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Federal Jurisdiction -- Federal Court Intervention as Protection Against Illegal Police Harassment

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opinion in *Hicks* indicates that the court, though appearing to approve the decision in *Biggs* and to recognize the policy behind section 8-56 upon which that decision was based, either overlooked or dismissed the fact that the policy behind section 50-10 is the same and should be controlling. The court turned from any discussion of policy, distinguished the two statutes on the fact that they are worded differently,[38] and rested its holding upon the quotation from *Perkins*[39] while ignoring completely the policy that Justice Ruffin found so important to that decision.

The effect of *Hicks* is that section 50-10 is extended beyond its policy-oriented base. Such an extension can lead only to future injustice and underhanded methods of procuring "competent" testimony. The insignificance of collusion in North Carolina divorce law[40] may indicate the advisability of repeal of both this statute and its counterpart in section 8-56. At least, *Hicks* suggests the need for a closer look by both the legislature and the court.

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Federal Jurisdiction—Federal Court Intervention as Protection Against Illegal Police Harassment

"I found there's no correlation between a clean-shaven cheek and morality—and there's no correlation between long hair and immorality."[1] The words might well have been those of the district judge who in the recent case of *Wheeler v. Goodman*[2] observed:

> Hippies, like more conventional householders, are entitled to the protection of the constitution, and the court would be remiss if it allowed

policy against collusion or the opportunity for collusion in divorce actions" was not violated.

Historically, preservation of family harmony has also been an important policy consideration of the court. There is no indication, however, that this policy has valid application to the statutory disability under consideration. Certainly, if the facts are as the husband contended, the parties in *Hicks* are beyond reconciliation.

[38] 275 N.C. at 378, 167 S.E.2d at 766.

[39] See text at note 20 *supra*. The court also relied partially upon Becker v. Becker, 262 N.C. 685, 138 S.E.2d 507 (1964), a case presenting a similar factual situation, in which the testimony was summarily excluded without any discussion of policy.

[40] See note 25 *supra*.

[1] NEWSWEEK, Sept. 1, 1969, at 22A, quoting Beverly Hills, California, police chief Joseph Kimble after observing the White Lake, New York, rock festival.

[2] 298 F. Supp. 935 (W.D.N.C. 1969) (McMillan, J.)

the length of a man's hair or the thinness of his purse to affect the measure of his civil rights.[3]

In *Wheeler*, the "hippie" plaintiffs were living in a rented house in Charlotte, North Carolina. Over a short period of time, members of the Charlotte police force made several searches both of the house and of its occupants. The police also seized from the house several items that were not returned. Finally, on January 9, 1969, after hearing "profane talk," several police officers entered and arrested the persons within for vagrancy. In district criminal court the next day, a *nolle prosequi* with leave was taken by the prosecution. Both before and after this incident, the police warned visitors and occupants of the house to leave and not to return. These practices continued after the vagrancy charges until, aided by police presence, the owner of the house evicted the "hippies."

The "hippies" then brought an action as plaintiffs in federal court for injunctive and other relief against the Charlotte Police Department. The court found that the police had violated the plaintiffs' first amendment rights of free expression and free association and that they had conducted several illegal searches and seizures in violation of the fourth amendment.[4] The court issued a broad injunction, prohibiting the defendant police from investigating, detaining, or prosecuting the plaintiffs or any other persons under the North Carolina vagrancy statute; from conducting any unreasonable searches and seizures; and from harassing the plaintiffs in a manner to discourage them from the exercise of their first amendment rights. Finally, the court ordered that a three-judge district court be convened to consider the constitutionality of the North Carolina vagrancy statute.[5]

Federal jurisdiction was based upon the alleged deprivation of the plaintiffs' constitutional rights. The plaintiffs asserted that the general police harrassment, and specifically the vagrancy violation if the statute be unconstitutional, deprived them of due process of law. Relief was sought under section 1983 of Title 42 of the United States Code[6] and

[3] *Id.* at 942.

[4] *Id.* at 937-41.

[5] *Id.* at 942-44. On November 14, 1969, while this note was in the process of publication, the three-judge district court ruled the North Carolina vagrancy statute unconstitutional on the grounds of vagueness and overbreadth. Raleigh News & Observer, Nov. 15, 1969, at 1, col. 1-4.

[6] 42 U.S.C. § 1983 (1964), provides:

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 any other person within the jurisdiction

the corresponding jurisdictional statute, section 1343 of Title 28 of the United States Code.[7] These provisions are the basis for federal jurisdiction and relief as to both statutory and non-statutory problems in *Wheeler*.[8] The statutory problems, which concern the alleged unconstitutionality of the state vagrancy statute and its application against the plaintiffs, are within the scope of section 1983 since the vagrancy statute, if unconstitutional, would under color of state law deprive the plaintiffs of due process.[9] The non-statutory problems, which concern the police harassment and the infringements of first and fourth amendment rights *exclusive* of the application of the vagrancy statute, also state a claim for relief under section 1983 because the "under color of" wording has been held to encompass even unconstitutional police actions in excess of legal authority.[10]

In spite of the proper invocation of federal jurisdiction, certain restraints upon its exercise can be examined in the context of *Wheeler*. These restrictions, both judicial and statutory, are an effort to control areas of conflict between state and federal courts and to encourage a harmonious relationship between the two court systems. The restrictions include (1) the requirement that in some circumstances original federal jurisdiction be exercised by three judges rather than one, (2) the prohibition on injunction of a pending state proceeding, and (3) the judicial concept of abstention as modified by *Dombrowski v. Pfister*.[11]

The first restriction concerns the action of the single federal judge in

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thereof to the *deprivation of any rights,* privileges, or immunities *secured by the Constitution* and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

(Emphasis added.)

For a discussion of the "minority group" test under the statute, see Note, *Federal Jurisdiction—Expansion of the Civil Rights Act of 1871*, 47 N.C.L. REV. 922 (1969).

[7] 28 U.S.C. § 1343 (1964), provides in part:

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

. . .

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege, or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

[8] 298 F. Supp. at 940.

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

[10] Monroe v. Pape, 365 U.S. 167 (1961).

[11] 380 U.S. 479 (1965).

Wheeler in issuing an injunction as relief for both statutory and non-statutory problems.[12] The judge in enjoining enforcement of the vagrancy statute may have exceeded his powers because it appears that he was authorized only to issue a temporary restraining order to prevent irreparable injury.[13] The injunction issued against enforcement of the statute may have, in fact, been relief on the merits and solely within the province of the three-judge district court. The United States Supreme Court has pointed out:

> When an application for a statutory three-judge court is addressed to a district court, the court's inquiry is appropriately limited to determining whether the constitutional question raised is substantial, whether the complaint at least formally alleges a basis for equitable relief, and whether the case presented otherwise comes within the requirements of the three-judge statute. Those criteria were assuredly met here, and the applicable jurisdictional statute therefore made it impermissible for a single judge to decide the merits of the case, either by granting or withholding relief.[14]

There would, of course, be no similar bar to the single judge's issuing an injunction on the merits of the non-statutory claims because no three-judge court was required to decide them.

Two further restrictions on the exercise of federal jurisdiction remain to be considered regardless of whether an injunction or a temporary restraining order was appropriate. The first is whether federal relief should be granted to stop "pending" state proceedings in view of the anti-injunction statute;[15] the second whether federal relief should be withheld or suspended because of the abstention doctrine.[16]

The court in *Wheeler* in discussing the two above restrictions did not distinguish between the statutory and non-statutory problems. It also appears to have concluded that the test for both the anti-injunction statute and abstention doctrine is the same—the seriousness on the merits of the

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[12] 298 F. Supp. at 942.

[13] 28 U.S.C. § 2284(3) (1964); C. WRIGHT, FEDERAL COURTS § 50, at 166 (1963).

[14] Idlewild Bon Voyage Liquor Corp. v. Epstein, 370 U.S. 713, 715 (1962) (per curiam) (footnote omitted).

[15] 28 U.S.C. § 2283 (1964), 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. (emphasis added)

[16] *See* Douglas v. City of Jeannete, 319 U.S. 157 (1943); Railroad Comm'n v. Pullman Co., 312 U.S. 496 (1941).

state deprivations of substantive constitutional rights.[17] In fact, closer analysis reveals that the statutory and non-statutory problems should have been considered separately and that the tests for the two restrictions on jurisdiction are different and distinguishable.

Since there was no state proceeding concerning the alleged unconstitutional infringements exclusive of the vagrancy statute, the non-statutory problems created no restriction under the anti-injunction statute on the federal court's issuance of an injunction. There also was no reason for application of the abstention doctrine since the sole issues involved federal constitutional questions; state constitutional or legal provisions, if there were any, were clear.[18]

In considering the statutory questions, the single judge could have concluded that because only a temporary restraining order should be issued, the anti-injunction statute and abstention doctrine were inapplicable. The purpose of the temporary restraining order would have been to protect the plaintiffs from irreparable injury until the three-judge court could act on a request for an injunction. By discussing the two restrictions on the exercise of federal jurisdiction, the judge anticipated a three-judge court and to some extent matters within its discretion.[19] On the other hand, he could have taken the position that a restraining order should *not* be issued in respect to the statutory problems if the anti-injunction statute were a bar or if the three-judge court would properly abstain on the merits. This supposition will be a basis for a further discussion of *Wheeler*.

Plaintiff's central contention concerning the North Carolina vagrancy statute[20] was that it should be held unconstitutional for both vagueness

[17] 298 F. Supp. at 940.

[18] *See* Davis v. Mann, 377 U.S. 678, 690-91 (1963). North Carolina has adopted the UNIFORM DECLARATORY JUDGMENT ACT. See N.C. GEN. STAT. §§ 1-253 to -267 (1953). Even though relief might have been sought in state courts for the constitutional infringements, abstention was nevertheless improper because the purpose of 42 U.S.C. § 1983 is to provide a federal forum. McNeese v. Board of Educ., 373 U.S. 668, 671-72 (1963).

[19] It appears the single judge could not abstain on the merits because a three-judge district court was required to determine the constitutionality of the vagrancy statute. Idlewild Bon Voyage Liquor Corp. v. Epstein, 370 U.S. 713, 715 (1962) (per curiam). *See also* Currie, *The Three-Judge District Court in Constitutional Litigation*, 32 U. CHI. L. REV. 1 (1964).

[20] N.C. GEN. STAT. § 14-336 (1953) provides:

If any person shall come within any of the following classes, he shall be deemed a vagrant . . .

1. Persons wandering or strolling about in idleness who are able to work and have no property to support them.
2. Persons leading an idle, immoral or profligate life, who have no property to support them and who are able to work and do not work.
3. All persons able to work having no property to support them and who

and overbreath. The state supreme court has not ruled on the constitutional issue in cases brought under the present statute,[21] but recent decisions of other courts suggest that it cannot withstand constitutional attack.[22] Vagueness should refer to the lack of certainty in meaning, overbreath to the extent of the conduct made criminal by the statute. However, the term "vagueness" has to some extent been adopted to convey both meanings. If the North Carolina statute is vague, it is vague not because of lack of clarity but because it, in fact, makes "conduct" that should not be subject to such sanctions criminal. Therefore, the statute's constitutionality is open to attack as a violation of the due process clause of the fourteenth amendment by an overreaching of the police power of the state.[23]

Since the plaintiffs were prosecuted under the vagrancy statute, the initial problem of the restriction of the federal anti-injunction statute[24] is whether it would bar the exercise of federal jurisdiction. This statute would not apply if section 1983, under which the plaintiffs brought their action, were an express exception to it. Since the wording of section 1983 creates only broad equity jurisdiction, the Court of Appeals for the

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have not some visible and known means of a fair, honest, and reputable livelihood.

4. Persons having a fixed abode who have no visible property to support them and who live by stealing or by trading in, bartering for or buying stolen property.
5. Professional gamblers living in idleness.
6. All able-bodied men having no other visible means of support who shall live in idleness upon the wages or earnings of their mother, wife, or minor children, except of male children over eighteen years old.
7. Keepers and inmates of bawdy-houses, assignation houses, lewd and disorderly houses, and other places where illegal sexual intercourse is habitually carried on: Provided, that nothing here is intended or shall be construed as abolishing the crime of keeping a bawdy-house, or lessening the punishment by law for such crime.

[21] State v. Millner, 240 N.C. 602, 83 S.E.2d 546 (1954); State v. Harris, 229 N.C. 413, 50 S.E.2d 1 (1948); State v. Oldham, 224 N.C. 415, 30 S.E.2d 318 (1944); State v. Walker, 179 N.C. 730, 102 S.E. 404 (1920); State v. Price, 175 N.C. 804, 95 S.E. 478 (1918).

[22] Goldman v. Knecht, 295 F. Supp. 897 (D. Colo. 1969) (three-judge court); Smith v. Hill, 285 F. Supp. 556 (E.D.N.C. 1968) (municipal vagrancy ordinance); Baker v. Bindner, 274 F. Supp. 658 (W.D. Ky. 1967) (three-judge court); Alegata v. Commonwealth, 353 Mass. 287, 231 N.E.2d 201 (1967); Fenster v. Leary, 20 N.Y.2d 309, 229 N.E.2d 309, 282 N.Y.S.2d 739 (1967). In each of these cases a vagrancy statute or ordinance was held unconstitutional.

[23] Fenster v. Leary, 20 N.Y.2d 426, 229 N.E.2d 426, 282 N.Y.S.2d 739 (1967).

[24] The background of the anti-injunction statute was fully discussed in Toucey v. New York Life Ins. Co., 314 U.S. 118, 129-34 (1941), where Justice Frankfurter outlined the exceptions to the statute existing at that time. The present version of the anti-injunction statute, adopted in 1948 to overturn the result in *Toucey*, allows the federal courts to protect their judgments by enjoining relitigation in state courts. C. WRIGHT, FEDERAL COURTS § 47, at 154-55 (1963).

Fourth Circuit has held that no such *express* exception can be implied.[25] Nevertheless, the history and purpose of section 1983 (though not expressed in it) suggest strongly that it was intended as an exception,[26] and another circuit has so held.[27]

It is not surprising that the court in *Wheeler* did not attempt to resolve the question of whether section 1983 is an exception to the anti-injunction statute. Recently the United States Supreme Court has expressly declined to decide this issue.[28] The Court did strongly suggest that the anti-injunction statute applies only if state proceedings are begun prior to the filing of the federal complaint. The priority for adjudication is set by the "first in time" principle rather than by the type or nature of the rights and statutory questions to be resolved.

Thus the precise issue in *Wheeler* is whether a *nolle prosequi* with leave is a "state proceeding" within the meaning of the anti-injunction statute.[29] It is clear that the state proceedings commenced prior to the federal action and that the prosecutor decided to delay indefinitely while controlling whether there would ever be a state trial on the vagrancy charges. The federal court, in deciding if there was "state proceeding"

[25] Baines v. City of Danville, 337 F.2d 579, 586-96 (4th Cir. 1964). *Wheeler* cited this case for its comprehensive review of the issue. 298 F. Supp. at 940.

[26] For a discussion of the history and purpose of section 1983, suggesting it should be an exception to the anti-injunction statute, see 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, 88-93 (1967); Note, *Dombrowski Remedy—Federal Injunctions Against State Court Proceedings Violative of Constitutional Rights*, 21 RUTGERS L. REV. 92, 97-125 (1966).

[27] Cooper v. Hutchinson, 184 F.2d 119 (3d Cir. 1950). *Contra*, Smith v. Village of Lansing, 241 F.2d 856 (7th Cir. 1957); Sexton v. Barry, 233 F.2d 220 (6th Cir. 1956).

[28] The Court declined to decide the issue even though the three-judge district court held the anti-injunction statute a bar to relief. Cameron v. Johnson, 390 U.S. 611, 613-14 n.3 (1968), *aff'g on other grounds* 262 F. Supp. 873 (S.D. Miss. 1966).

[29] Possibly the use of *nolle prosequi* with leave was a violation of plaintiffs' sixth amendment right to a speedy trial, but such a determination is uncertain. There is no indication in *Wheeler* that plaintiffs (defendants in the vagrancy action) demanded a speedy trial nor is it certain whether a demand is necessary to prevent a waiver. Clearly the right to a speedy trial is violated when the defendant objects to a *nolle prosequi* with leave and demands a trial. However, even without a demand, there may be a violation of the right since the device allows the prosecutor to delay the trial indefinitely without justification and without defendant's affirmative assent. Klopfer v. North Carolina, 386 U.S. 213 (1967), *noted in* 46 N.C.L. REV. 387 (1968), *rev'g* State v. Klopfer, 266 N.C. 349, 145 S.E.2d 909 (1966), *noted in* 44 N.C.L. REV. 1126 (1966). *See also* State v. Johnson, 275 N.C. 264, 167 S.E.2d 274 (1969), *noted in* Note, *Criminal Procedure—The Potential Defendant's Right to a Speedy Trial*, 48 N.C.L. REV. 121 (1969).

within the protection of the anti-injunction statute, could have distinguished between a normal good-faith delay of the state criminal prosecution and a delay calculated to *threaten* or *harass* the plaintiffs rather than resolve the actual charges. Of course, the federal courts should not attempt to evaluate ordinary delays in state criminal prosecutions, but the delay here was no ordinary one. It showed the intention of the prosecution to avoid trial and a state constitutional test of the vagrancy statute. So in *Wheeler*, the federal judge could have applied a test of practical considerations[30] and thus interpreted the state action as "threatened" rather than "pending." The anti-injunction statute based on the *Dombrowski* implication[31] could be construed as applicable to a state proceeding that was progressing, but not to one where eventual action was merely threatened owing to the peculiar nature of the *nolle prosequi* with leave.

The final restriction on the exercise of federal jurisdiction is the abstention doctrine, which requires a federal court to decline to adjudicate a constitutional issue if a subsequent state court ruling on threshold state law could make the federal adjudication superfluous.[32] This doctrine may be invoked in actions in which a federal injunction is sought against possible state criminal prosecutions.[33] The federal courts should interfere in such cases only where abstention is improper and there is clear and imminent irreparable injury.[34]

Whether a federal court must abstain in a given situation depends upon several factors, including the following: (1) the probability of a future constitutional construction of the statute in question by the state courts; (2) the federal court's evaluation of the alleged vagueness or overbreath of the statute; (3) the statute's effect on its face on first amendment rights; and (4) bad faith enforcement of the statute by the state.[35] Thus the showing of irreparable injury to avoid abstention depends upon the nature and application of the state statute involved. The

[30] "As a practical consideration, it is recognized that federal interference with pending prosecutions would cause greater abrasion between federal and state courts than interference with threatened prosecutions." Boyer, *supra* note 26, at 96.

[31] Dombrowski v. Pfister, 380 U.S. 479, 484 n.2 (1965).

[32] Railroad Comm'n v. Pullman Co., 312 U.S. 496 (1941). The primary reasons for the doctrine are (1) to avoid a premature decision of a constitutional question, (2) to avoid unnecessary conflict with the states, which have the primary responsibility for deciding the status of their own laws, and (3) to promote federal judicial economy. C. WRIGHT, FEDERAL COURTS § 52, at 169 (1963).

[33] Douglas v. City of Jeanette, 319 U.S. 157, 162 (1943).

[34] *Id.* at 163-64.

[35] *See* Cameron v. Johnson, 390 U.S. 611, 620-21 (1968); Dombrowski v. Pfister, 380 U.S. 479, 484-85 (1965).

mere possibility that the state courts may not correctly determine its constitutionality is not a sufficient showing of irreparable injury to justify the issuance of a federal injunction.[36] On the other hand, a showing that defense of the criminal charges in state court will not adequately protect the constitutional right of freedom of expression is sufficient.[37] For example in *Dombrowski*, where the state had passed a broad statute to control subversive activities and propaganda, the Supreme Court found that even a defense to a criminal prosecution would not adequately protect freedom of expression because of the impairment of that right during the long period of trial and ultimate appellate review.[38] In making such a determination, the Court will almost certainly accord the first amendment right of freedom of association the same level of importance as freedom of expression.[39]

The North Carolina vagrancy statute on its face does not threaten freedom of expression or association; rather that threat derives from its selective application against groups unpopular with the police.[40] Indeed, the possibility of such selective enforcement may in itself be a significant threat to first amendment freedom.[41] The criteria for determining selective enforcement, of course, necessitate an evaluation of the state's good faith in applying the statute. If the statute has been invoked by the state in bad faith, the resulting harassment may be sufficient to show irreparable injury.[42]

The single factor of bad faith application of a statute is probably not *alone* sufficient to preclude abstention. The decision in *Cameron v.*

[36] Cameron v. Johnson, 390 U.S. 611, 621 (1968); Dombrowski v. Pfister, 380 U.S. 479, 484-85 (1965).

[37] Dombrowski v. Pfister, 380 U.S. 479, 485-86 (1965).

[38] *Id.*

[39] The Court emphasized the importance of the right of association in NAACP v. Alabama, 357 U.S. 449 (1958). While the *Wheeler* plaintiffs as a group were not engaged in activity for an important political or social purpose, it seems clear that the first amendment rights of freedom of expression and association would fully extend to them even if the purpose of their association were, in terms of community norms, antisocial or anti-cultural.

[40] The pattern of police behavior suggests apprehension that the "hippie house" would be the center of some criminal activity. However, police assumptions cannot serve as a basis for the forfeiture of constitutional rights. Likewise, deprivations of constitutional rights cannot be justified as "social control" over an unpopular and nonconformist group. The police should not attempt to circumvent the bounds of the Constitution in response to community pressures. In *Wheeler*, excluding the vagrancy charges, no criminal activity was proved to have occurred at the house. 298 F. Supp. at 937.

[41] Smith v. Hill, 285 F. Supp. 556, 562 (E.D.N.C. 1968).

[42] Cameron v. Johnson, 390 U.S. 611, 620-21 (1968); Dowbrowski v. Pfister, 380 U.S. 479, 490 (1965).

Johnson[43] suggests that the nature of the enactment is more determinative in a decision whether to abstain than is just good or bad faith application. It is reasonable that a federal court should abstain when a state statute appears constitutional on its face so that the issue becomes the bad faith enforcement of a constitutional enactment. If the statute is constitutional, then the state courts and possible appellate review in the United States Supreme Court should be adequate to protect the accused's rights. The alleged bad faith application is then in a sense irrelevant because the problem is whether the accused committed a provable offense under the statute.

In *Dombrowski* the Court held abstention improper because the statute in question was vague and because

> [T]he conduct charged in the indictment is not within the reach of an acceptable limiting construction readily to be anticipated as the result of a single criminal prosecution and is not the sort of "hard-core" conduct that would obviously be prohibited under any construction.[44]

As was noted earlier, the primary problem with the vagrancy statute attacked in *Wheeler* is not its uncertainty of meaning but its overbroad character. Abstention is improper unless the state statute is uncertain but can be limited to a constitutional construction by state courts.[45] If the meaning of the vagrancy statute is certain, and it appears for the most part that it is, then the only remaining problem is whether a state court could give it a constitutional construction. The conclusion of the court in *Wheeler* was that the state courts could not give the vagrancy statute a constitutional construction.[46] It appears that even a narrowing construction of the statute would still leave significant questions as to its constitutionality.

The court in *Wheeler*, while determining that the vagrancy statute was clearly defined, could have concluded that irreparable injury was

[43] 390 U.S. 611 (1968). The Court said that bad faith application of a valid statute was not established by the facts. However, the application of the Mississippi anti-picketing statute to Negro demonstrators protesting racial discrimination in voter registration suggests that the state did apply the statute to stifle protest and not solely to protect access to the local courthouse. The court could have found bad faith in the passage of the state statute after demonstrations began, and in its use to protect segregationist state policies. See *id.* at 620.

[44] 380 U.S. at 491-92.

[45] Zwickler v. Koota, 389 U.S. 241, 251 n.14 (1967).

[46] 298 F. Supp. at 941. Does the judge's decision on this point usurp the decision making process of the three-judge court? See note 19 and accompanying text *supra*.

shown because the delay in prosecution tended to suppress the constitutional rights of the plaintiffs to free association. If such a determination had been made, even defense of the state criminal prosecution would not suffice to protect the plaintiffs' first amendment rights. But the court, relying on *Dombrowski*, concluded that the vagrancy statute is uncertain in meaning and that its vagueness chills first amendment rights.[47] The court's reliance is misplaced because the weakness of the vagrancy statute is not vagueness but overbreath; and unlike the type of enactment in *Dombrowski*, the vagrancy statute on its face has nothing to do with first amendment rights. *Dombrowski's* application is proper only to enactments that on their face directly deal with first amendment rights because it is the threat of the vague statute in relation to those rights that is the basis of that decision.

The principles of *Dombrowski* cannot be invoked by the factors of alleged vagueness and selective enforcement of the statute alone. Vague state statutes call forth a basic abstention principle—to allow state courts to construe them in a constitutional manner, if possible, prior to federal court intervention. Only a statute that is both vague and that on its face affects first amendment rights should be exempt from abstention. The factor of selective enforcement of a vague statute actually *supports* abstention because such enforcement encourages the state courts to interpret the enactment in question. Abstention applies more clearly where the interpretation of state law is uncertain.[48]

The court in *Wheeler*, while perhaps not applying the correct principles to difficult issues, illustrated that there can be federal relief for substantial and systematic police harassment. This case involved the application of section 1983 to civil rights questions involving neither racial discrimination nor a mass demonstration; such cases brought under this statute are rare. The result of the relief granted in *Wheeler* for the nonstatutory constitutional deprivations could produce a new wave of jurisprudential problems[49] that may lead to narrower guidelines and limitations if more violent and politically-minded groups seek broad federal protection against police activities.[50]

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[47] 298 F. Supp. at 941.

[48] Harman v. Forssenius, 380 U.S. 528, 534 (1965).

[49] For a discussion of how a federal injunction could be used to control constitutional violations, see Note, *Federal Injunctions as a Remedy for Unconstitutional Police Conduct*, 78 YALE L.J. 142 (1968).

[50] Such protection could, of course, hamper legitimate police investigations if the injunctions issued are as broad and comprehensive as the one in *Wheeler*. The threat of contempt action against the police under such injunctions could be a

Only the failure of state law enforcement bodies to observe federal constitutional principles and the lack of faith in state court implementation of those principles are responsible for the continuing trend toward federal intervention in civil rights cases such as *Wheeler*. State enforcement agencies should be better trained and better supervised to prevent systematic unconstitutional police harassment. State courts and prosecutors both should be careful that procedural devices, such as the *nolle prosequi* with leave, are not abused where there is a lack of evidence or a desire to avoid a constitutional question. The proper forum for matters of state criminal law enforcement and state criminal statutory interpretation is in the state courts rather than in the federal district courts. But the principles of *Dombrowski* can be held to their narrowest construction by the federal courts only if the states through their law enforcement and judicial institutions provide adequate safeguards against the deprivation of constitutional rights.

NORMAN E. SMITH

Income Tax—Tests under Section 117 for Exclusion of Educational Grants

Section 117 of the Internal Revenue Code provides for the exclusion from gross income of amounts received as scholarships or fellowships.[1] Prior to its enactment there was no specific statutory provision covering educational stipends. Instead, the inquiry was "[w]hether such grants . . . fell within the broad provision excluding from income amounts re-

significant deterrent to effective police action. For a discussion of possible limitations on 42 U.S.C. § 1983 actions and the policy considerations behind such limitations, see Note, *Limiting the Section 1983 Action in the Wake of Monroe v. Pape*, 82 HARV. L. REV. 1486 (1969).

[1] The section reads in part:

§ 117. Scholarships and fellowship grants.

(a) General rule.—In the case of an individual, gross income does not include—

(1) any amount received—

(A) as a scholarship at an educational institution (as defined in section 151(e)(4)), or

(B) as a fellowship grant,

including the value of contributed services and accommodations; and

(2) any amount received to cover expenses for—

(A) travel,

(B) research,

(C) clerical help, or

(D) equipment,

which are incident to such a scholarship or to a fellowship grant, but only to the extent that the amount is so expended by the recipient.