UNC SCHOOL OF LAW

NORTH CAROLINA LAW REVIEW

Volume 45 | Number 2 Article 14

2-1-1967

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Recommended Citation

D. J. Jones Jr., *Constitutional Law -- Illegal Search and Seizure -- Injunction*, 45 N.C. L. Rev. 518 (1967).
Available at: http://scholarship.law.unc.edu/nclr/vol45/iss2/14

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the state police are faced with a greater variety of situations than federal officers were evidence such as that in *Hayden* is necessary for a conviction.[36] It is further urged that if confessions are often to be denied the state police and greater emphasis on scientific investigation is desirable, the police in the states should be allowed maximum access to evidence in an otherwise lawful search.[37]

HENRY C. MCFADYEN, JR.

Constitutional Law—Illegal Search and Seizure—Injunction

Dissatisfied with the more common remedies for unlawful police searches, the United States Court of Appeals for the Fourth Circuit, in *Lankford v. Gelston*,[1] has added significant dimensions to the use of the federal injunction. The case arises from the efforts of Baltimore police to apprehend two Negroes suspected of killing a city policeman. Possessing arrest warrants, but no search warrants, the police entered more than three hundred homes within a period of nineteen days. The searches, largely based on anonymous tips, were conducted predominately in Negro neighborhoods. Plaintiffs, owners of the homes searched, sought a temporary restraining order in the federal district court against further searches. Jurisdiction was based on section 1983 of the Judicial Code.[2] Since the searches had ceased and the police commissioner had issued a general order[3] prohibiting further searches without probable cause, the court refused relief.[4]

The court of appeals, however, was unimpressed with the general order, primarily because it left determination of probable cause[5]

[36] Traynor, *Mapp v. Ohio at Large in the Fifty States*, 1962 DUKE L.J. 319, 327-32 (1962); Weinstein, *Local Responsibility for Improvement of Search and Seizure*, 34 ROCKY MT. L. REV. 150 (1962).

[37] Hayden v. Warden, Md. Penitentiary, 363 F.2d 647, 658 (1966).

[1] 364 F.2d 197 (4th Cir. 1966).

[2] "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress." Rev. Stat. § 1979 (1875), 42 U.S.C. § 1983 (1964).

[3] For a full text of the order see 240 F. Supp. at 555 n.2 (1965).

[4] Lankford v. Schmidt, 240 F. Supp. 550 (D. Md. 1965).

[5] See U.S. CONST. amend. IV.

to the individual officer and because it was not issued until the suspects had apparently left town.[6] Noting the lack of other remedies for the plaintiffs, the court reversed and ordered the district court to enjoin the Baltimore police "from conducting a search of any private house to effect the arrest of any person not known to reside therein, whether with or without an arrest warrant, where the belief that the person is on the premises is based only on an anonymous tip and hence without probable cause."[7]

The *Lankford* case, then, offers an interesting basis for an analysis of federal injunctions limiting state police activity. It should be noted that when state remedies are sufficient to protect an individual's constitutional rights the federal courts are reluctant to interfere, primarily because of an interest in harmony between state and federal judicial systems.[8] In the recent Negro civil rights cases, however, the courts have ignored considerations of comity by either enjoining enforcement of segregation statutes[9] or simply declaring such statutes unconstitutional.[10] And even in the face of the federal anti-injunction statute,[11] at least one court has allowed an injunction after the commencement of a state criminal prosecution.[12]

In *Lankford,* no federal interference with a state judicial process was involved, and in such a situation the considerations of comity vanish. Moreover, if the conduct of the defendant is of a continuing nature, the court will usually grant an injunction,[13] and sometimes

[6] The suspects were later apprehended in New York.

[7] 364 F.2d at 206. The unanimous opinion was written by Judge Sobeloff.

[8] See Wolfe v. City of Albany, 189 F. Supp. 217 (M.D. Ga. 1960) where the court refused to grant an injunction against the enforcement of a handbill distribution statute which plaintiffs claimed abridged their right of freedom of speech. Relief was likewise denied in Douglas v. City of Jeannette, 319 U.S. 157 (1943) where the plaintiffs contended that a similar ordinance restricted their freedom of religion.

[9] Anderson v. City of Albany, 321 F.2d 649 (5th Cir. 1963).

[10] Morrison v. Davis, 252 F.2d 102 (5th Cir. 1958); Browder v. Gayle, 142 F. Supp. 707 (M.D. Ala. 1956), *aff'd* 352 U.S. 903 (1956).

[11] 28 U.S.C. § 2283 (1965) provides: "A court of the United States may not grant an injunction to stay proceedings in a state court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

[12] United States v. Wood, 295 F.2d 772 (5th Cir. 1961), *cert. denied,* 369 U.S. 850 (1963).

[13] See, *e.g.,* Local 309, United Furniture Workers v. Gates, 75 F. Supp. 620 (N.D. Ind. 1948), where police were enjoined from attendance at union meetings, which conduct was held to violate the union's rights of free speech and freedom of assembly, and Refoule v. Ellis, 74 F. Supp. 336 (N.D. Ga. 1947) where the court enjoined police from further violations of plaintiff's right of due process after noting statements of the police that they intended to do so.

may even be held in error for abuse of discretion if it fails to do so.[14] But if the defendant's misconduct has ceased, as in *Lankford*, the court must rely on more subtle considerations before granting an injunction.

One of the most important of these considerations is the likelihood of resumption of the conduct of the defendant. If events beyond his control have caused the cessation, the question will be moot and an injunction unnecessary.[15] If the cessation is voluntary on the part of the defendant, the question still may be moot,[16] but voluntary cessation is not alone enough to prevent an injunction.[17] The power of the court to grant injunctive relief "survives discontinuance of the illegal conduct,"[18] and the defendant must show that "there is no reasonable expectation that the wrong will be repeated."[19] Moreover, courts have had to recognize that certain extraneous factors may influence a defendant's choice of future conduct. For example, a firmly intrenched state policy of segregation may make resumption of discrimination more likely and the need for an injunction more acute.[20] Related also to the defendant's con-

[14] In Henry v. Greenville Airport Comm'n, 284 F.2d 631 (4th Cir. 1960) the Fourth Circuit Court of Appeals held that since the plaintiff had proved by undisputed evidence that he was being denied constitutional rights by not being permitted to use airport waiting room facilities reserved for white passengers, the district court had no discretion to deny a preliminary injunction. See also Clemons v. Board of Educ., 228 F.2d 853 (6th Cir. 1956), *cert. denied*, 350 U.S. 1006 (1956). In that case the district court was held to have abused its discretion by refusing to enjoin members of the board of education from enforcing a policy of racial segregation. See note 20 *infra* and accompanying text.

[15] United States v. Hamburg-American Co., 239 U.S. 466, 475-77 (1916). See also Standard Oil Co. v. United States, 283 U.S. 163, 182 (1931).

[16] The slightest likelihood of resumption of notorious conduct will keep the question from being moot. Anderson v. City of Albany, 321 F.2d 649, 657 (5th Cir. 1963). And the burden of the defendant to show mootness is a heavy one. United States v. W.T. Grant Co., 345 U.S. 629, 633 (1953).

[17] Walling v. Helmerich & Payne, Inc., 323 U.S. 37, 42-43 (1944); Hecht Co. v. Bowles, 321 U.S. 321, 327 (1944); NLRB v. General Motors Corp., 179 F.2d 221 (2d Cir. 1950).

[18] United States v. W.T. Grant Co., 345 U.S. 629, 633 (1953). See also Hecht Co. v. Bowles, 321 U.S. 321 (1944); Goshen Mfg. Co. v. Myers Mfg. Co., 242 U.S. 202 (1916).

[19] United States v. Aluminum Co. of America, 148 F.2d 416, 448 (2d Cir. 1945).

[20] Bailey v. Patterson, 323 F.2d 201, 205 (5th Cir. 1963). In other cases involving the civil rights of Negroes, dictum has indicated that plaintiffs are entitled to an injunction as a matter of right. In Clemons v. Board of Educ., 228 F.2d 853 (6th Cir. 1956), the court stated:

> The single question which appears to divide us is what guidance, if any, we should now give the district court as to the future exercise of

duct is the nature and degree of harm that the conduct, if resumed, could inflict upon the plaintiff. If the harm seems irreparable, as in *Lankford*, an injunction will naturally be more likely to follow. Thus, courts view a defendant's conduct with considerable suspicion and require much more than mere voluntary cessation before refusing an injunction: "Police protestations of repentance and reform timed to anticipate or to blunt the force of a lawsuit offer insufficient assurance that similar raids will not ensue when another aggravated crime occurs."[21]

Another important consideration concerning the advisability of an injunction is the availability to the plaintiff of other remedies. Other than the possibility of injunctive relief, a person is protected from violation of his constitutional rights by two devices—the exclusionary rule, whereby illegally obtained evidence is barred in a criminal proceeding, and the civil suit for damages. Neither of these remedies would have been useful in *Lankford*, as the court there pointed out.[22] Many excellent arguments have been made that the exclusionary rule is of little deterrent value in *any* situation,[23] and in *Lankford* the complete impotency of this remedy is even more obvious. The exclusionary rule applies only at trial, the illegal search having already occurred. Clearly if officers search a home without a warrant and find nothing incriminating, the rule is of no use at all to the victim of such a search.[24]

If the exclusionary rule has failed as a deterrent to unlawful invasions of privacy, civil remedies have fared little better. The right to sue a state official in federal court was clearly established

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> its jurisdiction. That question, I think unfortunately, must apparently be cast in terms of whether or not there has been an 'abuse of discretion.' Certainly there has been none in the popular concept of that phrase. . . . But the law of Ohio and the Constitution of the United States simply left no room for the [school] Board's action, whatever motives the Board may have had. I think the appellants were clearly entitled to injunctive relief as a matter of right in this case.

228 F.2d at 859.

[21] 364 F.2d at 203. See also United States v. Oregon State Medical Soc'y, 343 U.S. 326, 333 (1952).

[22] 364 F.2d at 202.

[23] The exclusionary rule places no personal sanction upon the policeman. Even if the average policeman understood the rule, seldom will he notice the final result of a violation. Burger, *Who Will Watch the Watchman?*, 14 AM. U.L. REV. 1, 11-12 (1964).

[24] Irvine v. California, 237 U.S. 128, 136-137 (1954); Brinegar v. United States, 338 U.S. 160, 181-182 (1949) (Jackson, J., dissenting). See generally Comment, 47 NW. U.L. REV. 493 (1952).

by *Monroe v. Pape.*[25] The Supreme Court there held that section 1983 of the Civil Rights Act[26] provides such a civil remedy regardless of whether the plaintiff has exhausted other available remedies. The case, involving unlawful search and seizure, construed such police activity as under color of law for the purposes of section 1983.[27] Though the reasoning in *Monroe* has been criticized,[28] it is clear that section 1983 presently provides for both injunctive relief and money damages in a civil rights violation.[29] Nevertheless, the utility of a private suit against a policeman remains extremely doubtful. Even if a plaintiff should win a judgment, the personal assets of most policemen will be insufficient for compensation, and, in any event, the deterrent value of the suit for damages seems slight at best.[30]

Viewing the *Lankford* situation in light of the foregoing discussion, the decision appears sound. Conspicuously, however, the court ignored an important problem peculiar to the injunction, that is, the severe penalty for its violation. A non-complying policeman may face a heavy, arbitrary fine or even imprisonment. The deterrent effect is plain, but one must ask whether this remedy goes too far by compromising effective law enforcement. If the *Lankford* decision represents a trend toward wholesale injunctive relief in civil rights violations, it is possible to foresee situations in which policemen, for fear of a fine or imprisonment, will neglect conscientious law enforcement. Unfortunately, the court in *Lankford* was faced with only two choices. It could have either affirmed the lower court's

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[25] 365 U.S. 167 (1961).

[26] See note 2 *supra.*

[27] The *Monroe* decision was based on the reasoning in Williams v. United States, 341 U.S. 97 (1951); Screws v. United States, 325 U.S. 91 (1945); United States v. Classic, 313 U.S. 299 (1941). The court further held that a municipal corporation was *not* liable to a civil suit under § 1983.

[28] Justice Frankfurter's lengthy dissent in the *Monroe* case is consistent with his concurring opinion in Snowden v, Hughes, 321 U.S. 1, 16 (1944): "It [the jurisdictional problem] is not to be resolved by abstract considerations such as the fact that every officer who proports to wield power conferred by a state is pro tanto the state. Otherwise every illegal discrimination by a policeman on the beat would be state action for purpose of suit in a federal court."

[29] Both of these remedies never appear to have been simultaneously awarded; however, there seems to be no good reason why this could not be done. See Note, 39 N.Y.U.L. Rev. 839, 846-49 (1964).

[30] Mapp v. Ohio, 367 U.S. 643, 651-652 (1961); Irvine v. California, 347 U.S. 128, 137 (1954); Wolf v. Colorado, 338 U.S. 25, 41, 42-44 (1949) (Murphy, J. dissenting); Negrich v. Hohn, 246 F. Supp. 173, 182 (W.D. Pa. 1965). See generally Editorial Note, 12 How. L.J. 285 (1966).

decision, thereby denying any relief, or it could have granted an injunction, a regrettably negative sanction. Considering the seriousness of the police conduct, the choice of the latter seems justified.

The point to be noted, however, is not whether the decision is right or wrong. The real importance of this case is the fact that it illustrates the disturbing lack of an adequate solution to the problem of police-community relations. The recent riots in several large American cities underscore the need for such a solution.[31] The court in *Lankford* felt that an injunction restricting police behavior would solve the problem.[32] Perhaps the court was right in this particular case, but it must be remembered that the wisdom of judicial control of the police function has already been questioned; furthermore, an injunction is only granted *after* an individual's rights have been violated, and even then it is very limited in scope.

What is lacking is a positive, constructive answer to the problem. Rather than subsequent censorship by the courts of police decisions, perhaps the answer lies in increasing judicial responsibility in the law enforcement process itself.[33] Others have suggested legislative action in this area,[34] while some feel that civilian participation in the police function may be the answer.[35] Whatever action is ulti-

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[31] One writer attributes the present difficulties with the police function to four major modern developments: (1) urbanization, (2) recent Supreme Court civil rights decisions, (3) mass migration of Negroes to Northern cities, and (4) the civil rights movement. Edwards, *Order and Civil Liberties: A Complex Role for the Police*, 64 MICH. L. REV. 47 (1965).

[32] "The sense of impending crisis in police-community relations persists, and nothing would so directly ameliorate it as a judicial decree forbidding the practices complained of." 364 F.2d at 204.

[33] Greater fairness in law enforcement practices may result by requiring that a judge, rather than an ordinary magistrate, should determine whether arrest or search warrants should issue. See LaFave & Remington, *Controlling the Police: The Judge's Role in Making and Reviewing Law Enforcement Decisions*, 63 MICH. L. REV. 987 (1965).

[34] "If legislatures should enact their own ideas of what is reasonable in the way of search and seizure, would the Supreme Court insist that it has the exclusive right of definition, and declare the statutes invalid? . . . I can only venture a guess that the Court would not invalidate such legislation. . . ." Waite, *Whose Rules? The Problem of Improper Police Methods*, 48 A.B.A.J. 1057, 1058 (1962). The writer is a former Professor of Law at the University of Michigan and was a member of the Supreme Court's advisory committee on the rules of criminal procedure.

[35] The Civilian Review Board, a controversial method of regulating police conduct, has been adopted in a few American cities. It is interesting to note that in the November 8, 1966 General Election, the residents of New York City overwhelmingly voted against that city's existing Civilian Review Board. For a further discussion of such independent review bodies see Burger, *Who Will Watch the Watchman?*, 14 AM. U.L. REV. 1 (1964).

mately taken to eliminate police-community hostility, it is important that it be taken now. Otherwise, the future may offer an increasing number of cases like *Lankford v. Gelston.*

D. J. JONES, JR.

Constitutional Law—Power of Legislature to Disqualify Members-Elect

Julian Bond, representative-elect to the Georgia General Assembly, was not allowed to take the oath of office on the first day of the session. Challenges to his qualifications were referred to a special committee, that held hearings and recommended that he not be seated. The House approved the recommendation and denied Bond his seat. In *Bond v. Floyd,*[1] Bond and two members of his constituency sought to enjoin the exclusion. The three-judge District Court, one judge dissenting, upheld the House action as a reasonable exercise of its power to judge the qualifications of its members. It found the House justified in declaring the strong anti-war statement of the Student Nonviolent Coordinating Committee, which Bond supported and expanded on,[2] repugnant to the oath required of House members to support the federal constitution. Thus, there was no denial of due process.

The dissent did not reach the federal constitutional issues. Construing the power of the House to judge the qualifications of its members as limited to the qualifications specifically mentioned in the state constitution,[3] it would hold the House action void as in violation of that constitution. The majority thought this a "restrictive view, unfounded in recognized authority."[4] Both opinions turned to the federal Congress for legislative precedents.

[1] 251 F. Supp. 333 (N.D. Ga. 1966) *reversed,* 35 U.S.L. WEEK 4038 (U.S. Dec. 5, 1966). See note 75 *infra.*

[2] *Id.* at 336, 337. The SNCC statement opposed the war and declared support for men who would not respond to the draft, calling for a "freedom fight" at home as an alternative. Bond asserted that he fully supported the statement, and added that he was a pacifist who admired the courage of draft-card burners.

[3] GA. CONST. art. III, § VII, para. 1. This provision is substantially the same as U.S. CONST. art. 1, § 5. The qualifications mentioned in the Georgia Constitution are citizenship, residency, age, no former conviction of a crime of moral turpitude, and no holding of a civil or military office at the time of election.

[4] 251 F. Supp. at 340.