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Variations on the Theme of Dombrowski v. Pfister: Federal Intervention in State Criminal Proceedings Affecting First Amendment Rights

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LEADING ARTICLE

VARIATIONS ON THE THEME OF DOMBROWSKI v. PFISTER: FEDERAL INTERVENTION IN STATE CRIMINAL PROCEEDINGS AFFECTING FIRST AMENDMENT RIGHTS

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One of the most rapidly changing and complex areas of the law revolves around the propriety and wisdom of federal court "interference" with state court proceedings involving first amendment rights. Mr. Stickgold examines the doctrine being evolved in this area, centering the discussion around Dombrowski v. Pfister and cases that have followed it. The author reports that several courts have not followed the Dombrowski mandates, and consequently, fundamental first amendment freedoms are not adequately protected.

The purpose of this article is to examine the implementation and development of a Supreme Court mandate to the United States district courts. The time span between the pronouncement of a mandate and its understanding and correct implementation by the lower courts is often great. In *Dombrowski v. Pfister*,[1] the Supreme Court ordered that lower federal courts immediately consider two attacks on state criminal prosecutions affecting speech activities: those where it is alleged that the prosecution is under a statute vague and overbroad on its face, and those where it is alleged that protected speech activities are the basis of a prosecution in bad faith, for the purpose of discouraging and intimidating persons in the exercise of first amendment rights.[2] The Court further

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1 380 U.S. 479 (1965).

2 *Id.* at 489-92. Although I am confident that *Dombrowski* issued the mandate indicated, there is still some lingering doubt as to whether both attacks are necessary to state a claim under the Civil Rights Act, 42 U.S.C. § 1983 (1964), or whether the mandate governs when either attack is present. *Dombrowski* clearly considered the two attacks separately. Justices Black, Stewart, and Harlan, however, dissenting in Cameron v. Johnson, 381 U.S. 741 (1965), indicate that both evils must be present. See text accompanying notes 113-57 *infra*. Commentators on the subject have almost uniformly accepted the "two prong" theory of *Dombrowski*. *See* Bailey, *Enjoining State Criminal Prosecutions which Abridge First Amendment Freedoms*, 3 HARV. CIV. LIB.-CIV. RIGHTS L. REV. 67, 85-86 n.59 (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, 84 (1967); Brewer, *Dombrowski v. Pfister: Federal Injunctions Against State Prosecutions In Civil Rights Cases—A*

ordered that either declaratory or injunctive relief, or both, be granted if either of these evils is established.[3] In *Cameron v. Johnson*[4] and *Zwickler v. Koota*,[5] the Court has further refined the intricacies of some of the issues raised in *Dombrowski* by again ordering lower federal courts not to abstain from deciding whether declaratory or injunctive relief is appropriate when substantial first amendment issues are raised.[6]

This article will explore the contours of the issues and pronouncements in *Dombrowski*;[7] examine how the mandate has been implemented and developed in cases subsequent to *Dombrowski*; and discuss the presumptions and perspectives which should guide courts in this area.

I. THE THEME: DOMBROWSKI V. PFISTER

Early in October 1963, James Dombrowski, Director of the Southern Conference Educational Fund (SCEF), along with Benjamin Smith, its treasurer, and Bruce Waltzer, its attorney, were arrested by state and local police on warrants charging violation of the Louisiana Subversive Activities and Communist Control Law and the Communist Propaganda Control Law.[8] Search warrants were issued, and the homes and offices of these men were searched.[9] SCEF had been engaged in civil rights activity in various Southern states since the late thirties. Its purpose was "to help secure to Negro citizens the rights guaranteed to them under the United States Constitution and to end all forms of racial segregation and discrimination in the interest of Negro and white citizens of the Southern States."[10]

New Trend in Federal-State Judicial Relations, 34 FORDHAM L. REV. 71, 80 (1965); *The Supreme Court, 1964 Term*, 79 HARV. L. REV. 150, 173 (1965); Note, *The Dombrowski Remedy—Federal Injunctions Against State Court Proceedings Violative of Constitutional Rights*, 21 RUTGERS L. REV. 92, 96 (1966); 1966 DUKE L.J. 219; 21 RUTGERS L. REV. 679, 681, 691 (1967); 3 SAN DIEGO L. REV. 76, 83 (1966); 32 TENN. L. REV. 641, 642 (1965). *See also* Comment, *Theories of Federalism and Civil Rights*, 75 YALE L.J. 1007, 1033 (1966), and 27 U. PITT. L. REV. 145 (1965), which recognize, but criticize, the "two prong" theory.

[3] 380 U.S. at 492, 497-98.

[4] 381 U.S. 741 (1965).

[5] 389 U.S. 241 (1967).

[6] Federal courts have exercised the power to enjoin state criminal prosecutions affecting speech activities for other reasons. See McSurely v. Ratliff, Civil No. 1146 (E.D. Ky., Sept. 14, 1967); Hulett v. Julian, 250 F. Supp. 208 (M.D. Ala. 1966).

[7] This article will not deal with federal intervention in state criminal proceedings dealing with nonspeech activities.

[8] Subversive Activities and Communist Control Law, LA. REV. STAT. ANN. §§ 14:358-:374 (Supp. 1968); Communist Propaganda Control Law, LA. REV. STAT. ANN. §§ 14:390-:390.8 (Supp. 1962).

[9] See Judge Wisdom's dissent for a description of the search. Dombrowski v. Pfister, 227 F. Supp. 556, 573 (E.D. La. 1964).

[10] *See* Complaint, Dombrowski v. Pfister, 227 F. Supp. 556 (E.D. La.

The arrest warrants were quashed by a Louisiana parish judge because there was no probable cause for their issuance. The seized evidence was suppressed on the ground that the raids were illegal. "Louisiana officials continued, however, to threaten prosecution . . . ."[11] Shortly thereafter, a Louisiana grand jury was convened to consider evidence against SCEF and its officials. On November 12, 1963, Dombrowski and SCEF filed a suit in the United States district court for declaratory and injunctive relief.

The federal suit alleged that the actions taken by state and local officials were for the illegal purpose of deterring SCEF's civil rights activities and destroying its capacity to function. It further alleged that the statutory sections under which the criminal prosecutions had been brought were unconstitutional on their face and as applied. It supported the suit with offers of proof and affidavits dealing with the legitimacy of the conduct of SCEF and the other plaintiffs, the nature of the official action directed against them by James Pfister and others, and the announced purpose of such official action.[12]

Judge Wisdom issued a temporary restraining order against further prosecution pending the decision of the three judge court which had been convened to consider the constitutional attack on the statutes. The three judge court dismissed the suit for failure to state a claim upon which relief could be granted, and dissolved the temporary restraining order.[13] Judge Wisdom dissented.[14]

The district court held that the substantial nature of the constitutional issues raised did not, in itself, justify interference in the state proceeding, particularly where the state's right of self-preservation, "the last vestige of the dignity of sovereignty," was at issue.[15] It indicated that although interference with state proceedings has been allowed "under exceptional circumstances," no such

1964). It is interesting to note that both Smith and Waltzer were arrested while attending the first interracial lawyers conference held in New Orleans in the 20th century. *See* Brewer, *supra* note 2, at 75.

[11] 380 U.S. at 488. The seized books and records found their way into the hands of Chairman Pfister of the Louisiana Joint Legislative Commission on Un-American Activities, and on November 8, 1963, SCEF was named in a committee resolution as a "Communist front organization." Dombrowski v. Pfister, 227 F. Supp. 556, App. A, para. 14 (E.D. La. 1964).

[12] *See* Complaint, Intervening Complaint, Offers of Proof, and Affadavits, Dombrowski v. Pfister, 227 F. Supp. 556 (E.D. La. 1964). Portions of the complaint are reproduced in Dombrowski v. Pfister, 227 F. Supp. 556, 564 (E.D. La. 1964).

[13] Dombrowski v. Pfister, 227 F. Supp. 556 (E.D. La. 1964). The three judge court was convened pursuant to 28 U.S.C. §§ 2281, 2284 (1964).

[14] Dombrowski v. Pfister, 227 F. Supp. 556, 569 (E.D. La. 1964). Judge Wisdom feels abstention was totally inappropriate; would find certain sections of the law unconstitutional on their face; would require a hearing on the allegations of "bad faith" application of the laws; and would issue injunctive relief if the allegations are proven.

[15] *Id.* at 559.

circumstances existed here. It looked to the importance of the state's interest, and found that "[n]one of the cases [where interference was sanctioned] involved so fundamental an element of state sovereignty as that of self-preservation."[16]

The court determined that federal legislation and case law did not supercede the right of a state to prosecute for sedition against the state itself, and that since the state could constitutionally proceed, the resolution of plaintiffs' constitutional challenges should be in the state criminal proceedings. Likewise, the court refused an evidentiary hearing on the unconstitutional application of the statutes (although recognizing that such "evidence has been frequently admitted") since "here the very vitals of our constitutional system of government are on the line."[17] According to the court, the preservation of the integrity of the state criminal process, the avoidance of undue conflict between the sovereigns, and a possible saving interpretation of the statutes by the state courts all dictated abstention.[18]

The Supreme Court noted probable jurisdiction[19] in order to resolve a "seeming conflict" between the district court decision in *Dombrowski* and the later Supreme Court decision in *Baggett v. Bullitt*,[20] "and to settle important questions concerning federal in-

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[16] *Id.* at 560 n.1. The district court cites and attempts to distinguish eight cases in which interference was allowed.

[17] *Id.* at 564. *See* Gibson v. Florida, 372 U.S. 539 (1963); NAACP v. Button, 371 U.S. 415 (1963); Louisiana *ex. rel.* Gremillion v. NAACP, 366 U.S. 293 (1961); Bates v. City of Little Rock, 361 U.S. 516 (1960); NAACP v. Alabama, 357 U.S. 449 (1958).

[18] Dombrowski v. Pfister, 227 F. Supp. 556, 559-64 (E.D. La. 1964).

[19] 377 U.S. 976 (1964).

[20] 377 U.S. 360 (1964). *Baggett* was decided by the Supreme Court on June 1, 1964, whereas the Louisiana district court decided *Dombrowski* on February 20, 1964. The history of *Baggett* can be followed in Nostrand v. Balmer, 53 Wash. 2d 460, 335 P.2d 10 (1959), *vacated and remanded sub nom.*, Nostrand v. Little, 362 U.S. 474 (1960); Nostrand v. Little, 58 Wash. 2d 111, 361 P.2d 551 (1961), *appeal dismissed*, 368 U.S. 436 (1962); Baggett v. Bullitt, 215 F. Supp. 439 (W.D. Wash. 1963).

In *Baggett*, 64 members of the faculty, staff, and student body of the University of Washington brought a class action to have certain 1931 and 1955 Washington statutes that required the execution of two different loyalty oaths as a condition of employment declared unconstitutional, and for an injunction against the enforcement of these statutes against some of the plaintiffs. The three judge court held the 1955 oath constitutional. It also held that, although there were substantial constitutional questions as to the validity of the 1931 oath, it would abstain in favor of state court adjudication. The Supreme Court held abstention inappropriate, and then examined the two oaths and found them both vague and overbroad.

> The state labels as wholly fanciful the suggested possible coverage of the two oaths. It may well be correct, but the contention only emphasizes the difficulties with the two statutes; for if the oaths do not reach some or any of the behavior suggested, what specific conduct do the oaths cover? Where does fanciful possibility end and intended coverage begin?
>
> It will not do to say that a prosecutor's sense of fairness and the

junctions against state criminal prosecutions threatening constitutionally protected expression."[21] The Court may have unsettled more questions than it settled, but it addressed itself to the following significant points. First, what kinds of challenges to state criminal prosecutions threatening constitutionally protected expression will establish irreparable harm sufficient to state a federal equitable claim? Second, when is it appropriate to avoid decision on these challenges and abstain in favor of state court adjudication of the issues?

II. THE SETTLED ISSUES—THE UNSETTLED ISSUES

A. Irreparable Harm

The Court began by restating the rule that "it is generally to be assumed that state courts and prosecutors will observe constitutional limitations as expounded by this Court, and that the mere possibility of *erroneous initial application* of constitutional standards will usually not amount to the irreparable injury necessary to justify a disruption of orderly state proceedings."[22] The injury "normally incident" to a criminal proceeding "brought lawfully and in good faith"[23] is insufficient to "warrant cutting short the normal adjudication of constitutional issues in the course of a criminal prosecution."[24]

The first question in *Dombrowski*, therefore, narrowed to whether the two evils alleged[25] involved merely the "erroneous initial application of constitutional standards" incident to an "otherwise good faith criminal prosecution" or "irreparable injury."[26] The Supreme Court found that these allegations by plaintiffs

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Constitution would prevent a successful perjury prosecution for some of the activities seemingly embraced within the sweeping statutory definitions. The hazard of being prosecuted for knowing but guiltless behavior remains . . . . Well-intentioned prosecutors and judicial safeguards do not neutralize the vice of a vague law. Baggett v. Bullitt, 377 U.S. 360, 373 (1964).

21 Dombrowski v. Pfister, 380 U.S. 479, 483 (1965).

22 *Id.* at 484-85 (emphasis added). *See* Douglas v. City of Jeanette, 319 U.S. 157 (1943).

23 Dombrowski v. Pfister, 380 U.S. 479, 485 (1965).

24 *Id. See* Beal v. Missouri Pac. R. Co., 312 U.S. 45 (1941) (mere threat of a single prosecution); Spielman Motor Sales Co. v. Dodge, 295 U.S. 89 (1935) (same); Watson v. Buck, 313 U.S. 387 (1941) (no irreparable injury or constitutional infirmity in statute); Fenner v. Boykin, 271 U.S. 240 (1926) (same).

25 Originally, James A. Dombrowski, Executive Director of the Southern Conference Educational Fund, Inc., and the SCEF were the plaintiffs. Subsequently, a motion to intervene as plaintiffs was granted on behalf of Benjamin E. Smith, Treasurer of SCEF, and Bruce C. Waltzer, "a friend and supporter" of SCEF and an attorney active in civil rights. All four parties are referred to as plaintiffs. Plaintiffs actually alleged more than two evils, but the other allegations were either dropped on appeal or assimilated into the two main points.

26 380 U.S. at 484-85.

> depict a situation in which the defense of the State's criminal prosecution will not assure adequate vindication of constitutional rights. They suggest that a substantial loss or impairment of freedom of expression will occur if appellants must await the state court's disposition and ultimate review in this Court of any adverse determination. These allegations, if true, clearly show irreparable injury.[27]

We shall examine the reasons why the harm caused by these two evils is severe enough to justify early intervention in state processes.[28]

1. MISUSE OF A STATUTE

The complaint in *Dombrowski* alleged that the threat to enforce the statute against the plaintiffs was made not with an "expectation of securing valid convictions," but rather as part of a plan to "harass appellants and discourage them and their supporters from asserting and attempting to vindicate the constitutional rights of Negro citizens of Louisiana."[29] Since the district court denied an evidentiary hearing on these allegations,[30] the issue before the Supreme Court was *not* whether a "bad faith prosecution" had, in fact, been established, but whether sufficient *allegations* of bad faith were stated under section 1983 (the Civil Rights Act)[31] to require the district court to adjudicate the issues and fashion appropriate relief should plaintiffs prevail.[32] The lower court's dismissal was reversed. The Supreme Court said:

> [A]ppellants have attacked the good faith of the appellees in enforcing the statutes, claiming that they have invoked, and threaten to continue to invoke, criminal process *without any hope of ultimate success*, but only to discourage appellants' civil rights activities. . . . [T]hese allegations state a claim under the Civil Rights Act, 42 U.S.C. § 1983.[33]

The phrase "without any hope of *ultimate* success" is important in understanding the Court's reasoning. It is not infrequent that a prosecutor can count on the local judge or jury to convict political dissenters or others holding unpopular views, regardless of the

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[27] *Id.* at 485-86.

[28] See the caveat in note 2 *supra.*

[29] 380 U.S. at 482. The complaint was supported by affadavits and offers of proof. See note 10 *supra.*

[30] Dombrowski v. Pfister, 227 F. Supp. 556, 563 (E.D. La. 1964).

[31] 42 U.S.C. § 1983 (1964).

[32] The Supreme Court remanded the case for a hearing by the district court on the "bad faith" attack. Dombrowski v. Pfister, 380 U.S. 479, 497-98 (1965). The hearing has not been held, and a temporary restraining order issued pending the hearing is still in effect. *See* 21 RUTGERS L. REV., *supra* note 2, at 95 n.22.

[33] 380 U.S. at 490 (emphasis added).

facts or law in the case.[34] However, the concept of "ultimate success" includes appeals through the state system and the possibility of certiorari or appeal to the Supreme Court of the United States. It is the "hope of success" at these higher, unbiased levels of review that must be examined.

The elements necessary to establish a bad faith prosecution have yet to be articulated.[35] Involving as it does an inquiry into the state of mind and the intentions of prosecutors and other state officials, the burden of establishing deliberate intent to suppress speech activities is almost insurmountable.[36] In most cases, there are bound to be ambiguities as to the state's purpose in initiating arrests or prosecutions.[37] The area between those cases where valid statutes are clearly intentionally misapplied to protected speech activities, and those where the statute is found to be unconstitutional "as applied," but without proof of intentional misconduct by state officials is wide, and will probably encompass most cases.

The phrase "bad faith prosecution"[38] in the opinion seems to exclude cases where the prosecution is obviously unconstitutional, but where no direct proof of the prosecutor's intent is available. For example, it has been suggested that discriminatory enforcement of

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[34] Lusky, *Racial Discrimination and the Federal Law: A Problem in Nullification*, 63 COLUM. L. REV. 1163 (1963). After discussing numerous examples of such local bias, Professor Lusky comments:

> It is sometimes forgotten that the principal, if not the only, reason for establishment of the lower federal courts was the need for dealing with local opposition to, or disregard of, the federal law. Unless they perform this function adequately, there is little reason to have them at all. *Id.* at 1178.

[35] For Dombrowski's statement, see text accompanying note 33 *supra*. Also see text accompanying notes 36-42 *infra*. Just how much of a "hint" of improper purpose must be established is still unsettled. The burden imposed is presently an extremely onerous one, see note 36 *infra*, and it has been suggested that the burden be revised. *See* Bailey, *supra* note 2, at 102-21.

[36] Two cases where the burden has been overcome are NAACP v. Thompson, 357 F.2d 831 (5th Cir. 1966); and Cox v. Louisiana, 348 F.2d 750 (5th Cir. 1965) (reversing denial of removal), 363 F.2d 887 (5th Cir. 1966) (vacated for further consideration in light of City of Greenwood v. Peacock, 384 U.S. 808 [1966], and Georgia v. Rachel, 384 U.S. 780 [1966]). The burden has often proved too great. *See* Brooks v. Briley, 274 F. Supp. 538 (M.D. Tenn. 1967); Carmichael v. Allen, 267 F. Supp. 985 (N.D. Ga. 1966); Cameron v. Johnson, 262 F. Supp. 873 (S.D. Miss. 1966); Turner v. LaBelle, 251 F. Supp. 443 (D. Conn. 1966). *See also* Bailey, *supra* note 2, at 96.

[37] To determine the purpose, courts have looked to public announcements by government officials in newspapers or other news media, statements of legislators, and the history of the practice attacked and its effect on protected activities.

[38] The term is used in Dombrowski v. Pfister, 380 U.S. 479, 490 (1965), and is apparently meant to distinguish the type of situation present in Douglas v. City of Jeanette, 319 U.S. 157 (1943), where the state was held to be proceeding in "good faith."

a valid statute should be sufficient to abort a prosecution in its inception.[39] And prosecutions under a law phrased in general terms but passed with the clear intent that it be applied to specific activities which the court finds to be protected should also support relief.[40] Conversely, use of a law which has lain dormant and unused for a considerable period might give rise to a presumption that the prosecution is primarily to suppress the speech activity, not vindicate some ongoing socially justifiable state policy.[41] Each of these types of state enforcement should legitimately be placed under the "bad faith" heading. They represent instances where the attack on the speech activities so overwhelms any possible state interest in a continuing policy of legitimate concern that a strong presumption should arise that the "purpose" of the prosecution is to thwart first amendment rights.[42]

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[39] See Douglas v. City of Jeanette, 319 U.S. 157 (1943), which refers to the propriety of injunctive relief in a case like Hague v. CIO, 307 U.S. 496 (1939), where state officials acted in "bad faith" to drive union organizers out of the area.

[40] *See* Cameron v. Johnson, 244 F. Supp. 846 (S.D. Miss. 1964), *rev'd and remanded per curiam*, 262 F. Supp. 873 (S.D. Miss. 1966), *prob. juris. noted*, 389 U.S. 809 (1967); Bush v. School Bd., 194 F. Supp. 182 (E.D. La. 1961). *Compare* United States v. Miller, 367 F.2d 72 (2d Cir. 1967), *cert. denied*, 386 U.S. 911, *with* O'Brien v. United States, 376 F.2d 538 (1st Cir. 1967).

[41] In Poe v. Ullman, 367 U.S. 497 (1961), the Court held that no justiciable issue was presented where a doctor and his patient sued for a declaration that Connecticut's laws against both giving advice on contraceptives and their use were unconstitutional. The primary basis for the holding was that no "imminent prosecution" was established. The Court said:

> But even were we to read the allegations to convey a clear threat of imminent prosecutions, we are not bound to accept as true all that is alleged . . . . The Connecticut law prohibiting the use of contraceptives has been on the State's books since 1879 . . . . During the more than three quarters of a century since its enactment, a prosecution for its violation seems never to have been initiated, except in one case. *See* State v. Nelson, 126 Conn. 412, 11 A.2d 856 (1940).

See also Turner v. La Belle, 251 F. Supp. 443 (D. Conn. 1966).

[42] See Bailey, *supra* note 2, at 104-06, where the author suggests that a "preliminary" hearing be held in federal court when a colorable first amendment claim has been made, to determine whether "state officials, however sincere, have . . . put together sufficient evidence to support constitutionally permissible prosecution." This would include an "inquiry . . . whether the law sought to be enforced could, in light of the first amendment, reasonably and constitutionally be applied to the conduct in which the petitioners engaged."

Another possible aspect of "bad faith" has been raised with regard to the searches and seizures in *Dombrowski*. It was alleged in Dombrowski v. Eastland, 387 U.S. 82 (1967), that state officials had a working relationship with the United States Internal Security Subcommittee, through its Chairman, Senator Eastland, and its Chief Counsel. A suit was filed, pursuant to 42 U.S.C. § 1983 (1964), alleging an illegal conspiracy to seize the records, and requesting damages against Senator Eastland and his Chief Counsel. The Supreme Court held that although Senator Eastland was immune from such a suit, his Chief Counsel was not, and recovery of damages was warranted if the alleged conspiracy with Louisiana officials

2. VAGUENESS ATTACK ON STATUTE REGULATING EXPRESSION

Dombrowski also alleged that the statutes under which he was being prosecuted[43] were unconstitutionally vague and overbroad.[44] The district court opinion conceded that these allegations raised serious first amendment issues,[45] but held that "the normal adjudication of constitutional defenses in the course of state criminal prosecutions"[46] was sufficient. The Supreme Court reversed, finding the district court's conventional view of irreparable harm too limited.

> 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 may be critical. For in such cases, the statutes lend themselves too readily to denial of those rights.[47]

The Court based its decision, therefore, both on the harm implicit in the threat posed by the vagueness and overbreadth of the statute itself, and the legitimacy of the existence of a prosecution under that statute. The Supreme Court reiterated that the assumption that defense of a criminal prosecution will generally assure ample vindication of constitutional rights is unfounded when the statute regulates expression and is attacked as vague and overbroad.[48] "For the threat of sanctions may deter . . . almost as potently as the actual application of sanctions."[49] The point seems to be that when the *existence* of the state proceeding is challenged in federal court as unconstitutional, the plaintiffs cannot be relegated to that proceeding for their hearing. And if the challenge succeeds, the state proceeding cannot continue.

The Court feels there is "danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application."[50] The "chilling effect" on the exercise of free speech can result, "however expeditious" the state court proceedings. The prosecution itself, "unaf-

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was proven. See Pfister v. Arceneaux, 376 F.2d 821 (5th Cir. 1966), which was the suit against the Louisiana officials.

43 See note 8 *supra*.

44 Dombrowski v. Pfister, 227 F. Supp. 556, 565 (E.D. La. 1964).

45 *Id.* at 559.

46 Dombrowski v. Pfister, 380 U.S. 479, 483 (1965).

47 *Id.* at 486 (emphasis added).

48 Garrison v. Louisiana, 379 U.S. 64 (1964); Baggett v. Bullitt, 377 U.S. 360 (1964); NAACP v. Button, 371 U.S. 415 (1963); City of Altus v. Carr, 255 F. Supp. 828, 836 (W.D. Tex. 1966); Bush v. School Bd., 194 F. Supp. 182 (E.D. La. 1961), *aff'd sub nom.*, Tugwell v. Bush, 367 U.S. 907 (1961).

49 Dombrowski v. Pfister, 380 U.S. 479, 486, *citing* NAACP v. Button, 371 U.S. 415 (1963).

50 NAACP v. Button, 371 U.S. 415, 433 (1963).

fected by the prospects of its success or failure,"[51] may cause impermissible burdens on speech. "Because of the sensitive nature of constitutionally protected expression, we have not required that all of those subject to overbroad regulations risk prosecution to test their rights."[52]

Criminal prosecution always imposes burdens on the defendant. These burdens act, and are intended to act, not only to initiate the criminal process, but to halt the activities in which the individual was engaged. It can therefore be seen that a different problem may be posed when these burdens serve to stifle protected speech activities rather than some other activity of less importance in our society.[53]

These burdens are limitless, but they can be grouped generally. First, the burdens that arise from the normal criminal process: arrest,[54] bail,[55] detention,[56] and trial.[57] A related burden, present

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[51] Dombrowski v. Pfister, 380 U.S. 479, 487 (1965). *See* Baggett v. Bullitt, 377 U.S. 360 (1964); NAACP v. Button, 371 U.S. 415 (1963); Gremillion v. United States, 368 U.S. 11 (1961); Bush v. School Bd., 194 F. Supp. 182 (E.D. La. 1961).

[52] 380 U.S. at 486.

[53] These other activities may or may not be illegal. Acquittal is normally considered sufficient protection to vindicate a legitimate activity which was inappropriately halted by the initiation of criminal procedures. Speech, as a "preferred freedom," may call not only for quicker and more certain vindication, but for different remedies to assure these results.

[54] The use of arrests to deter civil rights workers is the most obvious contemporary example. The same is now true of anti-Vietnam War demonstrations. Thousands were arrested during the "freedom rides" and "sit-ins" in the South, hundreds in Mississippi alone. Professor Lusky discusses the Mississippi experience. Lusky, *supra* note 34. More recently, arrest has been used to break up demonstrations and other activities directed against the role of the United States in the Vietnam War. In New York City, during December 4-8, 1967, hundreds of demonstrators were arrested and briefly jailed, only to be released without charge a few hours later, when the demonstration had ended. N.Y. Times, Dec. 8, 1967, § 1, at 1, col. 4; *id.*, at 12, col. 1.

[55] In Bailey v. Patterson, 199 F. Supp. 595 (S.D. Miss. 1961), the total bail required by the state courts for the freedom riders was $372,000. *See* Boyer, *supra* note 2, at 95. The evils of the present bail system prevalent in most American jurisdictions have prompted great criticism. *See, e.g.*, D. FREED & P. WALD, BAIL IN THE UNITED STATES: 1964—A REPORT TO THE NATIONAL CONFERENCE ON BAIL AND CRIMINAL JUSTICE 53 (1964), where the authors conclude that high bail had been employed in civil rights cases "as punishment or to deter continued demonstrations"; Foote, *Coming Constitutional Crisis in Bail*, 113 U. PA. L. REV. 959 (1965); Note, *Bail and Civil Rights*, 2 LAW IN TRANS. Q. 111 (1965); Note, *Bail: The Need for Reconsideration*, 59 NW. U.L. REV. 678 (1964). *See also* The Federal Bail Reform Act, 18 U.S.C. §§ 3146, 3152 (1966).

[56] High bail, besides effectively draining the financial resources of the defendant and those who support him, often has a direct effect on subsequent proceedings in the case. The threat of prolonged pre-conviction detention in lieu of bail often forces guilty pleas which would not otherwise be entered. Those who do not plead guilty may spend many weeks or

in every case, is the extra-legal sanctions, including stigmatization and disruption of personal life, which arise automatically from the imposition of the first type.[58] The third type of burden—peculiar to speech cases—is a burden placed upon "all society"[59]: others will be deterred from speech activities. The *Dombrowski* court expressed concern on this point in indicating why the normal "standing" requirements in a case involving first amendment freedoms were loosened to take into consideration possible threats to persons not party to the law suit. "For free expression—of transcendent value to all society, and not merely to those exercising their rights—might be the loser."[60] Professor Kinoy has remarked of Justice Brennan's opinion: "[T]he Justice was not referring solely to the 'chilling effect' on the individuals who are caught in the toils of repressive legislation. Not at all. He wrote of the 'chilling effect' on the exercise of these rights by the entire nation."[61] Unnumbered, unknown people[62] may be deterred from

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months in jail awaiting trial. Often the pre-conviction detention period will be longer than the maximum possible sentence for the offense with which the defendant is charged. Acquittal is of little use if more than the maximum possible sentence has already been served.

57 See Thompson v. City of Louisville, 362 U.S. 199 (1960), where although the case did not involve speech activities, the "burdens" of being forced to trial for legitimate activities is illustrated.

58 *See* 80 HARV. L. REV. 1490, 1496 (1967). The number, variety, and seriousness of extra-legal sanctions are limited only by the imagination of those attempting to impose the sanctions. The most obvious, and frequent, personal sanctions are loss of employment, or various rights connected with employment; loss of student status (many of the plaintiffs in Zwicker v. Boll, 270 F. Supp. 131 [W.D. Wis. 1967], see text accompanying notes 175-186 *infra*, have been expelled from the University of Wisconsin on one pretext or another, although their convictions are on appeal to the Wisconsin Supreme Court, and *Zwicker v. Boll* is still pending in the United States Supreme Court); loss of various opportunities for status or improvement in status, such as promotion, pay increases, etc.; social ostracism, including expulsion from social clubs, or the more informal and insidious exclusion from social activities in which one was previously invited to participate; political defeat; economic ruin, as through boycotts, threats, or loss of good will; harassment to family, in the form of letters, phone calls, personal insults, or threats; and ridicule and public obloquy, including unfavorable newspaper and radio-TV coverage.

Organizational activities can likewise be destroyed. Membership and contributions often cease when public knowledge of association with a particular organization is likely to produce repercussions against the individuals. *See* NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449 (1958); Louisiana *ex rel.* Gremillion v. NAACP, 366 U.S. 293 (1961); Robison, *Protection of Associations from Compulsory Disclosure of Membership*, 58 COLUM. L. REV. 614 (1958).

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

60 *Id.*

61 Kinoy, *Brief Remarks on Dombrowski v. Pfister—A New Path in Constitutional Litigation?*, 26 GUILD PRACTITIONER 1, 7 (1967).

62 *Dombrowski* expands the concept of "irreparable harm" necessary to justify equitable intervention, and reaffirms the liberalized concept of "standing" in first amendment cases. One of the broadest statements on

exercising their first amendment rights if criminal prosecution, "however expeditious,"[63]—and whether ultimate acquittal comes or not[64]—is permitted. *Dombrowski* declared: "We believe that those affected by a statute are entitled to be free of the burdens of defending prosecutions, however expeditious, aimed at hammering out the structure of the statute piecemeal, with no likelihood of obviating similar uncertainty for others."[65] Those with a scrupulous regard for the proscriptions and limits of the law[66] might steer clear of the areas of protected expression to be certain not to risk involvement with the criminal process.[67] Fear is a powerful deterrent, and when aimed at first amendment activities, it gives rise to the "chilling effect"[68] which most bothers the Court. When a prosecution is threatened, therefore, and one or both of the two *Dombrowski* evils are alleged, a federal claim for equitable relief has been stated.

B. Abstention and Comity

Even though a claim may be stated under the Civil Rights Act,[69] the courts must still deal with the Siamese twins of "comity"[70]

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standing can be read in Heckler v. Shepard, 243 F. Supp. 841 (D. Idaho 1965), where plaintiffs attacked a state loyalty oath.

> It does not appear from the evidence before us, even after hearing the case on the merits, that any of the plaintiffs have been injured by the operation of the challenged statute, or that any of them would actually be injured by its enforcement; nevertheless, in view of controlling precedent, the standing of plaintiffs to have the constitutional issues adjudicated is no longer open to question. *Id.* at 844.

Numerous commentators on *Dombrowski* have noted the Court's concern with the effect on third persons of state actions affecting speech activities. *See, e.g., The Supreme Court, 1964 Term*, 79 HARV. L. REV. 56, 171 (1965); 32 TENN. L. REV. 641, 642 (1965).

[63] Dombrowski v. Pfister, 380 U.S. 479, 491 (1965).

[64] *Id.* at 486.

[65] *Id.* at 491.

[66] Baggett v. Bullitt, 377 U.S. 360, 385 (1964); Amsterdam, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67 (1960).

[67] Spieser v. Randall, 357 U.S. 513 (1958).

[68] Dombrowski v. Pfister, 380 U.S. 479, 487 (1965). *See* Baggett v. Bullitt, 377 U.S. 360 (1964); NAACP v. Button, 371 U.S. 415 (1963); Wolft v. Selective Serv. Local Bd. 16, 372 F.2d 817 (2d Cir. 1967); Bush v. School Bd., 194 F. Supp. 182 (E.D. La. 1961).

[69] 42 U.S.C. § 1983 (1964). There are, of course, a number of sections that the courts refer to as the "Civil Rights Act." Appellants in *Dombrowski* alleged infringements of *id.* §§ 1971, 1981, 1983, 1985. It appears, however, that the Court considered the claim to be stated under *id.* § 1983. *See* Dilworth v. Riner, 343 F.2d 226 (5th Cir. 1965). References to the Civil Rights Act in this article will be to 42 U.S.C. § 1983 (1964) unless otherwise noted.

[70] *See* Boyer, *supra* note 2, at 62; Taylor & Willis, *The Power of Federal Courts to Enjoin Proceedings in State Courts*, 42 YALE L.J. 1169 (1933); Warren, *Federal and State Court Interference*, 43 HARV. L. REV. 345 (1930); Note, *Federal Civil Procedure: Anti-Injunction Statute's Application to Civil Rights Cases*, 1965 DUKE L.J. 813; Note, *Federal Injunctions Against State Criminal Proceedings*, 4 STAN. L. REV. 381 (1952). *See, e.g.*, England

and "abstention."[71] The doctrine of abstention is a judge fashioned vehicle[72] whereby a federal court refuses to proceed in a case over which it clearly has jurisdiction. It is normally invoked to allow a state court decision on an issue of state law which will avoid or moot the federal constitutional issue raised,[73] or to prevent "unseemly conflict" between the state and federal courts, and thereby preserve the concept of "comity."[74]

The modern abstention doctrine originated in *Railroad Commission v. Pullman Co.*[75] A unanimous court, emphasizing a desire to "avoid the waste of a tentative decision as well as the friction of a premature constitutional adjudication,"[76] refused to exercise jurisdiction because of a possible interpretation of state law that would be controlling.[77] *Pullman* reflects, therefore, the two basic underpinnings of abstention: a desire to avoid premature constitutional decision and a "furthering [of] the harmonious relation between state and federal authority."[78] The Court's main emphasis was, however, on the first point.[79]

The comity issue is often phrased that the state judicial system provides procedures whereby the plaintiff's issues can be raised and resolved;[80] that an "unseemly conflict" between state and federal

v. Medical Examiners, 375 U.S. 411 (1964); Government Employees v. Windsor, 353 U.S. 364 (1957); Beal v. Missouri Pac. R.R. Co., 312 U.S. 45 (1941).

[71] *See, Federal Judicial Power: The Doctrine of Equitable Abstention*, 2 RACE REL. L. REP. 1222 (1957); Boyer, *supra* note 2, at 76; Wright, *The Abstention Doctrine Reconsidered*, 37 TEX. L. REV. 815 (1959); *Developments in the Law—Injunctions*, 78 HARV. L. REV. 994, 1045 (1965); Note, *Judicial Abstention From the Exercise of Federal Jurisdiction*, 59 COLUM. L. REV. 749 (1959); Note, *Federal Power to Enjoin State Proceedings*, 74 HARV. L. REV. 726 (1961); Note, *The Abstention Doctrine*, 17 VAND. L. REV. 124 (1964). *See, e.g.*, Louisana Power & Light Co. v. City of Thibodaux, 360 U.S. 25 (1959); *Compare* Harrison v. NAACP, 360 U.S. 167 (1959), *with* Dombrowski v. Pfister, 380 U.S. 479 (1965), and Ashwander v. TVA, 297 U.S. 288, 347 (1936) (concurring opinion).

[72] England v. Board of Medical Examiners, 375 U.S. 411, 415 (1964).

[73] See note 71 *supra*.

[74] See note 70 *supra*.

[75] 312 U.S. 496 (1941). For a case decided the same year, implementing the abstention commands of 28 U.S.C. § 2283 (1964), see Toucey v. New York Life Ins. Co., 314 U.S. 118 (1941).

[76] Railroad Comm'n v. Pullman Co., 312 U.S. 496, 500 (1941).

[77] *Id.*

[78] *Id.* at 501.

[79] Beal v. Missouri Pac. R.R. Co., 312 U.S. 45 (1941).

[80] Zwickler v. Koota, 261 F. Supp. 985 (E.D.N.Y. 1966), *rev'd*, 389 U.S. 241 (1967); Dombrowski v. Pfister, 227 F. Supp. 556 (E.D. La. 1964). *Compare* Davis v. Jury Comm'n, 261 F. Supp. 591 (M.D. Ala. 1966), *and* Kelley v. Wallace, 257 F. Supp. 343 (M.D. Ala. 1966); *with* Hulett v. Julian, 250 F. Supp. 208 (M.D. Ala. 1966); Midwest Video Corp. v. Campbell, 250 F. Supp. 158 (D.C.N.M. 1965); Baggett v. Bullitt, 215 F. Supp. 439 (W.D. Wash. 1963), *rev'd* 377 U.S. 360 (1964). *Contra*, McNeese v. Board of Educ., 373 U.S. 668 (1963); Monroe v. Pape, 365 U.S. 167 (1961); City of Altus v. Carr, 255 F. Supp. 828 (W.D. Tex. 1966).

courts would result if jurisdiction was exercised;[81] or that the federal court should not interfere in the absence of a showing of bad faith on the part of the state system.[82] On the issue of enjoining criminal prosecutions, a broad rule of comity justified abstention in *Douglas v. City of Jeanette*.[83]

Douglas was a federal suit to restrain threatened criminal prosecution of Jehovahs' Witnesses who were making house to house distribution of books and pamphlets. The prosecution was under a peddler's licensing ordinance. The suit alleged that the ordinance "as applied" was an unconstitutional abridgement of free speech, press, and religion.[84] On the day that the Court decided *Douglas*, the ordinance as applied was held unconstitutional on the same grounds in *Murdock v. Pennsylvania*,[85] which decided a number of appeals from convictions under the ordinance for conduct substantially identical to that in *Douglas*.

Douglas held that the complaint clearly stated a claim under the Civil Rights Act,[86] but that equitable relief was "in the discretion of the court"[87] and should be withheld if sought on "slight or inconsequential grounds,"[88] particularly where it might "interfere with or embarrass"[89] state proceedings. Since the Court had just held the ordinance, as applied, unconstitutional, it refused to enjoin threatened prosecutions. The Court felt that the ruling in *Murdock* had, in effect, removed the threat to speech activities. "There is no allegation here and no proof that respondents would not, nor can we assume that they will not, acquiesce in the decision of this Court holding the challenged ordinance unconstitutional as applied to petitioners."[90]

The "hands off" attitude grew mushroomlike out of *Douglas*, and it still grows in spite of the specific language in *Dombrowski*: "We hold the abstention doctrine is inappropriate for cases such as the present one where, unlike *Douglas v. City of Jeanette*, statutes are justifiably attacked on their face as abridging free expression, or as applied for the purpose of discouraging protected activities."[91]

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81 Martin v. Creasy, 360 U.S. 219 (1959).
82 Zwickler v. Koota, 261 F. Supp. 985 (E.D.N.Y. 1966).
83 319 U.S. 157 (1943).
84 *Id.* at 159.
85 319 U.S. 105 (1943).
86 Douglas v. City of Jeanette, 319 U.S. 157, 162 (1943).
87 *Id.*
88 *Id.*
89 *Id.* at 163.
90 *Id.* at 165.
91 380 U.S. at 489. *See* Boyer, *supra* note 2, at 78, 81: "In recent years, the abstention doctrine has been increasingly used by the district courts as a means of deferring or avoiding the distasteful task of enforcing federal law opposed by the local community. . . . *Douglas* continues to be invoked by those who would restrict or eliminate the role of the federal courts from aggressive state action."

Dombrowski stands as a basic policy change from *Douglas*[92] and other more recent first amendment cases.[93] The Court has realized that the *delay* inherent in the abstention doctrine is at the heart of the "irreparable harm" caused to speech activities. "[W]e have, in effect, avoided making vindication of freedom of expression await the outcome of protracted litigation."[94] *Dombrowski* dealt with plaintiff's allegations separately. Abstention was held inappropriate when a prosecution is attacked as being initiated and conducted to discourage protected activities.[95] In this situation, a constitutional interpretation of a statute by the state court is not needed because the validity of the statute is unrelated to the nature of the attack on the prosecution. Even if the statute is clearly constitutional, this "would not alter the impropriety of appellees' invoking the statute in bad faith to impose continued harassment in order to discourage appellants' activities."[96]

It is the nature of the prosecution—including the *purpose* for which it is initiated and conducted—not the constitutionality of the statute under which it is initiated that creates the harm under this wing of the *Dombrowski* decision.[97] This is consistent with dictum in *Douglas* which indicated that no person is immune from prosecution in "good faith" for his alleged criminal acts.[98] Justice Stone in *Douglas* specifically referred to *Hague v. CIO*,[99] "where local officials forcibly broke up meetings of the complainants and in many instances forcibly deported them from the state without trial,"[100] as an instance where equitable relief would be justified because officials were not acting in good faith. Considerations of

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92 Boyer, *supra* note 2, at 86; Brewer, *supra* note 2, at 88.

93 See Harrison v. NAACP, 360 U.S. 167 (1959), where the Supreme Court abstained from meeting an attack on the constitutionality of statutes characterized by the district court as "parts of the general plan of massive resistance to the integration of schools." The Court emphasized the avoidance of unnecessary interference by federal courts with proper and validly administered state concerns, and a possible state court interpretation which would avoid the constitutional question. *Id.* at 176, 177. *See also*, Albertson v. Millard, 345 U.S. 242 (1953); Musser v. Utah, 333 U.S. 95 (1948).

94 Dombrowski v. Pfister, 380 U.S. 479, 487 (1965). For example, the judgment on the merits in Harrison v. NAACP, 360 U.S. 167 (1959), was reached almost seven years after the institution of litigation. See also the extensive litigation leading to Baggett v. Bullitt, 377 U.S. 360 (1964).

95 380 U.S. at 490.

96 *Id.* *See* Cox v. Louisiana, 348 F.2d 750, 752 (5th Cir. 1965); NAACP v. Thompson, 357 F.2d 831, 833 (5th Cir. 1966).

97 It is possible that use of a patently invalid statute, or one previously declared unconstitutional as applied to the same or similar circumstances, would be an "indicia" of bad faith. See Aelony v. Pace, 8 RACE REL. L. REP. 1355 (M.D. Ga. 1963); Carmichael v. Allen, 267 F. Supp. 985 (N.D. Ga. 1966). Both cases involve the use of a statute declared unconstitutional in Herndon v. Lowry, 301 U.S. 242 (1937).

98 Douglas v. City of Jeanette, 319 U.S. 157, 163 (1943).

99 307 U.S. 496 (1939).

100 Douglas v. City of Jeanette, 319 U.S. 157, 164 (1943).

comity have never included allowing a bad faith prosecution to proceed unimpeded. Comity, which presumes that state courts will function in good faith and give paramount consideration to protecting first amendment rights, cannot prevent interference in state proceedings when an attack on those very presumptions is established.

Whereas the nature of the prosecution, rather than the constitutionality of the statute, is crucial in the bad faith attack, the opposite is true in the vagueness attack. Here, regardless of the good faith and diligence of the state prosecutor or available procedures in state courts,[101] it is the dangers inherent in the vague statute that makes abstention inappropriate.

> In these circumstances, to abstain is to subject those affected to the uncertainties and vagaries of criminal prosecution, whereas the reasons for the vagueness doctrine in the area of expression demand no less than freedom from prosecution prior to a construction adequate to save the statute. In such cases, abstention is at war with the purposes of the vagueness doctrine, which demands appropriate federal relief regardless of the prospects for expeditious determination of state criminal prosecutions.[102]

"Well intentioned prosecutors and judicial safeguards do not neutralize the vice of a vague law."[103]

The policies underlying abstention go directly to protecting the integrity of the state judicial process, either in reality or image. There is no question that a functioning, viable federalism requires a series of state court systems which are entitled to the confidence of the people.[104] But when first amendment freedoms "of transcendent value to all society"[105] require *immediate* protection,[106] and it is likely that the lowest state court would view protection of these freedoms as impairing the integrity of that court or some local policy,[107] it is essential that the federal trial forum be

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101 Many district court opinions cite availability of state procedures as a reason for abstaining from decision or for withholding relief. However, it should be clear that unless the entire constitutional challenge can be avoided in a "single state proceeding" by a decision on an independent issue of state law, the availability of state procedures and remedies is irrelevant to the federal remedy. *See* Monroe v. Pape, 365 U.S. 167 (1961), McNeese v. Board of Educ., 373 U.S. 668 (1963). It should be noted that in *Dombrowski*, the Orleans Parish District Court had summarily vacated the first arrest and search warrants. This availability of state remedies, and demonstration of "good faith" by the state court, did not in any way bar federal relief.

102 Dombrowski v. Pfister, 380 U.S. 479, 492 (1965).

103 Baggett v. Bullitt, 377 U.S. 360, 373 (1964).

104 The "comity" principle operates on the presumption that the state courts have, and are entitled to have, this "confidence" of the people.

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

106 *See* Brewer, *supra* note 2, at 88; Boyer, *supra* note 2, at 86.

107 *See* Brewer, *supra* note 2, at 85; Boyer, *supra* note 93, at 85.

available for immediate relief. Where delay is the very evil to be prevented, abstention in favor of a procedure which promotes delay is totally inappropriate.[108]

It appears therefore, that the various burdens of a criminal prosecution cannot be imposed on an individual or class raising either of the two *Dombrowski* challenges. If a requirement of *Douglas* is that the criminal proceeding be brought "lawfully and in good faith,"[109] an exception to *Douglas* exists when the criminal proceeding is brought in bad faith. To require a defendant to go through the entire proceeding to challenge its existence merely compounds the "chilling effect" which the Court wishes to prevent.[110] In a prosecution under a vague or overbroad statute, the process of "hammering out the structure of the statute piecemeal"[111] (as is inevitable in a prosecution where the court must deal "with only a narrow portion of the prohibition at any one time"[112]) cannot obviate the unconstitutional uncertainty for persons other than the defendant.

III. THE FIRST VARIATION: CAMERON V. JOHNSON

The next case to raise some of the *Dombrowski* issues was *Cameron v. Johnson*.[113] While *Dombrowski* floundered in the district court in Louisiana, *Cameron* fared no better before a three

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108 See Lusky, *supra* note 34, at 1164, where he states:
> [D]elay for its own sake—obstructionism—violates the pivotal compact of the open society, the terms of which are: ungrudging acceptance of the present law in return for effective access to the processes of orderly change. Such violation destroys faith in those processes and constitutes a direct invitation to "self-help," that is, the achievement of desired objectives by force or illegal pressure tactics. Self-help is the negation of civil order; and if employed on a broad scale, it brings on the pervasive coercion of the police state.

109 Douglas v. City of Jeanette, 319 U.S. 157, 163 (1943).

110 A colleague, who insists upon anonymity, suggests a colorful, if not altogether valid, analogy. If a doctor prescribes heart surgery for a patient when, in fact, heart surgery is completely inappropriate, it is of little comfort to the patient to be told that the doctor will use only the best surgical procedures, and will proceed in good faith.

111 Dombrowski v. Pfister, 380 U.S. 479, 491 (1965).

112 *Id.*

113 381 U.S. 741 (1965).* Two earlier cases presenting certain of the issues raised in *Cameron* were Baines v. Danville, 337 F.2d 579 (4th Cir. 1964), *cert. denied*, 381 U.S. 939 (1965); and Wells v. Hand, 238 F. Supp. 779 (M.D. Ga.), *aff'd per curiam sub nom.* Wells v. Reynolds, 382 U.S. 39 (1965). *Baines* refused to find 42 U.S.C. § 1983 (1964) an exception to 28 U.S.C. § 2283 (1964). *Wells* abstained as to a Georgia statute subsequently held unconstitutional in Carmichael v. Allen, 267 F. Supp. 985 (N.D. Ga. 1966). *See* Bailey, *supra* note 2, at 93; Comment, *Theories of Federalism and Civil Rights*, 75 YALE L.J. 1007, 1035 (1966).

* After this article was written, the Supreme Court issued its second opinion in Cameron v. Johnson, 36 U.S.L.W. 4319 (April 22, 1968), on appeal from the district court's decision on remand. See the author's Closing Note at the conclusion of this article.

judge panel in Mississippi.[114] Reverend Cameron, leader of a voter-registration drive, had sought a declaratory judgment against the Mississippi Unlawful Picketing statute,[115] and an injunction against prosecution under this statute. The statute was passed unanimously by the Mississippi Legislature on April 8, 1964, after a 10 week picketing campaign by Negro Mississippians to enforce their constitutional right to register and vote. Reverend Cameron was threatened with arrest on April 9, and on April 10, he, along with "forty-odd other persons," was arrested[116] and state court prosecutions were begun. The federal action was initiated three days after the arrests.

Plaintiffs alleged both that the plan, purpose, or design[117] in the passage and enforcement of the statute was to "discourag[e] protected activities,"[118] and that it was unconstitutionally vague and overbroad.[119] The court considered the "bad faith" attack on the merits and found "that there was no such plan, or purpose, or design or intendment of [the statute],"[120] and that the state was prosecuting plaintiffs "in good faith." It refused, however, to determine the statute's constitutionality.[121]

The court felt abstention appropriate on the vagueness and overbreadth attack for a number of reasons. First, "the courts of Mississippi have not construed the Act . . . ."[122] Second, plaintiffs had an "effective and efficient statutory remedy . . . available to them"[123] in the state courts. Third, "petitioner has invoked the jurisdiction of the state court . . . by filing a motion to quash the affidavits on the ground that the Act is unconstitutional"[124] and this indicates an adequate remedy at law. Even though the court states that these reasons support abstention, it strongly indicated that, in its view, the statute is constitutional.[125] This, in fact, appeared to be the real ground for the decision to abstain.

Judge Rives in dissent spoke solely to the vagueness attack:

> In my opinion, the statute is so clearly unconstitutional that this case is hardly one "required . . . to be heard and determined by a district court of three judges. . . ." On

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114 Cameron v. Johnson, 244 F. Supp. 846 (S.D. Miss. 1964). This first district court opinion is referred to in the text as *Cameron I*.

115 MISS. CODE ANN. § 2318.5 (1964). The law is often referred to as House Bill 546, Mississippi Laws, 1964.

116 Cameron v. Johnson, 244 F. Supp. 846, 856 (S.D. Miss. 1964) (Rives, dissenting).

117 *Id.* at 848.

118 Dombrowski v. Pfister, 380 U.S. 479, 490 (1965).

119 Cameron v. Johnson, 244 F. Supp. 846, 850 (S.D. Miss. 1964).

120 *Id.* at 848.

121 *Id.* at 848, 849, 851.

122 *Id.* at 848.

123 *Id.*

124 *Id.* at 854.

125 *Id.* at 851, 855.

> the subject of abstention, I need not repeat in this dissent the argument contained in my dissenting opinion in Bailey v. Patterson . . . .[126]

On April 26, 1965, the Supreme Court decided *Dombrowski*, and on June 7, 1965, issued the now famous *per curiam* order in *Cameron*.

> Appellants brought this action, *inter alia*, under 42 U.S.C. §1983 (1958 ed.), to enjoin enforcement of the Mississippi Anti-Picketing statute, on the grounds that it was an unconstitutionally broad regulation of speech, and that it was being applied for the purpose of discouraging appellants' civil rights activities.
>
> The motion for leave to proceed *in forma pauperis* is granted. The judgment is vacated and the cause remanded for reconsideration in light of *Dombrowski v. Pfister*, 380 U.S. 479. On remand, the District Court should first consider whether 28 U.S.C. §2283 (1958 ed.) bars a federal injunction in this case, see 380 U.S. at 484, n.2. If §2283 is not a bar, the court should then determine whether relief is proper in light of the criteria set forth in *Dombrowski*.[127]

The Supreme Court's opinion is interesting, not only for the support the remand order seems to give to *Dombrowski's* vitality, but for Justice Black's dissenting opinion arguing, it seems, for a severely limited *Dombrowski*.[128] Justice Black's dissent deserves more than casual mention because his interpretation has since been applied by a number of three judge panels,[129] and because *Cameron* is again before the Supreme Court.[130] It is therefore likely that Black's theory will soon be put to the test.

Black is convinced that the Unlawful Picketing statute is constitutional. He sees no reason for the remand, feeling that the Court should decide the issues before it rather than delay adjudication further.[131] He also refuses to accept any argument that the statute is vague or overbroad.[132] However, the Supreme Court had not decided *Dombrowski* when the district court rendered its decision in *Cameron I*.[133] To allow the lower court to reconsider its decision in light of *Dombrowski*, therefore, is consistent with an unstated premise of *Dombrowski* that it is the district court, not

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126 *Id.* at 858 (Rives, dissenting). *See* Bailey v. Patterson, 199 F. Supp. 595 (S.D. Miss. 1961), *vacated and remanded*, 369 U.S. 31 (1962).

127 381 U.S. at 741.

128 *Id.* at 742 (dissenting opinion).

129 Brooks v. Briley, 274 F. Supp. 538 (M.D. Tenn. 1967); Zwicker v. Boll, 270 F. Supp. 131 (W.D. Wis. 1967); Cameron v. Johnson, 262 F. Supp. 873 (S.D. Miss. 1966). This district court opinion is referred to in the opinion as *Cameron II*.

130 *Prob. juris. noted*, 389 U.S. 809 (1967).

131 Cameron v. Johnson, 381 U.S. 741, 752 (1965) (dissenting opinion).

132 *Id.* at 745, 749-50.

133 *See* note 114 *supra*.

the Supreme Court, that is to bear primary responsibility in these cases.[134] Further, with one judge in the district court dissenting on the validity of the statute, it was not unrealistic to assume that a declaration of the statute's invalidity might be rendered on remand. The two abstaining judges would now have to deal directly with the constitutionality issue.

Judge Rives is just as certain that the statute is unconstitutional as Justice Black is that it is valid.[135] Black's statement that holding the statute unconstitutional "somehow takes away from the States" the right "to control their streets and ingress and egress to and from their public buildings"[136] overstates the issue. The issue, of course, is not *whether* the state has such power, but whether the Unlawful Picketing statute was a constitutional exercise of that power.[137]

More difficult to understand than his feeling that the statute is valid, is Justice Black's apparent misreading of both the lower court opinion in *Cameron* and the Supreme Court decision in *Dombrowski*. Justice Black states,

> We understand from the District Court's opinion and conclusions of law that it did not dismiss the complaint on the ground that it thought it necessary to have the state courts construe the statute, but rather on the ground that *having found the statute constitutional* it dismissed in order for the criminal cases to be tried in the state courts.[138]

Although, as previously indicated, *Cameron I* made several statements supporting the constitutionality of the statute, it specifically holds,

> In this case it is not necessary to pass on the constitutionality of this Act, even though there can be slight doubt as to its constitutionality, and where it is rather clear that it is constitutional, the Courts lean to a doctrine hereinbefore announced of abstention *until it is passed upon by the courts of the State.*[139]

And further, "We are of the opinion that under the law and the facts of this case it is the duty of the Federal Courts to abstain and permit the plaintiffs to pursue their state remedies, as they have already commenced to do."[140] The district court goes to great

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134 Lusky, *supra* note 34, at 1178-84, 1191; Wisdom, *The Frictionmaking, Exacerbating Political Role of Federal Courts*, 21 Sw. L.J. 411 (1967).

135 Cameron v. Johnson, 244 F. Supp. 846, 858 (S.D. Miss. 1964) (dissenting opinion).

136 Cameron v. Johnson, 381 U.S. 741, 751 (1965).

137 *See* Shelton v. Tucker, 364 U.S. 479 (1960); Cameron v. Johnson, 244 F. Supp. 846, 857-58 (S.D. Miss. 1964) (dissenting opinion).

138 Cameron v. Johnson, 381 U.S. 741, 745 n.6 (1965) (emphasis added). Black did not participate in *Dombrowski*.

139 Cameron v. Johnson, 244 F. Supp. 846, 851 (1964) (emphasis added).

140 *Id.* at 855-56.

length to discuss Supreme Court abstention cases to support its view.[141] Justice Black finds what is hinted at but is not there: a holding that the statute is constitutional.

Black's view of *Dombrowski* is that, rather than allowing injunctive relief if *either* a vague or overbroad statute *or* a prosecution initiated to deter free speech is established, relief should be forthcoming only where *both* evils are present. *Dombrowski* approved injunctions against vague statutes affecting speech, he says, only "where it was *also alleged* that the statute was part of a plan 'to employ arrests, seizures, and threats of prosecution' under the statute in a way that would discourage"[142] the assertion of constitutional rights. He goes on to state that, "This Court in Dombrowski held, as I read the opinion, that an injunction against any enforcement of any kind of the state statute . . . could issue there *only because* . . . there were threats of prosecution purely to harrass . . . ."[143] This interpretation would severely restrict its application.[144]

Dombrowski clearly holds abstention inappropriate where "statutes are justifiably attacked on their face as abridging free expression *or* as applied for the purpose of discouraging protected activities."[145] If one attack or the other is sufficient to require a decision on the merits, certainly some relief was intended to be forthcoming should plaintiffs prevail. And in determining the presence of "irreparable harm" so as to support injunctive relief, the two evils must be analyzed separately.

As previously discussed,[146] the chilling of first amendment activities springs differently from the two evils. The more certain it appears that a prosecution is for the bad faith purpose of deterring free speech or assembly, the less relevant is the constitutionality of the statute under which the prosecution is proceeding. In this situation, "it is obvious that defense in a state criminal prosecution will not suffice to avoid irreparable injury."[147] It is not difficult for an even slightly sophisticated prosecutor to avoid facially invalid laws, but still accomplish his insidious purpose of stifling speech activities.[148] Whether the local government's hostility against a person is a result of his race, his religion, or his political views, requiring the presence of a facially invalid statute as a pre-

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141 *Id.* at 852-55.

142 Cameron v. Johnson, 381 U.S. 741, 748 (1965). See Comment, *supra* note 113, at 1034, whose author seems to feel that Black's theory is the appropriate one, although recognizing that *Dombrowski* held otherwise.

143 381 U.S. at 748.

144 *See* 1966 DUKE L.J. 219, 232.

145 380 U.S. at 489-90 (emphasis added).

146 *See* text accompanying notes 29-62 *supra*. *See* note 2 *supra*.

147 Cameron v. Johnson, 381 U.S. 741, 755 (1965) (dissenting opinion).

148 For a description of the trend in Mississippi, see Lusky, *supra* note 34, at 1168-70.

requisite to considering the attack on the legitimacy of state action emasculates the basic concept of immediate federal protection for first amendment freedoms.

On the other hand, the more vague, indefinite, and overbroad a statute is, the more likely people desiring to speak out will be silenced by the language of the statute itself, regardless of the attitudes or actions of state officials in starting a prosecution. Further, the more vague the statute, the more likely that a court, prosecutor, or policeman will be acting with the honest belief that a violation of the statute has in fact occurred. One evil of a vague or overbroad statute is that, by its terms, it allows too wide a scope of application by those with the duty of charging violations.

> It will not do to say that a prosecutor's sense of fairness and the Constitution would prevent a successful . . . prosecution for some of the activities seemingly embraced within the sweeping statutory definitions. The hazard of being prosecuted for knowing but guiltless behavior remains. . . . Well-intentioned prosecutors and judicial safeguards do not neutralize the vice of a vague law.[149]

Justice Black's requirement that both evils be present to justify injunctive relief would severely constrict the broadened concept of "irreparable harm" worked out by the Court in *Dombrowski* and other recent cases.[150]

In *Cameron II*[151] the district court reaffirmed that the prosecutions were in "good faith," held the statute constitutional, and found that section 2283 barred relief as to the pending prosecutions, with section 1983 being no exception. Judge Rives again dissented,[152] reiterating his earlier view that section 1983 is an exception to section 2283, and that "the statute is . . . clearly unconstitutional."[153] He added that the evidentiary record "clearly shows that section 2318.5 [the Unlawful Picketing statute] was unconstitutionally applied."[154]

The Supreme Court noted probable jurisdiction in *Cameron II*, and will now hopefully resolve two of the key "unsettled" *Dombrowski* problems. First, does section 2283 (the Anti-Injunction statute) bar relief sought under the Civil Rights Act?[155] To the

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149 Baggett v. Bullitt, 377 U.S. 360, 373 (1964).

150 Aptheker v. Secretary of State, 378 U.S. 500 (1964); Baggett v. Bullitt, 377 U.S. 360 (1964); NAACP v. Button, 371 U.S. 415 (1962); United States v. Raines, 362 U.S. 17 (1960); Smith v. California, 361 U.S. 147 (1959); Thornhill v. Alabama, 310 U.S. 88 (1940).

151 Cameron v. Johnson, 262 F. Supp. 873 (S.D. Miss. 1966).

152 *Id.* at 881-97.

153 *Id.* at 882.

154 *Id.* at 890.

155 The Anti-Injunction statute is 28 U.S.C. § 2283 (1964). The Civil Rights Act is 42 U.S.C. § 1983 (1964). See Cameron v. Johnson, 36 U.S.L.W. 4319, 4320 n.3 (April 22, 1968), and the author's Closing Note at the end of this article.

extent that *Dombrowski* considers abstention inappropriate in certain first amendment cases, it would appear unlikely that section 2283, which is the legislative embodiment of the comity doctrine repudiated by *Dombrowski*, could be allowed to stand as a bar to relief without substantially destroying the *Dombrowski* remedy.[156] *Dombrowski* found abstention inappropriate when a bad faith or facial invalidity attack is appropriately alleged *prior* to initiation of a prosecution. *Cameron* will decide the propriety of abstention *subsequent* to the initiation of a prosecution.

Second, assuming the Court finds that section 2283 does not bar consideration of plaintiffs' claims on their merits, it may have to deal with Justice Black's thesis that both evils are necessary to warrant injunctive relief. If the Unlawful Picketing statute is found unconstitutional, but the Court accepts the lower court's finding of no bad faith, will relief be forthcoming? And should the Court find that the Mississippi legislature and prosecuting officials used an otherwise valid statute to destroy plaintiffs' constitutionally protected picketing, will relief be granted?

IV. MULTIPLE VARIATIONS: THE TWO CAMPS

Since *Dombrowski*, and even more so since Black's dissent in *Cameron*, district courts have placed themselves into two camps that are opposed in philosophy of federalism and in decisions. The following quotations are from cases which were decided four days apart in late October 1967 and which involved similar fact situations and attacks on statutes.

> There is no showing of irreparable injury which is requisite to justify federal equitable relief, or of the special circumstances that would warrant federal disruption of the normal pattern of raising constitutional defenses in the course of the state criminal proceedings. . . . If the challenged laws are void for vagueness or overbreadth, the state courts are fully capable of so ruling.[157]

> Any unconstitutional statute, attempting to regulate First Amendment rights, which has been invoked, or as here, in reasonable anticipation of future events will be invoked, against a member of society, does, *in and of itself*, result in a suppression of constitutional rights, i.e., "chilling effect." Accordingly, we find ourselves unable to invoke the abstention doctrine as urged upon us by the defendants, and therefore take jurisdiction of this case under the authority expressed in *Dombrowski v. Pfister*.[158]

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156 The history and analysis of 28 U.S.C. § 2283 (1964), and its relation to 42 U.S.C. § 1983 (1964), has been detailed in numerous articles. See particularly, H. HART & M. WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1075-78 (1953); Bailey, *supra* note 2, at 122-24; Boyer, *supra* note 2, at 66-72, 88-96; Brewer, *supra* note 2, at 97-103; 50 VA. L. REV. 1404 (1964).

157 Brooks v. Briley, 274 F. Supp. 538 (M.D. Tenn. 1967).

158 Baker v. Binder, 274 F. Supp. 658 (W.D. Ky. 1967).

The first, reminiscent of *Douglas*, is typical of those courts still reluctant to affirmatively protect first amendment freedoms. The latter, citing and implementing *Dombrowski*, is indicative of those courts now eager, in appropriate circumstances, to aggressively and quickly vindicate state infringement on those same freedoms.

While it seems clear that *Dombrowski's* mandate makes the eager courts correct and the reluctant courts in error, the eager courts often fail to deal adequately with the abstention and anti-injunction statute problems which the reluctant courts overemphasize, and even misuse, to justify avoiding decision. The views of these two camps must confront each other squarely or federal relief may continue to turn on the federal district in which one happens to file suit.

A. The Reluctant Courts

Zwickler v. Koota[159] and *Zwicker v. Boll*[160] ride tandem in more ways than the similarity of plaintiffs' names. Different facets of a number of crucial "unsettled" issues, as well as the replay of some supposedly "settled" ones, are presented.

1. ZWICKLER V. KOOTA

During the 1966 congressional campaign, Sanford Zwickler desired to distribute unsigned political leaflets attacking a local congressman. Section 781-b of the New York Penal Law makes such action a criminal offense. No prosecution had been started against Zwickler for his 1966 activities, and none had been affirmatively threatened at the time that he initiated a federal action. He based his apprehension of "threatened prosecution" on the fact that during the *1964* political campaign he had distributed the same unsigned leaflet, and was charged and convicted of a violation of section 781-b.[161] Zwickler alleged that section 781-b was unconstitutionally vague and overbroad. He further alleged that he desired to distribute leaflets as he did in 1964, but that District Attorney Koota "intends or will again prosecute the plaintiff for his . . . acts of distribution."[162]

The district court found Zwickler's vagueness and overbreadth attack to be "not clearly frivolous," but refused to find that there was an imminently threatened prosecution under the statute. The

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159 261 F. Supp. 985 (E.D.N.Y. 1966), *rev'd and remanded*, 389 U.S. 241 (1967).

160 270 F. Supp. 131 (W.D. Wis. 1967).

161 The conviction was ultimately reversed for insufficient evidence, without reaching the constitutional challenges. People v. Zwickler, (Sup. Ct., Kings Co., April 23, 1965), *aff'd*, 16 N.Y.2d 1069, 266 N.Y.S.2d 140, 213 N.E.2d 467 (1965).

162 Zwickler v. Koota, 261 F. Supp. 985, 992 (E.D.N.Y. 1966), *rev'd and remanded*, 389 U.S. 241 (1967).

court suggested that the suit was premature. Plaintiff's defense to any prosecution which may come would assure him "adequate vindication of his alleged constitutional rights."[163] In fact, in emphasizing the adequacy of state remedies, and therefore the absence of that imminent harm which requires the federal court to face the issues, the lower court indicated that if Zwickler did not want to await the possible prosecution, he could "if he desires, institute an action in the *state* court for a declaratory judgment."[164]

The Supreme Court reversed in *Koota*[165] as it had in *Baggett, Dombrowski,* and *Cameron.* It found a key confusion in the lower court's opinion. "*Dombrowski* teaches that the questions of abstention and of injunctive relief are not the same."[166] Abstention is inappropriate in cases where statutes are justifiably attacked on their face as abridging free expression.[167] The Supreme Court specifically spells out what was not clearly articulated in *Dombrowski.* If the appropriate *allegations* are made, the federal court must deal with the issues, not abstain and refer them to the state court. The district court's suggestion that Zwickler file a declaratory judgment action in the state court is contrary to the mandates of *Baggett, Dombrowski,* and now *Koota.* In *Baggett* the court rejected the idea that plaintiff had the burden to file a state declaratory judgment suit. In *Dombrowski* the court affirmatively held that the burden was on the state to seek clarification of a facially vague and overbroad statute in the state court before the statute can be used.[168] Now in *Koota,* it offers the plaintiff the alternative of a federal suit. And if that alternative is chosen, *Koota* requires a decision on the merits.

> In . . . expanding federal judicial power, Congress imposed the duty upon all levels of the federal judiciary to give due respect to a suitor's choice of a federal forum for the hearing and decision of his federal constitutional claims.
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> . . . .
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> It was error to refuse to pass on appellant's claim for a declaratory judgment.[169]

Koota isolates another issue. There is a difference in the requirements for obtaining declaratory rather than injunctive relief. The Court requires two different burdens of proof for the two types of relief. "Irreparable harm" need not be established to obtain declaratory relief. "It will be the task of the District Court

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163 261 F. Supp. at 992.
164 *Id.* at 993.
165 389 U.S. 241 (1967).
166 *Id.* at 254.
167 *Id. See* Keyishian v. Board of Regents, 385 U.S. 589, 601 n.9 (1967); Dombrowski v. Pfister, 380 U.S. 479, 489-90 (1965); Baggett v. Bullitt, 377 U.S. 360 (1964).
168 380 U.S. at 491.
169 389 U.S. at 248, 252.

on the remand to decide whether an injunction will be 'necessary or appropriate' *should appellant's prayer for declaratory relief prevail.*"[170] Although *Dombrowski's* broadened interpretation of "irreparable harm" in first amendment cases brings these two burdens of proof closer together, it remains to be seen how much more harm must be shown, if any, after the issuance of a declaratory judgment, to warrant an injunction.[171]

The delineation of a difference between the requirements for declaratory and injunctive relief also raises an interesting possibility concerning Justice Black's views in *Cameron.* Black indicated that to obtain "an *injunction* against the enforcement of any kind of a state statute,"[172] both a vague or overbroad statute and a plan to harrass speech activities must be established. But Zwickler, rather than alleging prosecutorial abuse, alleged instead that Koota was a "diligent and conscientious public officer" who, "pursuant to his duties intends or will again prosecute the plaintiff for his [intended] acts of distribution."[173]

Although the issue of whether one or both evils is required for *declaratory* relief is not reached by the Supreme Court in *Koota,* Black's concurrence in the remand portends that perhaps he is willing to allow declaratory relief if *either Dombrowski* evil is established, and only requires both for injunctive relief. A "bad faith" prosecution may be the additional "harm" Justice Black would require.[174]

2. ZWICKER V. BOLL

Zwicker v. Boll[175] presents many of the same problems as *Koota,* but in a different posture. First, whereas in *Koota* one issue was

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170 *Id.* at 255 (emphasis added).

171 One possibility would be that the plaintiff would have to show that the state courts were not acting pursuant to the declaratory judgment. If the state proceeded with pending prosecutions, or initiated new prosecutions, under the statute declared unconstitutional, injunctive relief would be warranted. This is the assumption upon which the courts in Douglas v. City of Jeanette, 319 U.S. 157 (1943); Baker v. Binder, 274 F. Supp. 658 (W.D. Ky. 1967); Ware v. Nichols, 266 F. Supp. 564 (N.D. Miss. 1967) proceeded.

172 Cameron v. Johnson, 381 U.S. 741, 748 (1965) (emphasis added).

173 Zwickler v. Koota, 261 F. Supp. 985, 988 (E.D.N.Y. 1966). The district court found this allegation inadequate to support either declaratory or injunctive relief against the statute attacked as vague and overbroad, because "there is no suggestion that the alleged threatened prosecution of the plaintiffs will be undertaken in bad faith." The lower court therefore extended Black's view on injunctive relief to a request for declaratory relief as well. This is not the Supreme Court's view, however.

174 Assuming on remand that the suit is not declared moot, see Zwickler v. Koota, 389 U.S. 241, 252-253, nn.15-16 (1967), the district court may have to directly meet the issue of whether a bad faith prosecution, in addition to a vague or overbroad statute, is a necessary element for declaratory, as opposed to injunctive, relief.

175 270 F. Supp. 131 (W.D. Wis. 1967).

whether the suit had been filed too early, the plaintiffs in *Boll* (according to the district court) filed their suit too late, since the misdemeanor prosecutions already had begun and not-guilty pleas had been entered. Second, in *Koota* there had not been a constitutional interpretation of the statute in question by the state's highest court, and the district court stated this as a reason for absention.[176] In *Boll*, there had been a state supreme court interpretation of the statute in question, and the district court abstained on the ground that the constitutional issue had already been resolved in favor of the statute.[177]

Boll arose out of the arrest of 19 antiwar demonstrators on the University of Wisconsin Madison campus. State criminal complaints were filed shortly after arrest charging them with disorderly conduct. All were immediately arraigned and pleaded not guilty. Prior to trial, a *Dombrowski*-type complaint was filed alleging prosecution in bad faith and prosecution under a vague and overbroad statute. As in *Dombrowski*, the panel never held an evidentiary hearing, but only heard legal arguments on the vagueness attack. The court, in a two to one decision, dismissed the suit without reaching any substantive issue, indicating they would abstain since the issues were appropriate for decision in the state criminal proceeding.

The decision of the court stated that "[a]pplying common sense principles of comity to the existing situation, I find no compelling reason why this court should assert power to decide these issues in this action."[178] The court avoided the question of whether section 1983 is an exception to section 2283, stating that "it is not necessary" to make such a determination.[179] The concurring judge rested his abstention primarily on the dictates of section 2283, although stating agreement with the court's opinion.

> In my view an act of Congress, 28 U.S.C. § 2283, even when read together with 42 U.S.C. § 1983, forbids this court from staying the state court actions, and impliedly, at least admonishes us, if it does not prohibit us from superseding, in effect, the state court resolution of these federal issues by issuing a declaratory judgment.[180]

An important difference between *Boll* and *Koota* is that in *Boll* the Supreme Court of Wisconsin had met a vagueness attack on the disorderly conduct statute by declaring it constitutional in *State v. Givens*.[181] Therefore, the rationale that the federal court should

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176 261 F. Supp. at 992-93.

177 The Wisconsin Supreme Court found the disorderly conduct statute challenged in *Boll* to be not unconstitutionally vague in State v. Givens, 28 Wis. 2d 109, 135 N.W.2d 780 (1965).

178 Zwicker v. Boll, 270 F. Supp. 131, 134 (W.D. Wis. 1967).

179 *Id.* at 136.

180 *Id.* at 137 (concurring opinion).

181 28 Wis. 2d 109, 135 N.W.2d 780 (1965).

abstain when the highest state court has not had an opportunity to interpret the statute should have been inapplicable here. Yet the court in *Boll* abstained and sent the case back to the state for a "second bite," while the Supreme Court in *Koota* remanded for consideration on the merits in spite of the lack of a New York Court of Appeals interpretation of the statute.

The *Boll* court badly confused three points. It failed to distinguish between the two distinct *Dombrowski* evils; it failed to recognize the difference between determining whether it will abstain, and determining whether relief is appropriate; and it failed to understand the requirements for obtaining the two distinct types of relief requested—declaratory and injunctive.

In failing to distinguish the vagueness and overbreadth attack from the prosecutorial abuse attack, the court showed the same confusion displayed by the lower court in *Koota*. Even under Black's narrowing conception of the problem, it is not disputed that there are two separate evils. Justice Black thinks both must be present to warrant injunctive relief; *Dombrowski* indicated either is sufficient. But the *Boll* court argued that it would abstain on the vagueness question because bad faith had not been established. Further, the court continued, since the Wisconsin Supreme Court had already upheld the constitutionality of the statute, there was no need to consider it anew.[182]

But any discussion of the failure to establish bad faith is irrelevant. The conduct of the plaintiffs,[183] the motives and purposes of the state in pursuing the prosecution, and the availability of state procedures to raise the issues are all irrelevant under the vagueness and overbreadth wing of *Dombrowski*. Further, even if certain conduct were relevant, no evidentiary hearing was allowed, and factual conclusions were therefore inappropriate. It is precisely because the Wisconsin Supreme Court has upheld the statute in a former prosecution that *Dombrowski* requires federal decision in this case. Justice Brennan said:

> Because of the sensitive nature of constitutionally protected expression, we have not required that all of those subject to overbroad regulations risk prosecution to test their rights. . . . If the rule were otherwise, the contours of regulation *would have to be hammered out case by case* —and tested only by those hardy enough to risk criminal prosecution to determine the proper scope of regulation. . . . Moreover, we have not thought that the improbabil-

182 270 F. Supp. at 135-36.

183 When plaintiff's conduct appears from the indictments to be "hard core," *i.e.*, conduct that would obviously be prohibited under any construction of the statute being attacked as vague, plaintiff may lose his standing to attack the statute in this collateral fashion. *See* Dombrowski v. Pfister, 380 U.S. 479, 491-92 (1965); Carmichael v. Allen, 267 F. Supp. 985 (N.D. Ga. 1967).

> ity of successful prosecution makes the case different. 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.*[184]

Dombrowski's command that abstention is inappropriate in certain first amendment cases does not mean that the plaintiffs will necessarily prevail, or that if they prevail they will be entitled to injunctive relief. What it *does* mean is that the federal court, not the state court, has the duty to decide the first amendment issues. "Plainly, escape from that duty is not permissible merely because state courts also have the solemn responsibility, equally with the federal courts."[185] *Boll* fails to recognize this difference. It seems to operate on the assumption that if the court foregoes abstention, plaintiffs have prevailed. But abstention goes to the exercise of jurisdiction, not to the granting of relief.

> We yet like to believe that wherever the Federal courts sit, human rights under the Federal Constitution are always a proper subject for adjudication, and that we have not the right to decline the exercise of that jurisdiction simply because the rights asserted may be adjudicated in some other forum.[186]

Finally, *Koota* makes clear that the requirements for declaratory and injunctive relief are distinct. *Boll* treats the requirements for each type of relief as identical.

3. BROOKS V. BRILEY

Brooks v. Briley[187] is the most recent case to accept Black's reasoning as persuasive. Plaintiffs, members and officers of the Student Nonviolent Coordinating Committee (SNCC), challenged the legitimacy of the prosecution of three of their members under various Tennessee statutes. The charges grew out of disturbances in Nashville, Tennessee. A full evidentiary hearing was held on plaintiffs' charge that officials of Nashville had purposely pro-

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184 Dombrowski v. Pfister, 380 U.S. 479, 491-92 (1965) (emphasis added). *Givens* considered only a vagueness attack on WIS. STAT. § 947.01(1) (1963). See Connally v. General Constr. Co., 269 U.S. 385 (1926). This was pointed up by the dissent in Zwicker v. Boll, 270 F. Supp. 131, 144 (W.D. Wis. 1967). *Zwickler v. Koota* indicates that disposing of the "vagueness" attack does not meet the "overbreadth" attack.

> Appellant's challenge is not that the statute is void for vagueness, . . . [but rather] his constitutional attack is that the statute, although lacking neither clarity nor precision, is void for "overbreadth," that is, that it offends the constitutional principle that "a governmental purpose to control or prevent activities constitutionally subject to state regulational may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms." 389 U.S. at 249-50.

185 Zwickler v. Koota, 389 U.S. 241, 248 (1967).

186 *Id.*

187 274 F. Supp. 538 (M.D. Tenn. 1967).

voked the violence which occurred and were now prosecuting them in bad faith. The court's characterization of the issue in the case telegraphs its decision: "[T]he action, basically, involves the right of state and municipal law enforcement authorities, including the local police, to cope effectively with a serious outbreak of *violence and lawlessness* without *interference* from the long arm of a federal injunction."[188] In a lengthy decision, the court stated,

> we find to be devoid of factual support, and indeed even fanciful, the plaintiffs' charge that policemen and other officers and officials of the Metropolitan Government of Nashville, combined or conspired in bad faith to harass the plaintiffs and to deprive them of their constitutionally protected rights.[189]

The court also held that a class action could not be maintained and that it would abstain on the constitutionality of the challenged statutes, leaving the remaining individual plaintiffs to their criminal defense in the state courts.[190] The court reasoned that bad faith on the part of the state, in prosecuting under a vague and overbroad statute, must be established before the court will consider the vagueness challenge.[191]

The court further found no "chilling effect" on plaintiffs' exercise of their rights of free speech arising from the vague statutes. As with "bad faith," the court considered irreparable harm as to the vagueness attack to be an objectively ascertainable series of facts, discoverable only through a perusal of the evidence. Since no such "harm" seems to have been demonstrated from the hearing, the court abstained.

Making the same mistake found in the district court decisions in *Boll, Koota,* and *Dombrowski* itself, the court in *Brooks* failed to understand *Dombrowski*'s broadened interpretation of "irreparable harm"—that in the area of speech activities, injury is assumed from the existence of the vague statute. This misunderstanding led the court to indicate that state remedies, including defense of the criminal actions, will protect plaintiffs' rights.

But even assuming that the plaintiffs in *Brooks* did not establish that they were entitled to relief, the court made the more basic error of abstaining. The court misinterpreted not only *Dombrowski,* but Black's dissent in *Cameron.* Although Black feels prosecutorial abuse is necessary to injunctive relief, he clearly does not support abstention. *Koota* also made clear that the question of the quantity and quality of injury necessary to obtain an injunction is distinct from the question of the propriety of abstention. Further, since declaratory relief may be granted "irrespective of

188 *Id.* at 541 (emphasis added).
189 *Id.*
190 *Id.* at 549.
191 *Id.* at 551.

. . . the propriety of an injunction,"[192] a finding of "irreparable harm" is not only unnecessary to forego abstention, but may be unnecessary to obtain declaratory relief.

B. The Eager Courts

1. CARMICHAEL V. ALLEN

On September 8, 1966, Stokely Carmichael, then Chairman of SNCC, was arrested in Atlanta, Georgia, on charges of riot and disorderly conduct.[193] On September 13 and 14, seventeen others, including seven SNCC workers, were charged with riot or "circulating insurrectionary literature,"[194] or both.

On September 9, 1966, a federal suit was filed[195] attacking the attempts to prosecute as "a bad faith effort to interfere with admitted rights by misuse of the state's criminal procedures,"[196] and as based on vague and overbroad[197] statutes. This latter attack was made on the Georgia insurrection and riot statutes and on the disorderly conduct ordinance of Atlanta.

In *Carmichael*, a three judge panel declared four sections of the insurrection statute and the entire disorderly conduct ordinance unconstitutional. Attempted or threatened prosecutions were enjoined.[198] The court abstained from determining the constitutionality of the riot statute on the ground that "the conduct charged [in the indictment] would come within a possible permissible constitutional construction of the statute by the state court,"[199] obtainable in a single state proceeding.

Since it found five of the laws unconstitutional, it only discussed the bad faith attack with regard to the riot statute. It held that allegations that the statute was being used in bad faith, "regardless of whether [it] . . . is constitutional or not,"[200] entitled the complaining parties to relief if true. The court concluded, however, after an evidentiary hearing, "that the plaintiffs have simply failed to carry this burden."[201]

The *Carmichael* court clearly accepted the "double pronged attack" of *Dombrowski*,[202] and rejected Black's *Cameron* dissent. The vagueness attack alone, without regard to prosecutorial abuse,

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192 Zwickler v. Koota, 389 U.S. 241, 254 (1967).
193 The arrests were made under GA. CODE ANN. § 26-5302 (1953) and Atlanta Ordinance § 20-7.
194 GA. CODE ANN. § 26-904 (1953).
195 Carmichael v. Allen, 267 F. Supp. 985 (1965).
196 *Id.* at 987.
197 *Id.*
198 *Id.* at 993-95.
199 *Id.* at 996.
200 *Id.*
201 *Id.* at 997.
202 *Id.* at 992.

entitled the plaintiffs to declaratory and injunctive relief from prosecutions under five of the laws. And only when the riot statute survived this first attack did the court go on to consider whether it was being applied in bad faith. The relief denied in *Brooks* as a "disruption of the delicate division of authority between federal and state governments," and an invitation "to disrespect for the law itself,"[203] was granted in *Carmichael* as essential to the protection of that "delicate division of authority."

2. WARE V. NICHOLS

In October 1964, eight voter registration workers in Belzoni, Mississippi, were arrested and charged with criminal syndicalism.[204] In *Ware v. Nichols*,[205] the federal court struck down the entire statute as "so vague and overbroad as to violate the First Amendment rights read into state laws by the Fourteenth Amendment."[206] Citing *Dombrowski* and *Cameron*, the court rejected defendants' urgings to abstain "until the Supreme Court of Mississippi has construed the Criminal Syndicalism Act."[207] The court responded simply, "In the circumstances this case presents, the abstention doctrine is inappropriate."[208]

Although declaring the Mississippi statute unconstitutional on its face, the court denied an injunction on the assumption that "the state and county officials will withhold any action to enforce the Act, until a final judgment is rendered. Should this case not be appealed or should the Supreme Court affirm our judgment on appeal, we may assume that the charges against the plaintiffs will be dismissed."[209] The court, therefore, did not reach "the question of whether 28 U.S.C. 1343, 42 U.S.C. 1971, and 28 [*sic*] U.S.C. 1983 are exceptions to 28 U.S.C. 2283, the federal anti-injunction statute."[210] Like *Douglas*, it assumed that the declared invalidity of the statute removed the threat of prosecution and hence the need for an injunction.

The *Ware* court not only accepted the *Dombrowski* two-pronged attack, but recognized the *Koota* distinction between declaratory and injunctive relief. The court did not seek "irreparable harm" in the facts of the case, as was sought by the district courts in

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203 274 F. Supp. at 552.
204 MISS. CODE ANN. §§ 2066.5-01 to .5-06 (Supp. 1964).
205 266 F. Supp. 564 (N.D. Miss. 1967).
206 *Id.* at 569.
207 *Id.* at 566.
208 *Id.*
209 *Id.* at 569.
210 *Id.* Judge Wisdom, concurring, would find all three sections to be exceptions to § 2283. In addition to agreeing that the statute is invalid, he would find that there had been prosecutorial abuse, since plaintiffs did "nothing more than express opposition to their subordinate place in society." *Id.*

Boll, Koota, and *Brooks,* but reiterated that the threat of sanctions arising from the overbroad statute has a sufficient chilling effect to require immediate federal intervention in the form of a declaratory judgment.

3. MCSURELY V. RATLIFF

In the closest replay of *Dombrowski* to come before the courts, the McSurelys and the Bradens, officials and field organizers of the Southern Conference Educational Fund, Inc. (SCEF), and Joseph Mulloy, a field representative for Appalachian Volunteers, were arrested in Pike County, Kentucky, and charged with advocating sedition and criminal syndicalism.[211] A federal suit was brought on September 1, 1967, to enjoin the criminal proceedings.[212] In what must be considered the most exciting victory for a vigorous *Dombrowski* doctrine, the panel declared the pertinent section of the Kentucky sedition statute unconstitutional, and issued a permanent injunction against present or future prosecutions under the statute. In its two page unpublished order, the court stated: "Being of the opinion that K.R.S. 432.040 is unconstitutional, we find under the circumstances of this case that Dombrowski v. Pfister is applicable and the doctrine of abstention is not applicable."[213]

The court's opinion, issued several weeks after the order, found the statute clearly unconstitutional, and preempted by federal legislation. The court disposed of the defendants' assertions that the doctrine of abstention, as well as the prohibition of the anti-injunction statute, barred relief. Abstention, the court felt, was precluded because a rehabilitation of the statute was impossible. The statute was so broad and sweeping that nothing short of rewriting it could bring it within permissible constitutional limitations.[214] The anti-injunction statute was not a bar since, like in *Dombrowski,* an indictment had not been returned, and there-

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211 All five were charged under KY. REV. STAT. § 432.040 (1962). As in *Dombrowski,* plaintiffs' homes were searched at the time of their arrest and their libraries and official and personal files were seized and removed from the premises. The seized documents, like those seized from Dombrowski and others, were of great interest to a congressional committee. In this case, Senator McClellan's Subcommittee on Investigations immediately subpeonaed the seized documents from Ratliff. In the course of the proceedings to challenge the legitimacy of the subpeona, and the investigation pursuant to which it was issued, the United States Supreme Court has twice restrained Ratliff from releasing the seized material pending a final decision on the challenges. McSurely v. Ratliff, 389 U.S. 949 (1967); McSurely v. Ratliff, 390 U.S. 914 (1968).

212 McSurely v. Ratliff, Civil No. 1146 (E.D. Ky., Sept. 14, 1967).

213 McSurely v. Ratliff, Order No. 1146 (E.D. Ky., Sept. 14, 1967). The order in *McSurely* was issued from the bench after only two hours of deliberation.

214 In 1920 the Governor of Kentucky asserted that the law "goes far afield and far beyond syndicalism and sedition." *Id.* at 1.

fore no "proceeding" was pending in the state court at the time the federal suit was filed.

The court, echoing *Ware* and *Carmichael*, found irreparable harm in the "sweeping application" of the statute, and required no factual support from the particular events of the case, although it carefully considered the allegations and supporting documents. If *Dombrowski* was meant to give an immediate remedy in the district courts, *McSurely* implemented that mandate without reservation.

4. BAKER V. BINDER

Four days after the Tennessee federal court had abstained on the issue of the constitutionality of several statutes in *Brooks v. Briley*,[215] a three judge Kentucky panel decided *Baker v. Binder*.[216] The court declared three Kentucky statutes and three Louisville ordinances "unconstitutional and void."[217]

"The thrust of the complaint [was] double edged in nature."[218] It asked for declaratory judgment on the constitutionality of the statutes and ordinances, and for injunctive relief from their enforcement against the plaintiffs on the ground that it was "carried forth by defendants with the specific purpose and resultant effect of suppressing plaintiffs' peaceable protest against alleged racial discrimination in the sale and rental of housing in the city of Louisville, Kentucky."[219] The facts disclosed the nature of demonstrations by the plaintiffs, the "heckling" by their opponents, and the conduct of the police.[220]

The court found no proof of "selective enforcement," "police brutality," or "suppression of constitutional rights."[221] The bad faith allegations were dismissed with these words: "Very frankly, we as a Court are at a loss to determine what the police could have done, or left undone, under the circumstances, with which the plaintiffs would have found no fault."[222] In *Brooks*, a failure to establish bad faith was the basis on which the court abstained from considering the constitutional challenge to the statutes. But the separate wings of *Dombrowski* were clearly understood and applied in *Baker*.

> 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*

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215 See text accompanying notes 187-92 *supra*.
216 274 F. Supp. 658 (W.D. Ky. 1967).
217 *Id.* at 661-64.
218 *Id.* at 659.
219 *Id.*
220 *Id.* at 659-60.
221 *Id.* at 660.
222 *Id.*

> *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.*[223]

The basis for relief was found in the statutes' susceptibility of being used to suppress the constitutional rights of the plaintiffs, even though the court specifically found that they had not been so used in this case. Since the possible unconstitutional application, "in and of itself, [may] result in a suppression of constitutional rights, i.e., 'chilling effect' . . . we find ourselves unable to invoke the abstention doctrine as urged upon us by the defendants."[224]

As in *Ware*, the court issued declaratory judgments voiding the six laws, but refused an injunction on the assumption that if plaintiffs ultimately prevailed, the state would dismiss all charges. Unlike *Ware*, however, the court specifically found "that the statutes relied upon by the plaintiffs as the basis of their cause of action [including section 1983] herein are exceptions to 28 U.S.C. 2283,"[225] and that the court had the power to grant injunctive relief if it became necessary.

C. *Strengths and Weaknesses*

We return to differences implicit in the quotations beginning this discussion of the two camps. We find the reluctant courts, in harking back to the *Pullman-Douglas* view, failing to recognize three accommodations which have been made in the traditional balance between state and federal courts when first amendment activities are threatened. First, they incorrectly declare that the presence of a "bad faith" prosecution is essential to establish the irreparable harm necessary to support relief under the vagueness-overbreadth attack on a statute. *Boll* and *Brooks*[226] explicitly agree with Justice Black that

> an injunction against any enforcement of any kind of the state statute . . . could issue there *only because* (1) there were threats of prosecutions purely to harrass, with no hope of ultimate success, [and] (2) the law was challenged as, and found to be on its face, an "overly broad and vague regulation of expression . . . ."[227]

Carmichael, Baker, Ware, and *McSurely*, however, all accept the "two pronged" theory of *Dombrowski*. None of these cases required proof of a "bad faith use" of the vague statute. The feared chilling effect arising from the threatened prosecutions under the

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223 *Id.* (emphasis added).

224 *Id.*

225 *Id.* at 664.

226 See also the district court opinions in Zwickler v. Koota, 261 F. Supp. 985 (E.D.N.Y. 1966); Dombrowski v. Pfister, 227 F. Supp. 556 (E.D. La. 1964); Baggett v. Bullitt, 215 F. Supp. 439 (W.D. Wash. 1963).

227 Cameron v. Johnson, 381 U.S. 741, 748 (1964).

statute was sufficient to support declaratory or injunctive relief.

Second, the reluctant courts improperly abstain. *Koota* made crystal clear, if *Dombrowski* and *Cameron* did not, that an appropriate *attack* on a statute touching first amendment activities as being, on its face, unconstitutionally vague or overbroad, is sufficient to require a federal trial court to decide the issue on the merits. Other cases also require the foregoing of abstention when the attack is on the legitimacy of the conduct of state officials, whether in initiating a sham prosecution,[228] intimidating Negroes from voter registration,[229] or a myriad of other activities which infringe constitutionally protected federal rights.[230] Yet the courts in *Boll* and *Brooks* found support, either in the common-law doctrines of comity and abstention, or in the anti-injunction statute, section 2283, for abstention in cases in which *Dombrowski* and *Koota* clearly dictate otherwise.

The eager courts, however, uniformly reject the applicability of the abstention doctrine or the anti-injunction statute, either expressly or by implication, in granting relief. In all four cases, a prosecution had been instituted *prior* to the filing of the federal suit, but in one way or another, section 2283 was avoided. *Baker* expressly found the Civil Rights Act to be an "exception" to section 2283. *Carmichael* and *McSurely* implicitly made this finding by granting injunctive relief against the pending prosecutions. In *Carmichael*, the issue was never discussed. In *Ware*, the court avoided the statute's bar against "injunctions" by granting only declaratory relief.[231]

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[228] Abstention as to a factual hearing was held inappropriate on the "bad faith" attack in Dombrowski v. Pfister, 380 U.S. 479, 498 (1965). *See also* Baker v. Binder, 274 F. Supp. 658 (W.D. Ky. 1967); Brooks v. Briley, 274 F. Supp. 538 (M.D. Tenn. 1967); Carmichael v. Allen, 267 F. Supp. 985 (N.D. Ga. 1966).

[229] Smith v. Allwright, 321 U.S. 649 (1944); Giles v. Harris, 189 U.S. 475 (1903). *Compare* United States v. Wood, 295 F.2d 772 (5th Cir. 1961), *cert. denied*, 369 U.S. 850 (1962), *with* United States v. McLead, 385 F.2d 734 (5th Cir. 1967); United States v. Edwards, 333 F.2d 575 (5th Cir. 1964); *and* United States v. Clark, 249 F. Supp. 720 (S.D. Ala. 1965). *See* 2 T. EMERSON, D. HABER & N. DORSEN, POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES 1105-1229 (Student ed. 1967).

[230] See generally, 2 T. EMERSON, D. HABER & N. DORSEN, *supra* note 229, for discussion of the problems of the legitimacy of state conduct with regard to education, the administration of justice, employment, housing, public accomodations, and welfare services.

[231] In *Baker*, the court followed the *Ware* procedure and granted only declaratory, and not injunctive, relief. The court in *Baker* did find § 1983 to be an exception to § 2283, however. It seems probable that once it is decided that § 2283 does not bar declaratory relief, and such relief has been granted, an injunction can be issued without worrying about the § 1983-§ 2283 problem because § 2283 specifically provided that an injunction may be issued against state court proceedings "to protect or effectuate" a judgment.

The inarticulate premise on which these two camps differ on the abstention issue is whether state court procedures and remedies are likely to be *effective* in protecting first amendment rights. The eager courts accept the underlying premise of *Dombrowski* that to require resort to the state courts will probably render protection ineffective,[232] and that federal procedures must be available to grant immediate protection if relief is warranted. There is little or no discussion of the abstention and comity arguments that occupy so much space in the decisions of the reluctant courts —arguments which, *sotto voce*, accept the premise that relief through the state court system is available and adequate.[233]

This failure of both sides to discuss the underlying issue has weakened the decisions. In rushing to enforce *Dombrowski*'s mandate, the eager courts have ignored, avoided, or summarily dealt with the issues that should have been met directly. The reluctant courts overuse, and sometimes misuse, ripeness, comity, and abstention arguments to avoid decision on questions which *Dombrowski* commands them to decide. It is incumbent upon the *eager* courts to meet these issues to strengthen *Dombrowski* and assert a new aggressive federalism.

Finally, *Boll* and *Brooks* fail to adequately distinguish between the requirements for declaratory and injunctive relief. *Boll* indicates that failure to establish need for injunctive relief also bars declaratory relief. And *Brooks* indicates that "it is clear that the prohibition under section 2283 against enjoining state court proceedings cannot be avoided by seeking a declaratory judgment."[234] *Koota* seems to dispense with the notion that there is no difference between declaratory and injunctive relief in this area.

Ware and *Baker* understood and acted upon this distinction even before *Koota* was decided. Although *Baker* indicated that the Civil Rights Act was an exception to the anti-injunction statute, it refrained from issuing an injunction on the assumption that "the Commonwealth of Kentucky and City officials will withhold any enforcement action against . . . plaintiffs."[235] *Ware* acts upon the same assumption in granting only declaratory relief, but "[does]

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232 Dombrowski v. Pfister, 380 U.S. 479, 499 (1965) (dissenting opinion).

233 The point is only broached in Carmichael v. Allen, 267 F. Supp. 985 (N.D. Ga. 1966), when the court abstains from determining the validity of the Georgia riot statute on the grounds that (1) the indictments charged "hard core" conduct, and (2) the statute was susceptible of a permissible limiting construction in a single state criminal proceeding. Arguably, however, since the indictments were returned after the federal suit was filed, and only because the federal court refused to issue a temporary restraining order, the court should have considered the case as falling within the *Dombrowski* "loophole," 380 U.S. at 482 n.2, since the indictments were returned only because the federal court erroneously refused to restrain the state. *See* McSurely v. Ratliff, Civil No. 1146 (E.D. Ky., Sept. 14, 1967).

234 274 F. Supp. at 553.

235 274 F. Supp. at 664.

not reach the question of whether . . . 1983 [is an] exception to . . . 2283."[236] *Koota* points up the distinction, therefore, in a suit filed *before* any state proceeding was initiated. *Ware* and *Baker*, operating on the same assumption about the conduct of state officials, but on differing legal interpretations of the relation between sections 1983 and 2283, make this distinction operative in suits filed *after* state criminal prosecutions have begun.[237]

V. PRESUMPTIONS AND PERSPECTIVES

This article has, so far, been devoted primarily to an analysis of the legal issues which must be resolved in providing maximum protection for first amendment rights while accommodating the conflicts which may arise between state and federal courts. However, these issues are decided within a conceptual framework of what the problems are, how federalism works and should work in this area, and what solutions are needed. Differing perspectives on the social dangers posed by restricting the state in its administration of public order as opposed to restricting speech activities; various presumptions about the operation of the state and federal court systems; and an understanding of the need for immediate rather than delayed protection of first amendment rights, shape this framework. The aim of this conclusion is merely to pose some relevant considerations about these problems.

Dombrowski did not change the view that first amendment rights are of paramount importance in our social and political scheme. Likewise, it did not really alter the understanding of the threats to speech activities posed by vague or overbroad criminal statutes.[238] What it did was begin to recognize that the "scheme of things" has gone askew. The preferential treatment to be ac-

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[236] Ware v. Nichols, 266 F. Supp. 564 (N.D. Miss. 1967). Both *Ware* and *Baker* support the comity doctrine on the assumption that state officials will heed the declaratory judgment.

[237] Since the preparation of this article, many additional suits have been filed requesting declaratory, injunctive, or other relief against threatened or pending criminal prosecutions affecting first amendment rights. These suits are all grounded in the theories made viable by *Dombrowski*. Cases which have reached decision include Burmeister v. New York City Police Dep't, 275 F. Supp. 690 (S.D.N.Y. 1967); Landry v. Daley, Civil No. 67-C-1863 (N.D. Ill., E. Div., March 1, 1968) (two opinions: one judge declaring two Chicago ordinances unconstitutional; three judge court finding two Illinois statutes valid). Cases still pending in federal district courts include Soglin v. Kauffman, Civil No. 67-C-141 (W.D. Wis. 1967) (challenging WIS. STAT. § 947.01 [1965], the disorderly conduct statute challenged in Zwicker v. Boll, 270 F. Supp. 131 [W.D. Wis. 1967]); Wynn v. Bryne, Civil No. 991-67 (D.N.J. 1967) (challenging the hundreds of prosecutions arising out of the 1967 Newark riots); Burks v. Schott, Civil No. 6478 (S.D. Ohio 1967) (challenging prosecutions arising out of Cincinnati urban disorders); Warren v. Groves, Civil No. 3483 (S.D. Ohio 1968) (challenging the Ohio "riot" statute).

[238] Amsterdam, *supra* note 66.

corded first amendment freedoms in theory was not often enough found where it counts: on the street, at the police station, in city hall, or in the lowest state courts.

The doctrines of vagueness and overbreadth serve (in the area of the first amendment) partly as a mediator between "all the organs of public coercion of a state and . . . the *institution* of federal protection of the individual's private interests."[239] Vagueness, basically a due process concept, rests primarily on the rationale that a person is entitled to a "fair warning" as to what conduct is criminally proscribed. The rationale goes beyond this to require that statutes also be specific so that a trial court may properly judge guilt or innocence, and an appellate court may have some meaningful frame of reference within which to review what the trial court has done. Overbreadth is concerned with a criminal statute's language infringing first amendment activities, either explicitly or by being susceptible to possible application to protected conduct. The value decision which places speech activities in a preferred position, bolstered by the supremacy clause, dictates to the state that "when it approaches the foothills of First Amendment freedoms, it must step with far greater care"[240] in proscribing conduct than in other areas.

Both doctrines, however, are concerned with more than the precision of legislative drafting. They express substantive concerns. Speaking to this, Professor Amsterdam has stated:

> The doctrine determines, in effect, to what extent the administration of public order can assume a form which, first, makes possible the deprivation sub silentio of the rights of particular citizens and second, makes virtually inefficacious the federal judicial machinery established for the vindication of those rights.[241]

Dombrowski, however, was not directed to any reevaluation of the preference for free speech or the dangers of vague and overbroad statutes, but to the ways in which these preferences can be asserted and these dangers met.[242]

The real remaining conflict is which court system should initially be allowed to consider these issues. Until *Dombrowski*, except in extraordinary situations, it was assumed that the state court

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239 *Id.* at 81.

240 Zwicker v. Boll, 270 F. Supp. 131, 147 (W.D. Wis. 1967).

241 Amsterdam, *supra* note 66, at 81.

242 It is no hyperbole to say that the critical issues of human liberty in this country today are not issues of rights, but of remedies. . . . The American citizen has a right of free expression, but he may be arrested, jailed, fined under guise of bail and put to every risk and rancor of the criminal process if he expresses himself unpopularly. The "right" is there on paper; what is needed is the machinery to make the paper right a practical protection. Brief for NAACP Legal Defense and Education Fund as Amicus Curiae, at 17-18, Dombrowski v. Pfister, 377 U.S. 976 (1964).

system should consider the matter in the first instance, since it was in a better position to construe its state's criminal statutes, and since it was the state that would lose a weapon against civil disorder should a statute fall. Because a properly functioning state process is essential to a working federalism in the criminal area, state courts should be reinforced in their roles as the primary tribunals to consider these matters. But it is suggested, perhaps rather obviously, that the state court's role, whether fulfilled or not in reality, includes making sure that the state does not function in the criminal field so as to destroy or thwart federal rights. There is a difference between what can generally be expected of a state court when it is resolving conflicting state and federal interests in a particular case, and when it is the very existence of the state court proceeding that is challenged as the threat to the federal right.[243]

Specifically, the maintenance of maximum freedom in the area of speech is of paramount national interest. It should be of paramount state interest. The question therefore arises, as in *Dombrowski*, whether the very existence of a state criminal proceeding, or a state criminal statute, will be destructive of this paramount interest. It has been held time and again, for example, that various prior restraints on speech activities are invalid, regardless of the fact that, in a particular battle, "speech" may triumph over the restraint (for example, a police chief with unlimited discretion to issue parade permits *does* grant such a permit to organization X).[244] *Dombrowski* has determined that threats under vague or overbroad statutes, and the existence of certain criminal prosecutions, are likewise invalid because by their very nature they restrain or chill legitimate speech activities. The assumption that the chilling effect will occur is made regardless of the prospects for success or failure in the particular case. The key reason in both instances is that the normal procedures—defense of a state criminal prosecution and the appellate route—have the immediate and permanently destructive effect of restraint on the exercise of speech. The only corrective relief is so distant and ephemeral that the delayed vindication of the first amendment rights is no real relief at all. The delay alone is a denial of effective protection of speech activities. Add the *Dombrowski* presumption that criminal prosecutions normally do not allow for correction of the evils and the "unarticulated assumption that state courts will not be as prone as federal

[243] Professor Amsterdam notes, as must I, that "I am not making the naive assumption that all federal district judges are appropriately sympathetic to the enforcement of all or any federal rights. . . . Institutions must be designed in view of generalities; as a generality, I have no doubt that the federal judges are more enlightened concerning, more tolerant toward, and more courageous to protect, federal rights than are their state counterparts." Amsterdam, *supra* note 66, at 837 n.186.

[244] *See* Near v. Minnesota, 283 U.S. 697 (1931); Emerson, *The Doctrine of Prior Restraint*, 20 LAW & CONTEMP. PROB. 648 (1955).

courts to vindicate constitutional rights promptly and effectively,"[245] and it becomes apparent that there is a glaring need for uniform and speedy relief.[246]

It is submitted that the only way at present to achieve this uniform, speedy relief throughout the nation is to *require* federal district courts to decide challenges made to the legitimacy of state proceedings or statutes. Although a working relationship between the state and federal courts is obviously desirable, it is not necessarily the pinnacle value.

> Stated as an unqualified preference for state administration of federal law which takes its shape within a matrix of state law regulation, the argument evidently proves too much; for every congressionally created federal trial jurisdiction constitutes to some extent a subordination of that value to the values of federal law enforcement by nationally responsible tribunals. And if it is true that constitutional restrictions on the state criminal process present a particularly fertile field for valuable interaction of federal and state law in the state courts, it is also true that they present a particularly strong adversity of state and federal interests, and hence a particularly strong risk that federal rights will suffer if left in state hands.[247]

Another point which must be considered is that the issue is not *whether* federal courts should have any jurisdiction to review the legitimacy of state criminal proceedings, but whether the stage at which the review occurs should be altered. "Not all intrusions are equally abrasive."[248] Normally, federal courts intrude only after procedures within the state have been exhausted. "Speech" therefore fights the same battle over and over again, and the state is given a renewed opportunity in every case to correct a given evil. Yet value decisions have been made in related areas of federal jurisdiction—removal in civil rights cases, diversity and federal question jurisdiction, and anticipatory habeas corpus[249]—that the state process inherently has sufficient prejudice within it to warrant a presumption that federal relief must be available at an early stage in the process. Section 1983 created, and *Dombrowski* has finally recoguized, the presumption that the state process is inherently ill-equipped to handle the kinds of challenges to state authority made in a way which will afford any meaningful protection to speech activities. Arguably, intrusion by the lowest federal court—more aware of local interests and pressures, and closest to the problems—creates less conflict than intrusion by the Supreme Court on appeal. I do not speak of "conflict" in the sense

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245 Dombrowski v. Pfister, 380 U.S. 479, 499 (1965) (dissenting opinion). *See also* Brewer, *supra* note 2, at 95; Boyer, *supra* note 2, at 85.

246 *See* Brewer, *supra* note 2, at 71, 94, 95; Boyer, *supra* note 2, at 51.

247 Amsterdam, *supra* note 66, at 836.

248 *Id.* at 835.

249 28 U.S.C. §§ 1443, 1331-32, 2241 (1964).

that some of the local citizenry get any less excited about "federal interference."[250] I speak of "conflict" in terms of preserving as much of the state process as possible. The intrusion comes at an early stage in the process, rather than at the very end, and the state saves a considerable investment in time, money, and prestige if it learns of its errors early. Intervention at this stage would allow the state a meaningful opportunity to correct the evil; for example, by obtaining a permissible limiting construction of the vague statute in a state declaratory judgment proceeding; by finding another, constitutionally specific statute under which to charge; by deciding not to pursue prosecution any further; by disciplining officials found to be acting in "bad faith;" and ultimately, it is hoped, by providing affirmative protection to speech activities. If the state then proceeded further, it would do so with the contours of its powers clearly defined and the importance of the federal interests firmly and freshly impressed upon it by the federal court.[251]

Another reason for early consideration by a federal court lies in the need for a fact-finding process as free as possible from bias, prejudice, and confusion. With regard to a bad faith attack, for example, the very evil under attack often is that the prosecution was in some way motivated by strong local bias, prejudice, or bigotry. In this circumstance, a legitimate presumption is created that the fact-finding process will have a better chance of being correct and complete in the federal forum. The classic differences which make the federal courts, on the whole, less likely to be responsive to local prejudices—lifetime tenure of judges and secure salaries—show their importance particularly in cases where the court is called upon to protect those who have incurred the wrath of local powers. Clean fact-finding is also crucial to a mean-

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250 It is probably true that a federal district judge who, by various orders restricting state activities, supports the speech activities of unpopular minorities or dissenters, will be subject to substantially more abuse than would the Supreme Court if it issued the same order. This is due to many factors, including the fact that the judge is a part of the local community. The sense of "betrayal" felt by the community when he lends his support to an unpopular cause will be greater than when similar support is furnished by a distant, and quite impersonal Supreme Court. Also significant is the fact that the decision is likely to be rendered while local passions over the incidents or individuals involved are still aroused. For example, Judge James E. Doyle, the sole federal judge for the Western District of Wisconsin was criticized when he issued a series of temporary restraining orders against various punitive actions by the State of Wisconsin initiated against the antiwar demonstrators who were the plaintiffs in Zwicker v. Boll, 270 F. Supp. 131 (W.D. Wis. 1967).

251 *Dombrowski* "will definitely have the effect of causing state prosecutors and trial courts to test the facts of cases raising basic constitutional questions against controlling Supreme Court decisions, for the accuracy of their efforts in this connection may be put to the test in the federal courts." Brewer, *supra* note 2, at 105.

ingful appellate review, since so many legal determinations turn on the scope and nature of the fact-finding process.

Professor Amsterdam suggests that expansion of the civil rights removal statute provides the best way to "clearly, cleanly and completely"[252] exclude these cases from the state court jurisdiction. He presents strong arguments which demonstrate that the amount of friction created is far less when a matter is removed completely than when touchy and sensitive factual issues must be tried concerning the competency of the state court.[253]

However, removal is not necessarily the best remedy when the criminal proceeding itself is challenged. The "removal of friction" between the systems, although important, should not be the paramount concern. It is more important to achieve the maximum protection possible for first amendment activities, even at the expense of retaining a certain amount of friction. A criminal proceeding, even in the federal courts, imposes burdens on the individual and on speech activities, which warrant the existence of a procedure which relieves these burdens until it is determined that a criminal proceeding is, indeed, legitimate. Removal will eliminate certain problems of prejudice inherent in the state courts, and may cleanse the fact-finding process, but it will not eliminate the serious prejudice present in the criminal proceeding itself. Likewise, it will not obviate the threat of prosecution for others. It initially accepts the very determination—that a criminal proceeding may constitutionally be begun—which is challenged as invalid. To resolve the matter in a federal court, therefore, would relieve only part of the chilling effect.

The ultimate consideration is that the availability of federal power against state infringement of federally protected rights of free speech and assembly must be as immediate and effective as is state power to seize membership lists, destroy a demonstration, or arrest a speaker. The state courts, in theory, should exercise their power to protect these federal interests. "[B]ut the battle is not over theory. The battle is for the streets, and on the streets conviction [or even arrest] now is worth a hundred times reversal later."[254] The *Dombrowski* remedy is essential to the realization of immediate *affirmative* protection for speech activities. Hopefully, the use of federal power now will help create state systems willing to lend as much immediate power to protecting these activities as they presently do to thwart them.

VI. CLOSING NOTE

Subsequent to the preparation of this article, the United States

252 Amsterdam, *supra* note 66, at 835.
253 *Id.*
254 *Id.* at 801.

Supreme Court decided *Cameron v. Johnson*.[255] Justice Brennan, for the majority, held that the Mississippi Unlawful Picketing statute was not void for vagueness or overbreadth, and that the evidentiary hearing had not established a bad faith prosecution. The decision confirms that neither abstention nor section 2283 prevent a consideration of the merits of the two *Dombrowski* challenges. As to the vagueness and overbreadth attack, declaratory relief must issue if the statute's invalidity is established. As to the bad faith attack, the Court denied equitable relief after considering the issue on its merits. It did not reach the issue of whether section 2283 would bar the issuance of an injunction otherwise thought appropriate. Both the majority and Justices Fortas and Douglas, in dissent, expressly reserve decision on this point.[256] The burden which the Court intimates must be met to justify equitable relief against prosecutorial abuse is an extremely unrealistic and onerous one.[257] This test appears to allow state officials to harass the exercise of protected expression so long as they have an expectation of obtaining conviction. Since the same community attitudes which promote or condone the police action are likely to support the locally elected prosecutor and judge, or locally selected jury, the expectation of conviction should not be the crucial factor. It was hoped, rather, that the Supreme Court would accept the more realistic philosophy of the fifth circuit, which considers "guilt" as only one of many relevant factors.[258] *Cameron* seems to allow a readily accessible remedy, in the form of a suit for declaratory judgment, to attack the use of vague or overbroad statutes. When the harrassment of protected expression is pursued under a facially valid statute, however, *Cameron's* language seems to impose an almost overwhelming evidentiary burden. Whether the test announced in *Cameron* is as stringent as it appears must await further litigation.

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255 36 U.S.L.W. 4319 (April 22, 1968).

256 *Id.* at 4320 n.3; *Id.* at 4324 n.5.

257 *Id.* at 4322.

258 *See, e.g.*, United States v. McLeod, 385 F.2d 734, 744 (1967): "Police may arrest guilty people for reasons other than their guilt—for example for the reason that they are Negroes who want to register and vote."