to the general scheme of the Court's control over its own docket and in order to keep its appellate docket within narrow confines, the statutes are to be very narrowly construed.<sup>133</sup> They have therefore held in three recent cases that there is no right of direct appeal from a three-judge decision which does not actually grant or deny an injunction.<sup>134</sup> Each was an appeal of a declaratory judgment only.

Each of the three cases involved some special reason why the issue of declaratory relief had been considered separately from that of injunctive relief. But one three-judge court has interpreted the Court's decisions as a plea for help and has adopted the interpretation that it may defeat the burdensome direct appeal by totally declining to rule on the request for a declaratory judgment.<sup>135</sup>

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<sup>131</sup> 28 U.S.C. § 1253 (1970):

Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges.

<sup>132</sup> *Jackson v. Choate*, 404 F.2d 910, 912 n.5 (5th Cir. 1968). Judge Brown, Chief Judge of the Court of Appeals for the Fifth Circuit, reported that "As of November 1, 1968, there were 100 3-judge cases pending in the Fifth Circuit. . . . In the 15 months since July 1967 I have constituted 109 3-Judge Courts." Of the 362 cases on the Court's 1971-1972 appellate docket held over from the previous docket, 66 were direct appeals from three-judge district courts. 40 U.S.L.W. 3005-3010 (July 3, 1971).

<sup>133</sup> *Phillips v. United States*, 312 U.S. 246, 250, 61 S. Ct. 480, 483, 85 L. Ed. 800, 804 (1941).

<sup>134</sup> *Gunn v. Univ. Comm. to End the War in Viet Nam*, 399 U.S. 383, 390, 90 S. Ct. 2013, 2017, 26 L. Ed.2d 684, 689 (1970); *Mitchell v. Donovan*, 398 U.S. 427, 430, 90 S. Ct. 1763, 1765, 26 L. Ed.2d 378, 381 (1970); *Rockefeller v. Catholic Medical Center*, 397 U.S. 820, 90 S. Ct. 1517, 25 L. Ed.2d 806 (1970). See, e.g., *Long Island Viet Nam War Moratorium Comm. v. Cahn*, 437 F.2d 344 (2d Cir. 1970), *aff'g* 322 F. Supp. 559 (E.D.N.Y.), *petition for cert. filed*, 39 U.S.L.W. 3438 (U.S. March 24, 1971) (No. 1507, 1970 Term; renumbered No. 70-102, 1971 Term).

<sup>135</sup> *Gregory v. Gaffney*, 322 F. Supp. 238, 241 (W.D.N.C. 1971).

We think it wholly impractical, if not impossible, for the Supreme Court to effectively consider what now could well be several hundred direct appeals per annum from three-judge courts. . . . Although we will not hesitate to grant injunctive relief upon a showing of necessity, we are convinced that we should not routinely generate direct appeals to an already overburdened Supreme Court when another adequate remedy will suffice.

It is possible that this approach is a distortion of the Court's decisions and will be regarded by the Court as an effective denial of injunctive relief. But this decision may very well be grasped by the Court as the sought-for method of regaining a better control over its crowded docket. If so, the effect will be great because of the general practice of granting only declaratory relief and the desire of lower courts to follow the wishes of the Supreme Court. The result would be an even longer delay required before review of district court decisions declaring state criminal laws unconstitutional and an even greater need for the two systems of courts to harmonize their decisions. The state courts must accept the fact that Supreme Court review will be an exception, not the rule, while lower federal courts remain also cognizant of this fact in seeking to minimize the need for review.

#### CONCLUSION

The *Pruett* and *Lawrence* decisions are not startling. They merely represent a proper regulation of prohibited conduct under a statute which has been found defective as applied to a different set of circumstances.<sup>136</sup> But the *Babbitz* and *Reed* situations must not be repeated unless complete disrespect between the two systems of courts breeds dangerous conflicts. These two cases demonstrate the two superior powers of injunction and habeas corpus which will result in federal district court superiority in any single case. But to ensure the state courts their rightful place in the administration of their own laws and ensure the minimization of conflicts necessary to avoid undue uncertainty over the validity of state criminal statutes and convictions, the lower federal courts must exercise greater discretion in the use of their powers.

The *Lawrence* principle need not toll the abdication of the lower federal courts', especially the three-judge courts', role in criminal constitutional litigation. It merely raises the question of when will the federal remedy be effective.

When the question is finally answered, the doors of the federal courts will be open or closed, not only to a physician or pregnant married woman in Madison, Wisconsin, but to blacks in Mississippi, slum dwellers in Harlem, and grape pickers in California. A federal court must not be headstrong. But amenity among state and federal judicial officials must never cause a federal court to close its doors to those to whom the door should open.<sup>137</sup>

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<sup>136</sup> "[A] tainted statute is generally unenforced in a particular case only, it may or may not have wider effects, . . . in another case it may be valid, a change in circumstance may produce a change of decision . . ." Borchard, Book Review, 45 YALE L.J. 1533, 1534 (1936).

<sup>137</sup> *Kennan v. Warren*, 328 F. Supp. 525, 534 (W.D. Wis. 1971).