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Bad Faith Prosecutions of Civil Rights Matters in State Courts--Future Developments of Subjunctive Relief in Federal Courts

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NOTES

BAD FAITH PROSECUTIONS OF CIVIL RIGHTS MATTERS IN STATE COURTS—FUTURE DEVELOPMENTS OF SUBJUNCTIVE RELIEF IN FEDERAL COURTS

INTRODUCTION

Since the somewhat placid attitudes of the 1950's[1] this country has witnessed some rather significant changes. The unifying principles of the 1960's seem to be involvement and activism, focusing chiefly upon the civil rights movement. And though the civil rights movement encompasses a rather broad spectrum of affairs, most would concede that the central concern of this movement has been the plight of the Negro in our society. Even at this stage in our thinking about racial matters, the tactics of civil disobedience provide a significant, albeit unfortunate method of calling attention to the problems of the Negro. It is important that we reconsider and re-think the place of civil disobedience in this country, for there are indications that it will continue as a force within our system.

But as the Negro's situation continues to improve, it is evident that other methods will be used to accomplish desired ends. Essential to the success of less forceful devices, however, is an atmosphere which allows freedom of expression and some hope of fair treatment. As Dean Griswold has so acutely recognized:

> The Negro, and his supporters, march in the streets not because the law is not clear, but because it has not been followed. He knows from long experience that a resort to the courts will far too often result, initially, in delay, frustration, injustice, and denial of clearly defined rights. It is small comfort to him that three years later he will get justice from the Supreme Court of the United States. Justice—true and real justice—should be dispensed by voting registrars, sheriffs, the police, school boards, district attorneys, justices of the peace, and the others close at hand who represent the authority of the State, and who use their authority far too often to perpetuate a system of social control, which may represent what has been regarded as the southern way of life, but which is wholly inconsistent with rights established by valid Federal power as a part of "the supreme Law of the Land."[2]

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1 See SATIN, THE 1950's: AMERICA'S "PLACID" DECADE (1960).

2 U.S. COMM'N ON CIVIL RIGHTS, ENFORCEMENT; A REPORT ON EQUAL PROTECTION IN THE SOUTH 186-87 (1965) (separate statement of Commissioner Erwin N. Griswold) (Report hereinafter cited as U.S. COMM'N REPORT ON EQUAL PROTECTION).

His contention that some state courts, especially in the South, have not adequately protected these rights seems beyond dispute.[3] While many solutions have been proposed, currently much emphasis is placed upon the possibilities of injunctive relief granted by the federal courts against state-court proceedings. The Supreme Court in *Dombrowski v. Pfister*[4] broadened the criteria for injunctive relief in civil rights cases. Yet that case, though providing relief for many litigants, leaves much uncertainty in this area of the law. It is the purpose of this paper to sketch the historical background of this aspect of injunctive relief, to attempt a delineation of the present scope of the *Dombrowski* remedy, and to examine the impact of subsequent cases upon that remedy. Moreover, emphasis will be placed upon the impact of these legal problems upon our federal system and upon the work of the federal courts. The focus of this Note is upon injunctive relief in the federal court against state proceedings or anticipated proceedings, although other forms of relief in the federal court, such as removal and habeas corpus, will be brought into this discussion.[5]

BACKGROUND

Before dealing with the focal points of this Note, it is necessary to consider the historical environment in which recent cases have been decided. No attempt will be made to discuss in detail this background, as most of these problems are adequately considered elsewhere; rather, this background sketch is intended to serve as a means of acquainting the reader with the exact nature of the problems presented later in this Note.

As early as 1793 statutory recognition was given to the notion that the federal courts should not enjoin state proceedings.[6] But this general proposition soon became subject to numerous exceptions. This erosion continued until 1941 with the much discussed case of *Toucey v. New York Life Ins. Co.*[7] Thereafter, Congress attempted to alleviate the confusion in this area with the following language:

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3 U.S. COMM'N REPORT ON EQUAL PROTECTION, *supra* note 2, gives a detailed report on these abuses. See also KUNSTLER, DEEP IN MY HEART (1966).

4 380 U.S. 479 (1965) (hereinafter referred to as *Dombrowski*).

5 See generally Annot., *Anticipatory Relief in Federal Courts Against State Criminal Prosecutions Growing Out of Civil Rights Activities*, 8 A.L.R.3d 301 (1966). For a discussion of habeas corpus, see Amsterdam, *Criminal Prosecutions Affecting Federally Guaranteed Civil Rights: Federal Removal and Habeas Corpus Jurisdiction to Abort State Court Trial*, 113 U. PA. L. REV. 793 (1965); Wright & Sofaer, *Federal Habeas Corpus For State Prisoners: The Allocation of Fact-Finding Responsibility*, 75 YALE L.J. 895 (1966).

6 Act of March 2, 1793, ch. 22, § 5, 1 Stat. 335, which provided that no writ of injunction might be granted on the part of federal courts to stay proceedings in any state court. See the discussion in Toucey v. New York Life Ins. Co., 314 U.S. 118, 129-41 (1941). See generally Durfee & Sloss, *Federal Injunction Against Proceedings in State Courts: The Life History of a Statute*, 30 MICH. L. REV. 1145 (1932).

7 314 U.S. 118 (1941).

> A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.[8]

The anti-injunction statute has been held inapplicable to situations in which the state prosecution has not yet begun.[9] Yet, even here, the courts

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[8] 28 U.S.C. § 2283 (1964). See Comment, *Federal Injunctions Against Proceedings in State Courts*, 35 CALIF. L. REV. 545 (1947); Comment, *Anti-Suit Injunctions Between State and Federal Courts*, 32 U. CHI. L. REV. 471 (1965). For cases interpreting this statute see Donovan v. City of Dallas, 377 U.S. 408 (1964); Leiter Minerals v. United States, 352 U.S. 220 (1956); Amalgamated Clothing Workers of America v. Richman Bros., 348 U.S. 511 (1955). The American Law Institute in STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS (Tent. Draft No. 4, 1966), has proposed the following restatement of § 2283:

> A court of the United States shall not grant an injunction to stay proceedings in a State court, or the enforcement of a judgement of a State court, unless such an injunction is otherwise warranted, and: (1) an Act of Congress authorizes such relief or provides that other proceedings shall cease; or (2) the injunction is requested by the United States, or an officer or agency thereof; or (3) the injunction is necessary to protect the jurisdiction of the court over property in its custody or subject to its control; or (4) the injunction is in aid of a claim for interpleader; or (5) the injunction is necessary to protect or effectuate a prior judgment of the court; or (6) the injunction is sought to preserve temporarily the status quo pending determination of whether this section permits grant of a permanent injunction.

Id. at 19. The commentary on this section provides an excellent background discussion of this problem and also a discussion of the scope of and justification for the proposed changes. *Id.* at 114-25.

For the purposes of this civil rights discussion, one of the most controversial questions presently is whether 42 U.S.C. § 1983 (1964) can be interpreted as express authorizations for a stay of state proceedings. This section provides that:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

The Supreme Court in Cameron v. Johnson, 381 U.S. 741 (1965), refused to rule on this question. Courts in Baines v. City of Danville, 337 F.2d 579 (4th Cir. 1964), *cert. denied*, 381 U.S. 939 (1965); Goss v. Illinois, 312 F.2d 257 (7th Cir. 1963); and Sexton v. Barry, 233 F.2d 220 (6th Cir.), *cert. denied*, 352 U.S. 870 (1956), have held in the negative. But in Cooper v. Hutchinson, 184 F.2d 119 (3d Cir. 1950), it was held that the former equivalent of § 1983 was an express exception to § 2283. A case from the fifth circuit, Dilworth v. Riner, 343 F.2d 226 (5th Cir. 1965), has held that portions of the Civil Rights Act of 1964 provided an express exception to § 2283. For an excellent discussion of this problem see Note, *The Dombrowski Remedy—Federal Injunctions Against State Court Proceedings Violative of Constitutional Rights*, 21 RUTGERS L. REV. 92 (1966). This work provides an extensive analysis of the history of § 1983 and § 2283 and the cases construing these statutes, and concludes that § 1983 is definitely an express exception.

[9] See Dombrowski v. Pfister, 380 U.S. 479 (1965); Carmichael v. Allen, Civil No. 10421, N.D. Ga., Dec. 13, 1966.

have developed an abstention doctrine by reason of comity which can provide an equally rigid bar to federal stays of state proceedings. For a number of years the classic case cited for this proposition was *Douglas v. City of Jeannette*.[10] This case involved a suit in federal court by Jehovah's Witnesses to enjoin the further enforcement of a licensing ordinance. The petitioners asked for equitable relief, alleging that the continued enforcement of the statute deprived them of first-amendment protections. The Court held an injunction should not have issued. Nonetheless, the Court did concede that the district court had the power to decide the case, but ruled that the federal court should interfere with the state criminal processes only on a showing of danger of irreparable injury "both great and immediate."

A rather extensive discussion of the law in this area is found in *Beal v. Missouri Pac. R.R.*,[11] where the Court said:

> It is a familiar rule that courts of equity do not ordinarily restrain criminal prosecutions. . . .
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> This is especially the case where the only threatened action is the prosecuton in the state courts by state officers of an alleged violation of state law, with the resulting final and authoritative determination of the disputed question whether the act complained of is lawful or unlawful. . . .
>
> Hence interference with the processes of the criminal law in state courts, in whose control they are lodged by the Constitution, and the determination of questions of criminal liability under state law by federal courts of equity, can be justified only in most exceptional circumstances, and upon clear showing that an injunction is necessary in order to prevent irreparable injury.[12]

Though much uncertainty still surrounds these earlier decisions, several observations can be made about them which aid interpretation of later cases. When comparing these earlier decisions with more recent cases, one is immediately struck by the different contexts in which they arose.[13] Although generalization is perhaps dangerous, it seems evident that the Negro unrest of recent years has been the dominant context in which recent cases have arisen; likewise, the element of first-amendment privileges has been the central concern in this area. A second observation is the early development of the principle that only threatened prosecutions may be enjoined.[14] This distinction, which still remains in force, has been justified on a number of grounds. Possibly the most evident reason is the simple fact

10 319 U.S. 157 (1943).

11 312 U.S. 45 (1941).

12 *Id.* at 49-50.

13 See the extensive discussion of earlier cases in Note, *Federal Injunctions Against State Criminal Proceedings*, 4 STAN. L. REV. 381 (1952).

14 See *id.* at 386-90.

that stopping an intended prosecution offers a substantially smaller opportunity for affront to the state and interferes less with the state criminal processes than would the stay of a prosecution already in process. Nonetheless, it does seem as if some reevaluation is needed, as the present law is unsatisfactory. The current law forces the defense attorney to race to get into the federal court before the state prosecution begins. Also, it is sometimes difficult to know whether the prosecution will actually begin. If an attorney fails to reach the federal court in time, he then must defend in the state courts and await an opportunity to argue before the Supreme Court. This is grossly unfair in the case of a patently bad-faith prosecution.

Finally, it must be noted that these earlier decisions did recognize the possibility that a federal court could exercise its equity powers in certain cases. One source[15] has outlined three main criteria for determining whether the exercise of equitable jurisdiction was proper. First . . . the petitioner must attack the statute he seeks to enjoin as repugnant to a federal statute or the Constitution. . . . Secondly, there must be a clear showing that imminent enforcement of the statute is threatened. . . . The third consideration is the excessive cost involved in complying with or challenging the state statute in a local court. Injunctive relief is usually granted if a large fine or fee must be paid, or multiple prosecutions for successive offenses are threatened.[16] This third consideration underscores the emphasis of these older decisions upon, for the most part, economic injury, injury to property, as "irreparable injury."

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Yet change was inevitable, for profound forces were at work in our system. Reference was made in the introduction of this paper to some of these forces and to the sad situation that existed in the administration of justice. The judicial consciousness began to focus upon the need to protect the ultimate weapon of oppressed persons—the right of free expression. Moreover, the void-for-vagueness doctrine, long before established, began to appear more frequently.[17] Likewise, attention was focused upon the more subtle devices that were perpetuating these conditions. Advocates, intimately engaged in the struggle for change, began to present their arguments before the intellectual community.[18] Gradually, decisions began to appear which granted injunctive relief: In *Browder v. Gayle*,[19] the enforce-

15 Comment, *Federal Injunctions and State Enforcement of Invalid Criminal Statutes*, 65 COLUM. L. REV. 647 (1965).

16 *Id.* at 650, 651.

17 See, e.g., Ashton v. Kentucky, 384 U.S. 195 (1966); Edwards v. South Carolina, 372 U.S. 229 (1963). See generally Note, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67 (1960).

18 See, e.g., KUNSTLER, DEEP IN MY HEART (1966); SOUTHERN JUSTICE (Friedman ed. 1965); Amsterdam, *supra* note 5.

19 142 F. Supp. 707 (M.D. Ala. N.D.), *aff'd per curiam*, 352 U.S. 903 (1956).

ment of Alabama segregation statutes was enjoined. Thereafter, the scope of this decision was broadened in *Morrison v. Davis*[20] and *Busch v. Orleans Parish School Bd.*[21] Possibly these and other decisions could have been dismissed, however, as merely meeting the "irreparable injury" and "extraordinary circumstances" tests of the older cases. Finally, in 1965, the Supreme Court addressed itself, in the context of civil rights, to the increasing problem of federal injunctions against state prosecutions: *Dombrowski v. Pfister*[22] was decided. Though the facts of *Dombrowski* are quite complex,[23] basically the case involved an attempt in the federal courts to enjoin the enforcement of the Louisiana "anti-subversion laws." The originally-attempted prosecution had been vacated for lack of facts necessary to continue prosecution. But demands continued for the prosecution of these persons, and their attorneys consequently petitioned for relief in the district court. They requested a declaratory judgment and temporary and permanent injunctions against further prosecutions, on the ground that the laws were unconstitutional on their face and unconstitutional as applied. Also, they sought injunctive relief under various civil rights statutes,[24] alleging that the prosecutions were not made in a good faith effort to obtain valid convictions, but rather to discourage civil-rights activity.[25]

The three-judge district court refused to issue an injunction and held that it would not determine the constitutionality of the Louisiana law in advance of appropriate proceedings in the state court. The majority opinion viewed this case as involving "the paramount right of a state to self-preservation."[26] The essential emphasis of the majority opinion was upon this factor, although later in the opinion the majority discussion focuses upon states rights, upon the danger of the federal courts impinging upon the sovereignty of a state. Judge Wisdom in his dissenting opinion places emphasis upon this latter basis in saying, "To me, the majority's decision appears to rest on a sort of visceral feeling that somehow, if relief were

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20 252 F.2d 102 (5th Cir.), *cert. denied*, 356 U.S. 968 (1958).

21 194 F. Supp. 182 (E.D. La.), *aff'd per curiam sub nom.* Gremillion v. United States, 368 U.S. 11 (1961). See the discussion of all these cases in Note, *supra* note 8, at 113-14.

22 380 U.S. 479 (1965).

23 For an exhaustive study of the background facts of *Dombrowski* see Brewer, *Dombrowski v. Pfister: Federal Injunctions Against State Prosecutions in Civil Rights Cases—A New Trend in Federal-State Judicial Relations*, 34 FORDHAM L. REV. 71 (1965). This article also contains an excellent analysis of the scope of that decision and its possible implications for the future.

24 REV. STAT. §§ 1979-80 (1875), 42 U.S.C. §§ 1983, 1985 (1964).

25 See Complaint No. 14019, Dombrowski v. Pfister, E.D. La., 1963. Also relevant to the scope of this note is a later case which developed out of this same fact situation, involving another possible type of relief. See Dombrowski v. Eastland, 387 U.S. 82 (1967) (per curiam).

26 Dombrowski v. Pfister, 227 F. Supp. 556, 560 (E.D. La. 1964).

granted, the Court would be impinging on States' Rights."[27] Judge Wisdom finds federal injunctive relief under these circumstances entirely consistent with federalism.

> There is, therefore, no substance to the majority's argument that the federal court is here being asked to interfere with orderly state criminal processes . . . . The processes under attack in this case are, allegedly, not the State's usual, orderly, impersonal, legislative and criminal processes.[28]

The Supreme Court reversed the decision of the three-judge district court. The Court adopted the same logic as was used in the dissenting opinion below in dealing with the nature of federalism. "[T]he Court has recognized that federal interference with a State's *good-faith* administration of its criminal laws is peculiarly inconsistent with our federal framework."[29] *Dombrowski* sets out two situations in which injunctive relief is appropriate. These are referred to as the two "wings" of *Dombrowski*. First, equitable relief is appropriate where an actual prosecution is threatened under a statute which is challenged on its face as an overly broad and vague regulation of first amendment privileges.[30] Second, equitable relief is appropriate where state criminal statutes, though on their face valid, are being applied for the purpose of discouraging protected activities without any hope of ultimate success.[31] The Supreme Court reasoned that in either circumstance there was in fact a danger of irreparable injury to the persons prosecuted and that even ultimate reversal by the Supreme Court could not fully protect them due to the "chilling effect" such action might have upon the exercise of first amendment rights.

This case was viewed with great optimism by those who advocated a much more prominent position for the federal courts in regulating abuses

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27 *Id.* at 570.

28 *Id.* at 571.

29 Dombrowski v. Pfister, 380 U.S. 479, 484 (1965). (Emphasis added.)

30 *Id.* at 490.

31 *Ibid.* For an analysis of the second wing of *Dombrowski*, see the Fifth Circuit opinion in Cox v. Louisiana, 348 F.2d 750 (5th Cir. 1965). Therein Judge Wisdom said this about the prosecution of certain civil rights workers:

> The second prosecution is without any hope of success. The district attorney's transparent purpose is to harass and punish the petitioner for his leadership in the civil rights movement, and to deter him and others from exercising rights of free speech and assembly in Louisiana—in this instance, by advocating integration of public accommodations.

Id. at 752. Judge Wisdom continued with this much quoted passage:

> When a State, under the pretext of preserving law and order uses local laws, valid on their face, to harass and punish citizens for the exercise of their constitutional rights or federally protected statutory rights, the general principle must yield to the exception: the federal system is imperiled.

Ibid.

in the state judicial process. One author referred to this case as possibly containing

> at least the beginnings of a dramatic new synthesis which, if followed, will undoubtedly have a profound effect upon the relationship between the federal and state judicial systems and, ultimately, upon the understanding and application of constitutional principles by lower state courts throughout America.[32]

And there seemed to be good reason for this optimism. Freedom of expression was being emphasized in a number of decisions.[33] *Mapp*,[34] *Gideon*,[35] *Escobedo*[36] and other cases demonstrated the willingness of the Supreme Court to force state courts to comply with the commands of the Constitution.[37] The temper of the Court seemed to make the time right for a concerted effort to sweep away some of the remaining obstacles that prevented full use of the federal courts for vindication of constitutional rights.

Cases after Dombrowski—The Scope of Dombrowski

Let us now turn to subsequent Supreme Court cases (which tend to dampen that enthusiasm) before attempting to assess the current vitality of *Dombrowski*. In *Cameron v. Johnson*,[38] the Supreme Court was given an opportunity to rule that Section 1983, title 42, of the *United States Code* was an express exception to the anti-injunction statute, Section 2283 of title 28. In *Cameron*, the petitioners, active in Negro voter registration, were attacking the Mississippi anti-picketing statute. They alleged that the statute was void on its face for vagueness and overbreadth and that it was unconstitutional as applied to plaintiffs and others similarly situated because it was being used to harass and interfere with rights of national citizenship, principally the right to vote and freedom of expression.[39] But instead of a decision on the merits, the Supreme Court delivered a per

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32 Brewer, *supra* note 23, at 84.

33 See, e.g., New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

34 Mapp v. Ohio, 367 U.S. 643 (1961).

35 Gideon v. Wainwright, 372 U.S. 335 (1963).

36 Escobedo v. Illinois, 378 U.S. 478 (1964).

37 See argument in Brewer, *supra* note 23, at 104. Brewer further argues that:

> In the past, the Court has often allowed decisions clearly foreshadowing even more dramatic rulings to stand for a time as writing on the wall, apparently in the hope that the warning thus provided would be heeded in the appropriate quarters and that stronger and broader opinions implementing the earlier rationale would prove unnecessary.

Id. at 105. It is the argument of this paper that subsequent Supreme Court decisions reveal that this in fact was not their purpose.

38 381 U.S. 741 (1965).

39 See Cameron v. Johnson, 244 F. Supp. 846, 850 (S.D. Miss. 1964). For a discussion of this case see Note, *supra* note 8, at 94.

curiam decision in which it vacated the order of the lower court and remanded for consideration of whether Section 2283 barred a federal injunction, and if not, for a determination whether relief was proper in light of *Dombrowski.*[40] Mr. Justice Black in his dissenting opinion referred to the majority opinion as "a cryptic, uninformative *per curiam* order."[41] He continued by saying that

> The summary disposition the Court makes of this case fails properly to enlighten state or federal courts or the people who deserve to know what are the rights of the people, the rights of affected groups, the rights of the Federal Government, and the rights of the States in this field of activities which encompasses some of the most burning, pressing and important issues of our time.[42]

Black was of the opinion that *Dombrowski* was inapplicable to the facts of *Cameron,* and determined that there are two basic situations covered by that case. First, there is a statute unconstitutional on its face involved;[43] but second,

> Dombrowski also indicates to me that there might be cases in which state or federal officers, acting under color of a law which is valid, could be enjoined from engaging in unlawful conduct which deprives persons of their federally guaranteed statutory or constitutional rights,[44]

But Black makes it clear that to use this argument the petitioner must be quite specific in his allegations, and presumably would require a heavy burden of proof.

> I cannot believe for one moment that this Court in *Dombrowski* intended to authorize federal injunctions completely suspending all enforcement of a constitutionally valid state criminal law merely because state defendants allege that state officials are about to harass them by doing no more than enforcing that valid law against them in the state courts.[45]

Black is clearly concerned with the right of a state through clear and specific statutes to control their streets and public properties. In this respect, majority and dissenting opinions both emphasize the continued vitality of

40 Cameron v. Johnson, 381 U.S. 741, 742 (1965). The lower court held on remand that § 2283 did bar a federal injunction. Cameron v. Johnson, 262 F. Supp. 873 (S.D. Miss. 1966). See the original decision in 244 F. Supp. 846 (S.D. Miss. 1964). This writer can find no record of an appeal from the decision of the district court on remand.

41 Cameron v. Johnson, *supra* note 40, at 742 (dissenting opinion).

42 *Ibid.*

43 *Id.* at 748.

44 *Id.* at 749.

45 *Id.* at 752.

Douglas v. City of Jeannette. Justice White's opinion also indicates the need for clarification in this area.

> It is obvious, however, that several of my Brethren find more guidance in *Dombrowski* than I do and more than I think a district judge can find in either that case or this unrevealing *per curiam* remand, which ignores the differences between this case and *Dombrowski.*[46]

Then, in *City of Greenwood v. Peacock,*[47] the Supreme Court was asked to allow removal of state prosecutions which were alleged to be in violation of a defendant's civil rights under appropriate federal law. In *Peacock,* such charges as obstructing public streets, assault and disturbing the peace were involved. The civil rights workers alleged that the obstruction-of-streets statute was unconstitutionally vague on its face, unconstitutional as applied, and that its application was part of a general policy in Mississippi of racial discrimination. Likewise, they alleged that the sole purpose of the arrests and prosecutions was to harass and punish them for their exercise of constitutionally protected activity. Their claim for removal was based upon title 28 of the *United States Code,* sections 1443(1) and 1443(2).[48] The Supreme Court rejected both claims. Section 1443(2) was held to be available only to federal officers and to persons assisting such officers in the

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46 *Id.* at 759 (dissenting opinion).

47 384 U.S. 808 (1966). On the same day as it handed down the *Peacock* case, the court also decided Georgia v. Rachel, 384 U.S. 780 (1966). In *Rachel,* the civil rights workers were arrested while attempting to receive service in certain restaurants. Upon their arrest and subsequent prosecution under Georgia's criminal trespass statute, they petitioned for removal under § 1443. The District Court refused to remove, and this was reversed by the Court of Appeals. The Supreme Court affirmed the Court of Appeals' decision, agreeing that Hamm v. City of Rock Hill, 379 U.S. 306 (1964), was applicable. *Hamm* made the Civil Rights Act of 1964, 42 U.S.C. § 2000a (1964), applicable to protected conduct which had occurred before the 1964 act was passed. *Rachel* makes it clear that § 1443(1) is available to persons whose prosecution stems exclusively from an activity protected by the Civil Rights Act of 1964, *i.e.,* the peaceful exercise of the right to equal accommodation in establishments covered by the Civil Rights Act of 1964. For a very thorough analysis of *Rachel and Peacock,* see Note, *Federal Jurisdiction: The Civil Rights Removal Statute Revisited,* 1967 DUKE L.J. 136.

48 The civil rights removal provisions are as follows:

> Any of the following civil actions or criminal prosecutions, commenced in a State court may be removed by the defendant to the district court of the United States for district and division embracing the place wherein it is pending:
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> (1) Against any person who is denied or cannot enforce in the courts of such State a right under any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction thereof;
>
> (2) For any act under color of authority derived from any law providing for equal rights, or for refusing to do any act on the ground that it would be inconsistent with such law.

28 U.S.C. § 1443 (1964).

performance of their official duties.[49] The rejection of Section 1443(1), however, is probably more significant in our discussion. The Supreme Court chose to adopt a very narrow construction of this section, holding that the phrase "*equal* civil rights" did not include the broad constitutional guarantees of the first amendment.[50] This was consistent with a long line of decisions.[51] The Court emphasized in its holding that it was not suggesting that the petitioners had not alleged a denial of rights guaranteed under federal law, but rather that the removal statute was not the proper means of redress for these wrongs.

Many persons have disagreed with the Court's conclusion on this point; strong arguments have been made that removal was the proper remedy here.[52] One writer[53] expressed disappointment in this decision by saying:

> When it was decided in April 1965, *Dombrowski v. Pfister* seemed to herald a radical expansion of federal protection for embattled local minorities. But barely one year later the Supreme Court reneged. . . . With its renewed ban on direct intervention [in *Peacock*], the Court has senselessly disarmed the Southern federal bench.[54]

Further, the Court in *Peacock* discussed the *Dombrowski* remedy as one of the alternative means of redressing the wrongs alleged.

> If the state prosecution or trial on the charge of obstructing a public street or on any other charge *would itself clearly deny their rights protected by the First Amendment,* they may under some *circumstances* obtain an injunction in the federal court.[55]

There is, of course, great danger in attempting to read too much into any portion of an opinion. But the above language is highly restrictive and certainly seems to negate any inference that *Dombrowski* will be given a broader scope . Moreover, later language in the opinion tends to indicate a continued shift in the concern of the Court. And this language may well prove crucial in the decision of later cases.

> It is worth contemplating what the result would be if the strained interpretation of § 1443(1) urged by the individual petitioners were to

49 City of Greenwood v. Peacock, 384 U.S. 808, 815 (1966).

50 *Id.* at 825.

51 See, e.g., Kentucky v. Powers, 201 U.S. 1 (1906); Strauder v. West Virginia, 100 U.S. 303 (1879).

52 See Johnson, *Removal of Civil Rights Cases from State to Federal Courts: The Matrix of Section 1443,* 26 FED. B.J. 99 (1966); Note, *Federal Jurisdiction: The Civil Rights Removal Statute Revisited,* 1967 DUKE L.J. 136; Note, *The Dombrowski Remedy—Federal Injunctions Against State Court Proceedings Violation of Constitutional Rights,* 21 RUTGERS L. REV. 92, 118-120 (1966).

53 Note, *Theories of Federalism and Civil Rights,* 75 YALE L.J. 1007, 1050 (1966).

54 *Id.* at 1050, 1052.

55 City of Greenwood v. Peacock, 384 U.S. 808, 829 (1966). (Emphasis added.)

> prevail. . . . [I]f the individual petitioners should prevail in their interpretation of § 1443(1), then every criminal case in every court of every State—on any charge from a five-dollar misdemeanor to first-degree murder—would be removable to a federal court upon a petition alleging (1) that the defendant was being prosecuted because of his race and that he was completely innocent of the charge brought against him, or (2) that he would be unable to obtain a fair trial in the state court. On motion to remand, the federal court would be required in every case to hold a hearing, which would amount to at least a preliminary trial of the motivations of the state officers who arrested and charged the defendant, of the quality of the state court or judge before whom the charges were filed, and of the defendant's innocence or guilt.[56]

The decision in *Adderly v. Florida*[57] is also relevant in this discussion, even though it did not involve an attempt to obtain relief in the lower federal courts from abuses in the state courts. In *Adderley*, the defendants, at Florida A. & M. University, were arrested during demonstrations at the county jail. They were protesting the earlier arrest of other protesting students. The defendants were convicted on a charge of "trespass with a malicious and mischievous intent."[58] The Supreme Court upheld the convictions of these defendants.

One commentator lamented this decision and mentioned the following grounds upon which the Court could have reversed the convictions:[59]

> (1) The offense as defined by the instructions was unconstitutionally vague,
>
> (2) the convictions were based on an indefensible sort of entrapment,
>
> (3) the statute was applied as a licensing statute with no legislative standards for the exercise of discretion,
>
> (4) the statute was specifically overbroad in punishing petitioners for engaging in constitutionally protected behavior,
>
> (5) the statute was generally overbroad because it applied to fact situations in which the court has found constitutionally protected behavior, and
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> (6) there was insufficient evidence to support at least one element of the offense.[60]

Yet the Court did not choose to reverse by adopting any of these techniques. Although too much can easily be read into this case, it represents at least

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56 *Id.* at 832.

57 385 U.S. 39 (1966).

58 *Id.* at 40.

59 Kipperman, *Civil Rights at Armageddon—The Supreme Court Steps Back: Adderly v. Florida*, 3 LAW IN TRANS. Q. 219 (1966).

60 *Id.* at 234, 235.

a warning that a minimum of responsibility and care must be exercised in overt conduct, even though such conduct is also mixed with expression and association. Or, in the words of the Court, this represents a negation of the view

> that people who want to propogandize protests or views have a constitutional right to do so whenever and however and wherever they please. . . . We reject [this concept of constitutional law]. The United State Constitution does not forbid a State to control the use of its own property for its own lawful nondiscriminatory purpose.[61]

Certainly, however, this case can not be viewed as a repudiation of the notion that the first amendment privileges enjoy a very high place in our scale of values. Yet the case does represent an awareness on the part of the Supreme Court of some of the practical limitations that must be placed upon such mixed conduct. And it is an express declaration that certain types of conduct are unlawful. This has definite implications for our injunction problem, since this decision narrows the area of protected activities, or at least creates some doubt as to the nature of protected conduct.

This problem in *Adderley* leads to a discussion of the present scope of the *Dombrowski* remedies in light of the aforementioned decisions. Can there be a bad-faith prosecution of unprotected activity? An affirmative answer seems to be required; but this problem may be more theoretical than real, since the proof of bad faith would be an extremely difficult burden when the prosecution is of illegal conduct under a valid statute. For example, *Carmichael v. Allen*[62] involved, among other things, an intended prosecution under Georgia's Riot Statute. One of the arguments of petitioners was that irrespective of whether the statute was constitutional or not, it was being applied against the petitioners, "not in a bona fide effort to vindicate the state's criminal laws, but only to discourage the plaintiffs' civil rights activities."[63] The court recognized the theoretical validity of this contention, citing this portion of *Dombrowski:*

> [A]ppellants have attacked the good faith of the appellees [state officials] in enforcing the statutes, claiming that they have invoked, and threaten to continue to invoke, criminal process without any hope of ultimate success, but only to discourage appellants' civil rights activities. If these allegations state a claim under the Civil Rights Act, 42 U.S.C. § 1983, as we believe they do . . . [citing cases] the interpretation ultimately put on the statutes by the state courts is irrelevant.[64]

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61 Adderly v. Florida, 385 U.S. 39, 48 (1966).
62 267 F. Supp. 985 (N.D. Ga. 1967).
63 *Id.* at 22.
64 Dombrowski v. Pfister, 380 U.S. 479, 490 (1965).

The court in *Carmichael* pointed out the extremely heavy burden that the petitioner must carry to prevail on that issue and concluded that the petitioners before them had simply failed to carry this burden. However, the court may have been overly generous in dealing with this point, as one of the conditions explicitly posited by *Dombrowski* is that the state prosecution be "without any hope of ultimate success."[65] The *Cox* case[66] illustrates a bad-faith prosecution under a prima facie valid statute. But there the doctrine of unconstitutional application of a statute was used where the conduct prosecuted was of a type guaranteed by the federal constitution and federal statutes. Beyond this, *i.e.*, a statute valid on its face and validly applied, it would seem that *Dombrowski* would not reach.

Is the *Dombrowski* remedy limited to a first amendment context? For instance, could a Negro charged with murder, or any other charge which in itself does not relate to first amendment privileges, petition a federal district court for injunctive relief alleging that the prosecution is a bad-faith prosecution? Recall the dicta in *Peacock* which limited injunctive relief to cases where the "charge would itself clearly deny their rights protected by the First Amendment."[67] But wouldn't this charge be a possible means of intimidating other persons in their exercise of free expression? On a showing that the murder charge is entirely groundless, motivated by an intent to intimidate others, isn't this case within the scope of the second wing of *Dombrowski*? It seems that these facts would merit injunctive relief, for here the motivation to intimidate others is present and therefore the test of "irreparable injury" is met.

Yet the thesis of this paper is that the Supreme Court has retained the "irreparable injury" test, met in *Dombrowski* by the element of a "chilling" of first amendment exercise. True, the concerns of the Supreme Court have shifted in recent years. But inherent in recent cases is a recognition of some of the practical problems that are involved in this area. There is the realization of the problems that would be created if there were massive attempts in the federal district courts to enjoin state criminal proceedings. A petition for relief usually requires that a federal court hold a hearing and a preliminary investigation to see if there is any merit in the petitioners allegations. This unquestionably is a timely process. But under *Dombrowski* the extreme cases are enjoinable; there is relief for the defendant caught in that difficult situation. But most cases are not so clear. There is conflicting evidence and there is at least some reasonable question. Therefore, we find the federal courts involved in extensive hearings and findings, only to deny relief for lack of sufficient proof. The Supreme Court has demonstrated a desire to keep that kind of case out of the federal system under our present laws.

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65 *Ibid.*

66 Cox v. Louisiana, 379 U.S. 536 (1965).

67 City of Greenwood v. Peacock, 384 U.S. 808, 829 (1966).

EXPANSION OF DOMBROWSKI?

The legal arguments for expanded federal initiative are persuasive. The argument is simple: The state certainly has the legitimate interest in the good faith prosecution of its criminal laws, but the misuse of this function through bad faith prosecutions to harass civil rights workers is not a legitimate function, nor a legitimate need of the state. Judge Wisdom puts it aptly.

> The general principle, basic to American Federalism, that United States courts usually should refrain from interfering with state courts' enforcing local laws is unassailable. But the sharp edge of the Supremacy Clause cuts across all such generalizations. When a State, under the pretext of preserving law and order uses local laws, valid on their face, to harass and punish citizens for the exercise of their constitutional rights or federally protected statutory rights, the general principle must yield to the exception: the federal system is imperiled.[68]

No "needless" friction is created between the state and federal courts when the state so acts in violation of guaranteed rights. But to some extent this particular argument views incorrectly the real nature of the problems involved. Prima facie bad-faith prosecutions are enjoinable under present law. Yet in the majority of cases it is not such an easy matter to label a prosecution as being carried on in bad faith. The argument is made that within this "grey area" the possibilities for subtile harassment are unlimited, that therefore we should let a more independent body, a more responsible body decide this question of bad faith. It is difficult to read Kunstler's work or the findings of the United States Commission on Equal Protection without being deeply troubled by the plight of those who continue to be denied full freedom. We in this country pride ourselves upon our "racial progress," yet these recent works show clearly that this progress falls far short of reaching the goals we have set. If the arguments for massive change are accepted, and they have much support, then we should realize where they will carry us. One must at least be conscious of the practical consequences that such changes will bring.

Many suggestions for reform have been made in recent years. The Association of the Bar of the City of New York, Special Committee on Civil Rights Under Law, has made a proposal for a Federal Civil Rights Procedure Law[69] which contains many of the typical suggestions for reform. These recommendations seem well written and worthy of consideration. Their report focuses upon changes in the law of removal and injunctive relief. First, the

[68] Cox v. Louisiana, 348 F.2d 750, 752 (5th Cir. 1965).

[69] See *Hearings Before the Subcommittee on Constitutional Rights of the Senate Committee of the Judiciary*, 89th Cong., 2d Sess., pt. 2, at 975-1057 (1966) [hereinafter called *Hearings*].

Committee recommended two additions to Section 1443, providing that in addition to (1) and (2) of that section, defendants may remove to the federal courts any state criminal prosecution:

> (3) For any exercise, or attempted exercise, of any right granted, secured or protected by the Civil Rights Act of 1964, or of any other right granted, secured or protected by the Constitution or laws of the United States against the denial of equal protection of the laws on account of race, color, religion or national origin; or
>
> (4) For any exercise, or attempted exercise, of any right to freedom of speech or of the press or of the people to peaceably assemble secured by the Constitution or laws of the United States when committed in furtherance of any right of the nature described in subsection (3) of this section.[70]

Several specific comments by the committee on this proposal are of special significance here. The committee seriously considered a scheme in which removal would no longer be automatic on the filing of appropriate papers but would take place only upon an order by the district court after an evidentiary showing. The committee rejected this scheme, believing that the burden of sending the case back to the state courts should be upon the prosecutor after an appropriate motion for remand. The committee's justification for the continued use of the automatic removal device and the expanded availability of removal are quite interesting. The committee points out that (1) under the present wording of the statute in subsections (1) and (2) there have been many removal petitions filed in recent years; (2) under the new rules, less resort to habeas corpus and equitable relief would be required; and (3) "in any event, deprived persons should not be denied the enjoyment of Federally granted rights to equal protection of the laws because of inconvenience to judges or to other litigants."[71] The chairman of this bar committee argued before the U.S. Subcommittee on Constitutional Rights[72] that his bill confines itself to situations "where commencement of the prosecution is a denial of equal protection or is a violation of one of the civil rights which the Federal Government itself has granted."[73] It is not the purpose of this paper to urge defeat of such a proposal nor defeat of the proposals on expansion of federal injunctive relief.[74] But in all honesty these

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70 *Hearings, supra* note 69, at 1017. See also the commentary on this proposal. *Id.* at 994-999.

71 *Hearings, supra* note 69, at 998-99.

72 *Hearings, supra* note 69, at 1024.

73 *Ibid.*

74 The recommended addition to § 1983 is as follows:

> (b) Such redress shall include the grant of an injunction to stay a proceeding in a State court where such proceeding was instituted for:
>
> (1) Any exercise, or attempted exercise, of any right granted, secured or protected

proposals of the New York Committee are broad in scope and involve immense practical problems.

The recent proposals[75] of the American Law Institute help illustrate this point. They have recommended that no changes be made in the civil rights removal statute.[76] They justify this stand by reference to "strong practical objections to such a course."[77] Then, they pose the question raised by the Court in *Peacock:* "Has the historic practice of holding state criminal trials in state courts—with power of ultimate review of any federal questions in this Court—been such a failure that the relationship of the state and federal courts should now be revolutionized?"[78] The ALI determined that its own answer must be negative.[79] However, the ALI has chosen to make a much needed change as to injunctive relief. In its Section 1372(7), presently Section

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by the Civil Rights Act of 1964, or of any other right granted, secured or protected by the Constitution or laws of the United States against the denial of equal protection of the laws on account of race, color, religion or national origin; or

(2) Any exercise, or attempted exercise, of any right to freedom of speech or of the press or of the people to peaceably assemble secured by the Constitution or laws of the United States, when committed in furtherance of any right of the nature described in subparagraph (I) of this subsection [*i.e.*, the present § 1983];

and where:

(i) An issue determinative of the proceeding in favor of the party seeking the injunction has been decided in favor of his contention in a final decision in another proceeding arising out of a like factual situation;

(ii) The statute, ordinance, administrative regulation or other authority for the proceeding has been declared unconstitutional in a final decision in another proceeding;

(iii) The statute, ordinance, administrative regulation or other authority for the proceeding is, on its face, an unconstitutional abridgment of the rights to freedom of speech or of the press or of the people to peaceably assemble; or

(iv) The proceeding was instituted for the purpose of discouraging the parties or others from exercising rights of freedom of speech or of the press or of the people to peaceably assemble.

Hearings, supra note 69, at 1019. For commentary on this proposal, see *id.* at 999-1005.

[75] ALI, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS (Tent. Draft No. 5, 1967).

[76] *Id.* at 9-10.

[77] *Id.* at 110-11.

[78] City of Greenwood v. Peacock, 384 U.S. 808, 834 (1966).

[79] ALI, *supra* note 75, at 111. A further comment is interesting.

The Reporters, their Advisers, and the Council are agreed that if fundamental changes are to be made in that relationship in the area of civil rights, such changes would more appropriately come in a civil rights bill than in a jurisdictional study. Accordingly we propose in this subsection to preserve the present removal statute unchanged.

Id. at 111, 112. This comment does not seem to reflect a consensus that such fundamental changes are desirable even in a civil rights bill. At least, the comment emphasizes the grave concern with which these persons view any such changes.

2283, the ALI has recently added this language representing another exception to the anti-injunction statute, allowing relief if

> (7) the injunction is to restrain a criminal prosecution that should not be permitted to continue either because the statute or other law that is the basis of the prosecution plainly cannot constitutionally be applied to the party seeking the injunction or because the prosecution is so plainly discriminatory against one who has engaged in conduct privileged under the Constitution or laws of the United States as to amount to a denial of the equal protection of the laws.[80]

Professor Wright has argued against massive changes in our law of removal and injunction as a solution to civil rights problems in the South.[81] The Supreme Court has, at least for a time, placed the burden upon the legislative branch to make massive changes if indeed such changes are deemed necessary. Before we allow this flood of cases to enter the federal courts, it would seem essential that we re-think the composition and work of the federal courts. Even at present the overcrowding of the federal courts is a matter of grave concern, especially in the Fifth Circuit.[82] It will require revamping the federal trial courts before we can shove all that litigation into their hands. It is not fair to the other litigants or to the judges unless needed change occurs, whether it be more judges, elimination of diversity cases, or otherwise.

These proposed changes would fundamentally affect our federal courts and are not to be made lightly. Moreover, under our present notions, the basic responsibility for criminal jurisdiction rests with the state courts. A fundamental change in this arrangement should be made with a full awareness of all the practical implications involved, and not in a flurry of idealistic slogans. It is submitted that the present law, though permeated by uncertainty, is at least temporarily the most desirable course for the future.

J. L. C., Jr.

80 *Id.* at 32. For commentary on this proposal, see *id.* at 184-188.

81 Classroom discussion with Professor Wright, April, 1967.

82 Wright, *The Overloaded Fifth Circuit: A Crisis In Judicial Administration*, 42 TEXAS L. REV. 949 (1964).