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Reference Ordinances and Three-Judge Courts

Elizabeth and William du Fresne***

As the fragmentation of areas of governmental responsibility increases, statutory reference terms which once were securely static in meaning must be re-examined. Illustrative of this evolutionary ambiguity are the terms "state statute" and "state officer" as they appear in the jurisdictional statute for federal three judge courts. The jurisdiction of such a court is governed by Title 28 U.S.C. § 2281:

> § 2281. Injunction against enforcement of State statute; three judge court required.
>
> An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title.

The Supreme Court has emphasized the importance of the jurisdictional considerations in potential three judge cases by refusing to discuss the merits of a case which should have been decided by either a single judge or a three judge court and was not.[1] The Court has cautioned us that § 2281 is to be viewed "not as a measure of broad social policy to be construed with great liberality but as an enactment technical in the strict sense of the term and to be applied as such."[2] In order that a "strict" application of the statute not contravene the purpose for which § 2281 was enacted, it should be remembered that the three-judge court was designed to provide a more responsible forum in the litigation of suits which, if successful, would render void state statutes embodying important statewide policies.[3]

One of the many situations which make the construction of § 2281 less than simple is the "reference ordinance" predicament. Most municipalities have passed local laws which say, in essence, that any violation of a state criminal statute is also a violation of city law, punishable in the municipal courts. In states where city courts have no power to enforce state law, an ordinance which incorporates by reference the whole range of state crimes into the city code gives the local court the necessary authority to hear prosecutions of matters otherwise beyond

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[1] *See* Idlewild Bon Voyage Liquor Corp. v. Epstein, 370 U.S. 713 (1962); Mengelkoch v. Industrial Welfare Comm'n., 393 U.S. 83 (1968).

[2] Phillips v. United States, 312 U.S. 246 (1941).

[3] Swift & Co. v. Wickham, 382 U.S. 111, 119 (1965). *See generally* Comment, *The Three Judge Federal Court in Challenges to State Actions,* 34 Tenn. L. Rev. 235 (1967).

their jurisdiction. Adding to this is the fact that the individual arrested for a violation of a reference ordinance is usually arrested under both the state statute and the local ordinance.

Studying § 2281, two dispositive jurisdictional issues[4] emerge in a federal case growing out of a "reference ordinance" arrest: (1) Whether the legislative enactments which the plaintiff challenges are "state statutes" within the purview of § 2281 and (2) whether the plaintiff has an action against a "state officer" as distinguished from a local officer?

I. Existence of a "State Statute"

The President's Commission on Law Enforcement and Administration has recognized and underscored the major role of city police in controlling crime and enforcing state criminal law.[5] As the importance of city police enforcement of state statutes has grown, municipal ordinances which make state criminal violations a city crime as well are additional, rather than exclusive, tools available to the police. The presence of such an ordinance does not and cannot restrict the policeman's ability to act simultaneously under the state statute. Since two separate prosecutions can result from the single arrest,[6] it is obvious that the arrest itself is double-pronged and relies on both the statute and the ordinance.

The ability to arrest for state crimes was given to "any peace officer" under the common law.[7] Although the division between state and city police was unknown at that time, municipal police have since been held to be the equivalent to the historic "watchmen" of a city, and thus have the same common law ability to arrest without a warrant as a sheriff.[8] The case law has held that city police have not only the right, but the *duty* to make arrests for violations of state statutes.[9] Thus, the fact that a violation of the state law may also be a violation of the city reference ordinance does not and cannot change the essential fact that the original violation is that of the state statute, and the police are authorized, and perhaps duty-bound, to enforce that statute. If the actual prosecution is

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[4] There are, of course, other essential jurisdictional questions which are not unique to the reference ordinance situation. For example, is it necessary that the action seek an injunction and that a substantial constitutional question be presented? *See generally* Currie, *The Three Judge District Court in Constitutional Litigation,* 32 U. CHI. L. REV. 1 (1964).

[5] *Cited in* Hamilton, *The Challenge of Crime in a Free Society,* 9 CURRENT MUNICIPAL PROBLEMS, 225, 227 (1967); *See also* Lumbard, *State and Local Government Crime Control,* 43 NOTRE DAME LAWYER 889 (1966); Wasby, *Public Law, Politics and Local Courts,* 14 J. PUB. L. 105 (1965).

[6] *E.g.,* Fla. Atty. Gen. Op. 059-43 (1959):

> *Therefore, if a municipal court convicts a person for violation of an ordinance which is identical to the state law the same person can again be tried in a state court for violation of the state law arising out of the same act.* [Emphasis supplied.]
>
> *Contra,* Waller v. State of Fla., 90 S. Ct. 1184 (1970).

[7] State v. Evans, 161 Mo. App. 95, 61 S.W. 590 (1901) which held that a policeman's common law authority to make arrests without warrants for violations of state law cannot be impliedly taken away by a statute which merely authorizes him to make arrests for violations of city ordinances. *See generally* Annot., 58 A.L.R. 2d 1056 (1958); Annot., 76 A.L.R. 2d 1432, 1450 (1961).

[8] 5 Am. Jur. 2d *Arrests,* § 24 (1962); State v. Evans, 160 Mo. App. 95, 61 S.W. 590 (1901).

[9] *Id.; See, e.g.,* Haynes v. State, 71 Fla. 585, 72 So. 180 (1916).

labeled as a violation of the reference ordinance, that in no way makes the initial violation into a mere ordinance violation.

A three-judge federal district court in Tennessee wrote recently that in commencing an inquiry into the properness of a three-judge court's jurisdiction, one should first ask if the statute in question embodies as a policy of the state that which is of "statewide interest and concern."[10] In the reference ordinance context, the statutes which are incorporated are criminal in nature. The state obviously is "concerned" and "interested" in all violations of state criminal statutes—the very term criminal implies an offense against the state. Thus, the state's legitimate interest is not lessened by an expression of interest on the part of the city. The city remains the secondary interest. In effect, the city has said —since the state is interested so are we. This is an obviously subordinate interest to that of the state. As the originating source, the state is much more deeply concerned than its political subdivision which is only reflecting the primary statutory enactment of the state sovereign.

If a prospective three-judge court plaintiff is only prosecuted in city courts under the reference ordinance, is his attack against the state cut off? The answer should be a resounding NO. Declarative relief, coupled with injunctive action, may be sought under § 2281. The basic philosophy of declarative judgments is that:

> It is not the Court's view that in our civilization it is necessary to have incidents requiring arrests to have the rights of the people declared.[11]

If an individual is arrested by city police officers who have authority to enforce state statutes, and is prosecuted in city courts for violating the statute as it is incorporated by a reference ordinance, a very real threat exists to that individual. The police who have arrested him have within their power the right to turn him over to the state prosecutory authorities at any time. For example, crimes which are classified as felonies are almost always turned over to the state courts.[12] Since state prosecution[13] always looms as a possibility, even after the city court trial, the necessary standing to contest the state statute adheres to the city court defendant.

The fact that the individual has not been prosecuted in a state court is in no way determinative of the issue. In *Carmichael v. Allen,*[14] the State Solicitor General:

> disavowed any intention of presenting a proposed bill of indictment against any of these plaintiffs or any others for acts arising out of

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[10] Hyden v. Baker, 286 F. Supp. 475 (M.D. Tenn. 1968) (3 judge court).

[11] Morrison v. Davis, 252 F. 2d 102, 103 (5th Cir. 1958).

[12] *See* Vanbel, *Municipal Corporations and the Police Power in Ohio,* 29 OHIO ST. L. J. 29, 57 (1968); Cleveland v. Betts, 168 Ohio St. 386, 154 N.E. 2d 917 (Ohio 1958) in which the Ohio Supreme Court condemned any procedure which would make the municipal court prosecution an end in itself in matters that had been declared to be serious offenses against the State. Such a procedure would amount to the ability of a city to defeat the overall policy of the State. *See also* Whinery, *Policy, Legislation and Organization of Municipal Courts in Oklahoma,* 18 OKLA. L. REV. 1 (1965).

[13] Fla. Atty. Gen. Op., *supra* note 6.

[14] 267 F. Supp. 985 (N.D. Ga. 1967) (3 judge court).

the events of September 6th or September 10th, or otherwise to seek prosecution for such acts under these insurrection statutes, neither Mr. Slaton nor any other representative of the State of Georgia has disavowed, any further intention to sue under these statutes in the future. It is hardly necessary to point out the 'chilling' effect upon the exercise of the freedom of speech and assembly of a statute prescribing punishment . . . if a person, conscientiously seeking to exercise these rights, must pattern his speech with the ever present threat of such a sanction. The court will grant an injunction prohibiting future prosecutions.[15]

Other recent cases[16] have allowed plaintiffs to contest the constitutionality of state statutes in a three-judge court with no actual prosecutions pending. Certainly the standing of the plaintiff is enhanced if he has already suffered a prosecution in city court under a reference ordinance. Such a prosecution would not have been but for the state statute[17] so the plaintiff has therefore been injured by the statute which he contests.

A complaint calling for a three judge court under § 2281 makes, at the very least, a perfunctory constitutional attack against a practice of a state officer or the effect of a state statute. In order to bring this constitutional attack against a state statute, the plaintiff need only show *some* injury, or threat of injury. It is the authors' contention that arrest under a reference ordinance is sufficient to constitute that injury. Any other supposition would be contrary to the modern philosophy of declarative and injunctive relief *prior* to arrest.[18]

As the Supreme Court said in *Dombrowski v. Pfister*: [19]

So long as the statute remains available to the State the threat of prosecution of protected expression is a real and substantial one. Even the prospect of ultimate failure of such prosecutions by no means dispels their chilling effect on protected freedoms.

And in *Baggett v. Bullitt*: [20]

It will not do to say that a prosecutor's sense of fairness and the Constitution would prevent a successful perjury prosecution for some of the activities seemingly embraced within the sweeping

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[15] *Id.* at 994.

[16] *See* Heard v. Rizzo, 281 F. Supp. 720, 728 (E.D. Pa. 1968) (3 judge court) in which plaintiffs were held to have standing to attack the constitutionality of a statute even though there had been no prosecutions for over fourteen years and it was sworn that none were presently contemplated; and Landry v. Daley, 280 F. Supp. 938, 948, n. 25 (N.D. Ill. 1968) (3 judge court) in which the plaintiffs were allowed to challenge three different statutes, one of which was not involved in any prosecution pending against the plaintiffs in state courts.

[17] The reference ordinance is an absolutely reflective creature; thus, when a state legislature repeals a state statute or adds a new criminal offense, these changes are automatically echoed in the reference ordinance.

[18] *See* Ex parte Young, 209 U.S. 123, 156 (1829) when state prosecution is threatened or about to be commenced; Warren, *Federal and State Court Interference,* 43 HARV. L. REV. 345, 366-378 (1930) (necessity to seek relief before prosecution is initiated in order to avoid § 2283); Note, *Federal Power to Enjoin State Court Proceedings,* 74 HARV. L. REV. 726, 728-29 (1961).

[19] 380 U.S. 479, 494 (1965) *mere threats to enforce statute sufficient.* [Emphasis supplied.]

[20] 377 U.S. 360, 373 (1964).

> statutory definitions. *The hazard of being prosecuted for knowing but guiltless behavior nevertheless remains.*

Probably nowhere more clearly than *Dombrowski* has the Court laid out the principle that attack on a statute as, *inter alia,* violative of the First Amendment freedoms does not require elaborate involvement to achieve standing; that, in fact, the necessity to risk prosecution is removed as a prerequisite for challenging such a statute.

> A criminal prosecution under a statute regulating expression usually involves imponderables and contingencies that themselves may inhibit the full exercise of First Amendment freedoms. See e.g., Smith v. California, 361 U.S. 147, 4 L. Ed. 2d 205, 80 S.Ct. 215. When the statutes also have an overbroad sweep, as is here alleged, the hazard of loss or substantial impairment of those previous rights may be critical. For in such cases, the statutes lend themselves too readily to denial of those rights. The assumption that defense of a criminal prosecution will generally assure ample vindication of constitutional rights is unfounded in such cases. See Baggett v. Bullitt, supra, 377 U.S. at 379. . . . For '[t]he threat of sanctions may deter . . . almost as potently as the actual application of sanctions. . . .' NAACP v. Button, 371 U.S. 415, 433. . . . *Because of the sensitive nature of constitutionally protected expression, we have not required that all of those subject to overbroad regulations risk prosecution to test their rights.* For free expression—of transcendent value to all society, and not merely to those exercising their rights—might be the loser. Cf. Garrison v. Louisiana, 379 U.S. 64, 74-75. . . . For example, we have consistently allowed attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity. [Citations omitted.] We have fashioned this exception to the usual rules governing standing, see United States v. Raines, supra, [362 U.S. 12] because of the '. . . danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application.' NAACP v. Button, supra, 371 U.S. at 433. *If the rule were otherwise, the contours of regulation would have to be hammered out case by case—and tested only by those hardy enough to risk criminal prosecution to determine the proper scope of regulation.* Cf. Ex parte Young, supra, 209 U.S. at 147-148. . . . By permitting determination of the invalidity of these statutes without regard to the permissibility of some regulation on the facts of particular cases, we have in effect, avoided making vindication of freedom of expression await the outcome of protracted litigation. Moreover, we have not thought that the improbability of successful prosecution makes the case difficult. The chilling effect upon the exercise of First Amendment rights may derive from the fact of the prosecution, unaffected by the prospects of its success or failure.[21]

Surely the person who has been arrested under a reference ordinance meets the standards set by *Dombrowski.*

There has been some concern about the effect on *Dombrowski* by the series of Supreme Court decisions clustered around *Younger v.*

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[21] 380 U.S. 479, 486-487 (1965). *See also* Landry v. Daley, 280 F. Supp. 938, 949, n. 26 (N.D. Ill. 1968) (3 judge court) (relaxed rules of standing in First Amendment cases).

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Harris.[22] Although these cases do set appropriate limitations on instances of federal judicial interference with pending state court proceedings, such restrictions do not significantly alter the three judge court considerations. Instead, they raise an initial question of whether federal jurisdiction should be exercised—the cause of action remains intact; it is simply a matter of federal abstention to allow prior state court action in some cases. Other cases are specifically noted as proper cases for original consideration by the Federal court, i.e., (1) the *Dombrowski* genre of bad faith, harassment, and/or intimidation arrests and enforcement; (2) unusual circumstances necessitating exercise of equity jurisdiction, such as flagrant, patent and totally pervasive unconstitutionality of the challenged statute in its entirety; [23] and (3) situations in which there is no remedy available within the state court system. This leaves a very broad field still subject to Federal cultivation.

Once the three judge court assumes jurisdiction over the cause of action arising from the challenge to the state statute, it can also rule on claims resting on the reference ordinance itself. The pendant jurisdiction of the three judge court encompasses the intimately related effect of the ordinance. In numerous cases, persons who are charged under both ordinances and statutes have contested the ordinance, as well as the statute, before a three judge court.[24]

One of the most pertinent of these cases is *Carmichael v. Allen*,[25] The plaintiffs in that case had been arrested by city police officers for violations of the city of Atlanta disorderly conduct ordinance and the state "riot" statute. They had commitment hearings in the Atlanta Police Court. Later, they were bound over to the county Grand Jury under the "riot" charge. The court first eliminated what was *not* involved in the case, saying they were not concerned with "the fundamental right of the state of Georgia *or* the city of Atlanta to prosecute within their spheres, any unlawful act of violence." [26] Affirmatively they *were* planning to consider whether "the defendants [all local officers except the county solicitor] are utilizing these challenged statutory enactments, either with full knowledge of their invalidity or without concern as to their validity, not for the true purpose of vindicating the criminal powers of the State *and city* to punish illegal acts, but with the ulterior purpose of interfering with protected rights of the plaintiffs . . ." [27] Against this background, the court invalidated the dis-

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[22] 91 S. Ct. 746 (1971).

[23] Watson v. Buck, 313 U.S. 387, 402 (1941).

[24] *See, e.g.*, Barber v. Kinsella, 277 F. Supp. 72 (D.C. Conn. 1967) (3 judge court) (Both Hartford ordinance and Connecticut statute dealing with breach of the peace); Browder v. Gayle, 142 F. Supp. 707 (N.D. Ala. 1956) (3 judge court), *aff'd per curiam*, 352 U.S. 903 (1956), *reh. den.*, 352 U.S. 950 (1956) (Mobile ordinance and Alabama statute governing segregation on buses); Baker v. Binder, 274 F. Supp. 658 (W.D. Ky. 1967) (3 judge court): (Louisville ordinance and Kentucky statute on vagrancy and loitering); Watch Tower & Bible Tract Soc. v. Bristol, 24 F. Supp. 57 (D. Conn. 1938) (3 judge court) (Bristol ordinance and Connecticut statute on breach of the peace).

[25] 267 F. Supp. 985 (N.D. Ga. 1967) (3 judge court).

[26] *Id.* at 992.

[27] *Id.* at 993.

orderly conduct ordinance of the city of Atlanta, along with their consideration of the state statutes.

The Supreme Court has spoken to the issue of deciding more than "just" the constitutionality of a State statute. In *Florida Lime & Avocado Growers, Inc. v. Jacobsen,*[28] *Railroad Commission of the State of California v. Pacific Gas & Electricity Co.,*[29] and *Louisville & Nashville R.R. Co. v. Garrett,*[30] the Court said § 2281 courts had jurisdiction "to determine all of the questions in the case, local as well as federal."[31] Should the court desire to take jurisdiction over the claims arising under the statute and not the ordinance, or should the Court not be convinced that three judge court jurisdiction lies, whatever matters the court does not entertain jurisdiction over should be referred back to the original single district judge, rather than to dismiss the case.[32]

II. The Presence of a "State Officer"

When one is seeking to establish three judge court jurisdiction in a case which involves a reference ordinance arrest or prosecution, the surface factual setting usually suggests only "local" officers as defendants, rather than the "state officers" necessary to the action under § 2281. The arresting officers are probably employed by the municipality; the judge and prosecuting attorney are part of the city bureaucracy. These potential defendants' authority may well be statutorily limited to a certain defined geographical area.

Although the question of convening a three judge court when defendants are local officials has not been frequently before the courts, there is one case which is directly on point and many others which are closely analogous. *Browder v. Gayle*[33] is the case most relevant to the

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[28] 362 U.S. 73 (1960).

[29] 302 U.S. 388 (1938).

[30] 231 U.S. 298 (1913).

[31] *Id.;* the policy that all controversial issues should be resolved in a single action is also reflected in Public Service Comm'n. of Mo. v. Brashear Freight Lines, Inc., 312 U.S. 621, 625 (1941):

> A district court composed of three judges under [the predecessors of § 2281] of course has jurisdiction to determine every question involved in the litigation pertaining to the prayer for an injunction, in order that a single law suit may afford final and authoritative decision of the controversy between the parties.

[32] *See* Landry v. Daley, 280 F. Supp. 938, 959, 972 (N.D. Ill. 1968), *rev'd on other grounds,* Boyle v. Landry, 91 S. Ct. 758 (1971) in which statutory charges were heard by the three judge panel, ordinance charges by Judge Wills and where, after the constitutional arguments were decided against the statute, the remainder of the case was referred back to the single judge to whom the case was originally assigned.

In Johnson v. Genessee County, Michigan, 232 F. Supp. 563, 566 (E.D. Mich. 1964) (3 judge court), the court decided that § 2281 jurisdiction did not lie:

> The Court is of the opinion that this case does not fall within the provisions of 28 U.S.C. § 2281, and that it is inappropriate that the two judges who have been called to the assistance of the district judge to hear and to determine the matter should further participate in such hearing and determination. These judges will, therefore, withdraw from the cause and permit the district judge above to determine the questions involved.

But see Perez v. Ledesma, 91 S. Ct. 674 (1971), which seems to suggest that the ordinance portion of a case must be totally disassociated from the entire three judge case. *See also* the concurring opinion of Black, White and Marshall in *Perez* for *some* clarification.

[33] 142 F. Supp. 707 (N.D. Ala. 1956) (3 judge court), *aff'd. per curiam,* 352 U.S. 903 (1956), *reh. den.,* 352 U.S. 950 (1956).

present inquiry. *Browder* involved an attack against the constitutionality of both Alabama statutes and city of Mobile ordinances. These laws required segregation of the races on motor buses. In arguing against the calling of a three judge court, the defendants claimed that these statutes and ordinances were being enforced only by municipal officials (the bus drivers) and not by "any officers of such state" as required by § 2281. This argument was found not to be persuasive as the state had vested its authority in the municipal officers to enforce the statutes and "notwithstanding their insistence to the contrary, that when so engaged the bus drivers clearly [were] officers of the state." The *Browder* opinion spoke directly to the injunction against the city chief of police, and said that this was part of the three judge court case as he "has the authority to make arrests for violations of state statutes [which are questioned herein] . . ."[34] Summarizing, the court said:

> All of the city officials admit in their answers that they are enforcing the State statutes. An official, though localized by his geographic activities and the mode of his selection, is performing a State function when he enforces a statute 'which embodies a policy of statewide concern.'[35]

Also, in *Crown Kosher Super Mkt. of Mass., Inc. v. Gallagher*,[36] the three judge court took jurisdiction even though the sole defendant was a city chief of police.

> Ground No. 15 objects that the decree purports 'to restrain only a local police chief and does not extend to a State officer,' whereas under 28 U.S.C. § 2281 the power of a three judge court is limited to restraining the action 'of any officer of such State in the enforcement or execution of such statute.' This objection is insubstantial in view of the answer and stipulation, both of which conceded that the defendant police chief did and would enforce the State law.[37]

The *Hyden v. Baker*[38] opinion conceded that many legislative policies which apply generally throughout the state must be effected by officials who would historically be considered "local." The defendants in *Hyden* attempted to characterize all acts of such local officers as essentially "local in nature." The court rejected the defendants' characterization and said when the "local" acts were considered in the context of the general scheme of state policy, it was obvious that the seem-

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[34] 142 F. Supp. 707, 713 (N.D. Ala. 1956).

[35] *Id.*; *accord,* Dyer v. Rich, 259 F. Supp. 736 (N.D. Miss. 1966). *See also* Rorick v. Everglades Drainage District, 307 U.S. 208, 212 (1939):

> But what is decisive under § 266 [predecessor of § 2281] is not the formal status of the officials sued but the sphere of their functions regarding the matter in issue. An official though localized by his geographic activities and the mode of his selection may when he enforces a statute which "embodies a policy of statewide concern," be performing a state function within the meaning of § 266.

[36] 176 F. Supp. 466 (D. Mass. 1959) (3 judge court), *rev'd on other grounds,* 366 U.S. 617 (1960).

[37] 176 F. Supp. 466, 494 (D. Mass. 1959).

[38] 386 F. Supp. 475 (M.D. Tenn. 1968) (3 judge court) (local court election apportionment).

ingly local acts were only "the means of implementing in specific counties a policy which is applicable to substantially all of the counties in Tennessee."

> *Our determination that the plaintiffs have made a substantial attack on provisions of statewide application also resolves the subsidiary questions of whether the complaints seek to enjoin a state officer within the meaning of* 28 U.S.C. § 2281 . . . .
>
> We believe that although the relief sought in these cases is local in nature, the statewide policy reflected in [Tennessee acts and constitution] has the effect of rendering these local officials 'state officers' within the meaning of 28 U.S.C. § 2281.[39]

An older case which has been frequently cited by the Supreme Court for its iteration of the category of local officials enforcing state statutes who are proper defendants for a three judge court is *Spielman Motor Sales Co. v. Dodge,*[40] a suit to enjoin a district attorney from criminally prosecuting the plaintiff under an allegedly unconstitutional state statute. The state in which the suit arose considered district attorneys to be local officers since they were elected by local elections and served a geographically restricted subdivision of the state. However, as the *Spielman* opinion explained, such matters as methods of selecting the officer or the definition of the officer's role by the state legislature cannot be decisive. The case stressed that both the "nature of the legislative action which is assailed" and the "function of the officer who is sought to be restrained" should be studied.[41]

> In the instant case it is manifest that the statute under attack attempted to establish a statewide policy, and not one merely in the interest of the particular county. *The defendant is charged with the duty of enforcing the statute by prosecuting those who disobey it, and in performing that duty he acts not merely in the local interest but in the name of the people of the state in compelling observance of its laws.* In that enforcement, he is acting in a true sense as an officer of the state. Appellant sought to restrain his action in that aspect, and hence we think that the case fell within [the provision that preceded 28 U.S.C. § 2281] and was properly heard by three judges.[42]

The reference ordinance device is a stratagem by which local officials seek to participate in the enforcement of state criminal law. Other systems by which locally elected or appointed officers have par-

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[39] Id. at 480. The court felt that "this substantial statewide applicability" distinguished the instant case from the apparently contrary cases of Moody v. Flowers, 387 U.S. 97 (1967) and Strickland v. Burns, 256 F. Supp. 824 (M.D. Tenn. 1966). The apparent contradiction in case law is clarified when one examines the language of Moody:

> The officer sought to be enjoined must be a state officer; a three judge court need not be convened where the action seeks to enjoin a local officer, *unless he is functioning pursuant to a statewide policy and performing a statewide function. Supra,* 387 U.S. at 101-102. [Emphasis supplied.]

[40] 295 U.S. 89 (1935).

[41] *Id.* at 94-95. *See also* Rorick v. Board of Comm'rs., 307 U.S. 208, 212 (1939); Watch Tower Bible & Tract Society v. City of Bristol, 24 F. Supp. 57, 58 (D. Conn. 1938) (3 judge court), *aff'd*, 305 U.S. 572 (1938).

[42] 387 U.S. 105 (1967); 295 U.S. 89, 95 (1935).

ticipated in applying locally a statute of statewide interest have consistently been held to be within the purview of a three judge court. For example, in *Sailors v. Kent Bd. of Education*,[43] a 1967 decision, we have one of the Supreme Court's current examination of the subject. There, the defendants were county school board members who were elected, under state statute, by the local school boards. The high court held that a three judge court had been properly convened.

It has even been held that local officers who were *mistakenly* and *unauthorizedly* enforcing a state statute were proper party defendants in a suit brought under § 2281 attacking the statute. In *Gilmore v. James*,[44] a tuba instructor at the local junior college was attacking the state loyalty oath. Since the school in question received no state funds, its utilization of the state teachers' loyalty oath was not required by the contested statute. In fact, the county junior college had no authority whatsoever to condition teacher employment on the taking of the oath. The county junior college board of trustees "admit it applied [the state statute] Art. 6252-7 to Gilmore but contends that such application was erroneous, thereby defeasing him of standing to directly attack the statute." [45]

> We are unable to accept this proposition. Gilmore was aggrieved by Article 6252-7 when it was applied to him by El Centro. *Inquiry whether or not El Centro was authorized to apply the statute is irrelevant*. . . . El Centro's action in exacting the oath is directly attributable to Article 6252-7.[46]

Although the enforcement of the statute was improper, the action of the local officials was directly attributable[47] to the state statute. As the opinion so graphically declares: "They [the local officials] were but a county cog in a statewide wheel." [48]

Beyond the considerations of the local official who evolves into a § 2281 "state officer" in certain circumstances, there is the additional possibility of joining a more traditional state officer as a party defendant. For example, in *Hyden v. Baker*,[49] the Attorney General of the state of Tennessee was joined as a defendant because of Tennessee statutes which require the Attorney General to be a party defendant in any declaratory action challenging the constitutionality of a state statute.

A general supervisory function has been held to be of an "adequate interest" to bring a state officer into a case as party defendant. In *United States v. Mississippi*,[50] a voting rights case, the Supreme Court reversed the lower court opinion which had, *inter alia*, dropped the state election board as a party defendant:

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[43] 254 F. Supp. 17 (W.D. Mich. 1966) (3 judge court), *aff'd*, 385 U.S. 966 (1966).

[44] 274 F. Supp. 75 (N.D. Tex. 1967) (3 judge court), *aff'd* 390 U.S. 975 (1967).

[45] *Id.* at 84.

[46] *Id. See also* Constantine v. Southwestern La. Institute, 120 F. Supp. 417, 421 (W.D. La. 1954) (3 judge court).

[47] Ex Parte Bransford, 310 U.S. 354, 361 (1940).

[48] 274 F. Supp. 75, 84 (N.D. Texas 1967).

[49] 286 F. Supp. 475, 481 (M.D. Tenn. 1968) (3 judge court).

[50] 380 U.S. 128 (1965).

> The District Court held with respect to the three members of the Mississippi Board of Election Commissioners that the complaint failed to show that they had a sufficient interest in administering or enforcing the laws under attack to permit making them parties defendant. We do not agree. Under state law the Election Commissioners have power, authority and responsibility to help administer the voting registration laws. . . .[51]

The court found that the board had general supervisory functions as to two tests that were covered by the challenged laws and that any injunctive relief would run against those supervising and administering those who enforce the state statute. It is equally natural to assume that an attack on a state statute which had been enforced via a reference ordinance could eventually result in an injunction which should issue against the state's chief legal officer and from thence be communicated to those over whom he has supervision.

Conclusion

The reference ordinance was created as a simple and expedient method of involving the city police and courts in the enforcement of state criminal law. Keeping this purpose clearly in mind, it is evident that the presence of a reference ordinance as a medium of enforcing a state statute cannot veil the statute from the scrutiny of the courts. If this is true—if it is the statute which is being attacked and against which injunctive relief is sought—a reference ordinance arrest and/or prosecution is no bar to the jurisdiction of a three judge court under § 2281. The courts have emphasized the existence of a "state statute" as the initial inquiry and have broadened the meaning of "state officer" to encompass all those who enforce the statute.[52] Since without the statute the reference ordinance would be powerless as a sanction against the particular behavior prohibited by the statute, an individual who was harmed by the enforcement of the ordinance is also, and primarily, harmed by the statute itself. This harm is sufficient to give a three judge federal district court, convened under Title 28, United States Code, Section 2281, jurisdiction over a constitutional attack on the statute.

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[51] *Id.* at 141.

[52] So it is that a state employee enforcing a statute of local interest only may be enjoined by a single judge [Rorick v. Board of Comm'rs., 307 U.S. 208; 212 (1939)] while a seemingly local official acting in a manner of statewide importance is entitled to three [Cleveland v. United States, 323 U.S. 329, 332 (1945) and Spielman Motor Sales Co. v. Dodge, 295 U.S. 89 (1935)]. *See generally* 15 L. Ed. 2d 194 (1965).