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FEDERAL COURTS—HABEAS CORPUS—Unconditional Release From Custody Under a Misdemeanor Conviction Does Not Render a Case Moot For Purposes of Habeas Corpus and a Lower Federal Court's Declaration of the Unconstitutionality of an Ordinance Is Not Binding Upon State Courts.

On August 17, 1966, Reverend Richard Lawrence and a companion were arrested in Chicago, charged with interfering with the duties of a police officer under the Municipal Code of the City of Chicago.[1] The activities leading to the arrest stemmed from a protest rally designed to focus attention on the official conduct of one Officer Ginkle of the Chicago Police Department. The rally was staged outside of Officer Ginkle's home. Reverend Lawrence and his companion proceeded to Ginkle's porch and there knocked persistently upon the door. One Sergeant O'Malley, assigned to protect the Ginkle family from harassment, requested that the two protestors leave the premises, forbidding them to knock upon the door or ring the bell. Subsequently, after a second unheeded warning, they were arrested, charged with interfering with the duties of a police officer under the aforementioned ordinance.

Lawrence was found guilty by a jury in the Circuit Court of Cook County, incurring a fine of $100. Since Lawrence claimed violations of his constitutional rights, an appeal was taken directly to the Illinois Supreme Court.

While this appeal was pending, the United States District Court for the Northern District of Illinois, in an unrelated declaratory judgment action,[2] held that the ordinance in question was void on its face as repugnant to the First and Fourteenth Amendments to the United States Constitution. In declaring that the ordinance was "vague and indefi-

1. Chicago, Ill. Municipal Code, Ch. 11, § 33, reads:
Any person who shall resist any officer of the police department in the discharge of his duties, or shall in any way interfere with or hinder or prevent him from discharging his duty as such officer, or shall offer or endeavor to do so, and who ever shall in any manner assist any person in the custody of the police force to escape or attempt to escape from such custody, or attempt to rescue any person in custody, shall be fined not less than ten dollars nor more than one hundred dollars for each offense.

2. Landry v. Daley, 280 F. Supp. 968 (N.D. Ill. 1968), *appeal dismissed as moot*, 410 F.2d 551 (7th Cir. 1969).

nite as well as over-broad," the District Court said that in failing to define the conduct which the ordinance proscribed, "[it] prohibit[ed] or impinge[d] upon constitutionally protected freedoms."[3]

Although Lawrence had raised the issue of the constitutionality of the ordinance on these very grounds, the Illinois Supreme Court, nonetheless, affirmed his conviction under that ordinance, without mentioning the District Court's opinion in *Landry* in its decision.[4] Rather, the Illinois court decided that "under a reasonable construction" the ordinance could not be said to be unconstitutionally vague and indefinite. The court said: "An ordinance must be read in a sensible way. . . ." It need not be "given an absurd effect which, although within its letter, is contrary to its spirit."[5] Lawrence refused to pay the fine, and in lieu of payment, was sentenced to jail for twenty days. He was then placed in the custody of the Sheriff of Cook County.

Lawrence then appealed to the United States Supreme Court[6] which dismissed his appeal and, treating the jurisdictional statement as a petition for a writ of certiorari, dismissed the petition.

Having thus exhausted his state remedies, Lawrence petitioned the United States District Court for a writ of *habeas corpus*.[7] This petition, being grounded upon the claim of unconstitutionality of the city ordinance, was denied.

Lawrence then took an appeal to the United States Circuit Court of Appeals for the Seventh Circuit.[8] At the time this appeal was heard, Lawrence had been unconditionally released from jail, having served his full sentence. This being the case the court found itself presented with two issues of consequence: first, whether an unconditional release from custody under a misdemeanor conviction renders a case moot for purposes of *habeas corpus*; second, whether a lower federal court's declaration of the unconstitutionality of an ordinance is binding upon state

3. 280 F. Supp. 968, 973 (N.D. Ill. 1968). In Landry v. Daley, plaintiffs sought declaratory judgments and injunctions against the enforcement of two city ordinances and three state statutes. In Landry v. Daley, 280 F. Supp. 968 (N.D. Ill. 1968), the district court granted declaratory relief against the two city ordinances, including Ch. 11 § 33. See also Landry v. Daley, 280 F. Supp. 938 (N.D. Ill. 1968) and Landry v. Daley, 288 F. Supp. 183 (N.D. Ill. 1968) for *ad hoc* injunctive relief following the prospective injunction of March 18, 1968, enjoining prosecutions under the city ordinances.

4. City of Chicago v. Lawrence, 42 Ill. 2d 461, 248 N.E.2d 71 (1969).

5. *Id.* at 464, 248 N.E.2d at 73.

6. Lawrence v. City of Chicago, 396 U.S. 39 (1969).

7. 28 U.S.C. § 2254 (1948) requires that petitioner be "in custody in violation of the Constitution or laws or treaties of the United States." Further he must have "exhausted the remedies available in the courts of the State." Exhaustion is not deemed to exist "if he has the right under the law of the State to raise, by any available procedure, the question presented."

8. U.S. *ex rel.* Lawrence v. Woods, 432 F.2d 1072 (7th Cir. 1970).

courts.[9] Although holding that the case was not moot, the court denied Lawrence relief by deciding that the state courts are not bound to follow the decisions of the lower federal courts on issues of federal law.

In deciding that the case was not moot, the court took steps towards expanding federal *habeas corpus* jurisdiction over state prisoners, thereby increasing the power of the lower federal courts in questions of federal law as that law relates to the states. Yet, in holding that the state courts are not bound by lower federal court rulings regarding the constitutionality of state or local enactments, and by saying that "as to the laws of the United States [the state and federal courts] are coordinate courts,"[10] the court put a limiting interpretation upon the Supremacy Clause of the United States Constitution, consequently limiting the binding power and importance of the lower federal courts in deciding questions of federal law. This is an interesting dichotomy in that the expanded *habeas corpus* jurisdiction gives evidence of the growing importance of the lower federal courts in the area of protection of federally guaranteed rights. Yet, while acknowledging this in its holding on mootness, the court ignored the trend in deciding the supremacy issue.

While the custody requirement[11] necessary for the issuance of the writ of *habeas corpus* has been liberalized in recent years, and while even the subsequent unconditional release of a prisoner petitioning for *habeas corpus* has been held not to bar the issuance of the writ,[12] the cases allowing such issuance have depending in large part upon collateral consequences attending the challenged convictions—consequences which impair the total freedom of the one convicted. Such consequences are generally grave in nature affecting such fundamental rights as voting, the holding of specified jobs and offices, and the obtaining of work.[13]

The first recognition that collateral legal consequences and civil disabilities might overcome a finding of mootness was in the area of appellate jurisdiction. In *St. Pierre v. United States*,[14] the Court, while

9. As to the second issue the precise question was whether Landry was to be heeded by the Illinois Supreme Court even though the Lawrence conviction had been obtained prior to the Landry holding.

10. U.S. *ex rel.* Lawrence v. Woods, 432 F.2d 1072, 1075 (7th Cir. 1970).

11. 28 U.S.C. § 2254, *supra* note 7.

12. Carafas v. LaVallee, 391 U.S. 234 (1968).

13. All *habeas corpus* cases to date have dealt with felony convictions and the consequences attending this more serious criminal category. Peyton v. Rowe, 391 U.S. 54 (1968); Carafas v. LaVallee, 391 U.S. 234 (1968); Scriberras v. U.S., 404 F.2d 247 (10th Cir. 1968); Brown v. Resor, 407 F.2d 281 (5th Cir. 1969); Sellers v. Smith, 412 F.2d 1002 (5th Cir. 1969). However, appellate cases have dealt with misdemeanor convictions and collateral legal consequences flowing therefrom: see Sibron v. New York, 392 U.S. 40 (1968) and Ginsberg v. New York, 390 U.S. 629 (1968).

14. 319 U.S. 41 (1943).

dismissing appellant's petition for writ of certiorari due to his having been unconditionally released from jail prior to the hearing, seemed to indicate that if St. Pierre had shown that the judgment affected his legal rights in some significant way the case might have been decided on the merits. St. Pierre did attempt to show that, were the judgment to stand, his credibility as a witness might be impaired at some later time, but this the court deemed a "moral stigma" of the judgment and not a legal disability. But, while *St. Pierre* was often cited for its rule that where the appellant has been released prior to the hearing of his appeal, that appeal is moot,[15] it has also been cited for its exception to that rule in cases of significant consequences affecting legal rights.

In *Fiswick v. United States,*[16] the Court granted certiorari even though the appellant had served his full sentence, because it was found that the facts there brought the case within the *St. Pierre* exception; penalties and disabilities existed which might impose legal hardships upon the appellant as a result of the judgment he had just satisfied. Being an alien, Fiswick faced the likelihood of deportation. This likelihood was held to be sufficient to establish the legal disability attending the conviction, and it was not necessary for Fiswick to prove that such deportation would as a matter of fact follow. Further disabilities flowing to Fiswick were the fact that his naturalization might be impeded, his conviction standing as a showing of poor moral character, and, last, and perhaps most significant for later appellants, the Court acknowledged the everyday disabilities of a felon, disabilities which result in the loss of certain civil rights. The Court, Justice Douglas as its spokesman, concluded that "[i]n no practical sense, then, can the case be said to be moot."[17]

In *Pollard v. United States,*[18] the Court took steps toward a redefinition of collateral legal consequences. It held that, where an appellant who has been unconditionally released appeals his conviction by challenging the legality of the sentence, the mere possibility of collateral consequences attending the importance of a sentence will save the case from a finding of mootness and will warrant a treatment of the merits. No specific consequences or disabilities were spelled out by the Court, which is particularly significant because here the challenge was not to the question of guilt at all—rather, it dealt solely with the legality of the sentence.

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15. See Zimmerman v. Walker, 319 U.S. 744 (1943); Jacobs v. New York, 388 U.S. 431 (1967); Tannenbaum v. New York, 388 U.S. 439 (1967).
16. 329 U.S. 211 (1946).
17. *Id.* at 221-22.
18. 352 U.S. 354 (1956).

Although the mootness doctrine had seen expansion in the area of appellate review, the changes were slower to come in the area of federal *habeas corpus* for state prisoners, due in large part to the narrow remedy which the courts felt *habeas corpus* afforded. Thus in *Parker v. Ellis*,[19] the Court in a per curiam opinion dismissed the petition for a writ of certiorari which had earlier been granted to review dismissal of petitioner's application for a writ of *habeas corpus*, because petitioner had been unconditionally released before the Court heard the case on the merits. The Court concluded that the purpose of the *habeas corpus* proceeding under the federal statute was to inquire into the legality of the imprisonment, with the resultant and only relief authorized being a discharge of the prisoner of his admission to bail. The Court held that, for purposes of adjudiciation of a *habeas corpus* petition, the petitioner must, at the time of that hearing, be in custody.

In dissenting to the *Parker v. Ellis* decision, Chief Justice Warren and Justices Black, Douglas and Brennan joined in an opinion which was to foreshadow the new definition of *habeas corpus* both in terms of its "custody" requirement and its grant of relief. The dissenting Justices felt that the injustice reflected by the case was so conclusively shown that the invalidity of the conviction should certainly have been proclaimed. They felt that "law and justice" required such a finding and, further, that such a finding would be in keeping with "the spirit of the writ."[20]

The case of *Jones v. Cunningham*[21] moved the newly-coined but latent definition of the *Parker* dissent one step into fruition by its holding that a petitioner is "in custody" even though he has been released on parole before his *habeas corpus* petition has been heard. The basis for this decision was recognition of the confinement to which a petitioner is subject even though he is not imprisoned. Justice Black, writing for the Court, stated that:

> [C]ustody and control of the Parole Board involve significant restraints on petitioner's liberty because of his conviction and sentence, which are in addition to those imposed by the State upon the public generally.[22]

While this decision was not as broad as those decisions involving cases on appeal, it was a step toward recognizing that physical custody was not the only restraint to which a man might be subjected. But the remedy

19. 362 U.S. 574 (1960).
20. *Id.* at 582-83.
21. 371 U.S. 236 (1962).
22. *Id.* at 242.

afforded was not changed in form; the Virginia Parole Board was merely substituted for the Superintendent of the Penitentiary as respondent, and petitioner became a candidate for unconditional release.

The most significant case concerning *habeas corpus* and its custody requirement was *Carafas v. LaVallee*[23] which expressly overruled the holding in *Parker v. Ellis*.[24] *Carafas*, dealing with a felony conviction, held that where the petition for writ of *habeas corpus* was filed while the petitioner was in custody, that petition did not become moot even though petitioner was subsequently released unconditionally from custody prior to a hearing on the petition. Writing for the Court, Justice Fortas concluded:

> It is clear that petitioner's cause is not moot. In consequence of his conviction, he cannot engage in certain businesses; he cannot serve as an official of a labor union for a specified period of time; he cannot serve as a juror. Because of these disabilities or burdens [which] may flow from petitioner's conviction, he has a substantial stake in the judgment of conviction which survives the satisfaction of the sentence imposed on him. On account of these 'collateral consequences,' the case is not moot.[25]

Although the Court readily applied the collateral consequences doctrine as first enunciated in cases involving appellate review, it was not apparently ready to hold that the collateral consequences themselves were or created, custody. Rather, the Court held that:

> [U]nder the statutory scheme, once the federal jurisdiction has attached in the District Court, it is not defeated by the release of the petitioner prior to completion of proceedings on such application.[26]

A further step was taken in *Carafas* to complete the new definition of *habeas corpus* jurisdiction as originally articulated in the *Parker v. Ellis* dissent. The relief to be granted was changed from mere release from physical custody or custody of any kind,[27] to "release from custody or other remedy."[28] "[T]he *habeas corpus* statute seem[s] specifically to contemplate the possibility of relief other than immediate release from physical custody."[29] Thus the Court deemed it appropriate that courts "dispose of . . . matter[s] as law and justice require."[30]

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23. 391 U.S. 234 (1968).
24. 362 U.S. 574 (1960).
25. 391 U.S. 234, 237-38 (1967). The Court cited Ginsberg v. New York, 390 U.S. 629, 633-34, n.2 (1968); Fiswick v. U.S., 329 U.S. 211, 222, n.10 (1946); United States v. Morgan, 346 U.S. 502, 512-13 (1954), all appellate jurisdiction cases dealing with the mootness issue as affected by collateral consequences.
26. *Id.* at 238.
27. *Cf.* Jones v. Cunningham, 371 U.S. 236 (1963).
28. U.S.C. § 2244(b) (1964 ed. Supp. II).
29. 391 U.S. 234, 239 (1967).
30. *Id.* at 239. See also 28 U.S.C. § 2243.

Having thus reached the decision in *Carafas* that once a *habeas corpus* petition has been filed a subsequent release will not destroy jurisdiction where legal disabilities remain, a holding derived from this case dealing with appellate jurisdiction, the focus turned from felony convictions which are more easily conducive to a finding of collateral consequences, to the more common misdemeanor convictions. As was the trend in the felony area, the area of mootness in misdemeanor cases was initiated at the appellate level.

The 1967 decisions of *Jacobs v. New York*[31] *and Tannenbaum v. New York*[32] reflect the treatment of a misdemeanor appeal in which the appellant had been released from custody prior to the hearing of the appeal. In those cases certiorari had been granted by the United States Supreme Court but, due to appellants' release prior to hearing, the petitions were dismissed. But again a dissent to the *per curiam* opinions foreshadowed the new doctrine to come. The dissenting opinion was again that of Chief Justice Warren, who felt that the Court was neglecting an "obligation" it had to decide constitutional questions in the area of obscenity and First Amendment rights. He stated that the Court should be "slow to accept mootness doctrines which grant the states an unreviewable power to suppress expression."[33] He further stated that "[where as here] a person has been convicted under a statute which limits his right of expression, his subsequent conduct will be significantly chilled by the conviction on his record."[34] This latter statement indicates that collateral consequences may attend misdemeanor convictions although those consequences were not spelled out. Justice Douglas, in his dissent in *Jacobs* and *Tannenbaum*, wrote:

> If those convicted cannot obtain ultimate review of such convictions, merely because of the shortness of sentences and the slowness of the judicial process, many will choose to comply with what may be an invalid statute.[35]

Again in 1967 the Court spoke to the question of mootness, but this time the majority reflected the *Jacobs* and *Tannenbaum* dissents. In *Sibron v. New York*,[36] a misdemeanor appeal which was heard long after appellant's unconditional release, the Court decided that the case was not moot in light of previous cases which set the stage for this near-total revision of the mootness doctrine. In recognizing the real need for change in the misdemeanor area, the Court stated:

31. 388 U.S. 431 (1967).
32. 388 U.S. 439 (1967).
33. 388 U.S. 431, 434 (1967).
34. *Id.* at 433.
35. *Id.* at 437.
36. 392 U.S. 40 (1968).

> Many deep and abiding constitutional problems are encountered primarily at a level of 'low visibility' in the criminal process—in the context of prosecutions for 'minor' offenses which carry only short sentences. We do not believe that the Constitution contemplates that people derived of constitutional rights at this level should be left utterly remediless and defenseless against repetitions of unconstitutional conduct. A State may not cut off federal review of whole classes of such cases by the simple expedient of a blanket denial of bail pending appeal.[37]

Further the Court enunciated what *Pollard v. United States*[38] had originally stated, that adverse legal consequences are presumed to exist. In fact it was recognized that "most criminal convictions do in fact entail adverse collateral legal consequences,"[39] and *Sibron* extended that *Pollard* holding to misdemeanor convictions.

And so the way was clear for the Seventh Circuit in *Lawrence* to follow the precedent set by the forerunner cases in the criminal appeal area. It determined that the collateral consequences attending even a misdemeanor conviction are significant enough to preserve the case for purposes of *habeas corpus* even though the petitioner has been unconditionally released prior to the hearing of the appeal. Just as the Supreme Court based its holding in *Carafas v. LaVallee*[40] upon the cases dealing with mootness in the criminal appeal area, so the *Lawrence* court adopted the rationale of the criminal appeal cases dealing with misdemeanor cases and the mootness doctrine.

Although *Pollard v. United States*[41] and *Sibron v. New York*[42] held that it is presumed that collateral consequences will flow from criminal convictions and, further, that there must be a showing that no disabilities will follow from the conviction before it will be dismissed as moot, the Seventh Circuit noted that in fact Lawrence faced disabilities as a result of his conviction. It cited an Illinois statute[43] which allows one charged with an ordinance violation or a misdemeanor, but subsequently acquitted or released without conviction, to have his arrest record expunged. This statute is significant for two reasons: first, it will only

37. *Id.* at 52-53.
38. 352 U.S. 354 (1957).
39. 392 U.S. 40, 55 (1967). See also 1969 Utah L. Rev. 265 (1969).
40. 391 U.S. 234 (1968).
41. 352 U.S. 354 (1957).
42. 392 U.S. 40 (1967).
43. Ill. Rev. Stats. Ch. 38, Sec. 206-5 which reads in pertinent part:
A person, not having previously been convicted of any criminal offense or municipal ordinance violation, charged with a violation of a municipal ordinance or a misdemeanor if he was acquitted or released without being convicted, may petition the Chief Judge of the Circuit wherein the charge was brought to have the record of arrest expunged from the official records of the arresting authority.

operate if the petitioner has not been previously convicted. Thus, it may not only have the consequences of striking this conviction, the first for Lawrence, but secondly, it may also serve to clear his legal slate so that it may, at some future time, operate again in his favor.

When considering the essence of the *Carafas* holding as extended by *Lawrence,* it becomes apparent that Chief Justice Warren's "time-is-of-the-essence strait jacket"[44] is a concept more valid in misdemeanor cases than in felony convictions. The complexities of the appellate process, necessities to be contended with under the exhaustion of state remedies doctrine, have a more harmful effect upon the appellate rights of persons convicted of misdemeanors due to the generally light sentences which the misdemeanor clearly connotes. To hold that custody is a requirement at the time of the hearing of the *habeas corpus* appeal may in fact deny review to a vast number of persons with viable and oftentimes important constitutional issues to raise—issues which may touch more frequently and immediately upon the rights of many citizens. It might even be contended that requiring physical custody at the time of the filing of the petition for the writ of *habeas corpus* likewise cuts off the rights of persons unconstitutionally convicted of misdemeanors because the appellate process moves too slowly. Had the Court in *Carafas* considered the collateral consequences which deprive one of total freedom, an equivalent of custody, even this barrier to federal review would have been eliminated within the terminology of the statute. Thus the law now appears to be that discharge pending direct appeal or appeal from the denial of a *habeas corpus* petition will not render either case moot regardless of whether the underlying conviction is for a felony or a misdemeanor.

Interestingly, the court in *Lawrence* concluded the portion of its opinion dealing with mootness by declaring that it saw "no reason why the question of mootness should be treated any differently in *habeas corpus* proceedings from direct appeals."[45] However, after equating the writ of *habeas corpus* with an appeal, the court then decided adversely concerning the Illinois Supreme Court's duty to follow the lower federal court's holding of unconstitutionality under the theory that there is no supremacy between the two sets of courts. It reasoned that the lower federal courts have no appellate jurisdiction over the state courts but, rather, both are subject to the appellate jurisdiction of the United States Supreme Court.[46]

44. Parker v. Ellis, 362 U.S. 574, 586 (1960), dissenting opinion.
45. 432 F.2d 1072, 1074 (7th Cir. 1970).
46. *Id.* at 1075.

In deciding the supremacy issue, the court wasn't able to base its holding upon a federal case, there being none on the precise point. However, it is significant to note that it apparently did not look to the body of law defining the role of the lower federal courts in an attempt to discern whether any trend would point to a contrary result. Rather, the Court of Appeals considered the state decisions on the point and with brief analysis, but while pointing out that other state cases had held that federal decisions were binding upon state courts,[47] the court adopted the holding of *State v. Coleman*,[48] concluding that state courts are not bound by district court holdings.

This holding is consistent with the traditional doctrines of precedent. Technically a court is bound only by the decisions of courts that have appellate jurisdiction over it. Thus the Supreme Court decisions are binding on the state courts because of its constitutionally granted power of review over state court decisions. In a narrow sense this is not true of the lower federal courts. Neither is the supremacy clause controlling because while it declares federal law to be "the supreme law of the land" it does not state that all federal courts have the power to finally declare what the federal law on a question is. On a broader plane, however, the decision fails to recognize the expanding power of the lower federal courts in the area of *habeas corpus*.

It is the nature of the writ which permits expansion of federal *habeas corpus* jurisdiction, as Justice Black pointed out in *Jones v. Cunningham*,[49] where he stated that the writ is not a static remedy but one which has grown over the years and continues to grow to protect individuals and their rights. As the writ has increased in scope and importance, so also has the court in which *habeas corpus* jurisdiction is vested—the federal court.[50]

As Professor Moore points out,[51] until the 1920's the function of the writ of *habeas corpus* was mainly "to guarantee the use of all proper legal processes, not to review the fairness of their application—thus assuring only a formalistic checklist freedom." Until that time the old doctrine of comity, as set down in *Ex Parte Royale*,[52] precluded the fed-

47. U.S. *ex. rel.* Lawrence v. Woods, 432 F.2d 1072, 1075 (1970) citing Handy v. Goodyear Tire & Rubber Co., 230 Ala. 211, 160 So. 530 (1935), and Kuchenmeister v. Los Angeles & S.L.R., 52 Utah 116, 172 P. 725 (1918). Although the rationale of those cases is best briefly discussed they deal with federal statutes and the federal court's right to decide such questions.

48. 46 N.J. 16, 214 A.2d 393 (1965).

49. 371 U.S. 236 (1963).

50. See 21 Vand. L. Rev. 949 (1968) for treatment of the ascendency of the lower federal courts.

51. 1A J. MOORE, FEDERAL PRACTICE ¶ 0.230[2], at 2705 (2d ed. 1968).

52. 117 U.S. 241, 252 (1886). "The forebearance which courts of coordinate

eral district court from looking to anything more than the simple question of whether the state court had proper jurisdiction to hear the matter, and then only after a total exhaustion of state remedies. This rule was formulated to prevent "unnecessary conflict between courts equally bound to guard and protect rights secured by the Constitution."[53] Thus, until 1915 and the case of *Frank v. Mangum*,[54] the decisions of state courts hearing cases by way of writ of *habeas corpus* if the state court was one of competent jurisdiction, and the only challenge available as to the state finding of law and fact was by appeal.[55]

But *Frank v. Mangum*,[56] while denying the petitioner relief from a conviction obtained in a mob-dominated atmosphere, did, by way of dicta, indicate a weakening of the traditional theory. The Court decided that in Frank's case there were still state remedies available whereby he might overcome the defect in the trial which led to his conviction, but also stated that had his state remedies been exhausted, the federal district court had the authority to look behind the trial record to conduct its own factual hearing.[57] But, while a federal court hearing a case by writ of *habeas corpus* was seemingly granted authority to look to and decide the case on the merits, the issuance of the writ was still granted primarily upon the ground that the state court lacked jurisdiction. However, the theory of jurisdiction was new; the state court, although hearing a proper case, might be divested of its jurisdiction if an extraordinary constitutional error were committed.

In 1923, on the same factual basis which *Frank* had presented, the Court in *Moore v. Dempsey*[58] decided that the district court was bound to determine whether the facts as presented by the petitioner were true and, if true, whether they could be sufficiently explained so as to leave the state proceedings undisturbed. Justice Holmes, writing for the Court, stated:

> [I]f the case is that the whole proceeding is a mask—[at the mercy of] public passion—and the state court fails to correct the

jurisdiction, administered under a single system, exercise towards each other, whereby conflicts are avoided, by avoiding interference with the process of each other, is a principle of comity, with perhaps no higher sanction than the utility which comes from concord; but between state courts and those of the United States it is something more. It is a principle of right and of law, and, therefore, of necessity."

53. *Id.* at 252.

54. 237 U.S. 309 (1915).

55. *Cf.* 21 Vand. L. Rev. 949 (1968) and 76 Harv. L. Rev. 483-84 (1963).

56. 237 U.S. 309 (1915).

57. The case record in Frank would certainly have presented the appearance that the court had jurisdiction and all guaranteed rights had been afforded the defendant. The error alleged, mob-domination, was not one to be found in the state's record of proceedings but rather was a factual question clearly going to the issue of due process.

58. 261 U.S. 86 (1923).

> wrong, neither perfection in the machinery for correction nor the possibility that the trial court and counsel saw no other way to avoid an immediate outbreak of the mob, can prevent this Court from securing to the petitioners their constitutional rights.[59]

While *Dempsey* was a clear mandate to the district courts to review factual issues contained both within the trial record and without, this was limited to the extent that the mob-domination allegation was one so clearly contrary to due process that the rule seemed applicable only in those extraordinary situations where the denial of due process was flagrant.

The later decisions of *Brown v. Allen*[60] and *Fay v. Noia*[61] clarified the fact that the federal district courts when hearing state cases by way of *habeas corpus* are in no way limited by the findings of fact or law by the state courts. In his concurring opinion in *Brown*, Justice Frankfurter stated that the district courts might accept the fact finding of the state court if, in the district judge's discretion, those facts adequately present all relevant issues. However, the district judge is not bound by the factual determination, and a hearing may be held to discover their accuracy. The state court's conclusions of law and its adjudication upon that law is not and cannot be binding upon the district court since, "[i]t is precisely these questions that the federal judge is commanded to decide."[62] That opinion continued:

> Although there is no need for the federal judge, if he could, to shut his eyes to the State consideration of such issues, no binding weight is to be attached to the State determination. The congressional requirement is greater. The State court cannot have the last say when it, though on fair consideration and what procedurally may be deemed fairness, may have misconceived a federal constitutional right.[63]

Another issue was decided in *Brown* which also had a significant impact upon *habeas corpus* jurisdiction. That issue liberalized the exhaustion doctrine, perhaps the single most limiting feature of *habeas corpus* jurisdiction. The Court stated definitively that a denial of certiorari by the United States Supreme Court could be given no meaning by a federal district court as regards the merits of the case at hand.[64] Thus the district court in *Brown* was held to be in error for having based

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59. *Id.* at 91.
60. 344 U.S. 443 (1953).
61. 372 U.S. 391 (1963).
62. 344 U.S. 443, 506 (1953).
63. *Id.* at 508.
64. *Id.* at 489-97. Opinion of J. Frankfurter.

its denial of the writ of *habeas corpus* in part upon the significance of the Court's denial of certiorari in the case.[65]

Fay v. Noia finally rounded out the liberalization of the exhaustion doctrine, holding that the *habeas corpus* petitioner need not have availed himself of all state remedies in a timely fashion in order to be eligible for the writ. Further, *Noia* held that it was not necessary for a state prisoner to petition for a writ of certiorari to the United States Supreme Court in order to be considered to have exhausted his state remedies.

In summary, then, *habeas corpus* jurisdiction has been greatly expanded. As Justice Brennan expressed it in *Fay v. Noia*,[66] "Although in form the Great Writ is simply a mode of procedure, its history is inextricably intertwined with the growth of fundamental rights of personal liberty." It is no longer limited to questions of a state's jurisdiction in a criminal proceeding, nor even based upon such a fiction. Rather, the hearing is addressed to the merits of the conviction and to the question of whether there has been a deprivation of fundamental liberty. Further, the writ is no longer discretionary. It is available to any person who alleges facts, which if true would show that he is being deprived of life or liberty without due process. It requires the court to give the case prompt attention.[67]

The exhaustion doctrine as applied to *habeas corpus* cases has seen new dimensions and is no longer the rigid barrier to federal jurisdiction which it once was. In addition, the *Carafas* holding concerning custody and the *Lawrence* addition to that holding in the area of misdemeanor cases have constituted a great step forward in increasing federal habeas corpus jurisdiction. And, going hand-in-hand with the new "custody" definition, is a new remedy in *habeas* cases, one which grants to the lower federal court wide power to fashion relief other than immediate release from custody—"release or other remedy" as "law and justice require." Thus, *Lawrence* has contributed to the expanded *habeas corpus* jurisdiction of the federal district court.

Thus today in the field of *habeas corpus*, the lower federal courts have the power to reverse any decision of a state court on questions of federal constitutional law, whether factual or legal. The question then becomes whether this power, so equivalent to appellate jurisdiction over the state courts, could or should properly be deemed to be the equivalent of appellate jurisdiction for purposes of the application of the

65. The case was affirmed, however, there being other grounds upon which the denial of the writ had been properly based.
66. 372 U.S. 391, 401 (1962).
67. Fay v. Noia, 372 U.S. 391 (1962).

doctrine of binding precedent. It is submitted that it should. However, two objections immediately arise. First, that this power is limited to criminal cases and does not generally extend to civil areas. This should however, not preclude its application in the criminal area at least and may to some degree foreshadow its extension into the civil area. The second objection is that one federal district judge is not bound by the decisions of another. If this be true why should a state court be bound. The simplest answer is that one federal district judge may not overrule another as he may a state court criminal decision. On a broader plane the power of review in the federal system to some degree insures similarity of decision at least within a circuit.

To some degree the question may be academic. In the vast majority of criminal cases, the power of federal review by habeas corpus insures that its decisions on constitutional questions will ultimately prevail in a given case. In this connection it is interesting to note that Lawrence never sought a decision from the federal court on the actual constitutionality of the ordinance in question. If he had, the apparent hardship of the decision might well have been avoided.

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