

1-1-1972

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Recommended Citation

Robert Allen Sedler, *Dombrowski in the Wake of Younger: The View from without and within*, 1972 *Wis. L. Rev.* 1, 61 (1972)
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DOMBROWSKI IN THE WAKE OF YOUNGER: THE VIEW FROM WITHOUT AND WITHIN†

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I. INTRODUCTION

The Supreme Court's decision in *Younger v. Harris*¹ and its companion cases² has aroused in many lawyers the fear that federal courts will no longer be available as forums for affirmative relief from unconstitutional governmental activity violating first amendment rights. In an earlier analysis, I contended that the *Dombrowski*-type suit was an effective weapon for social change, in that the availability of such relief in the federal courts redressed the balance between those seeking to achieve social change and those using their control of the organs of governmental power to resist it.³ Since the clear thrust of the *Younger* cases was to restrict the availability of this remedy, reevaluation of its effectiveness as an instrument for social change is now necessary. I propose first to review the *Dombrowski*-type suit as it had developed and was operating prior to *Younger*. Second, I will discuss my perception of the practical significance of the *Dombrowski*-type suit. I shall then try to determine exactly what the Supreme Court did in the *Younger* cases, speculate on why it did so, and analyze the legal issues in a *Dombrowski*-type suit as affected by *Younger*, suggesting some answers and strategies. Finally, I will discuss the political considerations regarding utilization of the *Dombrowski*-type suit today.

My analysis comes both from without and from within—from an academician attempting to be a “part-time movement lawyer,” representing individuals and groups seeking, through their legal strug-

† The invaluable assistance of Richard C. Rose, a third year student in the University of Kentucky College of Law, is gratefully acknowledged.

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1. 401 U.S. 37 (1971).

2. *Samuels v. Mackell*, 401 U.S. 66 (1971); *Boyle v. Landry*, 401 U.S. 77 (1971); *Dyson v. Stein*, 401 U.S. 200 (1971); *Byrne v. Karalexis*, 401 U.S. 216 (1971); *Perez v. Ledesma*, 401 U.S. 82 (1971). The latter three cases dealt with federal relief against state obscenity prosecutions. See note 71 *infra*. Injunctive relief against obscenity prosecutions does not usually involve the “repression against social change” problem, and these cases will not be considered except insofar as they may shed light on the availability of the remedy in the repression context.

3. Sedler, *The Dombrowski-Type Suit as an Effective Weapon for Social Change: Reflections From Without and Within* (pts. 1-2), 18 KAN. L. REV. 237, 629 (1970). See *Dombrowski v. Pfister*, 380 U.S. 479 (1965).

gles, to achieve social change.⁴ In all candor, I cannot claim to be either impartial or dispassionate; to the extent that these characteristics are virtues, I regret their absence. Nevertheless, I am willing to pay this cost, for I believe my own involvement has provided insights into the real life operations of the legal system that would otherwise be unavailable.

II. THE DOMBROWSKI-TYPE SUIT PRIOR TO YOUNGER⁵

The *Dombrowski*-type suit, as understood by most federal courts and legal commentators prior to *Younger*, permitted the federal courts to grant injunctive and declaratory relief in either of two circumstances: (1) against the enforcement of facially invalid laws regulating or applicable to acts of expression; and (2) against improper action by government officials designed to inhibit the exercise of first amendment rights.⁶ This included relief from pending state criminal prosecutions and from future enforcement, through criminal prosecution or otherwise. Although the great majority of cases involved attacks on state laws and pending or threatened state prosecutions, actions against federal officials were also permitted.⁷ Two distinct aspects to *Dombrowski* were generally recognized: the "void on its face"⁸ attack and "bad faith and harassment" challenge. Under the first theory, a criminal prosecution under a law facially invalid due to vagueness or overbreadth was deemed to have a *chilling effect* upon the exercise of first amendment rights by the accused and others;⁹ therefore, remedy by way of defense to that prosecution was inadequate to protect those rights.¹⁰ Likewise, where the prosecution was brought in bad

4. See Sedler, *supra* note 3, at 239.

5. For a more complete discussion of pre-*Younger* developments, see *id.* at 238-50.

6. See *id.* at 238. See also *Wheeler v. Goodman*, 298 F. Supp. 935 (W.D.N.C. 1969), *vacated*, 401 U.S. 987 (1971); *Cambist Films, Inc. v. Illinois*, 292 F. Supp. 185, 189 (N.D. Ill. 1968); C. WRIGHT, *HANDBOOK OF THE LAW OF FEDERAL COURTS* 206-208 (2d ed. 1970); Maraist, *Federal Injunctive Relief Against State Court Proceedings: The Significance of Dombrowski*, 48 TEXAS L. REV. 535, 567 (1970).

7. See, e.g., *Wolff v. Selective Serv. Local Bd. No. 16*, 372 F.2d 817 (2d Cir. 1969). *Dombrowski*-type suits have not generally been brought to enjoin pending federal prosecutions. *But see* *McSurely v. McClellan*, 426 F.2d 664 (D.C. Cir. 1970).

8. I originally referred to this as the "regulation of expression" aspect of *Dombrowski*.

9. As to the relationship of the "void on its face" doctrine to the assertion of the rights of third parties, see Sedler, *Standing to Assert Constitutional Jus Tertii in the Supreme Court*, 71 YALE L.J. 599, 612-626 (1962). For a criticism of the vagueness of the Court's opinion, see Maraist, *supra* note 6, at 566-568.

10. A criminal prosecution under a statute regulating expression usually involves imponderables and contingencies that themselves may inhibit the full exercise of First Amendment freedoms. . . . When the statutes also have an overbroad sweep, as is here alleged, the hazard of loss or substantial impairment of those precious rights

faith for the purpose of inhibiting the exercise of first amendment rights, the prosecution itself caused the injury.¹¹ In either instance "irreparable injury"¹² was held to exist, thus authorizing both injunctive and declaratory relief.

The significance of *Dombrowski*, however, should not be misunderstood.¹³ *Despite the importance of the court's recognition that bad faith and harassment constituted "irreparable injury," this holding actually broke no new ground.* It had long been recognized that while "equity does not generally enjoin criminal prosecutions, because there is an adequate remedy at law by way of defense to such prosecutions,"¹⁴ there are certain circumstances where this remedy was not adequate. Injunctive relief against threatened and even pending prosecutions was then justified.¹⁵ Perhaps the clearest of these cases—recognized in both the federal and state systems¹⁶—is when prosecution is part of a scheme of harassment designed to deprive the plaintiff of constitutional rights.

Dombrowski's breakthrough, therefore, was contained in the other branch of "irreparable injury"—the facially vague or overbroad statute. Recognizing a societal interest in avoidance of the chilling effects incidental to the existence of facially unconstitutional statutes, the court provided a liberal process for their invalidation. The

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. . . . 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.

Dombrowski v. Pfister, 380 U.S. 479, 486-87 (1965).

11. See *id.* at 488-89.

12. The term "irreparable injury" is another of those concepts developed during the days of the separate administration of law and equity. To say that the plaintiff must demonstrate that he will suffer "irreparable injury" is merely the traditional way of saying that he must demonstrate the inadequacy of other remedies in order to be affirmatively entitled to equitable relief.

13. See generally *Sedler*, *supra* note 3, at 244-45.

14. See, e.g., *Ivy v. Katzenbach*, 351 F.2d 32 (7th Cir. 1965); *Fairchild v. Brock*, 88 Cal. App. 2d 425, 199 P.2d 9 (1948); *Cicchetti v. Anderson*, 90 R.I. 76, 155 A.2d 64 (1959). See generally H. McCLINTOCK, *HANDBOOK OF THE PRINCIPLES OF EQUITY* § 173 (2d ed. 1948).

15. See, e.g., *Board of Comm'rs v. Orr*, 181 Ala. 308, 61 So. 920 (1913); *City of Ashland v. Heck's Inc.*, 407 S.W.2d 421 (Ky. 1966); *Fairmont Foods Co. v. City of Duluth*, 261 Minn. 189, 111 N.W.2d 342 (1961); *Huntworth v. Tanner*, 87 Wash. 670, 152 P. 523 (1915). See generally H. McCLINTOCK, *supra* note 14.

16. See *Beeler v. Smith*, 40 F. Supp. 139 (E.D. Ky. 1941); *Kenyon v. City of Chicopee*, 320 Mass. 528, 70 N.E.2d 241 (1946). See also *Denton v. City of Carrollton*, 235 F.2d 481 (5th Cir. 1956). In such cases the remedy by way of defense would have been inadequate, if for no other reason, because the plaintiffs would have been subject to a "multiplicity of suits," a traditional ground for equitable relief. See *Board of Comm'rs v. Orr*, 181 Ala. 308, 61 So. 920 (1913).

injunctive remedy was a potent weapon for vindication of society's interest in freedom of expression. Moreover, since in practice the *Dombrowski*-type suit was available with respect to pending, as well as threatened, prosecutions,¹⁷ instances of federal intervention into state proceedings clearly increased;¹⁸ primary responsibility for the protection of first amendment rights was thereby placed on federal district judges.

Some courts, however, did not read *Dombrowski* as setting forth alternative grounds of "irreparable injury" and thus required a showing of bad faith enforcement before reaching the constitutional

17. 28 U.S.C. § 2283 (1970), the anti-injunction act, makes significant the distinction between pending and threatened prosecutions. The section provides:

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.

In *Dombrowski*, the act was irrelevant since the original charges had been dismissed prior to the filing of the federal suit, and subsequent indictments were obtained only after the federal suit had been erroneously dismissed by the district court. Since no prosecution was pending, the court therefore left open the question of the impact of section 2283. In a subsequent case, *Cameron v. Johnson*, 390 U.S. 611, 614 n.3 (1968), the issue was again recognized but left unresolved. Lower federal courts, however, did reach the issue. Most considered the *Dombrowski*-type suit to provide a special circumstance justifying issuance of federal injunctive relief, despite the apparent prohibition of the statute. See, e.g., *Honey v. Goodman*, 432 F.2d 333 (6th Cir. 1970); *Sheridan v. Garrison*, 415 F.2d 699 (5th Cir. 1969); *Machesky v. Bizzell*, 414 F.2d 283 (5th Cir. 1969); *Wheeler v. Goodman*, 298 F. Supp. 935 (W.D.N.C. 1969), *vacated*, 401 U.S. 987 (1971). Other courts circumvented the problem by finding section 2283 inapplicable to claims for declaratory relief, even if a prosecution was pending. See, e.g., *Ware v. Nichols*, 266 F. Supp. 564 (N.D. Miss. 1967). By approaching the question in this way, courts avoided deciding whether 42 U.S.C. § 1983 (1970) constituted a statutorily authorized exception to section 2283 in all cases. The Third Circuit, which continues to hold that section 1983 is a statutorily authorized exception to section 2283 (*De Vita v. Sills*, 422 F.2d 1172 [3d Cir. 1970]), held that in a *Dombrowski*-type suit, injunctive relief was proper without regard to whether section 1983 was an exception in all cases. *Grove Press, Inc. v. Philadelphia*, 418 F.2d 82 (3d Cir. 1969). Most circuits passing on the question in a non-*Dombrowski* context have held that section 1983 was not a statutorily authorized exception. See *Baines v. City of Danville*, 337 F.2d 579 (4th Cir. 1964); *Sexton v. Barry*, 233 F.2d 220 (6th Cir. 1956), *cert. denied*, 350 U.S. 838 (1956); *Smith v. Village of Lansing*, 241 F.2d 856 (7th Cir. 1957). See also *Sedler*, *supra* note 3, at 251-52. This reasoning was used by a federal court in a non-*Dombrowski* context to invalidate a state anti-abortion law, where it admittedly could not enjoin the pending prosecution. *Babbitz v. McCann*, 310 F. Supp. 293 (E.D. Wis.), *appeal dismissed*, 400 U.S. 1 (1970). When state officials proved recalcitrant, it issued an injunction, later vacated by the Supreme Court in light of *Younger*. *Babbitz v. McCann*, 320 F. Supp. 219 (E.D. Wis. 1970), *vacated*, 402 U.S. 903 (1971). However, the controversy in Wisconsin continues unabated. See *Kennan v. Warren*, 328 F. Supp. 525 (W.D. Wis. 1971).

18. See *Sedler*, *supra* note 3, at 261-62.

claim.¹⁹ But most considered the two aspects independently, allowing attacks on the facial validity of a law without regard to bad faith enforcement.²⁰ *Cameron v. Johnson*²¹ seemingly fortified this interpretation. The plaintiffs challenged the Mississippi anti-picketing law on its face and further alleged that state officials had applied it in bad faith to harass them and discourage them from exercising their first amendment rights.²² Only after the Court found the law facially valid did it deal with the contention that "the record disclosed sufficient irreparable injury to entitle [the plaintiffs] to the injunction sought even if the statute is constitutional on its face."²³ Considering this issue, the Court found the evidence of bad faith enforcement insufficient.²⁴ The crucial point is that the Court apparently considered either facial invalidity or bad faith enforcement to be a proper basis for a *Dombrowski*-type suit; the Court's discussion of facial validity even though proof of bad faith was lacking necessarily implied that absence of the latter was not determinative.

After *Cameron* few skeptics remained; most courts and commentators assumed that *Dombrowski* had set forth alternative grounds for "irreparable injury" which would justify federal injunctive and declaratory relief.²⁵ When an action alleged both grounds, courts adopted the *Cameron* analysis: facial invalidity was considered first, and the claim of bad faith enforcement was discussed only after the law was found valid on its face.²⁶

III. THE IMPACT OF DOMBROWSKI: A POLITICAL THESIS

Having generally been viewed in the context of its effect upon federal-state relationships, the *Dombrowski*-type suit is often seen

19. See *id.* at 245.

20. See Stickgold, *Variations on the Theme of Dombrowski v. Pfister: Federal Intervention in State Criminal Proceedings Affecting First Amendment Rights*, 1968 Wis. L. Rev. 369, 399-406.

21. 390 U.S. 611 (1968).

22. The Court explicitly referred to the "two-pronged argument." *Id.* at 615.

23. *Id.* at 618.

24. *Id.* at 619-22.

25. See note 6 *supra*. At the time the Court decided *Cameron*, it affirmed per curiam the denial of relief in two other cases: *Brooks v. Briley*, 391 U.S. 361 (1968); *Zwicker v. Boll*, 391 U.S. 353 (1968). See Maraist, *supra* note 6, at 575-79; Sedler, *supra* note 3, at 245-46. They were not interpreted as inconsistent with the alternative grounds of "irreparable injury" approach, in effect, recognized in *Cameron*.

26. Sedler, *supra* note 3, at 246. Moreover, where the district court had erroneously dismissed a *Dombrowski*-type suit, the court of appeals would consider the facial validity of the law, and if it found the law to be facially invalid, would direct the lower court to grant appropriate relief. See *Davis v. Francois*, 395 F.2d 730 (5th Cir. 1968). If the statute was found facially valid, the court would remand for an evidentiary hearing on the charge of bad faith enforcement. See *Honey v. Goodman*, 432 F.2d 333 (6th Cir. 1970).

as imposing an affirmative responsibility upon the federal courts to protect first amendment rights, even to the point of interfering in state criminal prosecutions.²⁷ While recognizing its significance in this regard,²⁸ I would nevertheless contend that the federalism aspect of *Dombrowski* has been overemphasized. Instead, I believe such suits must be analyzed primarily from a remedial-political²⁹ perspective. *Dombrowski* means affirmative relief against governmental repression as opposed to defensive relief obtained in a criminal prosecution already instituted. If so perceived, the federalism problems diminish in relative importance, for *Dombrowski*-type relief is similarly appropriate to thwart repressive action by federal, as well as state, officials.³⁰ My thesis is, therefore, that the real significance of the *Dombrowski*-type suit relates to the impact that the availability of this remedy has on the conflict between those seeking to bring about social change and those using their control of the organs of governmental power to resist it.³¹

The criminal prosecution of social change advocates undoubtedly does have a chilling effect upon their efforts. Defending against a criminal prosecution can sap the already typically inadequate human and monetary resources so vital to any social change movement. Moreover, by instituting prosecution, the government acquires an important tactical advantage: a confrontation situation is created in which social change advocates can be denounced as "wrongdoers" or "subversives." Public opinion can thus be manipulated against the movement for social change; realistically, the ultimate outcome of the prosecution may be irrelevant. By the same token, the government can discourage others from initiating or supporting social change efforts with its warning that, "This can happen to you, too." Criminal prosecutions can then have a serious adverse impact on social change effort—an impact of which the government is fully aware.³²

27. This has been the general tenor of the writings on the subject. See Bailey, *Enjoining State Criminal Prosecutions Which Abridge First Amendment Freedoms*, 3 HARV. CIV. RIGHTS—CIV. LIB. L. REV. 67 (1967); Boyer, *Federal Injunctive Relief; A Counterpoise Against the Use of State Criminal Prosecutions Designed to Deter the Exercise of Preferred Constitutional Rights*, 13 HOW. L.J. 51 (1967); Brewer, *Dombrowski v. Pfister: Federal Injunctions Against State Prosecutions in Civil Rights Cases—A New Trend in Federal-State Judicial Relations*, 34 FORD. L. REV. 71 (1965); Maraist, *supra* note 6; Strickgold, *supra* note 20.

28. See Sedler, *supra* note 3, at 253-55.

29. The term "political" is used in its broadest sense to refer primarily to the impact of the availability of the *Dombrowski*-type suit on the rest of society—those whom the advocates of social change are trying to influence.

30. See note 7 *supra*.

31. See Sedler, *supra* note 3, at 255-58.

32. This is particularly so when the government uses the conspiracy charge. It can use the prosecution to demonstrate that social change effort represents a "conspiracy," with all the emotive impact and sinister meaning that charge connotes. The "Spock" and "Chicago Seven" conspiracy trials are prime examples.

Where such a prosecution is pending, the *Dombrowski*-type suit represents a counterattack; the otherwise hapless victims can themselves assume the political and psychological initiative. To the extent that the suit is successful and prosecutions are aborted or repressive laws invalidated, the government has been beaten.³³ Social change advocates will have been protected, repressive weapons may have been removed from the government's arsenal, and some of the chilling effect may have been eliminated.³⁴ Thus, the government's power to expose and deter is severely weakened.

Equally important, the mere availability of this remedy may have independent political significance *even if the litigation is unsuccessful*.³⁵ By initiating a *Dombrowski*-type suit to enjoin future prosecutions or the enforcement of repressive laws, those threatened by repressive governmental action can put the government itself on trial and if combined with direct political action, social change advocates might beat back or minimize the repressive effort. The *Dombrowski*-type suit also gives the advocates of social change the opportunity to expose the real purpose behind the threatened governmental action, and to obtain public support for their position.

The mystique of legal action can similarly inure to the benefit of dissidents; regardless of its final result, the fact that a suit has been filed implies some form of "wrongdoing" on the part of the government. Furthermore, *the government is being resisted in the courts, and the legitimacy of its actions is being challenged*.³⁶ The contradictions between the officially-approved values of freedom of expression and the right to dissent on the one hand, and the government's repressive policies on the other, can be brought into sharp focus.³⁷ And at a minimum, it will be shown that the government can be resisted, with that resistance taking place against a backdrop of "law and the Constitution."³⁸ Like-

33. I illustrated this element by a detailed consideration "from within" of *McSurely v. Ratliff*, 282 F. Supp. 848 (E.D. Ky. 1967). Sedler, *supra* note 3, at 631-39.

34. See Sedler, *supra* note 3, at 257-58.

35. *Id.* at 630, 640-49. I am not discounting the fact that the availability of relief in a federal as opposed to a state forum can make a very real difference. *Id.* at 253-55. However, I think it more important to emphasize the difference between affirmative and defensive relief, particularly in the political context.

36. As to "legitimizing democratic forms against the efforts of the rulers to delegitimize them," see the very provocative discussion in Kinoy, *The Role of the Radical Lawyer and Teacher of Law: Some Reflections*, 29 GUILD PRACTITIONER 3, 11-12 (1970).

37. Regarding the role of the radical lawyer in resolving contradictions, see *id.* at 9. As to "forcing the judge to face up to the contradictions" in the context of protecting first amendment rights, see Sedler, Book Review, 80 YALE L.J. 1070, 1083-84 (1971).

38. Professor Kinoy uses "The Example of Havana Lawyer Fidel Castro" to illustrate how the government can be resisted in the courts within a revolutionary framework. Kinoy, *supra* note 36, at 12-17.

wise, the filing of a suit arouses the "potential victims" by psychologically providing an "umbrella of protection," which both encourages continuation of social change efforts and reduces possible participant "fallout."³⁹ Finally, the threat of a *Dombrowski*-type suit may in some cases cause government officials to hesitate before acting against the advocates of social change. Hence, the availability of the *Dombrowski*-type suit provides not only a legal weapon against repression, but an important "political-legal" one as well.

IV. THE YOUNGER CASES

A. *Younger in the Perspective of Protest*

In tracing the development from *Dombrowski* to *Younger*, it is important to discuss the changing nature of protest during the years between 1965 and 1971 and to consider the possible impact of this factor on the *behavior* of courts faced with *Dombrowski*-type suits.⁴⁰ Four basic features characterize the pre-*Dombrowski* era of dissent and social change effort:⁴¹ (1) the protests were generally restricted to a particular region of the country—the South; (2) the objectives sought did not involve radical social change, were in accord with the officially approved value of eliminating racial discrimination,⁴² and emphasized primarily the removal of state created or supported impediments to racial equality; (3) the methods of protest were conventional and nonviolent;⁴³ and (4) the relevant state courts had proved unresponsive to pleas for protection of federal rights, making federal intervention absolutely necessary if civil rights activity was to continue free from severe repression.⁴⁴

In retrospect, the choice for the Supreme Court in *Dombrowski* was not particularly difficult. On one side were the officially approved values of racial equality and freedom of expression; on the other was the comity principle, directing federal courts to avoid interfering with state law enforcement and with the operations of state courts.⁴⁵ Judge Wisdom, dissenting when *Dombrowski* was before the three-judge court, stated the issue precisely:

39. I illustrated this element by a detailed consideration "from within" of the struggle against the Kentucky Un-American Activities Committee. Sedler, *supra* note 3, at 640-49.

40. See *id.* at 258-60.

41. *Id.*

42. Racial equality clearly continues to be an "officially-approved" value, as evidenced by such recent decisions as *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971); *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

43. But even here a protest could go "too far." See *Adderley v. Florida*, 385 U.S. 39 (1966).

44. See Sedler, *supra* note 3, at 253-54.

45. The comity principle is reflected in 28 U.S.C. § 2283 (1970). See *Younger v. Harris*, 401 U.S. 37, 44 (1971).

The main issue is whether the State is abusing its legislative power and criminal processes: whether the State, under the pretext of protecting itself against subversion, has harassed and humiliated the plaintiffs and is about to prosecute them solely because their activities in promoting civil rights for Negroes conflict with the State's steel-hard policy of segregation. They ask the federal court to protect their federally protected rights.⁴⁶

The only obstacle to such intervention—the comity principle—was further weakened by the state courts' own abdication of their responsibility to protect federal constitutional rights. If the Supreme Court had any lingering doubts about the propriety of federal intervention, they were likely tempered by the limited objectives of the protest and the conventional means employed. While the Court may have been aware of risks in opening the doors of the federal courts, these considerations were counterbalanced by the immediate need to protect civil rights activity in the South.

But by the very time *Dombrowski* was decided, the dimensions of protest in this country were beginning to undergo profound changes. Geographically, contemporary protest efforts have dispersed to virtually all areas of the country; conceptually, civil rights groups are now demanding affirmative governmental action to redress years of discrimination. Moreover, dissent and social change efforts have become multifaceted, thereby acquiring a broader base which is independent of race alone. And finally, the methods of protest have changed; direct action and civil disobedience⁴⁷ are considered legitimate tactics, and among some elements of the movement, the legitimacy extends to unrestrained violence.⁴⁸ In sum, the protest movement of today is in many respects the very opposite of the civil rights movement prior to *Dombrowski*. At every juncture, political, economic, and social institutions are being challenged, from both the radical and—for want of a better term—reformist perspectives.⁴⁹

The intensity of the movement for social change has produced a

46. *Dombrowski v. Pfister*, 227 F. Supp. 556, 569 (E.D. La. 1964).

47. I use the term "civil disobedience" to refer to a deliberate violation of law without regard to consequences, and distinguish it from a violation of a law for the purpose of testing its constitutionality. In the political context, of course, this distinction is not necessarily made.

48. Our society is by no means opposed to violence. It all depends on who is being violent against whom. As veteran movement lawyer William M. Kunstler has observed: "In terms of real violence to human beings, one B-52 raid over South Vietnam makes it offensive to apply the word violence to what some of the more militant factions of the movement have done." *Playboy Interview: William Kunstler*, PLAYBOY, Aug. 1970, at 232.

49. We are witnessing the "unprecedented and extraordinary growing radicalization of vast numbers of Americans who are experiencing the inability of the rulers to solve any of the immediate problems of the society." Kinoy, *supra* note 36, at 7.

repression of equal intensity by the "Establishment"⁵⁰—those administering the institutions of the society who are in a position to use their institutional power to resist fundamental social change. The shootings at Kent State and Jackson State, police raids on Black Panther headquarters, the enactment of "antiriot" laws and "crime control" bills, increased police surveillance and wiretapping, the prosecutions of movement leaders, and the mass arrests of protestors, all reflect an institutionalized effort to resist the movement for sweeping social change.⁵¹

This is then the context in which the *Dombrowski*-type suit had to be viewed by the courts in the years after *Dombrowski*. If I am correct in my contention that the *Dombrowski*-type suit represents an important legal-political remedy for advocates of social change in their conflict with the "Establishment," then negative response by the courts to the changing nature of protest would not be surprising.

My analysis of *Younger* further proceeds from the recognition of what I believe to be a critical paradox underlying the relationship between the first amendment and the struggle for social change.⁵² Assurance of the "dissent and social change" function of the first amendment—as distinguished from its "public information" and "individual self-fulfillment" functions⁵³—mandates broad protection for all expression, assembly, and petition. The antithesis of this function—repression—is itself a functionally active concept and will therefore emanate from the legislative and executive branches. Under our system, the burden then falls on the reactive (in an emphatically nonpolitical sense) branch of the government—the judiciary—to guarantee these fundamental rights.⁵⁴ But the courts as institutions cannot be divorced from the individual decision-makers occupying the positions of power within the judiciary.

50. I use the concept of "Establishment" as a loose term representing a combination of power and attitude: power in the sense of "the people who are running things" and attitude in the sense of an essential satisfaction with the status quo and resistance to fundamental political, economic, or social change. Those who have the "Establishment" attitude, but not the power, can best be considered as "supporters of the Establishment," or what President Nixon and *Time Magazine* have called the "silent majority."

51. In Professor Kinoy's view, "We are in a transition period in which the dominant sections of the ruling powers are edging toward a substitution of the present form of rule by the capitalist class—the form of rule classically known as bourgeois democracy—by another form of rule—the open terrorist dictatorship, classically known as fascism." Kinoy, *supra* note 36, at 6. For the "establishment liberal" view that repression is a figment of the New Left's imagination, see Goodman, *The Question of Repression*, COMMENTARY, Aug. 1970, at 23.

52. See also Sedler, *supra* note 37, at 1079-82.

53. *Id.* at 1079-80.

54. See T. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 13-14 (1970).

Generally, these men are themselves so totally integrated into the "Establishment"⁵⁵ that they will presumptively be inhospitable to the claims of social change advocates.⁵⁶ Thus, protection-in-fact of dissent and social change effort by the judiciary cannot be assumed.

The changing nature of protest in the post-*Dombrowski* years has dramatically changed the *frame of reference* in which the courts are considering the *Dombrowski*-type suit. Because judges are now being asked to protect dissent and social change effort directed toward radically altering the present political, social, and economic system, far more *motivation* to deny such protection is inevitable. This motivation is reinforced by the changing methods of protest; greater emphasis on direct action and civil disobedience means that protest often involves so-called "hard core" conduct which, as such, is not entitled to first amendment protection. The presence of "hard core" conduct is significant because it enables judges to avoid facing the contradiction between officially approved societal values reflected in the first amendment which guarantee the right to dissent and work for social change, and their own motivation, conscious or unconscious, to refuse such protection where efforts at sweeping and fundamental social change are involved.⁵⁷ Thus, the "hard core" nature of the conduct introduces an element that *legitimizes* a decision to deny protection;⁵⁸ while speech will be protected, violence or civil disobedience will not. The objectives of the protest theoretically have had nothing at all to do with the decision to deny protection. In sum, in the years following *Dombrowski*, situational counterpressures arguing for limiting the availability of affirmative relief have emerged and, correspondingly, been reflected in judicial decisions.⁵⁹

Another counterpressure militating towards restricting *Dombrowski* may have resulted from the sheer number of *Dombrowski*-type suits being filed, for part of the "federal judicial ethos" is that federal courts are being overburdened by civil rights actions. It has always seemed paradoxical to me that federal judges are so concerned about this supposedly large number of civil rights suits,⁶⁰ while accepting without question the diversity of citizenship

55. Federal judges are not subject to the same direct political pressures after they are appointed as are their state counterparts. But they are still a part of the local "Establishment" and are subject to what I have called "the cocktail party syndrome." See Sedler, *supra* note 3, at 254-55.

56. See Sedler, *supra* note 37, at 1081-83. For a discussion of the problems that this paradox presents and how the movement lawyer must deal with them, see text accompanying note 329 *infra*.

57. See text accompanying notes 329-332 *infra*.

58. Conversely, the failure of southern courts to protect first amendment rights at the time of *Dombrowski* "tipped" the balance in favor of federal intervention.

59. See the discussion of *Cameron v. Johnson*, 390 U.S. 611 (1968), in Sedler, *supra* note 3, at 267-69.

60. As to just how "burdened" the federal courts are because of "civil rights" suits, see Chevigny, *Section 1983 Jurisdiction: A Reply*, 83 HARV.

cases, which make up a substantial portion of the civil litigation in the federal courts⁶¹ and in which the federal court plays the role of the "ventriloquist's dummy."⁶² The primary responsibility of the federal courts should be the protection of federal rights under their "arising under-federal question" jurisdiction, with diversity cases of decidedly secondary importance. Yet in practice the federal judge is more comfortable with a diversity suit, where he is essentially deciding a "wealth issue"⁶³ between private persons or enterprises.⁶⁴ The hostility of federal judges to civil rights cases may then be explained both by the controversial nature of these cases⁶⁵ and by the fact, suggested above, that in such cases the judge is frequently asked to protect social change effort directed against the very system of which he is an integral part. The overburdening factor, coupled with an understandable reluctance on the part of federal judges to appear to be "putting down" their state court brethren by interfering with state proceedings, must also be taken into account in assessing the behavior of the courts when dealing with *Dombrowski*-type suits.

So long as the "void on its face" branch of *Dombrowski* was retained, the *Dombrowski*-type suit continued to be an important political-legal weapon for advocates of social change in their efforts to resist governmental repression. This statement, of course, is from the perspective of one committed to the movement for sweeping social change; from another perspective, it could be argued that the *Dombrowski*-type suit was being used not only to protect "legitimate" protest activities, but also to enable "hard core revolutionaries" to avoid "just punishment" for constitutionally unprotected conduct.⁶⁶ Moreover, its availability meant that fed-

L. REV. 1352, 1354-55 (1970). As of June 30, 1970, there were 93,207 civil cases pending in federal courts, of which 3,616 were classified as civil rights cases. DIRECTOR OF THE AD. OFFICE OF THE U.S. COURTS, ANNUAL REPORT, 1970, at 326-27, table X 2 (1971).

61. Of the civil cases referred to in note 60 *supra*, 31,557 were based solely on diversity of citizenship. Of these, 9,874 involved automobile accidents, and another 9,867 involved other personal injury claims. ANNUAL REPORT, *supra* note 60, at 327, table X 2.

62. Guaranty Trust Co. v. York, 326 U.S. 99, 108 (1945).

63. While the present social-economic-political system has brought to power persons whose values are likely to be wealth oriented and essentially conservative, I do not think that the attitude toward dissent and social change would necessarily be different if a "peaceful revolution" were to take place and the reins of power were transferred to those whose values are socialistic and radical. See Sedler, *supra* note 37, at 1082.

64. I view automobile accident cases as involving "wealth issues," even though many of the plaintiffs in such actions are lower income persons. Because of our fault system of tort liability, they have a chance to obtain "instant wealth."

65. As I stated earlier, the federal judge is part of the local community and is subject to the "cocktail party syndrome." He is subject to the charge of "betrayal" if he upholds federal constitutional rights to lend support to an "unpopular cause." See note 55 *supra*.

66. See *Wright v. City of Montgomery*, 282 F. Supp. 291, 296 (M.D. Ala. 1968), *aff'd.*, 406 F.2d 867 (1969).

eral courts were increasingly being asked to interfere with the orderly processes of the state courts and that they would continue to be overburdened by civil rights suits.⁶⁷

The context in which the Supreme Court decided the *Younger* cases was then a very different one from that in which it decided *Dombrowski*, and its decisions must be analyzed from that perspective.

B. *Younger and the Law*

On February 23, 1971, the Supreme Court decided six cases dealing with the *Dombrowski*-type suit. The main case, *Younger v. Harris*,⁶⁸ and related cases, *Samuels v. Mackell*⁶⁹ and *Boyle v. Landry*,⁷⁰ are germane to this discussion.⁷¹ Since some of the cases were argued two and even three times,⁷² it is clear that the Supreme Court made a fundamental policy judgment. With only Justice Douglas dissenting,⁷³ the Court struck the balance in favor of restricting the availability of the *Dombrowski* remedy.

Essentially, *Younger* held that the facial invalidity of the law under which a state criminal prosecution had been instituted no longer provided a basis for federal intervention in that proceeding. Thus, the "void on its face" aspect of *Dombrowski* as applied to pending state prosecutions was eliminated. The Court also held that a bare allegation of chilling effect due to facial invalidity even if true would not, in and of itself, constitute "irreparable injury,"

67. As Professor Charles Wright bitinglly observed in commenting on the prospective decisions in the *Younger* cases:

It is to be hoped that the decision in these cases will clarify the meaning of *Dombrowski* and will establish that every person prosecuted under state law for conduct arguably protected by the First Amendment cannot, by murmuring the words "chilling effect," halt the state prosecution while a federal court, ordinarily of three judges, passes on the validity of the statute and the bona fides of the state law enforcement officers.

C. WRIGHT, *supra* note 6, at 208.

68. 401 U.S. 37 (1971).

69. 401 U.S. 66 (1971).

70. 401 U.S. 77 (1971).

71. The three other cases involved federal intervention in state obscenity prosecutions and therefore are not particularly relevant to our discussion. In *Dyson v. Stein*, 401 U.S. 200 (1971); and *Byrne v. Karalexis*, 401 U.S. 216 (1971), the Court held that federal courts could not interfere with pending state obscenity prosecutions on the ground that the underlying statutes were facially invalid. In *Perez v. Ledesma*, 401 U.S. 82 (1971), the Court held improper a federal court order that materials seized for use in pending state prosecutions be returned because of the failure of the state to provide for a prior adversary judicial determination of obscenity. In both instances such relief had become "standard practice." See, e.g., *Camibist Films Inc. v. Illinois*, 292 F. Supp. 185 (N.D. Ill. 1968).

72. *Younger* and *Samuels* were argued three times; *Boyle*, *Dyson*, and *Byrne* were argued twice.

73. He wrote a single dissent to both *Younger* and *Boyle*, but concurred in *Samuels*.

so as to entitle the plaintiffs to relief against future enforcement.⁷⁴

Younger involved an attempt to enjoin prosecution under the California criminal syndicalism law.⁷⁵ The plaintiff alleged facial unconstitutionality and that "the prosecution and even the presence of the act inhibited him in the exercise of his rights of free speech and press, rights guaranteed him by the First Amendment."⁷⁶ There was no allegation that the prosecution "was brought in bad faith or is only one in a series of repeated prosecutions to which he will be subjected."⁷⁷ The conduct forming the basis of the criminal charge—leaflet distribution—constituted "pure speech" under any criteria.⁷⁸ The three-judge court held the statute unconstitutional, as it clearly was,⁷⁹ and enjoined the pending prosecution. The prosecutor appealed.

The Court began by alluding to the "longstanding public policy against federal interference with state court proceedings,"⁸⁰ as reflected in the anti-injunction act,⁸¹ and observed that even "irreparable injury," the traditional prerequisite for injunctive relief, was insufficient to justify federal intervention unless that injury was also "great and immediate."⁸² The Court did not elaborate on this distinction, except to say that "the threat to plaintiff's federally protected rights must be one that cannot be eliminated by his defense against a single criminal prosecution."⁸³ Thus, the *set*⁸⁴ with which the Court approached the question was one designed to preclude the granting of federal injunctive relief in all but "exceptional circumstances."⁸⁵

74. This was the only issue in *Boyle*.

75. CAL. PENAL CODE §§ 11400, 11401 (West 1970). This was the statute that was upheld in *Whitney v. California*, 274 U.S. 357 (1927).

76. 401 U.S. at 39.

77. *Id.* at 49. The obvious unconstitutionality of the law may have made the "bad faith" attack seem unnecessary.

78. As Justice Douglas pointed out in his dissent, "Harris' crime was distributing leaflets advocating change in industrial ownership through political action." 401 U.S. at 60. Justice Douglas also pointed out that Harris tried unsuccessfully to have the state court dismiss on constitutional grounds and also tried unsuccessfully to obtain a writ of prohibition from the state appellate court.

79. See *Brandenburg v. Ohio*, 395 U.S. 444 (1969), where the Court expressly overruled *Whitney*.

80. 401 U.S. at 43.

81. 28 U.S.C. § 2283 (1970).

82. 401 U.S. at 46.

83. *Id.* It may be queried whether this concept is any different from that of "inadequacy of other remedies," the traditional test of "irreparable injury." See note 12 *supra*.

84. A set may be defined as a readiness to make a specified response to a specified stimulus, so that when the stimulus is received, certain responses are selected from the repertoire of available responses rather than others. D. JOHNSON, *THE PSYCHOLOGY OF THOUGHT AND JUDGMENT* 65 (1955). The stimulus "injunction against pending state court proceedings" produced the response "only in exceptional circumstances."

85. See 401 U.S. at 46-48.

Those circumstances, said the Court were present in *Dombrowski*,⁸⁶ where the complaint alleged "a plan to employ arrests, seizures, and threats of prosecution under color of the statutes to harass the plaintiffs and discourage them and their supporters from asserting and attempting to vindicate the constitutional rights of Negro citizens of Louisiana," and further that "the threats to enforce the statute were not made with any expectation of securing a valid conviction."⁸⁷ The Court then referred to the raids on the office, the seizure of files, the absence of probable cause for the arrest warrants,⁸⁸ the intention of the prosecutor to initiate new prosecutions, and the public hearings at which photostatic copies of the illegally-seized documents had been displayed. These circumstances, in the Court's view, "sufficiently established the kind of irreparable injury, above and beyond that associated with the defense of a single prosecution brought in good faith, that had always been considered sufficient to justify federal intervention."⁸⁹

The Supreme Court then proceeded to lay to rest the "void on its face" aspect of *Dombrowski* once and for all. It observed that the district court

thought that the *Dombrowski* decision substantially broadened the availability of injunctions against state criminal prosecutions and that under that decision the federal courts may give equitable relief, without regard to any showing of bad faith or harassment, whenever a state statute is found "on its face" to be vague or overly broad, in violation of the First Amendment.⁹⁰

Although admitting that "some statements in the *Dombrowski* opin-

86. *Id.* at 48.

87. *Dombrowski v. Pfister*, 380 U.S. 479, 482 (1965), quoted in *Younger v. Harris*, 401 U.S. 37, 48 (1971).

88. *Dombrowski* and the other plaintiffs moved for a preliminary hearing in the state court, at which time the judge found that the police had not produced sufficient evidence to make out a prima facie case of criminal conspiracy. See Sedler, *supra* note 3, at 240.

89. 401 U.S. at 48. If this were the only basis for *Dombrowski*, one ought wonder why the Supreme Court proceeded to consider the substantive constitutional question, since the allegations of the complaint had never been proven at any evidentiary hearing. The three-judge court had dismissed the complaint for failure to state a claim upon which relief could be granted, and for this reason, the plaintiffs had not been given an opportunity to prove their allegations of bad faith and harassment. See Sedler, *supra* note 3, at 241. After holding that the complaint stated an actionable claim, the Court should have remanded for an evidentiary hearing, if fact questions would affect the decision to grant relief. Instead, it declared the statutes unconstitutional on their face and remanded the case with directions to issue injunctive relief. Be that as it may, the Court now said that *Dombrowski* was a case where "the plaintiffs had alleged a basis for equitable relief under the long-established standards." 401 U.S. at 50.

90. 401 U.S. at 50. So did everyone else. See note 6 *supra*.

ion would seem to support this argument,"⁹¹ the Court discounted them as unnecessary to the decision because the plaintiffs had "alleged a basis for equitable relief under the long-established standards."⁹² In any event, the Court was unwilling to find the concept of chilling effect "sufficient to justify such a substantial departure from the established doctrines regarding the availability of injunctive relief."⁹³ Moreover, the Court suggested that "the existence of a 'chilling effect,' even in the area of First Amendment rights, has never been considered a sufficient basis, in and of itself, for prohibiting state action."⁹⁴ It analogized to statutes regulating a subject within the state's power, which do not directly abridge free expression, but incidentally inhibit the exercise of first amendment rights. Observing that such statutes could be upheld as constitutional, the Court remarked:

Just as the incidental "chilling effect" of such statutes does not automatically render them unconstitutional, so the chilling effect that admittedly can result from the very existence of certain laws on the statute books does not in itself justify prohibiting the State from carrying out the important and necessary task of enforcing those laws against socially harmful conduct that the State believes in good faith to be punishable under its laws and Constitution.⁹⁵

In holding that injunctive relief was not justified on the basis of chilling effect alone, the Court further noted that this effect would not necessarily be eliminated by the grant of relief, since state officials could obtain an acceptable limiting construction of the law in the state courts.⁹⁶ They could then prosecute conduct occurring before the narrowing construction was made in the absence of "fair warning" problems. The chilling effect could be eliminated completely only if all prosecutions for conduct occurring prior to the satisfactory rewriting were enjoined. But, said the Court,

the States would then be stripped of all power to prosecute even the socially dangerous and constitutionally unprotected conduct that had been covered by the statute, until a new statute could be passed by the state legislature and approved by the federal courts in potentially lengthy trial and appellate proceedings.⁹⁷

Next, the Court took a swipe at the process of testing a law on its face in a *Dombrowski*-type suit, commenting that this practice

91. 401 U.S. at 50.

92. *Id.* This ignored, of course, the fact that the *Dombrowski* plaintiffs had not proved those allegations. See note 89 *supra*.

93. 401 U.S. at 50.

94. *Id.* at 51.

95. *Id.* at 51-52.

96. See *Dombrowski v. Pfister*, 380 U.S. 479, 492 (1965); Sedler, *supra* note 3, at 249-50.

97. 401 U.S. at 51.

bordered on having the federal courts render advisory opinions. It then concluded:

[W]e hold that the *Dombrowski* decision should not be regarded as having upset the settled doctrines that have always confined very narrowly the availability of injunctive relief against state criminal prosecutions. We do not think that opinion stands for the proposition that a federal court can properly enjoin enforcement of a statute solely on the basis of a showing that the statute "on its face" abridges First Amendment rights.⁹⁸

Since the Court found "an absence of the factors necessary under equitable principles to justify federal intervention,"⁹⁹ it again avoided deciding whether section 2283 barred federal relief against pending state court prosecutions.¹⁰⁰

The Court's only concession was its observation that, "[t]here may, of course, be extraordinary circumstances in which the necessary irreparable injury can be shown even in the absence of the usual prerequisites of bad faith and harassment."¹⁰¹ As an example, the Court suggested that a statute " 'might be flagrantly and patently violative of express constitutional prohibitions in every clause, sentence and paragraph, and in whatever manner and against whomever an effort might be made to apply it.' "¹⁰² It did not elaborate on other possible situations, nor did it consider whether the California criminal syndicalism law satisfied that criteria.¹⁰³

Only Justice Douglas dissented, arguing that the "void on its face" aspect of *Dombrowski* should be retained:

The eternal temptation, of course, has been to arrest the speaker rather than to correct the conditions about which he complains. I see no reason why these appellees should be made to walk the treacherous grounds of these statutes. They, like other citizens, need the umbrella of the First Amendment as they study, analyze, discuss, and debate the troubles of these days. When criminal prosecutions can be leveled against them because they express unpopular views, the society of the dialogue is in danger.¹⁰⁴

He also adopted the position that title 42, section 1983 of the United States Code was an expressly authorized exception to section 2283,

98. *Id.* at 53.

99. *Id.* at 54.

100. See note 17 *supra*.

101. 401 U.S. at 53.

102. *Id.* at 53-54, quoting *Watson v. Buck*, 313 U.S. 387, 402 (1941).

103. Its unconstitutionality would seem clear in light of *Brandenburg v. Ohio*, 395 U.S. 444 (1969). Indeed, it may be queried whether when the unconstitutionality of a law in light of prior decisions is so clear as to make any contention that it is not "plainly insubstantial," for purposes of the convention of a three-judge court (*Bailey v. Patterson*, 369 U.S. 31 [1962]; *Turner v. City of Memphis*, 369 U.S. 350 [1962]), it is also "patently and flagrantly" unconstitutional for *Dombrowski* purposes.

104. 401 U.S. at 65.

thereby permitting federal courts to enjoin pending state prosecutions where federal constitutional rights were involved.

*Samuels v. Mackell*¹⁰⁵ involved the same legal issues as *Younger*, except that the plaintiffs sought declaratory as well as injunctive relief. The Court held that where a state criminal proceeding was pending, the same standards should govern the propriety of either form of relief.¹⁰⁶ It noted that a declaratory judgment issued under such circumstances might serve as the basis for a subsequent injunction against those proceedings "to 'protect or effectuate' the declaratory judgment."¹⁰⁷ Furthermore, the Court contended that the declaratory judgment, even if not used as the actual basis for issuing an injunction, "has virtually the same practical effect as a formal injunction would."¹⁰⁸

In *Boyle v. Landry*,¹⁰⁹ the Court held that allegations of "chilling effect" were alone insufficient to justify relief against future enforcement of allegedly invalid laws. The Court took a similar position in *Younger* when it dismissed the challenges of third parties who alleged that the prosecution of Harris created a chilling effect upon their exercise of first amendment rights.¹¹⁰ But in *Younger*, the plaintiffs alleged a chilling effect solely on the basis of the pending prosecution against Harris and the existence of the law itself. In *Boyle*, however, much more governmental action had allegedly occurred, and only by taking the particular statute in isolation could the court find that the plaintiffs were proceeding solely on the basis of a mere statutory chilling effect. The plaintiffs, black residents of Chicago, had originally challenged the Illinois mob action, resisting arrest, aggravated assault, aggravated battery, and intimidation statutes. The complaint alleged that some of the plaintiffs had been arrested under some of the statutes and that blacks were being intimidated in the exercise of their first amendment rights through the wholesale use of all the statutes to prosecute them and through the use of arrests without probable cause, coupled with the setting of exorbitant bail. The three-judge court convened to hear the case upheld all of the statutes except one subsection of the mob action statute and one subsection of the intimidation statute,¹¹¹ enjoining enforcement of those portions of

105. 401 U.S. 66 (1971).

106. The Court analogized to federal interference with state tax collections. *Id.* at 73. See *Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. 293 (1943).

107. 401 U.S. at 72. This occurred with respect to the relief against the enforcement of the Wisconsin anti-abortion law. See note 17 *supra*.

108. 401 U.S. at 72. This will be true unless the state officials choose to ignore the federal ruling and force a test in the state courts, as in *Babbitz v. McCann*, 310 F. Supp. 293 (E.D. Wis.), *appeal dismissed*, 400 U.S. 1 (1970).

109. 401 U.S. 77 (1971).

110. 401 U.S. at 42.

111. *Landry v. Daley*, 280 F. Supp. 938 (N.D. Ill. 1968), *rev'd sub nom.*, *Boyle v. Landry*, 401 U.S. 77 (1971). For other aspects of the litigation not

the statutes declared invalid. The defendants did not appeal from the decision regarding the mob action statute; therefore the only issue before the Supreme Court involved the intimidation statute.

The Court noted that none of the plaintiffs had ever been prosecuted, or even been specifically threatened with prosecution, under the intimidation statute. Thus, it surmised that "those who originally brought this suit made a search of state statutes and city ordinances with a view to picking out certain ones that they thought might possibly be used by the authorities as devices for bad-faith prosecutions against them."¹¹² The Court concluded testily:

There is nothing contained in the allegations of the complaint from which one could infer that any one or more of the citizens who brought this suit is in any jeopardy of suffering irreparable injury if the State is left free to prosecute under the intimidation statute in the normal manner. As our holdings today in *Younger v. Harris* . . . and *Samuels v. Mackel* . . . show, the normal course of state criminal prosecutions cannot be disrupted or blocked on the basis of charges which in the last analysis amount to nothing more than speculation about the future. The policy of a century and a half against interference by the federal courts with state law enforcement is not to be set aside on such flimsy allegations as those relied upon here.¹¹³

Justice Douglas, dissenting, viewed the question in a sharply contrasting light. Looking to the *total* situation alleged in the complaint, he commented:

Landry and his associates, however, allege that appellants were using the intimidation section along with several other sections to harass them, not to prosecute them in the normal manner. They allege that appellants are arresting them without warrants or probable cause, and detaining them on excessive bail. They allege that the arrests are made during peaceful demonstrations without any expectation of securing valid convictions. In sum, Landry and his group allege that the "intimidation" section is one of several statutes which appellants are using *en masse* as part of a plan to harass them and discourage their exercise of their First Amendment rights. There is thus a lively and existing case or controversy concerning First Amendment rights. And I believe that the federal court acted in our finest tradition when it issued the stay.¹¹⁴

before the Supreme Court, see *Landry v. Daley*, 288 F. Supp. 200 (1968); *Landry v. Daley*, 288 F. Supp. 194 (1968); *Landry v. Daley*, 288 F. Supp. 189 (1968); *Landry v. Daley*, 288 F. Supp. 183 (1968); *Landry v. Daley*, 280 F. Supp. 968 (1968).

112. 401 U.S. at 81. These remarks echo those made earlier in *Younger v. Harris*, 401 U.S. 37, 53 (1971).

113. 401 U.S. at 81.

114. *Id.* at 64. For a discussion of *Boyle* in the context of relief against

Plainly, the rest of the Court did not see it that way.

In assessing the impact of *Younger* and *Samuels*, it must first be remembered that these cases dealt only with federal relief against *pending* state criminal prosecutions.¹¹⁵ The Court was careful to "express no view about the circumstances in which federal courts may act when there is no prosecution pending in state courts at the time the federal proceeding is begun."¹¹⁶ But when proceedings are pending—the time at which the counterattack element of *Dombrowski* must be brought into play—the Court took a very restrictive view, eliminating the "void on its face" aspect of *Dombrowski*, with respect to both injunctive and declaratory relief. While retaining the "bad faith and harassment" aspect, the Court nevertheless, left itself the option of holding that section 2283 barred relief even in those circumstances. There can, therefore, be no doubt that by removing a very important part of the *Dombrowski* remedy, the Court altered the balance against the advocates of social change.

Judging by the language in the opinions, concern with "hard core" conduct was a significant and conscious factor in causing the Court to take the turn that it did. For example, the plaintiffs in *Samuels*¹¹⁷ challenged the constitutionality of the New York criminal anarchy law on its face; but as Justice Douglas pointed out in his concurrence:

[W]hile some of the counts embrace only advocacy or acts which fall within its penumbra, still others are in the field of activities far removed from the protection of the First Amendment. There is a question concerning some of the overt acts But other overt acts relate to the acquisition of weapons, gunpowder, and the like, and the storing of gasoline to start fires. Persuasion by such means plainly has no First Amendment protection.¹¹⁸

Samuels then starkly presented the Court with the consequences of allowing unrestricted use of the "void on its face" doctrine to enjoin pending criminal prosecutions: "hard core revolutionaries," allegedly trying to "overthrow the system by force and violence" might invoke the "void on its face" doctrine in the federal courts to enjoin a state prosecution on first amendment grounds. While sev-

future prosecutions and enforcement of unconstitutional laws, see Section V-B *infra*.

115. Federal relief by way of removal of the prosecution from the state court is also very limited. See *Georgia v. Rachel*, 384 U.S. 780 (1966); *City of Greenwood v. Peacock*, 384 U.S. 808 (1966).

116. *Younger v. Harris*, 401 U.S. 37, 41 (1971). See also *id.* at 54 (Stewart & Harlan, JJ., concurring).

117. The factual situation was the same in *Fernandez*.

118. 401 U.S. at 75. The lower court had held that in view of the nature of plaintiffs' "hard core" conduct, they could not contend that the narrowing interpretation of the statute by the state courts subsequent to the acts for which they were charged failed to give them fair notice.

eral of the plaintiffs were being prosecuted under other laws, it is not difficult to imagine the Court asking, "What if the only law that could be used was the criminal anarchy law?"

Unlike *Younger*, a leafletting case, *Samuels* clearly involved "hard core" conduct, and it is reasonable to assume that the Court decided *Younger* with *Samuels* in mind. Indeed, Justice Black's majority opinion in *Younger* often seems more apropos to the *Samuels* facts.¹¹⁹

Justice Douglas, on the other hand, distinguished the two cases since it could not "be said that the cases against *Samuels* and *Fernandez* are palpably unconstitutional."¹²⁰ This being so, it was for the state courts to preserve the first amendment rights, if any, that might be involved, by "sifting out the chaff from the charges through motions to strike, instructions to the jury, and other procedural devices . . ."¹²¹ Certainly, concluded Justice Douglas, "violence has no sanctuary in the First Amendment, and the use of weapons, gunpowder, and gasoline may not constitutionally masquerade under the guise of 'advocacy.'"¹²² The other members of the Court, however, were unwilling to draw this line and demanded proof of bad faith enforcement as the minimum standard for federal intervention.

Nothing in any of the opinions indicates that the "burden on the federal courts" was a significant factor in the Court's decisions. Yet, it is difficult to believe that the Court was not influenced by the large number of *Dombrowski*-type suits being brought,¹²³ and perhaps it hoped that limiting the legal basis for such suits would encourage movement lawyers to be more selective in their use of this remedy. Unless selectivity does indeed develop, the burden may remain substantially unchanged, with plaintiffs merely substituting an allegation of bad faith enforcement and harassment for that of facial invalidity.

If law is a "prediction of what courts will do in fact,"¹²⁴ what, may it be asked, was the message that the Court was trying to convey in *Younger*? In terms of effect, the Court clearly readjusted the balance, altered in *Dombrowski*, between the advocates of social change and the government. This suggests the desirability of trying to analyze the future development of the *Dombrowski*-type suit with reference to "adjusting and readjusting the balance."

119. See text accompanying notes 95, 97 *supra*.

120. 401 U.S. at 75.

121. *Id.*

122. *Id.*

123. The "burden" is magnified because of the fact that in a number of these cases statutory three-judge courts are required. See notes 339-349 *infra* and accompanying text.

124. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 461 (1897).

In *Dombrowski*, the Court came down strong on the side of protecting dissent and social change effort against repressive governmental action, even at the price of interfering with the operation of the state courts. A justification for that decision was the failure of southern state courts to protect even minimally the first amendment rights of advocates of racial equality. By the time of *Cameron v. Johnson*,¹²⁵ the Court felt it necessary to readjust the balance somewhat. The changing nature of the objectives and methods of protest, the movement for fundamental and sweeping social change, and the presence of "hard core" conduct motivated the Court to impose restraints on the *Dombrowski* remedy. By placing a difficult burden on plaintiffs alleging bad faith and harassment the Court in effect told the government: "So long as you proceed under facially valid laws, we will not allow the federal courts to interfere unless you really harass people and try to prevent dissent entirely. You must be free to get at 'hard core' conduct, and at this time, that is more important to us than is the protection of dissent and social change effort—particularly since there is now a movement afoot for such sweeping and fundamental social change." In *Younger*, the Court, apparently after a great deal of soulsearching—it is not common for cases to be argued three times¹²⁶—tipped the balance even further and removed the "void on its face" weapon, which it saw as potentially being used to shield "hard core" conduct. It may also have hoped to discourage what it considered to be excessive use of the *Dombrowski*-type suit, thereby reducing the "burden" on the federal courts.

At the same time, the Court indicated methods by which to readjust the balance again in either direction: by retaining the "bad faith and harassment" aspect of *Dombrowski* and by again sidestepping the "2283 problem," the federal courts were authorized to grant relief in cases where there was demonstrable interference with the exercise of first amendment rights and where the persons claiming such rights had not engaged in "hard core" conduct.¹²⁷ Thus, when read in light of *Dombrowski*, *Younger* may also contain a subliminal warning to the government: "Ease up on the repression and limit yourself to punishing 'hard core' conduct." Similarly, the Court may be saying to the state court judges: "You now have the major responsibility for protecting federal constitutional rights, and like federal judges, you must go against your seeming self-interest to protect the right to dissent and work for social change." In the event that either default, the Supreme Court can readjust the balance and broaden access to the federal

125. 390 U.S. 611 (1968).

126. See note 72 *supra*.

127. Where "hard core" conduct is shown, it is not possible to assert a claim of bad faith enforcement, since the state would have "probable cause" to undertake the prosecution. See *Landry v. Daley*, 288 F. Supp. 183 (N.D. Ill. 1968).

courts by liberalizing the requirements for showing bad faith, extending the concept of "other irreparable injury," finding laws to be "flagrantly and patently unconstitutional," or even reinstating the "void on its face" aspect of *Dombrowski*.¹²⁸ On the other hand, there is a message for movement lawyers as well: "If you burden the courts with baseless *Dombrowski*-type suits; if you try to allege bad faith when the state is proceeding against 'hard core conduct'; or if you are not more selective in your use of the *Dombrowski*-type suit than you have been in the past, we will hold that section 2283 is a complete bar to federal relief against pending state prosecutions in all circumstances."¹²⁹

The above analysis is obviously speculative and may be based on completely unfounded premises. Nonetheless, it illustrates the kind of *behavioral* analysis that I believe must be made if the *Dombrowski*-type suit is to continue to be a viable and effective weapon against repression. In this context, we may now consider the legal problems in a *Dombrowski*-type suit today.

V. DOMBROWSKI AFTER YOUNGER: THE LEGAL PROBLEMS

A. Relief Against Pending State Criminal Prosecutions

As noted above with respect to pending prosecutions, *Younger* eliminated the "void on its face" aspect of *Dombrowski*, but left intact the "bad faith and harassment" aspect. The effect of this decision is aptly illustrated by reconsideration of *Baker v. Bindner*.¹³⁰ Suit was brought by open-housing advocates to enjoin their prosecution under various state and local laws for incidents arising out of their demonstrations. The arrests resulted from confrontations between the demonstrators and hecklers and from the efforts of the police to prevent physical conflict. As usually happens in such situations, the police arrested the demonstrators. In federal court, the plaintiffs alleged both facial invalidity and bad faith harassment. Following an evidentiary hearing, the court found that the police had not acted in bad faith, observing that "[t]he enforcement activity in these circumstances does not appear to us to have been dedicated to a halting of the demonstrations, but rather to a separation of the adversaries and to the protection of all concerned, including the general public."¹³¹ Certainly, under the subsequently enunciated *Cameron* criteria, the court was cor-

128. Unsatisfactory experience with the results of *Betts v. Brady*, 316 U.S. 455 (1942), for example, had a good deal to do with the decision in *Gideon v. Wainwright*, 372 U.S. 335 (1963). See particularly *id.* at 349 (Harlan, J., concurring).

129. While *Younger* and the other cases under discussion dealt only with *Dombrowski*-type suits against pending state criminal proceedings, I would submit that the same "adjusting and readjusting" can occur with respect to relief against future prosecutions and enforcement of unconstitutional laws.

130. 274 F. Supp. 658 (W.D. Ky. 1967).

131. *Id.* at 660.

rect in its conclusion that bad faith had not been shown. But, applying the "void on its face" aspect of *Dombrowski*, the Court stated:

Thus it is apparent that, in the judgment of this Court, the plaintiffs, in all fairness and practicality, have no legitimate complaint in this situation could we but find that all of the ordinances and statutes affecting freedom of expression in this litigation were constitutional. This we are unable to do as we find certain of them vague and overbroad, and of possible sweeping application.¹³²

It then proceeded to invalidate state criminal syndicalism, conspiracy, and vagrancy statutes, and city disorderly conduct, loitering, and parade permit ordinances. Under *Younger*, however, dismissal would be mandated, since the plaintiffs had "failed to show injury above and beyond that associated with the defense of a single prosecution brought in good faith."¹³³

Younger would likewise require a different result in a number of other cases where the court took jurisdiction¹³⁴ on the basis of an allegation of facial invalidity without regard to bad faith enforcement and, after finding the challenged law invalid on its face, issued injunctive or declaratory relief.¹³⁵ Thus, in cases where the district court had granted relief on this basis, appellate courts after *Younger* have reversed and ordered dismissal.¹³⁶ Dismissals are also routinely ordered now in district court cases where bad faith enforcement is not alleged.¹³⁷

On the other hand, several pre-*Younger* decisions were based on a finding of bad faith enforcement, and these cases will now be particularly important precedents. Often the success of the bad faith challenge appeared to rest on a showing of obvious harassment.¹³⁸ In *NAACP v. Thompson*,¹³⁹ for example, mass arrests occurred, movement leaders had been detained in temporary jail facilities until each could make an individual bond, and the prosecution

132. *Id.*

133. *Douglas v. City of Jeannette*, 319 U.S. 157 (1943).

134. Jurisdiction exists of course under 28 U.S.C. §§ 1343(3), (4) (1970), whenever the claim is based on 42 U.S.C. § 1983 (1970). The question is whether the court will exercise its jurisdiction.

135. See, e.g., *Livingston v. Garmire*, 437 F.2d 1050 (5th Cir. 1971); *Davis v. Francois*, 395 F.2d 730 (5th Cir. 1968); *Crosson v. Silver*, 319 F. Supp. 1084 (D. Ariz. 1970); *Robinson v. Coopwood*, 292 F. Supp. 926 (N.D. Miss. 1968); *Carmichael v. Allen*, 267 F. Supp. 985 (N.D. Ga. 1967); *Ware v. Nichols*, 266 F. Supp. 564 (N.D. Miss. 1967).

136. See *Hodsdon v. Stabler*, 444 F.2d 533 (3d Cir. 1971). See also *Star Satellite, Inc. v. Rosetti*, 441 F.2d 650 (5th Cir. 1971) (relief against obscenity prosecutions). Cf. *Coleman v. Yokum*, 442 F.2d 351 (5th Cir. 1971).

137. See *Hendricks v. Hagan*, 324 F. Supp. 1277 (S.D.N.Y. 1971); *Lawrence v. Lordi*, 324 F. Supp. 1092 (D.N.J. 1971). See also *Hearn v. Short*, 327 F. Supp. 33 (S.D. Tex. 1971) (relief against obscenity prosecutions).

138. See *Sedler*, *supra* note 3, at 266-67.

139. 357 F.2d 831 (5th Cir. 1966).

had insisted on trying each case separately. Granting affirmative relief, the court found:

The record discloses a pattern of conduct on the part of the officials of the city of Jackson that leads us to the conclusion that defendants took advantage of every opportunity, serious or trivial, to break up these demonstrations in protest against racial discrimination, and that a large number of the arrests had no other motive, and some had no justification whatever, either under municipal, State, or Federal law.¹⁴⁰

Similarly, in *Houser v. Hill*,¹⁴¹ the court enjoined police officials from inflicting summary punishment against blacks and arresting them upon pretense and subterfuge for the purpose of deterring them from the exercise of their constitutional rights.¹⁴² In such cases,¹⁴³ the arrests and prosecutions were part of a broader scheme of harassment, and the injunctions against the pending prosecutions were, in a sense, merely incidental to the relief against the harassment.¹⁴⁴ But if this aspect of *Dombrowski* is to have any vitality after *Younger*, it will be necessary for courts to grant relief in less extreme situations.

At the other end, *Cameron v. Johnson*¹⁴⁵ clearly holds that something more than an allegedly improper state of mind on the part of governmental officials must be shown, at least where there is a plausible basis for the prosecution. In trying to stake out the middle ground justifying relief after *Younger*, reconsideration of *Dombrowski* itself is useful. There the Court found: (1) raids and seizure of files; (2) lack of probable cause for arrests; (3) public "exposure" by use of photostatic copies of the illegally seized documents; and (4) threatened prosecutions under an unconstitutional law.¹⁴⁶ In other words, acts by government officials, other than bringing the prosecution demonstrated an intent to repress the exercise of first amendment rights. Further, the circumstances of the case suggested that as a result of those acts, the chilling effect upon the exercise of such rights was a real—not hypothetical—possibility. Therefore, as the Court pointed out in *Younger*, the

140. *Id.* at 838.

141. 278 F. Supp. 920 (M.D. Ala. 1968).

142. The court also issued a counterinjunction against the plaintiffs, restraining them from "[s]ponsoring or arranging meetings and assemblies to be addressed by those who advocate violence through the use of weapons and other conduct designed to and tending to disrupt the peace and order of the community; and [u]sing violent means to protest and demonstrate." *Id.* at 929.

143. See also *Wheeler v. Goodman*, 298 F. Supp. 935 (W.D.N.C. 1969), *vacated*, 401 U.S. 987 (1971) (relief against police harassment of "hippies"); *Hughes v. Rizzo*, 282 F. Supp. 881 (E.D. Pa. 1968).

144. As was true in "traditional" cases, where the court enjoined pending prosecutions on the ground of harassment. See note 16 *supra*.

145. 390 U.S. 611 (1968).

146. See *Sedler*, *supra* note 3, at 238, 240-42.

plaintiffs had alleged the "irreparable injury" entitling them to relief.

After *Younger*, it would, I think, be a mistake to concentrate simply on the "bad faith and harassment" aspect of *Dombrowski*. Instead, *Dombrowski* and *Younger* should be read as holding that federal injunctive or declaratory relief is warranted where the plaintiffs have established "irreparable injury," and that bad faith enforcement is only one basis of establishing such injury. The Court in *Younger* indicated agreement with this view when it stated, "[t]here may, of course, be extraordinary circumstances in which the necessary irreparable injury can be shown even in the absence of the usual prerequisites of bad faith and harassment."¹⁴⁷ Using the example of prosecution under a "flagrantly and patently" unconstitutional law, the Court commented that there might be still other "unusual situations calling for federal intervention,"¹⁴⁸ but that there was no point in attempting to specify what they might be. The cue from *Younger*, I submit, is to concentrate on showing "irreparable injury" by providing evidence of a demonstrable chilling effect on the exercise of first amendment rights.

Let me illustrate this approach by consideration of *McSurely v. Ratliff*,¹⁴⁹ a case that I discussed "from within" in an earlier article.¹⁵⁰ To a large extent the incidents were a replay of *Dombrowski*, even to the point of involving the Southern Conference Educational Fund. On the night of August 15, 1967, a party of 15 armed men, led by the prosecutor, conducted midnight raids on the homes of three antipoverty workers in Pike County, Kentucky, ransacking the dwellings and impounding large quantities of books and papers. Two of the workers, Alan and Margaret McSurely, were on the staff of the Southern Conference Educational Fund and the third, Joe Mulloy, was employed by the Appalachian Volunteers.¹⁵¹ The case became a cause celebre in Pike County; the prosecutor made frequent press and radio announcements suggesting that antipoverty workers were planning to try to "take over Pike County from the power structure and put in in the hands of the poor."¹⁵² Immediate political repercussions echoed throughout the state with the Governor and the Director of the Federal Office of Economic Opportunity jointly announcing the termination of any

147. 401 U.S. at 53.

148. *Id.* at 53-54.

149. 282 F. Supp. 848 (E.D. Ky. 1967).

150. Sedler, *supra* note 3, at 631-39. I have summarized the facts briefly here; they are discussed at length in *id.* at 633-35.

151. When Joe announced that he would resist the draft, he was discharged by the Appalachian Volunteers. He was then employed by the Southern Conference Educational Fund. Joe's draft resistance, in which the author served as his counsel, resulted in the "Mulloy reopening doctrine." *Mulloy v. United States*, 398 U.S. 410 (1970).

152. Sedler, *supra* note 3, at 634.

future funding for the Appalachian Volunteers in Kentucky.¹⁵³ The *Dombrowski*-type suit was filed shortly after the arrests were made. Subsequently, the Pike County grand jury issued a report alleging a "communist plot" (complete with "Red Guards") to take over Pike County,¹⁵⁴ and returned indictments against not only Mulloy and the McSurelys, but also Carl Braden, the director of the Southern Conference Educational Fund,¹⁵⁵ and his wife, Anne, an official of the Southern Conference.¹⁵⁶ The prosecution was primed for a political trial, designed to reveal that all Pike County antipoverty workers were "communists."

Enjoining the prosecutions, the federal court found *both* bad faith prosecution and facial invalidity. With respect to the "bad faith" aspect of *Dombrowski*, it stated:

[T]he conclusion is inescapable that the criminal prosecutions were instituted, at least in part, in order to stop plaintiffs' organizing activities in Pike County. That effort has been successful. Not only has there been the "chilling effect" on freedom of speech referred to in *Dombrowski*, there has been in fact a freezing effect. The Governor has issued a public statement that federal funds to the Appalachian Volunteers should be discontinued. Plaintiff's possessions have been seized and impounded and they have been placed in jail. The Bradens, who originally had not been charged with any offense, were indicted and placed in jail after they attempted to render assistance to the other plaintiffs. Clearly, the criminal prosecutions have put a damper on plaintiffs' freedom of speech, as well as on others who might be in sympathy with their objectives.¹⁵⁷

Again, bad faith was demonstrated by acts other than bringing the prosecution—the raids, the seizure, and the public statements—which in conjunction with the prosecution evidenced an intent to repress dissent and social change effort.

Moreover, as the court itself emphasized, the prosecution and the other acts produced *independent detrimental consequences*. Federal funding was threatened, the plaintiffs' ability to carry on their activities was impaired by the seizure of their books and documents, and—perhaps most important—a real chilling effect was created since others would hesitate both to associate with the plaintiffs and to carry on similar activities. Furthermore, although this was not discussed in the opinion, once the state prosecution had begun, the

153. *Id.* at 635.

154. The report must be seen to be believed. It is set out in *id.* at 636.

155. Succeeding James Dombrowski of *Dombrowski v. Pfister* fame.

156. Anne Braden had never been in Pike County and Carl had been there only once before. They were going there at the time to post bond for the McSurelys, and when they were late in arriving, the judge issued a bench warrant for their arrest.

157. 282 F. Supp. at 852-53.

plaintiffs would have suffered a *political* defeat, even though they might ultimately have been vindicated. The prosecutor was planning a political trial in the clearest sense;¹⁵⁸ besides attempting to show that antipoverty efforts in Pike County were part of a communist plot to overthrow the government of Pike County, he would have tried to portray all concerned—the Bradens, the Mc-Surelys, Mulloy, the SCEF staff, and the other Appalachian volunteers—as “communists,” “dupes,” “sympathizers,” and the like. Denial of the plot “disclosed” would have been futile, for, as the prosecutor would undoubtedly point out, “every communist denies it.” With the suspicion planted it is almost impossible to believe that the defendants would not have been found guilty. Any subsequent reversal of the conviction would have had little practical consequence; “technicalities” could never obscure the earlier “brand.” In short, if the case had been allowed to come to trial, the government officials would have won the political victory, and from the political perspective, the prosecution itself, “unaffected by the prospects of its success or failure,”¹⁵⁹ would truly have caused “irreparable injury.” These adverse political effects must therefore be added to the independent detrimental consequences that prosecution would have produced.¹⁶⁰

Finally, the nature of the sedition law itself must be considered. In the court’s own words, “[i]t is difficult to believe that capable lawyers could seriously contend that this statute is constitutional.”¹⁶¹ Enacted in 1920 before the development of modern first amendment law, the statute had never been interpreted by the Kentucky Court of Appeals.¹⁶² It certainly would have met even the “flagrantly and patently unconstitutional” test of *Younger*, much less the *Dombrowski* facial invalidity standard.

158. See Sedler, *supra* note 3, at 635-37. As I pointed out in the article, Carl Braden is Kentucky’s “Red Scare.” In 1954 he was convicted under the same statute in Louisville, and the conviction was ultimately reversed by the Kentucky Court of Appeals, but only on grounds of federal preemption. *Braden v. Commonwealth*, 291 S.W.2d 843 (Ky. 1956). The first “sedition” trial is discussed in Sedler, *supra* note 3, at 638-39.

159. *Dombrowski v. Pfister*, 380 U.S. 479, 487 (1965).

160. See Sedler, *supra* note 3, at 639.

161. 282 F. Supp. at 852. The court made this observation in the context of discussing the bad faith nature of the prosecution.

162. The statute in question is clearly unconstitutional even under the most flexible yardstick. It is too broad and too vague. It contravenes the First Amendment to the Constitution of the United States because it unduly prohibits freedom of speech, freedom of the press, and the right of assembly. It fails to distinguish between the advocacy of ideas and the advocacy of action. It makes it a criminal offense merely to possess, with intent to circulate, literature on the subject of sedition. It imposes the penalty of imprisonment for advocating an unpopular political belief. It would turn the courts into a forum for argument of political theories with imprisonment the penalty for the loser. It contains no requirement of criminal intent. The unwary and the ignorant could be enmeshed in the dragnet as easily as the covert plotter.

Id. at 851.

McSurely contains three elements which, at least in combination, and possibly individually as well, should satisfy the criteria for "irreparable injury." (1) acts of public officials in addition to bringing the prosecution, evidencing an intent to repress dissent and social change effort; (2) independent detrimental consequences resulting from the threatened prosecution and the other acts; and (3) prosecution under a "flagrantly and patently unconstitutional law." All add up to a demonstrable chilling effect upon the exercise of first amendment rights by the plaintiffs and others. Moreover, in the particular case, the elements were interrelated. As a result of the acts evidencing the bad faith prosecution, the plaintiffs suffered independent detrimental consequences, and the threatened prosecution itself would have an adverse political effect. The independent detrimental consequences suggest entitlement to injunctive relief under traditional equitable principles, regardless of bad faith. Finally, the "flagrantly and patently" unconstitutional nature of the law under which the prosecutions were brought was itself evidence of bad faith.¹⁶³

The above analysis of "irreparable injury," coupled with the Supreme Court's discussion in *Younger*, indicates that courts may retain a great deal of leeway to grant relief against pending prosecutions. I shall therefore discuss each of these elements—bad faith prosecution, independent detrimental consequences, and "flagrant and patent" unconstitutionality—more fully, particularly in light of post-*Younger* cases.

1. BAD FAITH PROSECUTION

Bad faith enforcement will likely be the major ground of attack and thus requires the most discussion. As stated earlier, *Cameron v. Johnson*¹⁶⁴ indicates that it will be very difficult to make out a case of bad faith prosecution simply by trying to show improper state of mind on the part of government officials. Hence, I shall emphasize the importance of showing acts in addition to bringing the prosecution which are illustrative of bad faith.

Nevertheless, some possibilities for showing bad faith on this basis alone may remain. In the earlier article I argued that proof of selective enforcement of the law in question should suffice to establish bad faith enforcement, since selective enforcement of a valid law is itself unconstitutional,¹⁶⁵ particularly in the first amendment context.¹⁶⁶ However, one court after *Younger* has held that federal injunctive relief on this basis is improper, at least where the claim of bad faith enforcement can be asserted in the

163. See note 161 *supra*.

164. 390 U.S. 611 (1968).

165. See *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

166. See *Cox v. Louisiana*, 379 U.S. 536 (1965).

state court.¹⁶⁷ This reasoning ignores the fact that selective enforcement bears on the issue of the prosecutor's bad faith in initiating the prosecution. Without necessarily insisting that selective enforcement per se justifies injunctive relief, the plaintiffs in a *Dombrowski*-type suit should argue that selective enforcement creates a presumption of bad faith. Once demonstrated, the government would have the burden of explaining why the law had not been enforced against others. Prosecution under a law which has lain dormant for so long as to become a "dead letter"¹⁶⁸ presents an analogous situation. Again, it can be argued that the use of such a law against persons engaged in protest gives rise to a presumption that it has been invoked in bad faith to suppress the protest activity.¹⁶⁹

It will be insufficient to prove merely that the plaintiffs have not violated the law in question. In *Cameron v. Johnson*,¹⁷⁰ the Court emphasized that, "[t]he question for the District Court was not the guilt or innocence of the persons charged; the question was whether the statute was enforced against them with no expectation of convictions but only to discourage exercise of protected rights." However, this remark in turn suggests use of the "totally devoid of evidence" argument developed in the *Thompson v. City of Louisville*¹⁷¹ line of cases.¹⁷² At the evidentiary hearing on the claim of bad faith enforcement, the plaintiffs should attempt to show not only that they did not violate the law in question, but also that the government cannot possibly produce any evidence to support a conviction. Of course, the charge of bad faith enforcement will be bolstered by proof of additional acts by government officials which demonstrate that the prosecution was part of an overall scheme to repress dissent and social change effort. In any event, in order to make out a case of bad faith enforcement, the plaintiffs should attempt to establish as many of the following elements as possible: (1) acts in addition to the institution of the prosecution; (2) selective enforcement; (3) prosecution under a "dead letter" law; (4) a total lack of evidence to support a conviction.¹⁷³ While any one of these elements may be sufficient, obviously the more the plaintiffs can show, the greater the likelihood of success.

I would like further to illustrate the bad faith enforcement attack by detailed consideration "from within," of another Southern Con-

167. *Hendricks v. Hogan*, 324 F. Supp. 1277 (S.D.N.Y. 1971).

168. *Cf. Poe v. Ullman*, 367 U.S. 497 (1961).

169. *See Stickgold*, *supra* note 20, at 376.

170. 390 U.S. 611, 621-22 (1968).

171. 362 U.S. 199 (1960).

172. *See, e.g., Gregory v. Chicago*, 394 U.S. 111 (1969); *Garner v. Louisiana*, 368 U.S. 157 (1961).

173. While it should be made separately, the "patent and flagrantly" unconstitutional argument is also relevant in the context of establishing bad faith.

ference Educational Fund case, *Honey v. Goodman*.¹⁷⁴ In the spring of 1968, "civil disorders" erupted in Louisville, Kentucky. Shortly thereafter, leaders of the Louisville black community—the "Black Six"—were indicted on a charge of conspiring to destroy private property. Coincidentally, the property described in the indictment was all the property destroyed during the "disorders," and the thrust of the prosecution was clear: to place the blame for the riots on "black agitators" rather than on the police practices in the black community that touched off the rioting.¹⁷⁵ After the prosecution moved for a change of venue on the ground that it could not get a fair trial in Jefferson County (Louisville), the circuit court, in a totally unprecedented move, granted the motion, transferring the case to Hart County, a rural county in south-central Kentucky with practically no black residents. The case was scheduled for trial in January 1970.

Civil rights groups organized protests against the trial. Mike Honey and Martha Allen were a young couple on the Southern Conference staff assigned to work as coordinators of the Kentucky chapter of the Southern Committee Against Repression. In that capacity, they sent letters to 1,200 residents of Hart County, whose names were listed in the telephone directory, protesting the upcoming trial. The letter noted that the trial had been moved because, "[t]he prosecutor in Louisville knows that he doesn't have evidence for a conviction, and that is why he is dumping this case on you,"¹⁷⁶

174. 432 F.2d 333 (6th Cir. 1970).

175. The National Advisory Commission on Civil Disorders found that deep hostility between police and ghetto communities was a primary cause of the disorders surveyed by the Commission. *NAT'L ADVISORY COMM'N ON CIVIL DISORDERS, REPORT 299* (Bantam ed. 1968).

176. The full text of the letter, set out in 432 F.2d at 336, was:

[Dated] January 1, 1970

To: Citizens of Hart County
Dear Friends,

On January 5 [1970] six black people from Louisville are being brought to trial in Hart County. The State claims that these people caused the Louisville uprising of '68. This is a lie.

The prosecutor in Louisville knows he doesn't have evidence for a conviction, and that is why he is dumping this case on you. He seems to think that the citizens of Hart County will convict these six people without any evidence.

Many people in Louisville are angry about this prosecution. They are angry because City and State officials are trying to make scapegoats of these six people. These officials are trying to make fools of you by moving the case from Louisville to Munfordville.

Don't be fooled. The same problems that exist in Jefferson County exist in Hart County, and they will not be solved by such shenanigans. The politicians are trying to jail these six people because they spoke up about unemployment, bad housing, poverty and racism. If they can be jailed for speaking their minds, so can you.

The politicians are trying to make fools of all of us. They tell us that social problems are our fault—not theirs. They try to use the race question to keep black and white divided. We are angry about all of this. We hope you are angry too. Enclosed is a folder about some of the things we are doing to protest this injustice. We urge you to protest against this trial being pushed off on you.

and urged the people to "protest against this trial being pushed off on you."¹⁷⁷ A folder describing other anti-repressive efforts was also enclosed.

On January 5, 1970, the opening day of the circuit court term, the circuit judge stated to the grand jury that a "heinous crime"¹⁷⁸ had been committed. Taking a copy of the letter out of his pocket, the judge displayed it to the grand jury, commenting that if any of them had received such a letter, he should report it to the prosecutor.¹⁷⁹ He then stated that sending the letter constituted the common law crime of embracery—an offense which the prosecuting attorney would later explain to them. Finally, he exclaimed that "he would find out who was responsible for the sending of the letter even if this necessitated the cooperation of the United States post office."¹⁸⁰ He concluded by returning the "Black Six" case to Jefferson County on the ground that sending the letter made it impossible to try the case in Hart County.¹⁸¹ After court adjourned, the prosecuting attorney publicly stated that he would seek criminal indictments against the letter's signers; two days later indictments were returned against Mike and Martha, charging them with the common law offense of embracery.¹⁸²

A search of reported decisions disclosed that the Kentucky Court of Appeals had discussed the common law offense on only two occasions—once in 1827 and again in 1930. In both cases the court defined the offense as "an attempt to influence a jury corruptly to one side, by promises, persuasions, entreaties . . . or the like."¹⁸³ In the 1930 case, the court held that the offense could be committed by soliciting a prospective juror, but directed dismissal of the indictment in the particular case because the person solicited had not been selected to serve. It is hardly surprising that this case was the last

Yours very truly,
 [signed] Mike Honey & Martha Allen
 Mike Honey and Martha Allen
 Coordinators, Kentucky Chapter
 Southern Committee Against Repression

177. 432 F.2d at 336.

178. *Id.* at 337.

179. Actually there were two prosecutors. In Kentucky, there is a county attorney for each of the 120 counties and a commonwealth's attorney for each of the 50 judicial districts. Both the county attorney and the commonwealth's attorney were involved here, and both were joined as defendants in the federal suit. The county attorney made the public statements referred to above.

180. 432 F.2d at 337.

181. Parenthetically, the conspiracy charge in the case was so devoid of evidentiary support that when the case was finally tried in Louisville, the "Black Six" received a directed verdict.

182. Kentucky still allows prosecutions for common law offenses. See KY. REV. STAT. §§ 431.060, 431.070, 431.075 (1962).

183. *Commonwealth v. Denny*, 235 Ky. 588, 591, 31 S.W.2d 940, 941-42 (1930); *Brown v. Beauchamp*, 21 Ky. (5 Mon.) 413, 415 (1827). See also 26 AM. JUR. 2d *Embracery* § 1 (1966).

reported reference to the common law offense, since attempting to bribe a juror is a statutory offense in Kentucky, and since other efforts to influence an individual juror fall within the purview of the state's obstruction of justice statute.¹⁸⁴ Clearly, the common law offense had become a "dead letter" (although perhaps "letter" is not the right term), but it provided the only method on which the judge and the prosecutor could proceed to punish sending a letter to 1,200 persons, some of whom might be selected for jury service.¹⁸⁵

We immediately brought a *Dombrowski*-type suit, alleging the facial invalidity of the common law offense,¹⁸⁶ as well as its unconstitutionality as applied.¹⁸⁷ As to the "bad faith and harassment" aspect of *Dombrowski*, we alleged that: (1) the prosecutions were instituted in bad faith for the purpose of inhibiting the plaintiffs and others from criticizing the administration of justice in the Commonwealth of Kentucky; (2) the prosecutions constituted an extreme form of selective enforcement, because the conduct for which the plaintiffs were being prosecuted—expressing their opinions to a mass audience on proceedings that are pending or will be pending in some court—was engaged in constantly by commentators and editors of newspapers and other forms of the mass media, and those persons were never prosecuted; and (3) the plaintiffs were charged with the offense solely because of disagreement with the nature of their expression. The basic theory of this attack was first that Hart County officials, including the judge, whom we did not name as defendant,¹⁸⁸ wanted to prosecute the plaintiffs because they "dared" to criticize the administration of justice in Kentucky, and second that Hart County officials wanted an excuse to "buck" the case back to Louisville.¹⁸⁹ As a practical matter, I expected

184. KY. REV. STAT. §§ 432.220, 432.300 (1962). See Schackelford v. Commonwealth, 185 Ky. 51, 214 S.W. 788 (1919).

185. In fact, only four members of the jury panel had received the letter.

186. *Ashton v. Kentucky*, 384 U.S. 195 (1966); *Edwards v. South Carolina*, 372 U.S. 229 (1963); *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

187. By this time it was clear that the unconstitutionality of a law as applied could be the basis of a *Dombrowski*-type attack. See *Entertainment Ventures, Inc. v. Brewer*, 306 F. Supp. 802 (M.D. Ala. 1969). See also *Grove Press, Inc. v. Philadelphia*, 418 F.2d 82 (3d Cir. 1969). The main thrust of my argument was based on the unconstitutionality of the common law offense as applied to the conduct of the plaintiffs, and the facial invalidity argument was related to unconstitutional application. I argued that the interpretation that the Hart County officials put on the common law offense—that it applied to sending a mass circulation letter to 1,200 persons who might be prospective jurors—rendered the offense overbroad, and that this interpretation was sanctioned by the decision in *Commonwealth v. Denny*, 235 Ky. 588, 31 S.W.2d 940 (1930).

188. I believe at that time I was under the erroneous impression that a judge enjoyed immunity in a section 1983 case even as to injunctive relief. The immunity extends only to liability for damages.

189. I think that the "political and propaganda effort" had a good deal

ultimately to prevail on constitutional grounds without having to reach the issue of bad faith prosecution.

The district judge summarily dismissed the suit two days after it was filed without waiting for the defendants' answer on the ground that the allegations of the complaint failed to show "irreparable injury." We immediately appealed to the Sixth Circuit and sought an injunction pending appeal to block the trial scheduled for April. The Sixth Circuit ordered the prosecutor to respond, and he agreed to postpone the state trial until after the court of appeals decided the case. The Sixth Circuit advanced the case for argument in June and handed down its decision in early October.

There was no doubt that the district judge had erred in his interpretation of "irreparable injury," and the Sixth Circuit was concerned primarily with the "2283 problem," since our suit by necessity had been filed after the indictment was returned. As I will discuss subsequently,¹⁹⁰ the court of appeals held that section 2283 was not a bar to a *Dombrowski*-type suit in the circumstances presented. However, the court upheld the common law offense on its face and refused to consider its constitutionality as applied.¹⁹¹ It then held that we had clearly stated a claim for relief under the "bad faith and harassment" aspect of *Dombrowski* and remanded the case for an evidentiary hearing, at which we would have the "'heavy burden' of showing that the State instituted the proceedings in bad faith and with no real hope of ultimate success, in order to chill the free expression of unpopular ideas."¹⁹²

By the scheduled date of the evidentiary hearing, the controversy had become somewhat moot. The "Black Six" trial had been moved back to Louisville where the defendants had been acquitted for lack of evidence—as stated in the letter. Mike and Martha had moved to Memphis, Tennessee, to take up new duties. Since neither side had anything to gain politically from further proceedings, by mutual agreement the state court prosecutions were dropped and the federal suit was dismissed.¹⁹³

Had an evidentiary hearing been held, I would have tried to show discussions between the judge and the prosecutor, and possibly others, about the "Black Six" case and about the letter. I hoped that this would demonstrate both a desire to use the sending of the letter as an excuse to get rid of the trial and a genuine indignation

to do with that desire. The Hart County officials did not relish an "invasion of blacks and radicals" for the trial.

190. See text accompanying note 258 *infra*.

191. It implied that this question could be considered by the district judge upon remand.

192. 432 F.2d at 344.

193. A practical effect of the availability of the *Dombrowski*-type suit is that the delay in bringing the case to trial may "cool the confrontation situation." In one sense, *Honey* resulted in a "stalemate." But in another sense, it was a "victory" because the threatened prosecution did not occur.

that "these two young radicals from out of town would dare to criticize the courts." I would have borne down most heavily on the claim of selective enforcement. Here I had hoped to demonstrate that local newspapers commented on potentially pending cases when arrests were made; I was fairly certain that the Louisville Courier-Journal, the only paper of statewide circulation, had commented on the "Black Six" case at various times after it had been transferred to Hart County. I also thought that I could show discussions on radio and television.¹⁹⁴

Thus, all of the elements supporting the charge of bad faith enforcement outlined previously were present here. There were: (1) acts in addition to the institution of the prosecution—the statements of the judge from the bench and the prosecutor's statements to the press; (2) a "dead letter" law; and (3) a strong case for selective enforcement.¹⁹⁵ The "total lack of evidence to support a conviction" argument would have related to our contention that the law was unconstitutional as applied: there was a total lack of evidence that Mike and Martha had engaged in conduct that could constitutionally be punished.¹⁹⁶ Since this was a "pure speech" case and the facts were not in dispute, the prosecutor would likely have been unable to cloud the issue. Thus, I think *Honey* is a good example of how the various elements can be combined to make out a case of bad faith prosecution, and it would have been interesting to see what would have happened if the case had been tried.

We may now consider how the bad faith enforcement attack has fared since *Younger*. In *Taylor v. City of Selma*,¹⁹⁷ a three-judge court found that prosecutions under the Alabama antiriot act, arising out of events during a 1966 election campaign, had been brought in bad faith for harassment purposes to prevent the plaintiffs' participation in the campaign.¹⁹⁸ Without elaborating on the reasons for its findings,¹⁹⁹ the court enjoined the pending prosecutions,

194. Judge Kalbfleisch, concurring, took a very restrictive view of a showing of selective enforcement, contending that it was limited to discussions of the "Black Six" case. 432 F.2d at 345. I would have tried to show discussions of other pending cases as well.

195. Here, the "dead letter" law and selective enforcement arguments blend together.

196. The "interference with the administration of justice" cases represent one area where the Supreme Court has been consistently applying the "clear and present danger" test. See, e.g., *Wood v. Georgia*, 370 U.S. 375 (1962); *Craig v. Harney*, 331 U.S. 367 (1947). It is impossible to see how it could be contended that sending the letter in question to 1,200 residents created the requisite "clear and present danger." See *Craig v. Harney*, *supra* at 376.

197. 327 F. Supp. 1191 (S.D. Ala. 1971).

198. The plaintiffs had appealed their convictions from an inferior court and were awaiting a trial de novo. The court stayed those proceedings in May 1967 until its final disposition of the case. No explanation was given for the long delay in making that disposition.

199. 327 F. Supp. at 1193.

declared the statute unconstitutional on its face, and enjoined future enforcement as well.

Duncan v. Perez,²⁰⁰ a second post-*Younger* bad faith prosecution case, arose out of a complex and lengthy set of facts. Duncan, a black, was first arrested on a charge of cruelty to juveniles after an incident "related to the racial tension which accompanied the federally ordered desegregation of schools in Plaquemines Parish."²⁰¹ He had allegedly slapped a twelve-year-old white boy on the arm while breaking up a confrontation between four whites and his two cousins. His attorneys filed a motion to quash on the ground that the statute was only applicable where a parental relationship existed. The prosecuting attorney then advised the complainants to file an affidavit charging simple battery. The day after Duncan appeared in court on the cruelty to juveniles charge he was arrested on the battery charge.²⁰² Bail was set at \$1,500, double the figure under the suggested bond schedule in effect in the parish. Duncan was found guilty of battery and sentenced to two months in prison and a \$150 fine, with an additional 20 days in prison if the fine was not paid—an unusually heavy sentence given the nature of the offense.²⁰³ After his lawyer was arrested on a charge of improper practice of law, a federal court issued an injunction, finding prosecution to have been brought in bad faith.²⁰⁴ Duncan then encountered difficulty obtaining release on bond pending appeal. His conviction was ultimately reversed by the United States Supreme Court on the ground of denial of the right to trial by jury.²⁰⁵ When the state sought to prosecute him again, Duncan turned to the federal court for affirmative relief.

Looking at the total set of circumstances—the arrests, the unusually high bond and sentence,²⁰⁶ the difficulty in obtaining release pending appeal, the arrest and prosecution of his attorney, and the comments of the prosecutor and the judge²⁰⁷—the court found that the prosecution had been instituted in bad faith and issued an injunction. It also observed that any violation that the plaintiff might

200. 445 F.2d 557 (5th Cir. 1971), *aff'g* 321 F. Supp. 181 (E.D. La. 1970).

201. 321 F. Supp. at 181-82.

202. *Id.* at 182.

203. Evidence at the federal court hearing revealed that over a five year period in the judicial district, sentence was imposed 84 times in battery cases. In only 15 cases was imprisonment ordered, and in only five did the sentence exceed that imposed on Duncan. In four of those cases, there existed an additional more serious charge.

204. *Sobol v. Perez*, 289 F. Supp. 392 (E.D. La. 1968).

205. *Duncan v. Louisiana*, 391 U.S. 145 (1968).

206. See note 203 *supra*.

207. The judge berated the plaintiff's lawyers, saying that they only wanted to have the Louisiana law denying jury trials in misdemeanor cases declared unconstitutional. He admitted on discovery that this fact influenced the sentence that he imposed on the plaintiff. 321 F. Supp. at 182-83.

have committed was "so slight and technical as to be generally reserved for law school hypotheticals rather than criminal prosecutions,"²⁰⁸ and that such de minimis "batteries" frequently occurred and were not prosecuted. Finally, the court speculated that the plaintiff would not have been prosecuted at all, and certainly would not have been reprosecuted, "were it not for the civil rights context out of which the case arose."²⁰⁹

When the case reached the Fifth Circuit, *Younger* had already been decided, and in the view of the court of appeals, "the district judge accurately forecast by his opinion that criteria which the Supreme Court established in *Younger v. Harris* for the grant of federal injunctive relief against state prosecutions."²¹⁰ It commented that where the state prosecution had been instituted in bad faith and for the purpose of harassment, "irreparable injury" need not be shown. A more accurate statement would have been that a bad faith prosecution necessarily constitutes "irreparable injury," because there is a federal constitutional right to be free from such prosecutions.

Both *Taylor* and *Duncan* are "southern cases," for which the *Dombrowski*-type suit was originally designed. In such cases, the federal courts—having had long experience with discriminatory and repressive law enforcement against blacks and civil rights activists—may be more disposed toward finding bad faith. Nonetheless, the cases are important illustrations of the viability of the bad faith attack after *Younger*. Even more significant, because of the absence of racial overtones, however, may be the recent case of *Shaw v. Garrison*.²¹¹ The court found that a perjury prosecution, instituted two days after Clay Shaw was acquitted of conspiracy to assassinate President Kennedy, had been brought in bad faith "with the specific intent to deprive Shaw of his rights under the First, Fifth and Fourteenth Amendments . . ." ²¹² Among the points that the court emphasized were: (1) Garrison's using sodium penathol and hypnosis on the "key witness" and instituting the conspiracy charge when that person identified Shaw as being present at a meeting with Oswald; (2) the fact that Garrison had been told by a police lieutenant prior to the trial that the "key witness" could not identify Shaw as having been present at the meeting; (3) Garrison's receipt of money from outside sources to finance the investigation and prosecution of Shaw, and the perjury prosecution as an effort to "produce results" for Garrison's backers; (4) the circumstances

208. *Id.* at 184.

209. *Id.* The court also specifically found that the reprosecution of *Duncan* "would deter and suppress the exercise of federally secured rights by Negroes in Plaquemines Parish," and that *Duncan* could assert their rights. *Id.* at 184-85.

210. 445 F.2d at 558.

211. 328 F. Supp. 390 (E.D. La. 1971).

212. *Id.* at 397.

surrounding Shaw's arrest,²¹³ Garrison's statements to the press, and extensive pretrial publicity; (5) the fact that there was no other instance where a defendant who took the stand and was acquitted was subsequently prosecuted for perjury; and (6) Garrison's significant financial interest in continuing the prosecution of Shaw, since he had written a book about his investigation of the alleged conspiracy. The case, then contained the numerous acts in addition to the prosecution, as well as selective enforcement, and also was analogous to a situation of "total lack of evidence to support a conviction." Of course, other factors were present as well,²¹⁴ but the case does point out how the total situation can demonstrate the bad faith of a prosecution.

However, other post-*Younger* cases have held claims of bad faith enforcement not proven. In *Lewis v. Kugler*,²¹⁵ the plaintiffs alleged that the New Jersey state police were singling out persons of "individualized personal appearance"²¹⁶ travelling on the highways and were routinely searching their vehicles. Nine of the plaintiffs had been subject to marijuana prosecutions as a result of the searches. It was further alleged that these searches were indicative of bad faith on the part of the state police and demonstrated deliberate harassment of so-called "long-haired travelers."²¹⁷ The court disagreed, stating that an experienced police officer could decide to "direct more attention in the performance of his police duties to the activities of some persons than to others,"²¹⁸ and observing that the illegality of the search could be asserted as a defense to the state criminal prosecution. The case did not present a sympathetic atmosphere for a finding of bad faith, given the court's implicit assumption that persons of individualized personal appearance are more likely to be drug users. Moreover, the only evidence of bad faith was the allegedly illegal searches. Also, having been arrested for possession of marijuana, the plaintiffs were certainly, in the view of the Court, engaged in "hard core" activity. Finally, the case involved "life style repression" rather than political repression, and while there are important first amendment overtones here, they do not focus as sharply as in "political cases." The federal court simply was not about to enjoin the prosecution

213. Shaw was led handcuffed into a hallway, where a crowd of newsmen, photographers, television camera crews, and members of the general public were gathered. He was shoved through the crowd to reach an elevator leading to the basement. All of this appeared on television. He could have been taken down in a private elevator located in Garrison's office. The court stated that "Shaw's arrest and the manner in which it was effected was outrageous and inexcusable." *Id.* at 399.

214. The facts in the case are set out in great detail in *id.* at 392-400.

215. 324 F. Supp. 1220 (D.N.J.), *vacated and remanded*, 446 F.2d 1343 (3d Cir. 1971).

216. *Id.* at 1221.

217. *Id.*

218. *Id.* at 1223.

of "drug users."²¹⁹

Similarly, in *Ascheim v. Quinlan*,²²⁰ the plaintiffs had originally been arrested on a charge of disorderly conduct arising out of an antiwar demonstration. When the case came to trial in city court, a large group of their supporters were present. During the trial, some "leaped up in noisy protest"²²¹ when a tipstaff tried to turn one of the plaintiffs around to face the magistrate. The magistrate then ordered the courtroom cleared; the police had moved most of the spectators through the courtroom door "when a melee broke out involving the officers and those being ejected."²²² The police filed charges of aggravated assault and battery, inciting to riot, and assault on a police officer against the plaintiffs and others. A federal suit was brought to enjoin the prosecutions. The plaintiffs contended that the tipstaff had pulled the person's long hair while trying to turn him around and that the police used obscene and insulting language toward the spectators and attacked a number of them. They also alleged existence of an overall plan to harass persons such as themselves and introduced evidence of other instances of police violence against those holding unpopular views.

Refusing relief the court found that: (1) the prosecutions could not be said to have been instituted without any hope of ultimate success; (2) even if bad faith were involved, there was no evidence to show that the officers intended to "deter the plaintiffs in the exercise of their First Amendment rights;"²²³ (3) the conduct of the plaintiffs out of which the prosecution arose was not entitled to first amendment protection; and (4) the particular policemen who preferred the charges were not involved in the other instances of alleged harassment and that the evidence regarding the incident in the city court was conflicting.²²⁴ Here the "hard core" nature of the plaintiffs' conduct, the difficulty of assigning "motive" to police officers as opposed to higher ranking officials, and the difficulty of proving a "police conspiracy" made the plaintiffs' burden insurmountable. The federal suit's primary purpose may well have been political—to expose police brutality against dissenters. But the case

219. On appeal, the decision was affirmed insofar as the court refused to enjoin the pending prosecutions. The remand occurred with regard to relief against future prosecutions. See text accompanying note 323 *infra*.

220. 324 F. Supp. 789 (W.D. Pa. 1971).

221. *Id.* at 791.

222. *Id.*

223. *Id.* at 796. The requirement of specific intent to violate first amendment rights is questionable. So long as the prosecution was brought in bad faith, an intention to repress exists, and that should be sufficient.

224. It did, however, observe that "some of the testimony of excessive force by individual police officers on specific occasions was quite disturbing and should cause concern in the minds of those officials who have the responsibility of determining the accuracy of such charges and taking appropriate action." 324 F. Supp. at 793-94.

was not one in which bad faith prosecution could realistically have been established.²²⁵

The result in each of these cases was fairly predictable. While a claim of bad faith enforcement can be sustained, particularly where there are additional acts, as in *Duncan* and *Shaw*, the case will be increasingly difficult if the plaintiffs are accused of having engaged in "hard core conduct," as in *Lewis* and *Ascheim*. It remains to be seen how courts will deal with the bad faith criterion after *Younger* in future cases where the conduct in question falls within these two extremes.

2. INDEPENDENT DETRIMENTAL CONSEQUENCES

The second basis of "irreparable injury" suggested is that of independent detrimental consequences. As in *Dombrowski* and *McSurely*, the independent consequences may be related to the bad faith nature of the prosecution; further, a showing of independent detrimental consequences alone should be sufficient. If, for example, *McSurely* had involved a "straight" sedition prosecution,²²⁶ unaccompanied by midnight raids and seizure of documents, and as a result of the threatened prosecution the Appalachian Volunteers faced a cutoff of federal funds, or if the criminal trial itself would have had an adverse political effect, then the remedy by way of defense to the prosecution would not have assured adequate vindication of federal constitutional rights. In such circumstances, the distinction between affirmative and defensive relief, particularly in terms of immediacy, becomes significant. As a matter of substantive law, plaintiffs will be entitled to relief against the prosecutions only if the underlying law is unconstitutional;²²⁷ but the existence of independent detrimental consequences should constitute "irreparable injury," thereby entitling them to a determination of the constitutional question by the federal court.

Therefore, I would contend that the showing of a *specific chilling effect* on the exercise of first amendment rights due to a pending state court proceeding constitutes independent detrimental consequences resulting from that proceeding, thus satisfying the requirement of "irreparable injury"; the sufficiency of this specific chilling effect to justify federal intervention would, of course, depend on the facts of the particular case. This argument is poignantly illustrated when relief is sought against enforcement of a state court injunction issued in a civil suit. Apart from the question of whether the test for federal intervention is as stringent when civil as opposed to criminal proceedings are involved,²²⁸ the existence of an

225. See also *Abramovich v. Bionaz*, 326 F. Supp. 142 (W.D. Pa. 1971).

226. We will presume an "honest but stupid" prosecutor.

227. Where bad faith is established, of course, it does not matter if the underlying law is unconstitutional.

228. See *Younger v. Harris*, 401 U.S. 37, 54 (1971) (Stewart & Harlan,

outstanding injunction prohibiting protest activity necessarily has a specific chilling effect. If the injunction is violated, those subject to it can be held in contempt,²²⁹ and they may be unable to assert its unconstitutionality as a defense.²³⁰ While an appeal in the state courts might be available, this procedure will often be more shadow than substance; where *immediate* relief is needed, as for example, where individuals wish to protest a recent event, the time lag between the event and the decision on appeal renders that remedy grossly inadequate.²³¹ In such circumstances, it can be contended that affirmative relief via federal intervention is imperative to avoid "irreparable injury."²³²

The cases support this contention. In the pre-*Younger* case of *Machesky v. Bizzell*,²³³ the Fifth Circuit enjoined enforcement of a state court injunction on the ground of unconstitutional overbreadth.²³⁴ Since the court apparently took jurisdiction on the basis of facial invalidity, the decision is now not as strong a precedent; however, in two post-*Younger* cases, district judges have confronted similar situations. In *Duke v. Texas*,²³⁵ a state court, after refusing to consider any constitutional objections, issued an injunction barring nonstudents from speaking at an antiwar rally on a state university campus. The federal court found that the plaintiffs "are subject to a wholesale abridgment of their rights to freedom of speech, press, assembly and association, which inherently constitutes continuing irreparable injury."²³⁶ It also pointed out that the plaintiffs had no adequate remedy at law, since the state judge had failed to consider their constitutional arguments and concluded that, "[i]n this case there is not merely a speculative 'chilling'

JJ., concurring). I emphasize that this discussion does not involve a "pure" *Younger* situation; I have utilized the injunction problem only because of its illustrative value.

229. See *Carroll v. President & Comm'rs of Princess Anne County*, 393 U.S. 175 (1968).

230. See *Walker v. City of Birmingham*, 388 U.S. 307 (1967); Tefft, *Neither Above the Law Nor Below It: A Note on Walker v. Birmingham*, 1967 S. Cr. Rev. 181.

231. Parties are not required to exhaust state judicial remedies before seeking relief in the federal courts pursuant to 42 U.S.C. § 1983 (1970). *Damico v. California*, 389 U.S. 416 (1967); *Monroe v. Pape*, 365 U.S. 167 (1961). However, it may be asked whether in this situation the plaintiffs would have to show that timely and effective relief in the state courts was not available in order to establish "irreparable injury."

232. *But see Appalachian Volunteers, Inc. v. Clark*, 432 F.2d 530 (6th Cir. 1970), *cert. denied*, 401 U.S. 939 (1971), where the failure of the plaintiffs to try to vacate a temporary restraining order in the state court was relied upon to justify a denial of federal relief. However, the case clearly was not one in which time was of the essence.

233. 414 F.2d 283 (5th Cir. 1969).

234. As will be subsequently discussed, the court also held that section 2283 was not a bar to relief in a *Dombrowski*-type suit.

235. 327 F. Supp. 1218 (E.D. Tex. 1971).

236. *Id.* at 1234.

threat, . . . but rather the cold reality of inestimable harm."²³⁷ Likewise, in *Montgomery County Board of Education v. Shelton*,²³⁸ the court enjoined enforcement of a state court injunction which prohibited black high school students from engaging in protest activities anywhere in the town except under strict conditions as to place and manner.²³⁹ The state court injunction was held to interfere with a prior federal court order restricting demonstrations near the school;²⁴⁰ moreover, the court found it overbroad, noting that the total effect of the federal and state court injunctions "effectually stifled both the First Amendment rights and desires of the black students peaceably to assemble and protest their school-related grievances to those in authority."²⁴¹

A specific chilling effect may also arise from the mere fact of criminal prosecution, regardless of the bad faith of the government officials. For example, the prosecution may critically interfere with the ability of the plaintiffs to carry on their dissent and social change effort. *McSurely v. Ratliff*²⁴² is a case in point, although there the arrests, rather than the actual prosecution, caused cutoff of federal aid to the Appalachian Volunteers. Again, as in *McSurely*, the political impact of the trial itself could create a specific chilling effect on the plaintiff's activities. In other words, whenever there has been a showing of a specific chilling effect or other independent detrimental consequences, there would exist a "threat to the plaintiff's federally protected rights that cannot be eliminated by his defense against a single criminal prosecution,"²⁴³ and affirmative relief would be proper. But it is essential to distinguish the hypothetical chilling effect due to prosecution under a facially invalid law which *Younger* holds insufficient, from the specific chilling effect or other independent detrimental consequences due to the prosecution which, under *Dombrowski* and *Younger*, may constitute "irreparable injury."

3. FLAGRANT AND PATENT UNCONSTITUTIONALITY

The third basis of "irreparable injury," recognized in *Younger*, is prosecution under a "flagrantly and patently unconstitutional law."²⁴⁴ The difference between a law that is "void on its face" and one that is "flagrantly and patently unconstitutional" is, of

237. *Id.*

238. 327 F. Supp. 811 (N.D. Miss. 1971).

239. The injunction is set out in full in *id.* at 820-21.

240. This alone would justify federal injunctive relief on the ground that such relief was necessary in aid of the federal court's jurisdiction and to protect and effectuate its judgment. See 28 U.S.C. § 2283 (1970).

241. 327 F. Supp. at 819.

242. 282 F. Supp. 848 (E.D. Ky. 1967).

243. This is the "boilerplate language" of *Dombrowski* and *Younger*.

244. It should be emphasized that "patently and flagrantly unconstitutional" is a separate basis of "irreparable injury" apart from its relevance to show the bad faith of the prosecutor in instituting the action.

course, one of emphasis and degree, but perhaps the question can be approached in terms of "obvious impact." In *Younger*, the Supreme Court appeared to be trying to avoid putting the federal courts in the position of having to engage in a detailed analysis of the specific provisions of a law to determine whether it met recognized standards of specificity and precision. Such an investigation was required in the *Boyle*-situation, where the lower court upheld many of the provisions of the challenged laws,²⁴⁵ but invalidated one section of the Illinois intimidation statute. The process of detailed analysis necessarily undertaken there clearly differs from that of *McSurely*, where the court could tell essentially by merely looking at the law that it was obviously unconstitutional.²⁴⁶

The distinction between laws that are obviously unconstitutional and those that can be found so only after a detailed analysis of their specific provisions is illustrated by the post-*Younger* case, *Hendricks v. Hogan*,²⁴⁷ involving a challenge to the New York flag desecration statute. The court conceded that the plaintiffs might have a valid claim that the statute was unconstitutionally vague or overbroad. But since the court could not conclude that it was "patently and flagrantly unconstitutional," relief was denied. As support for its decision, the court observed that the Supreme Court had left the constitutional question unresolved by its equally divided affirmance of the decision of the New York Court of Appeals upholding the statute.²⁴⁸ It might also have added that the lower federal courts have disagreed on the constitutionality of similar flag desecration statutes.²⁴⁹ Hence, unlike the law in *McSurely*, the statute's unconstitutionality was not obvious.²⁵⁰

Thus far we have discussed the components of "irreparable injury" in the abstract. However, as a practical matter, the extent to which courts will find "irreparable injury" will be influenced in no small part by the attitudes of the judges toward the *Dombrowski*-type suit in general and by the situation presented in the particular case. Those federal judges hostile to federal intervention—and there are many²⁵¹—will use *Younger* to buttress their refusal

245. See *Landry v. Daley*, 280 F. Supp. 968 (N.D. Ill. 1968).

246. See note 161 *supra* and accompanying text.

247. 324 F. Supp. 1277 (S.D.N.Y. 1971).

248. *People v. Radich*, 26 N.Y.2d 114, 257 N.E.2d 30, 308 N.Y.S.2d 846 (1970), *aff'd sub nom. by an equally divided court*, *Radich v. New York*, 401 U.S. 531 (1971). See also *Street v. New York*, 394 U.S. 576 (1969).

249. Compare, e.g., *Crossen v. Silver*, 319 F. Supp. 1084 (D. Ariz. 1970), with *Sutherland v. DeWulf*, 323 F. Supp. 740 (S.D. Ill. 1971).

250. See also *Lawrence v. Lordi*, 324 F. Supp. 1092, 1094 (D.N.J. 1971), where the court observed that the statute under attack there was similar to the one involved in *Younger*. As stated previously, the Court in *Younger* did not consider whether the California statute was "patently and flagrantly unconstitutional," although a strong argument could have been made to that effect.

251. Many, if not most, of the actual cases involving *Dombrowski*-type suits—like other claims for federal relief—are determined at the district

to grant relief, just as they were using other grounds before *Younger*. In effect, they will read *Younger* as barring relief completely and will be unresponsive to attempts to distinguish that case and to establish "irreparable injury." They can be expected to bend over backwards to find bad faith not demonstrated and "irreparable injury" not otherwise shown. More "interventionist-oriented" federal judges will read *Younger* as narrowly as possible and will make factual findings supporting "irreparable injury." For those judges "in the middle," the result may well depend on their view of the particular case. Insofar as patterns may develop, they are likely to be reflected in decisions of the courts of appeal, but here too differences may be expected. Ultimately, the Supreme Court will have to furnish further guidance.

4. STATE PROSECUTION AND SECTION 2283

The final question that must be considered with respect to pending state court proceedings is whether, even if "irreparable injury" is shown, the provisions of title 28, section 2283, of the United States code operate to bar federal relief. While the statute by its terms is only applicable to injunctive relief,²⁵² in light of *Samuels v. Mackell*,²⁵³ it is difficult to believe that if the Supreme Court held that section 2283 was a bar, it would nevertheless allow declaratory relief in analogous circumstances.²⁵⁴ The Supreme Court managed to avoid the question in *Dombrowski*, *Cameron*, and *Younger* and, as I suggested earlier,²⁵⁵ may be waiting to see what happens before finally making up its mind.

In the meantime the question will have to be resolved by the lower federal courts. As I pointed out in the original article, most of the courts that had passed directly on the question held that once the requirements for *Dombrowski*-type relief were satisfied, "special

court level, not infrequently in unreported opinions. An analysis of the reported pre-*Younger* cases would convey the impression that the suit was often successful. But the consensus among "movement" lawyers was to the contrary. See Sedler, *supra* note 3, at 261.

252. In their concurring opinion in *Younger*, Justices Stewart and Harlan emphasized this point. 401 U.S. at 55.

253. 401 U.S. 66 (1971).

254. In *Ware v. Nichols*, 266 F. Supp. 564 (N.D. Miss. 1967), the court relied on the granting of declaratory relief to avoid the section 2283 problem. The same course was followed in *Babbitz v. McCann*, 310 F. Supp. 293 (E.D. Wis. 1970), with respect to a challenge to a state anti-abortion law. But this distinction is questionable after *Samuels*, where the Court emphasized the similarity in effect between declaratory and injunctive relief and also pointed out how the grant of declaratory relief, with a later injunction if the order was not heeded—which is what happened in *Babbitz*—could effectively circumvent the requirements of section 2283. In the nonfederal context, the general prohibition against injunctive interference with pending prosecutions is equally applicable to declaratory relief. See *Reed v. Littleton*, 275 N.Y. 150, 9 N.E.2d 814 (1937).

255. See notes 124-129 *supra* and accompanying text.

circumstances" existed justifying an exception to section 2283. As the Fifth Circuit stated in *Machesky v. Bizzell*:²⁵⁶

We hold also that where important public rights to full dissemination of expression on public issues are abridged by state court proceedings, the principles of comity embodied in § 2283 must yield, and that the district court is empowered to enjoin the state court proceedings to the extent that they violate these First Amendment rights.²⁵⁷

By approaching the question in this manner, the court was not obliged to hold that section 1983 was a "statutorily authorized" exception to section 2283 in all circumstances, but only where a case for *Dombrowski*-type relief is established. I stressed this point before the Sixth Circuit in *Honey* and struck a responsive chord. The court there stated:

We need not, and do not, decide that section 1983 is an "express exception" to section 2283 under all circumstances. We do find, however, that where the "highly unusual and very limited circumstances of *Dombrowski* are plead and proved, the frustration of superior federal interests that would ensue from precluding an aggrieved citizen from obtaining a stay of state court proceedings would be so great as to pose a threat of irreparable injury to a national interest.²⁵⁸

The court of appeals' approach in *Honey* is particularly significant because it came after the Supreme Court's decision in *Atlantic Coast Line Railroad v. Brotherhood of Locomotive Engineers*,²⁵⁹ which apparently restricted departures from section 2283 to the specific statutory exceptions. However, it is possible to hold that section 1983 is a statutorily authorized exception where the "exceptional circumstances" of a *Dombrowski*-type suit are present without reaching the question of whether it is an exception in all cases.²⁶⁰ This rationale has been adopted by the Fifth and Sixth Circuits and is the approach now followed by the Third Circuit in *Dombrowski*-type cases.²⁶¹ Courts which have granted relief in the post-*Younger* cases have also expressly held that section 2283 is not an absolute bar. For the time being, then, it does not appear that

256. 414 F.2d 283 (5th Cir. 1969).

257. *Id.* at 291. See also *Sheridan v. Garrison*, 415 F.2d 699 (5th Cir. 1969).

258. 432 F.2d at 343.

259. 398 U.S. 281 (1970). The dissenting judge in *Honey* read *Atlantic Coast Line* as barring relief. 432 F.2d at 346.

260. For statutorily authorized exceptions to section 2283, see C. WRIGHT, *supra* note 6, at 181-82.

261. *Grove Press, Inc. v. Philadelphia*, 418 F.2d 82 (3d Cir. 1969). In a later case, however, that court reaffirmed its earlier position that 42 U.S.C. § 1983 (1970) was a statutorily authorized exception to section 2283 in all cases. *DeVita v. Sills*, 422 F.2d 1172 (3d Cir. 1970).

the "2283 problem" will loom significant, at least where the court is otherwise disposed to grant relief.²⁶²

B. Relief Against Future Prosecutions and Enforcement of Unconstitutional Laws or Against Other Governmental Action

We may now turn our attention to relief against future prosecutions and enforcement of unconstitutional laws or against other governmental action. So long as the plaintiff can establish the requisite interest to give him standing to challenge the law or action in question,²⁶³ such relief has been generally available in the federal courts under traditional principles governing "threatened irreparable injury." However, prior to *Dombrowski*, affirmative actions challenging repressive laws or governmental action on first amendment grounds were relatively uncommon.²⁶⁴ *Dombrowski* expressly recognized that the threatened enforcement of a facially invalid law could have a chilling effect on the exercise of first amendment rights, and on this basis future prosecutions were enjoined.²⁶⁵ By so doing, the Court indicated that relief against future enforcement could be authorized whenever threatened enforcement created a chilling effect. Its recognition of the concept of chilling effect raised the level of consciousness of the potential targets of governmental repression and encouraged them to seek relief in the federal courts before repression was brought to bear against them.

From this perspective, *Dombrowski* must be viewed as an impor-

262. Where the federal suit was instituted after an arrest had been made, but before an indictment was returned, it has been held that there was no proceeding "pending" at the time the federal suit was brought. *McSurely v. Ratliff*, 282 F. Supp. 848 (E.D. Ky. 1967); *Turner v. LaBelle*, 251 F. Supp. 443 (D. Conn. 1966). There is no doubt, however, that a proceeding is pending for "Younger purposes" as soon as the arrest has been made or the plaintiff has otherwise been proceeded against in the state courts.

263. As applied to relief against enforcement of state law, this involves the doctrine of *Ex parte Young*, 209 U.S. 123 (1908). See generally *C. Wright*, *supra* note 6 at 183-86.

264. This may have been due, in no small part, to the restrictive notion of standing enunciated in *United Public Workers v. Mitchell*, 330 U.S. 75 (1947), which seemed to say that no challenge could be made to a law except by one who had actually violated its prohibitions. That aspect of *Mitchell* was clearly overruled by *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967). And as has been observed, "subsequent case law has weakened *Mitchell* as precedent in First Amendment cases [since] *Mitchell* was decided prior to judicial recognition of the so-called 'chilling effect' doctrine." *National Ass'n of Letter Carriers v. Blount*, 305 F. Supp. 546, 549 (D.D.C. 1969), *appeal dismissed*, 400 U.S. 801 (1970).

265. In *Baggett v. Bullitt*, 377 U.S. 360 (1964)—the only loyalty oath case to come up from the lower federal courts instead of via the state courts—the Court assumed the standing of persons subject to the oath to seek affirmative relief against its enforcement. Chilling effect was discussed specifically in regard to abstention, and the Court's rationale on that point would be equally applicable to the standing question.

tant step in the process of broadening *standing*²⁶⁶ to seek relief against interference with first amendment rights, a process reflected in the Supreme Court's decision in *Flast v. Cohen*²⁶⁷ and in subsequent lower court cases.²⁶⁸ In *Flast* the Court developed the nexus criteria of standing: was there a nexus between the status asserted by the litigants and the claims they sought to present. In the *Dombrowski*-type suit the concept of chilling effect is relevant both to establish standing and to demonstrate "threatened irreparable injury"; when relief is sought against the enforcement of laws or other governmental action, standing, a limitation on judicial review, and "irreparable injury," a remedies consideration, blend. Under traditional remedies principles, a party who cannot show himself harmed by the existence of a law or governmental action would have no claim to relief and thus would be unable affirmatively to assert a constitutional challenge.²⁶⁹ Likewise, the absence of harm would mean that the party would not have standing to seek judicial review in the federal courts.²⁷⁰ After *Dombrowski*, the plaintiff, by showing that the threatened enforcement of a law or other governmental action had a chilling effect on the exercise of his first amendment rights, established "threatened irreparable injury," entitling him to injunctive relief and correspondingly had standing to seek review of the law's constitutionality.

For example, in *National Student Association v. Hershey*²⁷¹ anti-war organizations challenged the legality of the "Hershey Directive," prescribing the removal of draft deferments of registrants found by their local boards to have engaged in "illegal protest activity." The court of appeals first pointed out that the mere allegation of "chilling effect" as such did not give rise to a justiciable controversy, even in the area of first amendment rights.²⁷² But,

266. It could be argued that *Dombrowski* enlarged the concept of ripeness, an element of "case or controversy," rather than that of standing. However, since standing itself has article III dimensions (*Association of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150 [1970]), the two concepts are susceptible to analytical merger in some cases. I find analysis under the concept of standing more fruitful.

267. 392 U.S. 83 (1968).

268. See, e.g., *United Federation of Postal Clerks v. Watson*, 409 F.2d 462 (D.C. Cir. 1969); *National Ass'n of Letter Carriers v. Blount*, 305 F. Supp. 546 (D.D.C. 1969). Standing has generally been broadened in the non first amendment area as well. See, e.g., *Association of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150 (1970); *Barlow v. Collins*, 397 U.S. 159 (1970).

269. However, in a number of states parties can bring taxpayers' suits and presumably could challenge the constitutionality of certain laws in this manner. Cf. *Doremus v. Board of Educ.*, 342 U.S. 429 (1952).

270. The Court in *Flast* was careful to point out how the plaintiffs' first amendment rights were necessarily harmed by the action they were challenging.

271. 412 F.2d 1103 (D.C. Cir. 1969).

272. *Id.* at 1113-14. This remark was made in the context of determining whether an article III case or controversy existed.

on the other hand, if the allegations of chilling effect were true, the plaintiff would suffer an immediate and real injury in the form of inhibition of his exercise of his first amendment rights. Therefore, in such cases, "courts may rely on a credible threat of enforcement of plausible allegations of intent or desire to engage in the threatened activities as sufficient predicates for justiciability."²⁷³ This criterion seems equally applicable to a finding of "irreparable injury," and indeed the court did not even discuss "irreparable injury" separately. Instead, it found the "Hershey Directive" to be an "authoritative declaration of policy issued for the guidance of the System's line of officers"²⁷⁴ which would create a chilling effect on holders of deferments, causing them to refrain from antiwar activity for fear of losing their deferments.²⁷⁵ Thus, there was a justiciable controversy,²⁷⁶ and for our purposes, a showing of "irreparable injury" on the part of draft-age males eligible for deferment. The court also held that student political organizations which had been engaged in antiwar and antidraft activities had standing to challenge the legality of the directive, because "their organizational interests and those of at least many of their members coincide."²⁷⁷ The chilling effect of the directive on their members would have a corresponding effect on the organizations' own protest activities.²⁷⁸ A judgment declaring the Hershey Directive to have been unauthorized by statute was entered.

The above analysis demonstrates the specific chilling effect that threatened enforcement of laws or other governmental action can have upon the exercise of first amendment rights. Where such specific chilling effects can be shown, a *Dombrowski*-type suit is proper, and the same considerations relevant to "irreparable injury" will also establish the plaintiff's standing to make the challenge. Thus in addition to challenges by draft registrants or representative organizations to actions such as the Hershey Directive,²⁷⁹ courts have

273. *Id.* at 1112-13.

274. *Id.* at 1115.

275. *Id.* at 1118. The court emphasized that lay draft boards would be deciding whether the protest was "legal" or "illegal" and that this would seriously compound "this chilling effect on protected conduct." *Id.* It could have added that most draft board members would not look kindly on any kind of protest activity.

276. However, the court found no justiciable controversy presented as to the delinquency regulations, significant only after a punitive reclassification had occurred, or as to the Local Board Memorandum, which dealt only with draft card burning and therefore could not be said to violate first amendment rights. See *United States v. O'Brien*, 391 U.S. 367 (1968).

277. 412 F.2d at 1120.

278. The standing of an organization to assert a chilling effect on its members' first amendment activities had long been recognized. See *NAACP v. Alabama*, 357 U.S. 449 (1958).

279. See also *Wolff v. Selective Serv. Local Bd. No. 16*, 372 F.2d 817 (2d Cir. 1967), where the registrants' local boards reclassified them 1-A and declared them delinquents after they had participated in an antiwar demonstration at the offices of another board.

permitted attacks by university students and faculty members on speaker ban laws and similar regulations,²⁸⁰ and by public employees on loyalty oaths, even before sanctions had been invoked against them.²⁸¹

In *Boyle v. Landry*,²⁸² the Supreme Court did not alter this broadened test for "irreparable injury" and standing previously recognized in *Dombrowski*-type suits; it merely held that an allegation of chilling effect due to facial invalidity, without more, was insufficient to show "irreparable injury." The District of Columbia Court of Appeals made this very same point in *National Student Association v. Hershey*,²⁸³ while discussing justiciability. *Boyle* merely applied the same rationale to "irreparable injury"; nothing in the case affects the decisions in such cases as *Hershey* which hold a *demonstrable* chilling effect sufficient to satisfy the requirements of "irreparable injury" and of standing necessary for affirmative relief based on statutory facial invalidity.²⁸⁴ Therefore, it should be assumed that the *Hershey* test of "credible threat of enforcement and plausible allegations of intent or desire to engage in the threatened activities"²⁸⁵ continues in effect in *Dombrowski*-type suits seeking relief against future enforcement.

Dombrowski itself involved both elements relevant to a claim for relief against future enforcement: (1) fast prosecutions under allegedly unconstitutional laws; and (2) a specific threat of future prosecutions.²⁸⁶ Past arrests were recognized in a number of pre-*Younger*—and here pre-*Landry*—cases.²⁸⁷ In *Parker v. Morgan*,²⁸⁸

280. See, e.g., *Brooks v. Auburn Univ.*, 412 F.2d 1171 (5th Cir. 1969); *Smith v. University of Tennessee*, 300 F. Supp. 777 (E.D. Tenn. 1969).

281. Standing in these circumstances had been recognized prior to *Dombrowski*. See *Baggett v. Bullitt*, 377 U.S. 360 (1964).

282. 401 U.S. 77 (1971).

283. 412 F.2d 1103 (D.C. Cir. 1969).

284. In *Younger* the intervening plaintiffs alleged that the prosecution per se of *Younger* would have a chilling effect on their first amendment activities. This, of course, was insufficient to establish "irreparable injury." See also *Tatum v. Laird*, 444 F.2d 947 (D.C. Cir. 1971), cert. granted, 40 U.S.L.W. 3238 (U.S. Nov. 16, 1971), where individuals and groups who alleged that the Army's civilian surveillance activities created a chilling effect upon their exercise of first amendment rights were held to have presented a justiciable controversy which entitled them to an evidentiary hearing.

285. 412 F.2d at 1111-12.

286. See also *Zwickler v. Koota*, 389 U.S. 241 (1967), where there were past arrests, but no threat of future enforcement. The Court held that this might be sufficient to support a claim for declaratory relief, even if insufficient to support one for injunctive relief. By the time the case came up again the Court found it moot. *Golden v. Zwickler*, 394 U.S. 103 (1969).

287. See, e.g., *Parker v. Morgan*, 322 F. Supp. 585 (W.D.N.C. 1971); *Kirkwood v. Ellington*, 298 F. Supp. 461 (W.D. Tenn. 1969); *University Comm. to End the War in Vietnam v. Gunn*, 289 F. Supp. 469 (W.D. Tex. 1968), appeal dismissed, 399 U.S. 383 (1970); *Hunter v. Allen*, 286 F. Supp. 830 (N.D. Ga. 1968).

288. 322 F. Supp. 585 (W.D.N.C. 1971).

for instance, the plaintiffs had been prosecuted under a state flag desecration statute.²⁸⁹ Finding federal jurisdiction, the three-judge court replied:

Clearly the plaintiffs have standing to prosecute the suit. The state through its two solicitors joined as parties defendant admits a duty to enforce the statute and the intention to do so. Obviously Parker and Berg may reasonably apprehend further arrest and prosecution. Indeed the evidence tends to show that Parker, because of his apprehension, has discontinued wearing his flag jacket. We think these plaintiffs have a sufficient personal stake in the outcome of this lawsuit . . . and that the dispute is a genuinely adversary one susceptible to judicial resolution.²⁹⁰

Similarly, in the post-*Younger* case, *Taylor v. City of Selma*,²⁹¹ the court found bad faith prosecution and enjoined a pending prosecution under the Alabama antiriot statute. Also, at the request of the plaintiffs, who had brought the suit as a class action, it enjoined future prosecutions as well.

On the other hand, in *Fuller v. Scott*,²⁹² the court apparently reached a contrary result. After the plaintiffs were prosecuted under the North Carolina antiriot act, they immediately instituted the *Dombrowski*-type suit. In a pre-*Younger* decision, the federal court issued a declaratory judgment that certain portions of the act were unconstitutional. Thereafter, the state prosecutions were terminated in their favor.²⁹³ The federal court however then adopted the view that federal intervention was improper in light of *Younger* and *Samuels* and vacated its declaratory judgment. The court further refused to grant relief against future enforcement on the ground that the plaintiffs had neither been arrested, nor even threatened since the date of the original charges. In contrast, in *Parker*, law enforcement officials had stated that they intended to enforce the flag desecration statute if the plaintiffs, or anyone else, wore flag jackets. Assuming this admission to constitute a "credible threat of enforcement," the two cases are distinguishable.

Where the plaintiffs have been prosecuted under a particular law, and they plan to continue their activities in circumstances which make it likely that the law will be enforced against them again, there is both a "credible threat of enforcement and a desire to engage in the threatened activities." Relief against future enforcement should be available.

Where the plaintiffs have not been prosecuted, but where their activities are clearly subject to the law in question, and they seek

289. One plaintiff had been convicted, while the other was acquitted.

290. 322 F. Supp. at 587.

291. 327 F. Supp. 1191 (S.D. Ala. 1971).

292. 328 F. Supp. 842 (M.D.N.C. 1971).

293. An extremely broad injunction was also dissolved at the same time.

to carry on their activities free from its restrictions, established principles of "irreparable injury" and standing entitle them to seek a declaration of the statute's unconstitutionality and to enjoin its enforcement.²⁹⁴ A union organizer, for example, may challenge a law requiring a permit for solicitation of union membership even though he has not been prosecuted for its violation.²⁹⁵ Since the chilling effect on protected activity is a realistic one, the general principle is that the Constitution does not require litigants to be subjected to the possible harm of a criminal prosecution "before seeking relief from an allegedly unconstitutional statute when actual interference with protected rights is shown."²⁹⁶ Thus, persons expressly subject to laws that regulate first amendment activities can properly institute a *Dombrowski*-type suit before the laws have been invoked against them. In *Gall v. Lawler*,²⁹⁷ for example, the plaintiff was associated with an underground newspaper, the selling of which by another had resulted in prosecution for selling newspapers without a license. Since the plaintiff was clearly subject to the law in question, he was able to seek relief against its enforcement.²⁹⁸

The same result was reached in a post-*Younger* case, *Hull v. Pettrillo*,²⁹⁹ involving a similar situation. A city ordinance requiring a peddler's license was applied to the sale of *The Black Panther*, the newspaper of the Black Panther Party. After a successful prosecution had been brought against a party member for violation of the ordinance, the plaintiffs alleged that enforcement of the ordinance was part of a scheme of harassment "for the purpose of driving both the newspaper and the Black Panther Party itself out of the city."³⁰⁰ The police then disclaimed any intention to use the ordinance against the Panthers again, admitting that it could not constitutionally be applied to the sale of newspapers.³⁰¹ However, the court, citing *Dombrowski*, observed that so long as the law remained available to the state, the threat of prosecution was real. Holding the plaintiffs' allegations, if true, sufficient to justify federal intervention and relief against future enforcement of the law, the court provided several interesting observations:

[A]lthough the alleged harrassment of plaintiffs in this case is not nearly as pronounced as in *Dombrowski*, the dif-

294. See *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967).

295. See, e.g., *United Steelworkers of America v. Bagwell*, 383 F.2d 492 (4th Cir. 1967).

296. *Crossen v. Breckenridge*, 446 F.2d 833, 838 (6th Cir. 1971).

297. 322 F. Supp. 1223 (E.D. Wis. 1971).

298. The city had hauled out a peddler, solicitor, and transient merchant licensing law and applied it to an activity for which it obviously was never intended. The selective enforcement involved here was undoubtedly evident to the court.

299. 439 F.2d 1184 (2d Cir. 1971).

300. *Id.* at 1185.

301. *Id.* at 1186. See *Murdock v. Pennsylvania*, 319 U.S. 105 (1943).

ference in the degree of subtlety of the two campaigns may be primarily a function of their different locales. The same unconstitutional end may be accomplished by a protracted plan of subtle harassment as well as by blatant threats of improper legal action, and one ultimately may have no less of a chilling effect than the other. Without a definitive judicial interpretation denying the legality of its applicability to sale of plaintiffs' newspaper, the ordinance remains a potential tool in a campaign of harassment against the Black Panther Party, a campaign in which plaintiffs have alleged its use as such a tool is a reality.³⁰²

The court referred to the *Younger* cases only in a footnote, finding them inapplicable: "in the absence of federal relief, the chilling effect upon the First Amendment rights of vendors of the Black Panther newspaper—a chilling that is not merely speculative but arises out of specific official actions directed against these plaintiffs—will continue unchecked."³⁰³ The fact that the plaintiffs' activity had been held subject to the law, coupled with allegations of harassment and with the practical realities of the situation—the Black Panthers are not exactly popular with city officials anywhere—justified the finding of specific chilling effect.³⁰⁴

A more difficult situation is presented where the plaintiffs' activities are not expressly covered by the law in question and they have not been prosecuted under it.³⁰⁵ Here the concept of specific chilling effect and the nexus criteria of standing become significant. Most laws which can be used as instruments of repression are directed toward conduct, rather than toward categories of persons, groups, or activities. The existence of these laws constitutes a potent weapon in the hands of government officials, who can enforce them against any person or group engaged in dissent and social change effort. This is particularly true when the laws are vague and overbroad; threats to enforce such laws can have a very real chilling effect on social change effort and protest activity. Prior to *Younger*, it was often permissible, and indeed tactically sound, to wait until those laws were actually invoked.³⁰⁶ But with the elimination of the "void on its face" basis of attack, it may be necessary to take affirmative action to remove these potentially

302. 439 F.2d at 1187.

303. *Id.* at 1186-87 n.1. See also *Belknap v. Leary*, 427 F.2d 496 (2d Cir. 1970), where the court concluded that the problem no longer existed.

304. For post-*Younger* cases granting relief against future enforcement of obscenity-type laws, see *National Ass'n of Theater Owners v. Motion Picture Comm'n*, 328 F. Supp. 6 (E.D. Wis. 1971); *LaRue v. State*, 326 F. Supp. 348 (C.D. Cal. 1971).

305. In *Hershey*, the directive had been invoked against the activities of the plaintiffs. Affidavits had been introduced showing that draft boards had begun to reclassify protestors pursuant to its provisions.

306. There would then assuredly be a concrete case, and the nature of the repression would appear more clearly. Also, the filing of the suit would represent a counterattack.

repressive weapons prior to their actual invocation. When a “credible threat of enforcement” has been made, it should be possible to find a specific chilling effect on the dissent and social change effort toward which the threat is directed. The persons engaged in that effort will feel the brunt of the chill and, therefore, can show harm to their protected first amendment rights. There is likewise a nexus between their status and the challenge made: as persons engaged in social change effort, they are challenging laws that have been threatened to be enforced against that effort, as a result of which it may suffer a specific chilling effect.

A clear case of specific chilling effect was presented in *Long Island Vietnam Moratorium Committee v. Cahn*,³⁰⁷ where the prosecuting attorney of Nassau County, New York, announced at a press conference that he would enforce the state’s flag desecration statute against anyone displaying a representation of the American flag on which the peace symbol was superimposed. He alluded specifically to a decal and button circulated by the plaintiff organization as violative of the statute. A federal suit was immediately filed. The court did not question the standing of the organization, but as a result of the prosecutor’s statements, it would have come within the “expressly-covered-by-the-statute” test. In the context of holding abstention improper, the court also observed that a number of persons had been arrested for displaying the emblem distributed by the organization.³⁰⁸ The court then held the statute unconstitutional.

I would analyze the case as follows. The status of the plaintiff, as an organization distributing a decal containing both a flag and a peace symbol, gave it standing to assert a claim that the flag desecration statute was unconstitutional. The public statement of the prosecutor indicating an intent to enforce the law against anti-war advocates who conjoined the flag with the peace symbol could certainly have a specific chilling effect upon such activity, so as to satisfy the requirement of “irreparable injury” and entitle them to equitable relief. In other words, public threats to enforce a law against designated classes of persons makes the chilling effect real as to them, rather than merely hypothetical.³⁰⁹ Given the tendency of public officials to make “political announcements” of their intention to enforce repressive laws, a “credible threat of enforcement”

307. 437 F.2d 344 (2d Cir. 1970).

308. *Id.* at 347. Quoting the district judge, the court commented: “[O]ur citizens are entitled not to be threatened with prosecution because of a particular interpretation given to a somewhat ambiguous statute by a prosecutor whose views on public issues may differ from others.”

309. Thus, the Supreme Court’s remark in *Boyle* is most significant: “[T]he complaint contains no mention of any specific threat by any officer or official of Chicago, Cook County, or the State of Illinois to arrest or prosecute any one or more of the plaintiffs under that statute either one time or many times. 401 U.S. at 81.

can often be found, and then all that remains is that a person with standing challenge the law in question.

The same rationale was applied in the post-*Younger* case of *Anderson v. Vaughn*³¹⁰ involving an affirmative action to declare invalid the Connecticut "red flag" statute.³¹¹ The status of the plaintiffs was not discussed, but apparently they were part of a group that publicly displayed Viet Cong flags near "a state-wide gathering where the President of the United States was present."³¹² Although some members of that group had been arrested, the particular plaintiffs had not been. Since no prosecutions were pending against the plaintiffs and the class they purported to represent, the court held *Younger* inapplicable.³¹³ The court was then willing to find that a justiciable controversy existed,³¹⁴ since recent arrests had been made under the statute, and since law enforcement officials had indicated their intention to enforce the statute in the future:

In these circumstances we are of the view that the plaintiffs ought not be forced to violate a law affecting their First Amendment rights and subject themselves to criminal prosecution in order to place the issue before a judicial forum. Forced exposure to criminal sanctions in order to test the validity of statutory limitations of First Amendment rights is irreparable injury of sufficient dimension to justify federal declaratory relief.³¹⁵

The Court then held the statute invalid on its face.

The following strategy is therefore suggested: after a repressive law has been invoked, apart from whether a *Dombrowski*-type suit is brought to enjoin the pending prosecution, a suit should be filed to enjoin future enforcement by an "appropriate plaintiff"—for example, an individual or organization engaged in the type of activity forming the basis for the prosecution. Commencement of the prosecution should constitute a "credible threat of enforcement" and thus demonstrate that the chilling effect is real rather than hypothetical.³¹⁶

However, the court appeared to reach a contrary conclusion in *Hendricks v. Hogan*³¹⁷ a case involving a challenge to a flag dese-

310. 327 F. Supp. 101 (D. Conn. 1971).

311. Ch. 35, [1919] Conn. Laws 2703 (repealed effective Oct. 1, 1971).

312. 327 F. Supp. at 105 (dissenting opinion).

313. *Id.* at 102.

314. The court treated this as an article III question. As we have said earlier, the question also involves standing and "irreparable injury."

315. 327 F. Supp. at 103. The court assumed that the Connecticut authorities would now refuse to enforce the statute and dissolved a temporary restraining order previously issued.

316. This is to be contrasted with the situation where bringing the prosecution indicates that the plaintiff's activities are "expressly covered" by the law.

317. 324 F. Supp. 1277 (S.D.N.Y. 1971).

cration law which arose out of an art exhibition featuring "various uses or representations of the national flag."³¹⁸ Three of the plaintiffs had been charged with violation of the statute for "exhibiting . . . [the United States] flag in open view so as to resemble in shape a human penis, and draped from a toilet bowl . . ." ³¹⁹ The others were artists, many of whom exhibited at the show. As discussed earlier,³²⁰ the district court refused to enjoin the pending prosecution and, without extended discussion, dismissed the claims of the remaining plaintiffs, observing that they had been neither arrested nor threatened with arrest under the statute.³²¹

This analysis ignores the fact that there was a "credible threat of enforcement," as evidenced by the prosecution of the other plaintiffs, and that the unprosecuted plaintiffs would be unable to carry on their activities without fear of prosecution. These facts should demonstrate a specific chilling effect, and the plaintiffs, as members of the group toward which enforcement was directed, were appropriate parties to challenge the law's constitutionality. The result in *Hendricks* does suggest that it is strategically unwise to join as plaintiff a person already being prosecuted. Rather, it might be desirable to bring an entirely separate action against future enforcement, so as to focus more clearly on the standing of the particular plaintiffs and the chilling effect that the threat of enforcement has produced on their activities. At least the court will not be able to approach the case with the "*Younger* set"—no relief unless bad faith prosecution is shown.³²²

In *Lewis v. Kugler*,³²³ the New Jersey "long-haired travellers" case discussed earlier, the lower court refused to enjoin the prosecutions of those arrested and also denied relief to the plaintiffs who had not been arrested. As to the latter, the court held that they had not shown any ground for relief based on "allegations of anticipated future activities by the New Jersey State Police,"³²⁴ and expressly stated that, "where a number of plaintiffs are joined some of whom have criminal prosecutions pending against them and some of whom do not, the non-intervention principle enunciated in

318. *Id.* at 1279.

319. *Id.* at 1280.

320. See notes 247-250 *supra* and accompanying text.

321. A challenge was also made to the federal flag desecration statute, 18 U.S.C. § 700(a) (1970). The court held that the existence of the statute and an affidavit from the United States Attorney to the effect that he would execute the duties of his office was insufficient to justify consideration of the claim. One of the plaintiffs, Abbie Hoffman, had been prosecuted under that statute in the District of Columbia, and the court held that his claims could be determined in that action. For final resolution of that case, see *Hoffman v. United States*, 445 F.2d 226 (D.C. Cir. 1971).

322. See note 84 *supra*.

323. 324 F. Supp. 1220 (1971).

324. *Id.* at 1223.

Younger applies."³²⁵ However, this rationale is a sort of judicial "Catch 22": if you have not been prosecuted, you have not shown any injury; but as soon as you are prosecuted, *Younger* comes into play. Either way, federal relief is precluded. Reversing this portion of the opinion, the Third Circuit emphasized that the *Younger* decisions were applicable only to pending state prosecutions and that, "they do not alter the abstention doctrine insofar as it relates to federal Civil Rights Act claims which do not seek relief that entails intervention in state criminal proceedings."³²⁶ It assumed the standing of the plaintiffs to challenge the policy applicable to a class of persons of which they were a member and stated that if the plaintiffs could establish that they had been subject to a "deliberate pattern and practice of constitutional violations by the New Jersey State Troopers,"³²⁷ they would be entitled to injunctive relief. The case was remanded for an evidentiary hearing.³²⁸

In summary, *Younger* did not deal directly with the matter of relief against threatened prosecutions and future law enforcement; moreover, *Boyle* merely held that an allegation of chilling effect due to facial invalidity is insufficient. It is doubtful that the pre-*Younger* cases involving relief against future enforcement (as opposed to relief against pending prosecutions) were based solely on the hypothetical chilling effect due to the existence of facially invalid laws. The particular plaintiffs seeking relief were generally persons who had been prosecuted under the law challenged, were engaged in activities clearly covered by the law, or were members of a class against whom the law had been invoked. Thus, there generally had been past prosecutions under the law or other "credible threats of enforcement." Post-*Younger* cases have similarly allowed challenges on these bases. In suits to enjoin future enforcement, plaintiffs should therefore focus on: (1) the specific chilling effect on the exercise of first amendment rights by the plaintiffs because of past prosecutions or credible threats of enforcement; and (2) their standing by virtue of their status as protesters to challenge the validity of the law in question. Since *Younger* restricts the availability of relief against pending prosecutions, affirmative action to enjoin future enforcement or to obtain declarations of unconstitutionality now becomes particularly significant.

325. *Id.*

326. *Lewis v. Kugler*, 446 F.2d 1343, 1347 (3d Cir. 1971).

327. *Id.* at 1350.

328. The district court was advised that it could consider the merits of the constitutional claims of those who were being prosecuted as a part of its consideration of all of the evidence offered by the plaintiffs to prove a pattern and practice of unlawful police misconduct, but that it should not enter a judgment with respect to the constitutionality of the particular searches forming the basis of the state's prosecution. *Id.* at 1349.

VI. THE DOMBROWSKI-TYPE SUIT AFTER YOUNGER:
POLITICAL CONSIDERATIONS

Utilization of the *Dombrowski*-type suit as a weapon against repression must also be related to the broader question of manipulating the legal system in order to protect dissent and social change effort.³²⁹ I return now to the inherent paradox suggested earlier in this article: legal protection of dissent and social change effort must come from persons—judges—who are themselves integral components of the very “system” toward which that effort is directed.³³⁰ As part of the “Establishment,”³³¹ judges are likely to be essentially satisfied with the status quo and resistant to fundamental political, economic, and social change.

Assuming then that judicial protection of dissent and social change effort against governmental repression can not be taken for granted, it is essential to adopt a strategy which will maximize the likelihood of protection. My contention is that this effect is best achieved by forcing the judge to face the contradiction between theory and reality—between the assumption that the first amendment does guarantee the freedom to dissent and work for social change and the brutal fact that governmental repression is indeed rained on social change advocates. This strategy recognizes not only that judges have the motivation—conscious or unconscious—to deny protection, but also that they feel duty bound to uphold the Constitution. If protection of social change effort is to be forthcoming, I submit that it will, to a great extent, occur because institutional constraints on judges, and their own role perceptions, are capable of overcoming human predilections.

An important political consideration, therefore, is the relationship between utilization of the *Dombrowski*-type suit—both in general and in the context of a particular case—to manipulation of the system in order to protect dissent and social change effort. Is the suit, for example, a good vehicle in the particular case for forcing the judge to face up to the contradictions? For instance, if social activists desire to challenge a law as facially invalid in a case involving “hard core” conduct, it is much easier for the judge to rationalize a decision denying protection, than it is in a case involving “pure speech” clearly entitled to first amendment protection. Under some circumstances this may dictate foregoing the suit in the former case, especially since the “void on its face” aspect of *Dombrowski* has now been removed. Under others, political considerations may nevertheless make the filing of a *Dombrowski*-type suit necessary. The point is that the likelihood of *legal* failure is a relevant *political* consideration to take into account; each case must be assessed in

329. See Sedler, *supra* note 37, at 1079-83.

330. See notes 53-56 *supra* and accompanying text.

331. See note 50 *supra*.

terms of its relation to the overall effort against repression.³³²

Second, part of the current "judicial ethos" is the belief—whether or not justified—that *Dombrowski*-type suits and "civil rights" cases generally are being brought with such frequency as to "burden" the courts. Recognizing that the judges are essentially satisfied with the status quo and are resistant to fundamental social change, it is not difficult to understand why this attitude exists.³³³ But if resort to the courts is to be had in the effort to resist repression, and if the "system" is to be manipulated in order to protect dissent and social change effort, this ethos must be taken into account. I believe that judicial levels of consciousness will be raised best at this juncture by the filing of "appealing" *Dombrowski*-type suits, which cogently and dramatically illuminate the very real nature of the repression occurring. In a suit where clearly protected conduct is involved and where a repressive purpose can be easily demonstrated,³³⁴ the judges can be forced to face up to the contradictions and to see the necessity for federal intervention. Favorable precedents can be established and judicial levels of consciousness can be raised.

Obviously an argument could be made for a completely different kind of strategy. It could be contended that the best strategy is to force the courts to confront the issue in case after case so that the Supreme Court will ultimately be faced with the choice of broadening the availability of the *Dombrowski*-type remedy or eliminating it completely by holding section 2283 a bar to relief against all pending prosecutions. My own feeling at this time—engendered only in part by the Supreme Court's changing composition³³⁵—is that if the federal courts are faced with a multitude of *Dombrowski*-type suits, including those involving "hard core" conduct, the Supreme Court will come down on the wrong side of the question. Perhaps there are political advantages in such a result, but since I see the availability of the *Dombrowski*-type suit as having a significant political utility, even after *Younger*, I have a hard time imagining what they would be.³³⁶

332. It is important, particularly in the struggle against repression, that various components of the "movement for social change" consider how particular actions will affect the overall effort.

333. See notes 60-64 *supra* and accompanying text.

334. See, e.g., *Dombrowski v. Pfister*, 380 U.S. 479 (1965). As stated previously, *McSurely v. Ratliff*, 282 F. Supp. 848 (E.D. Ky. 1967), was also a good example. The cases involving attempts to suppress newspapers by obviously unconstitutional applications of licensing laws (*Hull v. Petrillo*, 439 F.2d 1184 [2d Cir. 1971]; *Gall v. Lawler*, 322 F. Supp. 1223 [E.D. Wis. 1971]), are still another.

335. Only Justice Douglas dissented in *Younger* and *Boyle*, and he concurred in *Samuels*.

336. I generally disagree with the "holocaust" theory of achieving social change. For an effective refutation of the "holocaust" theory in the political context, see Kinoy, *supra* note 36, at 9-10.

I can only reemphasize what I believe to be the importance of picking the right cases. Perhaps a certain priority should be given to seeking relief against future enforcement of unconstitutional laws or governmental action, thereby not only avoiding the legal problem of *Younger*, but the "federal courts don't intervene in state criminal prosecutions" syndrome as well.³³⁷ On the other hand, where criminal prosecutions are pending, the decision to bring a *Dombrowski*-type suit must be approached from the "political-legal" perspective. It should ordinarily be determined whether there are independent political advantages in bringing a *Dombrowski*-type suit, rather than in simply defending the state prosecution.³³⁸ Even if the political advantage is apparent, the likelihood of success in establishing bad faith prosecution or the other bases of "irreparable injury" should be taken into account, as well as the suitability of the case as a vehicle for forcing the court to face up to the need to protect dissent and social change effort from repressive governmental action. Naturally, if a case is particularly strong because the activity in question is clearly protected conduct and the repression obvious, this itself may constitute an important political consideration militating in favor of beginning the *Dombrowski*-type suit.

One final point, concerning use of three-judge courts,³³⁹ need be mentioned. In the *Dombrowski*-type suit, where injunctive relief is sought against the enforcement of state laws on the ground of unconstitutionality, the plaintiffs are necessarily entitled to a three-judge court. In some areas, this may be advantageous because the local district judge is unsympathetic to the problem of protecting dissent and social change effort. Also, direct appeal to the Supreme Court will be available if injunctive relief is denied by the three-judge court.³⁴⁰ While this shortened route has, in the past, met with the favor of movement lawyers, it may be essential to reconsider the virtue of such appeals; if present trends continue, the Supreme Court may become more "conservative" than will a number of courts of appeals.

Further, the three-judge requirement is universally unpopular with the federal judiciary, and in the *Dombrowski* context, compounds the "burden" such suits place on the courts. This judicial distaste tempts many district judges, to whom the application for convening a three-judge court must be addressed, to deny the application on the ground that the court lacks jurisdiction or that the federal question is insubstantial.³⁴¹ This denial requires an appeal

337. And of course, the section 2283 problem is also avoided.

338. It may be necessary to pay more attention to "manipulating the system" in the state courts and to consider how judicial behavior can be influenced in that setting. This will not be an easy task.

339. See generally C. WRIGHT, *supra* note 6, at § 50.

340. 28 U.S.C. § 1253 (1970).

341. Regarding the criteria for dismissals by the single judge, see C. WRIGHT, *supra* note 6, at 191-92.

to the court of appeals, which means further delay, and assuming that the district judge is reversed,³⁴² the plaintiffs are no further along than they should have been at the outset of the action. More significantly, the right of direct appeal again creates problems. If the Supreme Court does not want to hear the particular case it may grant a motion to affirm.³⁴³ Such an affirmance can not only set an unfavorable precedent, but also will permit the effective decision to be made by the three-judge lower court, without ever being meaningfully considered by an appellate court.

Hence, the three-judge court act, originally designed for the protection of state officials,³⁴⁴ and which in practice has worked to the benefit of the plaintiff seeking to enjoin allegedly unconstitutional state action,³⁴⁵ may no longer provide the advantages that plaintiffs once thought it offered. At least this may be true in particular areas, depending on the experience with three-judge courts and the relative "sympathy" on the part of district judges and the appropriate court of appeals. Where the benefits of a three-judge court are questionable, consideration should be given to structuring the case in such a way as to permit it to be heard by a single judge. This will likely not be difficult, as a practical matter, given the hostility to convening three-judge courts and the fact that the three-judge court act is not "a measure of broad social policy to be construed with great liberality, but . . . an enactment technical in the strict sense of the term and to be applied as such."³⁴⁶ Framing the case as one for a single judge, then, insures that the effective decision will be made by the court of appeals, with possible review in the Supreme Court on certiorari.

In cases seeking relief against future enforcement, the three-judge court can be avoided by limiting the claim to declaratory relief. As a practical matter, this is the only relief that the courts have been generally giving when declaring laws "void on their face."³⁴⁷ Or, where injunctive relief is sought against pending prosecutions on the basis of bad faith enforcement, it could be argued that the relief sought is against governmental action, rather than against the operation of the statute as such. The case would

342. Not infrequently the district judge will reach the merits in the process of finding "insubstantiality," and reversals for this reason are almost as frequent. In a number of cases the claim that the district judge found to be "insubstantial" was ultimately decided in the plaintiff's favor. See, e.g., *Kramer v. Union Free School Dist. No. 15*, 395 U.S. 621 (1969); *Keyishian v. Board of Regents*, 385 U.S. 589 (1967); *Schneider v. Rusk*, 377 U.S. 163 (1964).

343. There is a serious question whether the Supreme Court treats appeals, including those from three-judge courts, all that differently from the way it treats petitions for certiorari.

344. See C. WRIGHT, *supra* note 6, at 188-89.

345. See Sedler, *supra* note 3, at 255.

346. *Phillips v. United States*, 312 U.S. 246, 251 (1941).

347. See Sedler, *supra* note 3, at 262.

then be one in which "the constitutionality of a statute is drawn in question without any prayer for the restraint of its enforcement,"³⁴⁸ and a three-judge court would not be required. In fact, in pre-*Younger* days, some three-judge courts held that the claim of bad faith enforcement should be determined by the single judge and therefore limited their consideration to the facial validity of the statute.³⁴⁹ In any event, consideration should be given to the utility of seeking a three-judge court, and in many cases it may be to the plaintiff's advantage to avoid doing so.

VII. CONCLUSION

In this article I have attempted to analyze the *Dombrowski*-type suit in the wake of the *Younger* cases and to assess its present significance from the remedial-political perspective. I still believe that the availability of this remedy can go far to redress the balance between those seeking social change and those using their control of the apparatus of government to resist it. However, important decisions must be made regarding its utilization today, so that it can remain a potent weapon in the struggle for social change.

348. C. WRIGHT, *supra* note 6, at 190.

349. See, e.g., *Landry v. Daley*, 288 F. Supp. 194 (N.D. Ill. 1968).