file

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF LOUISIANA

NEW ORLEANS DIVISION

RICHARD B. SOBOL, et al.,	)	
PLAINTIFFS	)	CIVIL ACTION NO. 67-243
- v. -	)	SECTION "E"
LEANDER H. PEREZ, SR., et al.,	)	
DEFENDANTS	)	

PLAINTIFFS' PRETRIAL MEMORANDUM OF LAW

Part I of this memorandum states the jurisdictional ground of the action. Part II describes the nature of the relief sought by the plaintiffs, and the bases upon which they are entitled to that relief. It deals with questions of equity (Subpart II(A)), of comity (Subpart II(B)), of the import of the federal anti-injunction statute (Subpart II(C)), and of the standing of the several plaintiffs to raise the substantive points which they assert (Subpart II(D)). Part III deals with the merits of the controversy. It identifies the theories of each of the Causes of Action set forth in the Amended Complaint, the sources of law sustaining each, the authorities upon which plaintiffs principally rely, and the elements of each Cause which plaintiffs will establish at the hearing of this matter.

The subject matter of the lawsuit may be briefly stated at the outset. Plaintiff Sobol, a domiciliary of the District of Columbia is an attorney, a member of the bars of the District of Columbia, the State of New York, the Supreme Court of the United States, the Court of Appeals for the Fifth Circuit, and this Court. He is a staff attorney for the Lawyers Constitutional Defense Committee (hereafter LCDC), a charitable corporation organized under New York law to furnish free legal services to persons otherwise unable to obtain satisfactory representation in matters involving federal constitutional rights, and particularly rights of racial equality. Plaintiff Sobol is an expert in such matters. He is temporarily resident in the State of Louisiana, where he handles legal matters as an expert in the federal questions involved. Neither he nor LCDC receives any fee or compensation in connection with any such matters. In all matters, Plaintiff Sobol is associated with the office of Collins, Douglas and Elie, a firm of Negro attorneys admitted to the bar of the State of Louisiana.

In association with Messrs. Collins and Douglas of that firm, Plaintiff Sobol undertook in November, 1966, to represent Plaintiff Duncan, a Negro resident of Plaquemines Parish. Duncan was charged in the Parish with a criminal offense arising out of an interracial incident attending the desegregation of the Plaquemines schools under order of this Court. The charge was first prosecuted in the juvenile court, where Collins and Sobol appeared for Duncan, and Collins introduced Sobol as being from the District of Columbia and as his associate. Following the filing of a defensive motion challenging the jurisdiction of the juvenile court, Duncan was charged with simple battery, triable in the Twenty-Fifth Judicial District Court, and the juvenile charge was nol prossed. Sobol and Collins, on behalf of Duncan, filed a request for jury trial in the District Court, on federal constitutional grounds. This was denied, and on January 25 Sobol tried the battery case in Collins' absence, without objection by the court or the district attorney. Duncan was convicted. Sobol, Collins and Douglas filed a petition for certiorari in the Supreme Court of Louisiana, raising the federal jury contention. This was denied. Sobol thereupon immediately sought by phone and obtained an appointment with the Duncan trial judge (the Honorable Eugene E. Leon, a defendant herein), for the purpose of arranging Duncan's release on bond pending further review by the Supreme Court of the United States. Sobol met with Judge Leon in Plaquemines Parish on February 21, 1967, and bond for Duncan was arranged. Sobol was then arrested as he left the courthouse, on a bench warrant issued by Judge Leon upon an information filed by District Attorney Leander H. Perez Jr. (a defendant herein), charging Sobol with the unauthorized practice of law in Plaquemines Parish on January 25, 1967 (the Duncan trial date). Sobol was fingerprinted, "mugged," compelled to surrender his brief case and other personal property, and jailed for three hours before he could be released on a $1500 bond.

The present action was thereupon instituted by

Plaintiff Sobol, and by Plaintiffs Duncan and Reynolds as representatives of the class of Negroes and civil rights workers who are Sobol's present and prospective clients, seeking (i) a declaration of the unconstitutionality of the statutes under which Sobol is charged, on their face and as applied to Sobol, (ii) restraint of the enforcement of those statutes both in the pending prosecution of Sobol and by future arrest and prosecution of Sobol for the unauthorized practice of law, and (iii) necessary incidental relief against the further harassment of the plaintiffs.

The statutes under which Plaintiff Sobol is charged are L.S.A. - R.S. §§ 37:213, 37:214, as follows:

> § 213. Persons, professional associations and professional corporations entitled to practice law; penalty for unlawful practice
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> No natural person, who has not first been duly licensed and admitted to practice law by the Supreme Court of this state, no partnership except one formed for the practice of law and composed of such duly licensed natural persons, and no corporation or voluntary association except a professional law corporation organized pursuant to Chapter 11 of Title 12 of the Revised Statutes, shall:
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> (1) Practice law;
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> (2) Furnish attorneys or counsel or an attorney and counsel to render legal services;
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> (3) Hold himself or itself out to the public as being entitled to practice law;
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> (4) Render or furnish legal services or advice;

(5) Assume to be an attorney at law or counselor at law;

(6) Assume, use or advertise the title of lawyer, attorney, counselor, advocate or equivalent terms in any language, or any phrase containing any of these titles, in such manner as to convey the impression that he is a practitioner of law; or

(7) In any manner advertise that he, either alone or together with any other person, has, owns, conducts or maintains an office of any kind for the practice of law.

No person, partnership or corporation shall solicit employment for a legal practitioner.

This Section does not prevent any corporation or voluntary association formed for benevolent or charitable purposes and recognized by law, from furnishing an attorney at law to give free assistance to persons without means.

Any natural person who violates any provision of this Section shall be fined not more than one thousand dollars or imprisoned for not more that [sic] two years, or both.

Any partnership, corporation or voluntary association which violates this Section shall be fined not more than five thousand dollars. Every officer, trustee, director, agent, or employee of a corporation or voluntary association who, directly or indirectly, engages in any act violating any provision of this Section or assists the corporation or voluntary association in the performance of any such violation is subject to the penalties prescribed in this Section for violations by a natural person.

§ 214. Visiting attorneys of other states; reciprocity

Except as provided in this Section, no person licensed or qualified to practice as an attorney at law or as an attorney and counsellor at law in any other state and temporarily present in this state shall practice law in this state, unless he has been first duly licensed to practice law by the supreme court of this state or unless he acts in association with some attorney duly licensed to practice law by the supreme court of this state.

Nothing in this Chapter prevents the practice of law in this state by a visiting attorney from a state which, either by statute or by some rule of practice accorded specific recognition by the highest court of that state, has adopted a rule of reciprocity that permits an attorney duly licensed and qualified to practice law in this state to appear alone as an attorney in all courts of record in the other state, without being required to be admitted to practice in such other state, and without being required to associate with himself some attorney admitted to practice in the other state.

Whoever violates any provision of this Section shall be fined not more than one thousand dollars or imprisoned for not more than two years, or both.

I. JURISDICTION

Jurisdiction here rests principally upon 28 U.S.C. § 1343(3), (4) (1964), which empowers the Court to entertain suits authorized by REV. STAT. § 1979 (1875), 42 U.S.C. § 1983 (1964), for the vindication of federal civil rights. The sole essential elements of a claim under § 1983 are the deprivation (A) under color of state law, (B) of a right, privilege or immunity secured by the Constitution and laws of the United States. _E.g._, _Monroe_ v. _Pape_, 365 U.S. 167 (1961); _McNeese_ v. _Board of Education_, 373 U.S. 668 (1963); _Bond_ v. _Floyd_, 385 U.S. 116 (1966).

(A) Defendants are sued in their capacities as officials and officers, the suit seeking restraint of acts which they perform under the authority of office and by the powers of office. Plainly, the color-of-law requirement is thus satisfied, and this is so whether the defendants' enforcement against Plaintiff Sobol of L.S.A. - R.S. §§ 37:213, 37:214 is proper or abusive as a matter of state law. _Monroe_ v. _Pape_, _supra_, 365 U.S. at 171-187; _McNeese_ v. _Board of Education_, _supra_, 373 U.S. at 674; _Dombrowski_ v. _Pfister_, 380 U.S. 479, 489-492 (1965).

(B) Whether plaintiffs are correct in their assertions that the prosecution of Sobol abridges their federal constitutional rights is of course a question going to the merits, and it is discussed as such in Part III, infra. For jurisdictional purposes, it is sufficient to establish that the nature of the rights claimed places them within the category of "rights, privileges or immunities secured by the Constitution and laws," which § 1983 protects. That category of rights is best epitomized by Mr. Justice Stone's famous phrase: a "right or immunity .... of personal liberty, not dependent for its existence upon the infringement of property rights." Hague v. C.I.O., 307 U.S. 496, 518, 531 (1939)(plurality opinion), approved in Douglas v. City of Jeannette, 319 U.S. 157, 161-162 (1943) (disposition on other grounds). Plaintiffs' claims are self-evidently of this sort; and each has been held the proper basis for § 1983 relief. Concerning the plaintiffs' First-Fourteenth Amendment claims of rights of free expression, see, e.g., Baggett v. Bullitt, 377 U.S. 360 (1964); Keyishian v. Board of Regents, 385 U.S. 589 (1967); concerning their claims of denial of the equal protection of the laws, e.g., Gayle v. Browder, 142 F. Supp. 707 (M.D. Ala. 1956), aff'd per curiam, 352 U.S. 903 (1956); Evers v. Dwyer, 358 U.S. 202 (1958)(per curiam), and their claims of harassment and intimidation by groundless prosecution, N.A.A.C.P. v. Thompson, 357 F.2d 831 (5th Cir. 1966); Carmichael v. Allen, 267 F. Supp. 985 (N.D. Ga. 1966); concerning Plaintiff Sobol's right to practice his profession without arbitrary and discriminatory interference, Jordan v. Hutcheson, 323 F.2d 597 (4th Cir. 1963); Hornsby v. Allen, 326 F.2d 605 (5th Cir. 1964), rehearing denied, 330 F.2d 55 (5th Cir. 1964); concerning the claims of the class of client plaintiffs to protection of their federal constitutional rights in state criminal proceedings, e.g., Rinaldi v. Yeager, 384 U.S. 305 (1966), of their right of access to the courts to present federal issues, Smartt v. Avery, 370 F.2d 788 (6th Cir. 1967); Johnson v. Avery, 252 F. Supp. 783 (M.D. Tenn. 1966), and particularly of their right to counsel, Cooper v. Hutchinson, 184 F.2d 119 (3d Cir. 1950)(disposition on other grounds).1/

1/ The claims enumerated in the text are the principal substantive points upon which plaintiffs rely, as will appear in Part III infra. Of course, the jurisdiction conferred by §1983 to adjudicate those points carries with it pendent jurisdiction that permits the Court to determine the controversy on any ground it finds appropriate, be it one of federal law, Romero v. International Terminal Operating Co., 358 U.S. 354, 380-381 (1959), or state law, United Mine Workers v. Gibbs, 383 U.S. 715 (1966).

II. THE NATURE OF THE ACTION AND PLAINTIFFS' RIGHTS TO THE RELIEF SOUGHT

Plaintiffs' action is a classic equitable type: the suit against state officials for a declaration of the unconstitutionality of a state penal statute, on its face or as applied, and for an injunction of its enforcement against the plaintiffs. Although this sort of action has lately been projected into prominence by the civil rights confrontations of our time,[2/] it is, of course, an old and well-established form. At least since Ex parte Young, 209 U.S. 123 (1908),[3/] such suits have been entertained in the federal courts, where the traditional requirements of equity are met. Their maintenance is indeed assumed by the three-judge-court statutes, 28 U.S.C. §§ 2281-2284 (1964), pursuant to which this Court is convened.

There can thus be no question as to the general propriety of the relief sought. Persons subject to prosecution under state penal statutes may have them declared unconstitu-

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2/ See Note, The Dombrowski Remedy -- Federal Injunctions Against State Court Proceedings Violative of Constitutional Rights, 21 RUTGERS L. REV. 92 (1966); Note, Theories of Federalism and Civil Rights, 75 YALE L. J. 1007 (1966); Comment: Federal Injunctions Against State Actions, 35 GEO. WASH. L. REV. 744 (1967). See also UNITED STATES COMMISSION ON CIVIL RIGHTS, LAW ENFORCEMENT 124-129 (1965).

3/ Ex parte Young was described in Dombrowski v. Pfister, 380 U.S. 479, 483 (1965), as "the fountainhead of federal injunctions against state prosecutions."

tional, e.g., Evers v. Dwyer, 358 U.S. 202 (1958)(per curiam); Guyot v. Pierce, 372 F.2d 658 (5th Cir. 1967); Ware v. Nichols, 266 F. Supp. 564 (N.D. Miss. 1967)(three-judge court), and may obtain injunction both of their future enforcement by arrest and prosecution, e.g., Hague v. C.I.O., 307 U.S. 496 (1939); Strother v. Thompson, 372 F.2d 654 (5th Cir. 1967); Carmichael v. Allen, 267 F. Supp. 985 (N.D. Ga. 1966)(three-judge court), and of the continued maintenance of any pending prosecution, e.g., Dombrowski v. Pfister, 380 U.S. 479 (1965); Dilworth v. Riner, 343 F.2d 226 (5th Cir. 1965); Hulett v. Julian, 250 F. Supp. 208 (M.D. Ala. 1966)(three-judge court). Similarly, persons whose federally protected rights are jeopardized by the criminal prosecution of third parties, as where the effect of the prosecution may be to coerce the third party in a course of conduct which abridges the complaining person's federal guarantees, are entitled to an injunction both of future prosecutions, e.g., Pierce v. Society of Sisters, 268 U.S. 510 (1925); Morrison v. Davis, 252 F.2d 102 (5th Cir. 1958), and of pending prosecutions, Truax v. Raich, 239 U.S. 33 (1915); United States v. Wood, 295 F.2d 772 (5th Cir. 1961). In all of these situations, certain prerequisites must be met to justify declaratory and injunctive relief. We now turn to these.

A. Equity.

As in any equitable action, relief by declaration or restraint against a criminal prosecution is appropriate only when the traditional demands of equity are met: a showing of irreparable injury, and of the inadequacy of legal remedies. In the present context, these two matters are so closely interrelated that it appears appropriate to discuss them together.

Plaintiff Sobol's prosecution has a number of striking characteristics which lie at the heart of the plaintiffs' equitable claim:

(1) The prosecution is not for a single isolated act, but for conduct by Sobol which is an integral part of his daily activities; it thus coerces and threatens him in every aspect of his professional practice. By this prosecution, he is intimidated against the performance of any act, anywhere in Louisiana, which might fall within the extremely sweeping strictures of L.S.A. - R.S. 37:213, supra, pp. 4-5. This is an extreme example of a case in which (to quote a commonplace of federal equity doctrine) "plaintiff wants to pursue a continuing course of conduct which, under the terms of the statute [which he challenges] ..., would involve a multiplicity of offenses." HART & WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 863 (1953).

(2) The course of conduct in which Sobol is deterred by the *in terrorem* effect of the prosecution is the whole of his professional life. He is put completely out of operation, destroyed in his work as an attorney. To use another equitable commonplace, his means of livelihood are totally denied. See *Truax* v. *Raich*, 239 U.S. 33 (1915).

(3) But Sobol's work as an attorney is not merely a livelihood; it is also his method of political expression, and as such an activity within the broad protections of the First Amendment. See N.A.A.C.P. v. Button, 371 U.S. 415 (1963). His prosecution is "under a statute regulating expression [and therefore] ... 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." Dombrowski v. Pfister, 380 U.S. 479, 486 (1965).

(4) The exceedingly harsh penalties of the statutes under which Sobol is prosecuted (up to two years imprisonment and a thousand dollars for each act as an attorney, within the catalogue enumerated in L.S.A. - R.S. 37:213) make it impossible, as a practical matter, for Sobol to contest his right to professional existence in Louisiana by risking and defending prosecution. Not Sobol alone, but every officer of LCDC, and every director, trustee, agent or employee of LCDC, is subject to the drastic statutory penalties if the theory of Sobol's prosecution is sound. Every volunteer outstate attorney assigned by LCDC to assist Sobol is liable to those penalties; and Sobol, LCDC, and its officers, directors and agents, are liable to them on account of every act of a volunteer. The total threat, and its repressive effect, are staggering.

(5) This repressive effect throws its pall not only upon Sobol's functioning as an attorney, and upon LCDC's functioning as a civil rights legal aid association. It also threatens the activities of Negroes and civil rights workers, whose assertions of their federal constitutional and statutory rights to free expression, to the franchise, and to racial equality, have met with persistent legal opposition in Louisiana. These persons (represented by Plaintiffs Duncan and Reynolds) look to Sobol for protection and for the legal vindication of their vital federal guarantees. His repression withdraws that protection and intimidates them throughout the range of their activities.

(6) Sobol's defense of the criminal prosecution provides no adequate means of terminating the repression and intimidation. As plaintiffs will show, the effect of the prosecution has already been to deny Sobol's right to function in other parishes as well as Plaquemines. During the pendency of the prosecution, Sobol and LCDC are effectively hamstrung in their vital work within Louisiana. Sobol's clients and those who depend upon him and upon LCDC for protection are intimidated in their own civil rights activity. They are deterred from seeking his support both because the State of Louisiana is asserting in this prosecution that he has no right to represent them and because the prosecution evidences an official enmity to Sobol that warns them to stay clear of him. If Sobol

is tried and acquitted on this single Plaquemines charge, his status with regard to all of the other activities described in L.S.A. - R.S. 37:213 will remain in doubt nonetheless; and the notoriety of this prosecution, of this assertion of state power to deny Sobol's professional standing, will continue to inhibit his own activities, LCDC's, his clients' and his prospective clients! If he is tried and convicted, the repressive effect of the prosecution will carry well beyond the period of pendency of any appeal. Postconviction vindication of his rights -- even if these survive the "imponderables and contingencies" of criminal litigation, see Dombrowski v. Pfister, supra -- will neither give him the necessary scope of protection sought in the present declaratory and injunctive action, nor dissipate the impact on his prospective clients, the class plaintiffs here, of the threat to him and to them which this prosecution represents.

These circumstances, singly and collectively, make a plainly compelling case for equitable relief. The Supreme Court has long recognized that the enforcement or threatened enforcement of a penal statute which totally denies a man's pursuit of his occupation constitutes the sort of irreparable injury, irremediable by any legal remedy, that justifies an injunction. Truax v. Raich, supra; Pierce v. Society of Sisters, supra. This is obviously the more true where the man is an attorney, since the threat to him jeopardizes a broad range of activities of his clients, who are vitally dependent on him for their own protection. The impact on this client class of the recent, deplorable, increasingly frequent instances of harassment of civil rights attorneys has been judicially noticed, N.A.A.C.P. v. Button, 371 U.S. 415 (1963); Lefton v. City of Hattiesburg, 333 F.2d 280 (5th Cir. 1964), and the federal courts have been commensurately vigilant to protect the attorneys by the injunctive remedy. Dombrowski v. Pfister, 380 U.S. 479 (1965); Jordan v. Hutcheson, 323 F.2d 597 (4th Cir. 1963). It is significant that the clients "are not being prosecuted; they have not violated the state law [which is challenged as unconstitutional]; they are seriously affected by the provision of the statute which places a criminal penalty [on the lawyer, and] .... it is not even apparent that they could put themselves in position to be arrested and prosecuted [under the statute] even if they sought to test their constitutional rights in that manner ...." Morrison v. Davis, 252 F.2d 102, 103 (5th Cir. 1958). For if the attorney capitulates under the coercive force of the prosecution, the clients' rights are effectively destroyed without possibility of legal redress. And the exceptionally severe penalties of the Louisiana unauthorized-practice legislation make capitulation a distinctly likely -- perhaps necessary -- course, if the prosecution is allowed to go forward. Cf. Ex parte Young, 209 U.S. 123 (1908).

Moreover, it is crucial that the entire range of activities threatened by Plaintiff Sobol's prosecution under the vague and sweeping restrictions of L.S.A. - R.S. §§ 37:213, 37:214 is within the protection of the First Amendment. This is true of Sobol's own conduct (see p. 13, supra; Part III, infra), and of his clients'. It is true of LCDC's conduct, and of the conduct of its volunteer attorneys. Each is an act of expression, an exercise of the freedoms of expression to which the First Amendment has given a "preferred position." 4/ "These freedoms are delicate and vulnerable, as well as supremely precious in our society. The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions." N.A.A.C.P. v. Button, 371 U.S. 415, 433 (1963). "Historically, these preferred and paramount rights have continually come under attack from the best intentioned sources. And once the erosion of these rights is permitted to begin, it is exceedingly difficult to halt and the intervening damage may be irreparable." Wolff v. Selective Service Local Board No. 16, 372 F.2d 817, 822 (2d Cir. 1967). For this reason, the Supreme Court in Dombrowski v. Pfister, 380 U.S. 479 (1965), required 5/ the federal injunction of state criminal prosecutions that either are maintained under

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4/ Marsh v. Alabama, 326 U.S. 501, 509 (1946), and authorities cited; Saia v. New York, 334 U.S. 558, 562 (1948); see New York Times Co. v. Sullivan, 376 U.S. 254, 269-270 (1964).

5/ In Dombrowski the Supreme Court reversed a judgment denying injunctive relief. Its holding, therefore, is that the federal district courts are required to grant such relief upon the sort of showing described in the Court's opinion, quoted in text infra. Since considerable discretion is ordinarily allowed a district court in such equitable matters, the implication is plain: a district court may grant relief on a showing less compelling than that made in Dombrowski; and, when a showing meeting the Dombrowski standards appears, it must grant injunctive relief.

statutes "challenged ... as overly broad and vague regulations of expression," 380 U.S. at 490, or are maintained "without any hope of ultimate success, but only to discourage ... civil rights activities," ibid.

> ... For, in such cases, the statutes lend themselves too readily to denial of those [First Amendment] rights. The assumption that defense of a criminal prosecution will generally assure ample vindication of constitutional rights is unfounded in such cases.... 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. For free expression -- of transcendent value to all society, and not merely to those exercising their rights -- might be the loser.... For example, we have consistently allowed attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity.... We have fashioned this exception to the usual rules governing standing ... because of the ' ... danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application.' ... 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.... By permitting determination of the invalidity of these statutes without regard to the permissibility of some regulation on the facts of particular cases, we have, in effect, avoided making vindication of freedom of expression await the outcome of protracted litigation. Moreover, we have not thought that the improbability 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. ...
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> ... [A]ppellants have challenged the statutes as overly broad and vague regulations of expression.... [W]here, as here, prosecutions are actually threatened, this challenge, if not clearly frivolous, will establish

> the threat of irreparable injury required by traditional doctrines of equity. (380 U.S. at 486-487, 490.)

The question of equity in the present case is plainly controlled by Dombrowski and by the decisions in this Circuit following it. N.A.A.C.P. v. Thompson, 357 F.2d 831 (5th Cir. 1966); Guyot v. Pierce, 372 F.2d 658 (5th Cir. 1967); Strother v. Thompson, 372 F.2d 654 (5th Cir. 1967); Carmichael v. Allen, 267 F. Supp. 985 (N.D. Ga. 1966)(three-judge court); Ware v. Nichols, 266 F. Supp. 564 (N.D. Miss. 1967)(three-judge court). For here, as in Dombrowski itself, a sweeping state penal enactment is being enforced in such a fashion that the "area of proscribed conduct will be adequately defined and the deterrent effect of the statute contained within constitutional limits only by authoritative constructions sufficiently illuminating the contours of an otherwise vague prohibition.... [T]his cannot be satisfactorily done through a series of criminal prosecutions, dealing as they inevitably must with only a narrow portion of the prohibition at any one time, and not contributing materially to articulation of the statutory standard. 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." 379 U.S. at 490-491. See also Baggett v. Bullitt, 377 U.S. 360, 378-379 (1964).

Here, also, as in Dombrowski, a civil rights lawyer is being harassed. The prosecution herein has not ignored, and this Court should not ignore, the "signal" or "target" aspect of the charge against Plaintiff Sobol. It is a deep, broad and viciously effective thrust against the civil rights lawyer in Louisiana and in the South. 6/ Through the lawyer it cuts, deeply, broadly and effectively, against the assertion of federal civil rights by those whom official resistance to the Constitution has long compelled, and compels today, to depend upon the lawyer's protection. 7/ Of course it is true that Sobol may present in the criminal prosecution some of the federal constitutional defenses that he urges on this Court. But, as the Supreme Court recognized in Dombrowski, the presentation of those defenses there -- and even the hope of their ultimate vindication in that forum -- is an inadequate answer to the threat which this prosecution embodies against Sobol, LCDC, its volunteers, and the client plaintiffs.

> ... [It] does not protect plaintiffs from harassment and intimidation by the law enforcement agencies of the city, county, and State. It does not protect them from arrest en masse on frivolous or unfounded charges; it does not protect them from continued arrest and incarceration until bond could be deposited for their release; ... it does not protect them from often expensive litigation until their rights are finally vindicated; it does not protect them from being frightened away from the lawful assertion of their rights .... (N.A.A.C.P. v. Thompson, 357 F.2d 831, 838 (1966).)

6/ See Hammer, "Yankee Lawyer Go Home," New York Times, March 12, 1967, p. 8E, col. 1. See also Part III, infra.

7/ The courts of this Circuit are not unfamiliar with such "target"

Under the authorities and conformably to the most basic principles of equity, we submit, the conditions for the exercise of this Court's declaratory and injunctive jurisdiction are more than amply fulfilled.

B. Comity.

Of course, courts of the United States do not lightly enter the field of state penal legislation, or interfere with unconcluded prosecutions in the state courts. This principle of comity has two related aspects: the doctrine of Douglas v. City of Jeannette, 319 U.S. 157 (1943), under which a federal suitor challenging state criminal prosecution is remitted to the forum of the criminal court for vindication of his rights, so long as that forum appears adequate to vindicate them;[8/] and the abstention doctrine flowing from Railroad Comm'n of Texas v. Pullman Co., 312 U.S. 496 (1941), under which the federal suitor is directed to present his claims to the state courts in an adequate civil forum. These two doctrines are inapplicable here for the same reason. Both suppose the adequacy of a state forum for protection of the federal interest asserted in the federal suit; and neither applies unless a state forum is, in fact,

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prosecutions, designed and effective to intimidate civil rights activity by making a distressing example of civil rights leadership figures. See, e.g., United States v. Wood, 295 F.2d 772 (5th Cir. 1961); Cox v. Louisiana, 348 F.2d 750 (5th Cir. 1965). See also Dombrowski v. Pfister, supra; and see Jordan v. Hutcheson, 323 F.2d 597 (4th Cir. 1963).

8/ "In Douglas ..., the Court upheld a district court's refusal to enjoin application of a city ordinance to religious solicitation, even though the ordinance was that very day held unconstitutional as so applied on review of a criminal conviction under it. Murdock v. Pennsylvania, 319 U.S. 105.... Since injunctive relief looks to adequate to protect that federal interest.

The Dombrowski Court made this point unmistakably clear, expressly holding, first, that the Douglas principle was inapposite in the absence of adequate state legal remedies, 380 U.S. at 484-486 -- i.e., in "a situation in which defense of the State's criminal prosecution will not assure adequate vindication of constitutional rights," id. at 486 -- and, second, that where such a showing was made of the inadequacy of legal remedies and the "irreparable injury required by traditional doctrines of equity [,] ... the same reasons preclude denial of equitable relief pending an acceptable narrowing construction" sought in the state courts under the abstention principle. Id. at 490. The dependence of the comity doctrines upon the existence of a state legal remedy that is adequate in the classical equity sense was tersely expressed, also, in Hulett v. Julian, 250 F. Supp. 208, 209 (M.D. Ala. 1966)(three-judge court): "Judicial comity and its statutory counterpart, 28 U.S.C. § 2283, bar this Court from enjoining the [prosecution of the plaintiff in a state court] ... if the plaintiff has any adequate remedy under State law." Conversely, the inadequacy of state remedies required a federal injunction, as Hulett held. Other courts in this Circuit have taken the same view. E.g., N.A.A.C.P. v. Thompson, 357 F.2d 831, 838 (5th Cir. 1966); Carmichael v. Allen, 267 F. Supp. 985, 993 (N.D. Ga. 1966)(three-judge court). In short, in a federal

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the future, and it was not alleged that Pennsylvania courts and prosecutors would fail to respect the Murdock ruling, the Court found nothing to justify an injunction." Dombrowski v. Pfister, 380 U.S. 479, 485 (1965).

suit to restrain a state prosecution, the "same reasons" that satisfy the federal equitable requirements of irreparable injury and inadequate state remedies also satisfy the demands of comity. For this reason, what we have said in Part II(A), pp. 11-21 supra, on the question of equity equally controls the comity point.[9/]

Furthermore, the Dombrowski case itself is squarely controlling here. We have noted in the preceding Subpart (A) that Dombrowski is not distinguishable from this case as regards the question of equity. No more is it distinguishable as regards the overlapping question of comity. Here, as in Dombrowski, the Court is confronted with a harassment prosecution of a civil rights attorney under a vague and broadly sweeping statute which he challenges on First Amendment and cognate grounds. In one particular application, the statute has already been enforced against him by arrest and seizure; in addition, it threatens with drastic penalties a wide and undefined range of his professional activities and those of LCDC and its volunteers, all within the ambit of the First Amendment and that other bedrock guarantor of fundamental liberties, the Sixth.[10/] No dis-

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9/ We think it doubtful that the ordinary rules of comity have any application in suits authorized to be brought by §1983 to vindicate federally guaranteed civil rights. A close reading of the Douglas case discloses that the actual ground of decision there was the traditional equitable notion of adequacy of legal remedies. Although the Court has occasionally required abstention in §1983 cases, Harrison v. N.A.A.C.P., 360 U.S. 167 (1959), it did so without consideration; and in McNeese v. Board of Education, 373 U.S. 668, 674 (1963), the Court squarely held that abstention had no place in § 1983 matters. Since McNeese, the Court has not required abstention in such matters. Anderson v. Martin, 375 U.S. 399 (1964); Baggett v. Bullitt, 377 U.S. 360 (1964); Dombrowski v. Pfister, supra; Bond v.

[NOTE 9 IS CONTINUED AND NOTE 10 IS FOUND ON THE NEXT PAGE]

position of the single charge against Plaintiff Sobol will contain and regulate the "chilling effect" upon him, upon LCDC, and upon the class of client plaintiffs, of the all-encompassing strictures of L.S.A. - R.S. 37:213, 37:214, as those statutes are being used. No state forum is available to those client plaintiffs, in particular, if the prosecution crushes Sobol under its threat of a heavy prison sentence and, overbearing his powers of resistance, deprives them of his services. See Morrison v. Davis, 252 F.2d 102, 103 (5th Cir. 1958). They are entitled to be relieved of that repressive threat by the injunctive powers of this Court, cf. United States v. Wood, 295 F.2d 772 (5th Cir. 1961); and Sobol and LCDC 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." The Dombrowski case, 380 U.S. at 491, plainly so holds.

Floyd, 385 U.S. 116 (1966); Keyishian v. Board of Regents, 385 U.S. 589 (1967). And see Harman v. Forssenius, 380 U.S. 528 (1965).

Courts in this Circuit also have resisted the notion that comity bars injunctive relief against state legislation, including penal legislation, challenged as abridging federal civil rights in situations where the traditional equitable conditions for an injunction are met. Injunctions have sometimes been denied where state statutes, not facially unconstitutional, nor vague and overbroad, were applied to civil rights demonstrators whose conduct ran the gamut from peaceful to boisterous. E.g., Wells v. Hand, 238 F. Supp. 779 (M.D. Ga. 1965), aff'd per curiam sub nom. Wells v. Reynolds, 382 U.S. 39 (1965); Zellner v. Lingo, 218 F. Supp. 513 (M.D. Ala. 1963). Cases of this sort often lack equity, because in the volatile circumstances of street confrontations, the constitutional rights of the demonstrators present a "difficult question which must necessarily be dependent upon the facts of the particular case," Anderson v. Albany, 321 F.2d 649, 657 (5th Cir. 1963). Litigation of the proprieties of past arrests therefore fails to settle the rights of the parties for the future; and the courts are understandably reluctant to restrict by injunction police control of speculative future situations. Nevertheless, even in such cases, injunction may be allowed on a proper equitable showing. Kelly v. Page, 335 F.2d 114 (5th Cir. 1964); N.A.A.C.P. v. Thompson, 357 F.2d 831 (5th Cir. 1966). And in response to abstention contentions, courts in this Circuit have flatly held: "The short answer is that doctrine has no application where the plaintiffs complain that they are being deprived of constitutional civil rights, for the protection of which the Federal courts have a responsibility as heavy as that which rests on the State courts." Browder v. Gayle, 142 F. Supp. 707, 713 (M.D. Ala. 1956) (three-judge court), aff'd per curiam, 352 U.S. 903 (1956). Accord: Morrison v. Davis, 252 F.2d 102, 103 (1958). We would urge that view on this Court were it necessary to decision here; but, as indicated in text, the present case presents a situation in which abstention is plainly foreclosed on narrower grounds.

10/ See, e.g., Gideon v. Wainwright, 372 U.S. 335 (1963); Glasser v. United States, 315 U.S. 60 (1942).

C. 28 U.S.C. § 2283.

Dombrowski, 380 U.S. at 484, n. 2, leaves open the question of the effect of the federal anti-injunction statute, 28 U.S.C. § 2283 (1964), upon suits seeking the injunctive relief authorized by 42 U.S.C. § 1983.[11/] The question was not faced there because, in the fortuities of timing of that litigation, the filing of the federal injunctive complaint had preceded the return of criminal indictments, traditionally thought the point of beginning of "proceedings in a State court" described by § 2283. In the present case, the question is presented in a very narrow focus: namely, in a case otherwise meeting the standards of the Dombrowski opinion for required[12/] federal injunctive relief, is the right to relief defeated by § 2283 simply because the prosecutor files his information and obtains a bench warrant before federal suit can be filed? Without trenching on broader questions,[13/] we submit that the answer to that one is plainly, No.

11/ See also Cameron v. Johnson, 381 U.S. 741 (1965) (per curiam); Stevens v. Frick, 372 F.2d 378, 380-381 (2d Cir. 1967); Ware v. Nichols, 266 F. Supp. 564, 569 (N.D. Miss. 1967).

12/ See note 5 supra.

13/ This case does not require decision of the broader question whether every "suit in equity" for an injunction authorized by 42 U.S.C. § 1983 is thereby "expressly authorized by Act of Congress" within the exception to § 2283. The Circuits are split on that question, the Third holding that § 1983 furnishes an express authorization within the meaning of § 2283, Cooper v. Hutchinson, 184 F.2d 119 (3d Cir. 1950), and the Fourth, Sixth and Seventh holding that it does not. Baines v. City of Danville, 337 F.2d 579 (4th Cir. 1964); Sexton v. Barry, 233 F.2d 220 (6th Cir. 1956); Smith v. Village of Lansing, 241 F.2d 856 (7th Cir. 1957); Goss v. Illinois, 312 F.2d 257 (7th Cir. 1963). Some district courts in this Circuit have taken the latter view, Chaffee v. Johnson, 229 F. Supp. 445 (S.D. Miss. 1964); Kelley v. Wallace, 257 F. Supp. 343 (M.D. Ala. 1966), but the Court of Appeals avoided the question in affirming the Chaffee case on other grounds. 352 F.2d 514 (5th Cir. 1965) (per curiam). The Supreme Court declared the question open in footnote 2 of its Dombrowski opinion, and left it open in Cameron v. Johnson, supra note 11. On remand in Cameron, a three-judge district court held that § 1983 provided no exception to § 2283, with Judge Rives vigorously dissenting. Cameron v. Johnson, 262 F. Supp. 873 (S.D. Miss. 1966) (three-judge court). The point was not necessary to disposition of the case. A juris-

(1) Any appraisal of the effect of 28 U.S.C. § 2283

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dictional statement has been filed seeking review of that determination. Cameron v. Johnson, O.T. 1966, No. 1773 Misc.

We would of course urge that this Court hold § 1983 is an express exception to § 2283, if that submission were necessary to our position here. In light of the thorough discussion of the question in Judge Rives' opinion in Cameron v. Johnson, supra; in the majority and dissenting opinions for the Fourth Circuit in Baines; supra, and in the law review writings collected in note 2 supra, we think no valid purpose could be served by developing the submission extensively in this memorandum. We make what we believe are the compelling points briefly in the following paragraph of this footnote.

(1) "[D]espite the apparently unequivocal language of the predecessors of § 2283, a number of exceptions were judicially declared to exist," Baines v. City of Danville, 337 F.2d 579, 587 (4th Cir. 1964); for (as we shall show in the next text paragraph) §2283 has never been seen as a categorical jurisdictional bar, but rather as the statutory embodiment of a flexible principle of judicial comity. (2) The "expressly authorized" proviso of present § 2283 was added in 1948 to codify the principle of these judicially created exceptions. See note 14 infra. (3) The traditional principle of the exceptions does not require that a federal statute refer in terms to § 2283, Amalgamated Clothing Workers v. Richman Bros. Co., 348 U.S. 511, 516 (1955)(dictum); e.g., Providence and New York Steamship Co. v. Hill Mfg. Co., 109 U.S. 578, 599 (1883); nor even that it refer to proceedings in the state courts, e.g., Porter v. Dicken, 328 U.S. 252 (1946); Dilworth v. Riner, 343 F.2d 226 (5th Cir. 1965). The test is more organic, and a general grant of equitable jurisdiction may constitute an express authorization sufficient to come within the exception to §2283, as Porter v. Dicken, supra, exemplifies. The proper standard for determining whether a federal statute qualifies the anti-injunction policy of §2283 is whether "[t]he statutory purpose sought to be achieved under the [particular] ... statute require[s]" an injunction. Dilworth v. Riner, supra, 343 F.2d at 231. See also IA MOORE'S FEDERAL PRACTICE, ¶ 0.213[1], at p. 2417 ("underlying purpose"). If state proceedings threaten "the frustration of superior federal interests," Leiter Minerals, Inc. v. United States, 352 U.S. 220, 226 (1957), an injunction is required; and a statute creating or extending federal judicial protection to those interests is an exception to § 2283. (4) These authorities, then, direct attention to the purposes of 42 U.S.C. § 1983. Its purposes are plain. "It is abundantly clear that one reason the legislation [section 1 of the Ku Klux Act of 1871, now § 1983] was passed was to afford a federal right in federal courts because by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges, and immunities guaranteed by the Fourteenth Amendment might be denied by the state agencies." Monroe v. Pape, 365 U.S.

(1964) must begin with the recognition that that provision is

167, 180 (1961). "The purposes were several-fold -- to override certain kinds of state laws, to provide a remedy where state law was inadequate, 'to provide a federal remedy where the state remedy, though adequate in theory, was not available in practice' ..., and to provide a remedy in the federal courts supplementary to any remedy any State might have." McNeese v. Board of Education, 373 U.S. 668, 671-672 (1963). Consistently with these purposes, it is inconceivable that §1983 should not authorize the injunction of state proceedings which violate federal constitutional civil rights. (5) To hold that §1983 is thus an exception to §2283 would not work any significant dislocation of federal-state relations, nor unduly intrude the federal judiciary into state proceedings. For a federal injunction of state judicial proceedings could be obtained only within the restrictions and safeguards of the traditional doctrines of equity (see Subpart II(A) supra) and comity (see Subpart II(B) supra). Conversely, not to allow §1983 as an exception to § 2283 would oppose an additional, and quite unnecessary hurdle, in the path of lawsuits authorized by statute, equity, and comity, for the vindication of federal civil rights. As we show in text, that additional hurdle is far from insurmountable. But it is mischievous, precisely because the exact extent of the restriction imposed by § 2283 remains uncertain. And if, of course (inconsistently with our submission in the text) §2283 is viewed as constituting a considerable and largely impenetrable barrier against federal injunctions in the cases to which it applies, the effect will be wholly to emasculate §1983, the Dombrowski principle, and the vital federal freedoms which they protect. There is no justification for any such statutory construction. For, as Judge Wisdom wrote for the Court of Appeals in Cox v. Louisiana, 348 F.2d 750, 752 (5th Cir. 1965):

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

There can be no reason, we suggest, for holding that § 2283 disempowers federal courts to enjoin state proceedings condemned by § 1983, except distrust that the federal judges will abuse those remedies which the doctrines of equity and comity give them full authority to decline to use. The reasons not to disempower them in this fashion are commandingly embodied in the great principle of constitutional primacy of the Supremacy Clause, and in § 1983 it-not a jurisdictional statute, but a congressional affirmation of the rules of comity developed by and for the dual system of courts in our federal structure. Smith v. Apple, 264 U.S. 274, 278-279 (1924); T. Smith & Son v. Williams, 275 F.2d 397, 405-407 (5th Cir. 1960); MOORE, COMMENTARY ON THE JUDICIAL CODE, §.03(49) (1949), at pp. 407-410.[14/] The section has undergone

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self, by which "Congress has declared the historic judgment that within this precious area [of federal civil rights] ..., there is to be no slightest risk of nullification by state process." Wechsler, Federal Jurisdiction and the Revision of the Judicial Code, 13 LAW & CONTEMP. PROB. 216, 230 (1948).

14/ The progenitor of § 2283 was § 5 of the Act of March 2, 1793, 1 Stat. 335, which provided:

> ... nor shall a writ of injunction be granted to stay proceedings in any court of a state ...

Carried forward as REV. STAT. §720 (1875), the section was amended by 36 Stat. 1162 so as to appear in the following form as § 265 of the Judicial Code of 1911:

> The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a state, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy.

That version appears as 28 U.S.C. § 379 (1940). The 1948 code revision, 62 Stat. 968, produced the text of the present § 2283:

> 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.

The history of the enactment, and of its fluctuating periods of strict and liberal construction, the exceptions read into its seemingly categorical early language, and their theoretical bases and development, are discussed in Toucey v. New York Life Ins. Co., 314 U.S. 118 (1941); Amalgamated Clothing Workers v. Richman Bros., 348 U.S. 511 (1955); Jacksonville Blow Pipe Co. v. Reconstruction Finance Corp., 244 F.2d 394 (5th Cir. 1957); T. Smith & Son v. Williams, 275 F.2d 397 (5th Cir. 1960).

its judicial ups and downs, its times of strict and lax construction;[15] but it has always been a more penetrable barrier than its language made it appear.[16] And at least since the 1948 revision, with its avowed liberalizing purpose,[17] even those courts which take the most obdurate view of §2283 have conceded that it is nothing more or less than a somewhat intensified form of the judicially created comity principle discussed in the immediately preceding Subpart of this memorandum, pp. 21-24 supra. In Kelley v. Wallace, 257 F. Supp. 343 (M.D. Ala.

15/ See note 14 supra.

16/ See, e.g., Smith v. Apple, supra, 264 U.S. at 278-279, dealing with the apparently unqualified prohibition of the section in its 1911 form:

> ... It is not a jurisdictional statute. It neither confers jurisdiction upon the federal courts nor takes away the jurisdiction otherwise specifically conferred upon them by the Federal statutes. It merely limits their general equity powers in respect to the granting of a particular form of equitable relief; that is, it prevents them from granting relief by way of injunction in the cases included within its inhibitions. In short, it goes merely to the question of equity in the particular bill.... This section, as settled by repeated decisions of this court, does not prohibit in all cases injunctions staying proceedings in a state court. Such injunctions may be granted, consistently with its provisions, in several classes of cases.... Necessarily, therefore, in a suit in equity of which a district court has jurisdiction under the Federal statutes, where the relief sought is an injunction against proceedings in a state court, it is the duty of the court to determine, under the allegations and proof, whether a case is made which entitles the plaintiff to the injunction sought; that is, whether the case presented is one in which such relief is prohibited by the statute, or one in which it may nevertheless be granted.

17/ Prior to Toucey v. New York Life Ins. Co., 314 U.S. 118 (1941), the Supreme Court had proceeded rather liberally in creating exceptions to §2283. See the discussion in the Toucey opinions and in the cases cited in the last paragraph of note 14 supra. Toucey itself severely restricted the scope of implied exceptions to the anti-injunction statute, holding specifically that §2283 barred

1966), for example, Judge Johnson, after holding that 42 U.S.C. § 1983 did not supply a general exception to § 2283,[18/] recognized that "extraordinary circumstances [would] ... justify or require this Court's not following the congressional mandate as set out in § 2283," id. at 344, and went on to discuss those circumstances in terms of the question whether "the plaintiff was without adequate state remedies." Ibid. That principle was the basis for the holding in Hulett v. Julian, 250 F. Supp. 208 (M.D. Ala. 1966)(three-judge court) that where vital constitutional rights were infringed by a state prosecution and "the plaintiff has no adequate remedy under State law," id. at 210, both "[j]udicial comity and its statutory counterpart, 28 U.S.C. § 2283" permitted injunction of the prosecution. Id. at 209. The Fourth Circuit

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federal courts from enjoining relitigation in state courts of issues which the federal courts had previously determined. The response of Congress, in the Judicial Code revision of 1948, was to supply several broadside exceptions (the "statutory" exception, and exceptions for injunction by a federal court where "necessary in aid of its jurisdiction" or "to protect or effectuate its judgments") having the effect of restoring judicial flexibility in the administration of § 2283. The Reviser's Note states:

> ... An exception as to Acts of Congress relating to bankruptcy was omitted and the general exception substituted to cover all exceptions.
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> ....
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> ... [T]he revised section restores the basic law as generally understood and interpreted prior to the Toucey decision.

18/ See note 13 supra.

summarized the lore of § 2283 in Baines v. City of Danville, 337 F.2d 579, 593 (4th Cir. 1964), as follows:[19]

> Though we hold that § 2283, except when the United States is a party, applied to an attempt to enjoin then pending proceedings in a state court, is at least as broad as the judicially developed principle of comity which forbids federal interference with state court proceedings, it is not a jurisdictional statute. It is a limitation upon the exercise by a District Court of its equity jurisdiction. It was born of the realization of the problems which would arise if the Courts of the United States undertook to interfere with proceedings in state courts. It was fathered by the same principles of comity exemplified by Douglas v. City of Jeannetts .... Since the statute was fathered by the principles of comity, it has been held that the statute should be read in the light of those principles and, though absolute in its terms, is inapplicable in extraordinary cases in which an injunction against state court proceedings is the only means of avoiding grave and irreparable injury. In our view, the congressional command ought to be ignored only in the face of the most compelling reasons, but we have certainly been told by the Supreme Court that in those circumstances it may be disregarded, for its parentage discloses that it was not intended to be as absolute as it sounds.

The Supreme Court has made the same point recently in a dictum in the removal cases, City of Greenwood v. Peacock, 384 U.S. 808, 829 (1966), noting with regard to pending state prosecutions challenged under the First Amendment: "If the state prosecution or trial ... would itself clearly deny their rights protected by the First Amendment, they may under some circumstances obtain an

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19/ We should perhaps reiterate that we disagree with the holding of a divided Court of Appeals in Baines that 42 U.S.C. § 1983 is not a statutory exception to § 2283. We need not press our submission in that regard (stated in note 13, supra), however, unless this Court takes a different view than the Baines court -- and the consistent body of authority cited in the text -- as to the effect of §2283 in cases not exempted by statute from its coverage.

injunction in the federal court. See Dombrowski v. Pfister, ..." Accord: Donovan v. Dallas, 377 U.S. 408, 412 (1964) (§ 2283 authorizes the injunction of state proceedings "in some special circumstances"). The Court has long permitted injunctions in cases within the literal ban of §2283, where the state proceedings sought to be enjoined jeopardized "the frustration of superior federal interests." Leiter Minerals, Inc. v. United States, 352 U.S. 220, 226 (1957). E.g., Sovereign Camp, Woodmen of the World v. O'Neill, 266 U.S. 292 (1924); Rea v. United States, 350 U.S. 214 (1956). 20/

(2) We think it indisputable that a case in which the plain terms of Dombrowski require a federal injunction, consistently with the doctrines of equity and comity, to preserve federal civil rights against irreparable injury in state proceedings, is one presenting the "special circumstances," the threatened "frustration of superior federal interests," required to escape the ban of § 2283. This is evident for several reasons. First, the whole thrust of the Dombrowski opinion consists in an explicit and eloquent elaboration of the theme that state prosecutions of the sort it describes do critically and intolerably threaten the frustration of superior federal interests. The frustration is no less, of course, whether the prosecutor or his defendant files the first paper. Second, Dombrowski thoroughly

20/ Rea has since been distinguished in Wilson v. Schnettler, 365 U.S. 381 (1961), and Cleary v. Bolger, 371 U.S. 392 (1963), on grounds that go to questions of equity and comity but not to the application of §2283. This approach makes it clear, we think, that the questions under the statute approximate those discussed in Subparts II(A) and II(B) supra of this memorandum.

and deliberatively considers the demands of comity as embodied in three distinct but related principles -- the traditions of federal equity in state criminal cases, the Douglas v. City of Jeannette rule, and the abstention doctrine -- and, in each aspect, concludes that comity must be subordinated to the overriding obligation of the federal courts to protect precious federal civil rights from irreparable injury. But, as Smith v. Apple, supra; Hulett v. Julian, supra; the Baines opinion and a host of other authorities have recognized, §2283 is simply another embodiment of those "same principles of comity" (Baines, supra, 337 F.2d at 593) which Dombrowski subordinated. It may well be, perhaps, that a more compelling showing is required to override § 2283 than its non-statutory "counterpart" (Hulett v. Julian, supra, 250 F. Supp. at 209), the judicially created comity doctrine; or that the discretion of a district court is broader under the latter than the former constraint. But Dombrowski is not a mere principle of discretion, see note 5 supra; and the simplest reading of the Supreme Court's opinion demonstrates that the Dombrowski case hurtled the comity barrier with plenty of yardage to spare. The present case, we submit, comes within Dombrowski with at least the same yardage to spare.

Third, to hold that §2283 disallows the Dombrowski remedy in cases where the square holding of Dombrowski would compel it but for the temporal fluke that the prosecutor's information preceded his defendant's countersuit, would result in preposterous and self-defeating consequences. It would strip federal civil rights of the protection to which Dombrowski declared they were entitled, for no better reason than that a particular prosecutor was quick on the draw. In many cases, it would destroy the protection of Dombrowski altogether. For example, that aspect of Dombrowski which promises relief against discriminatory and harassing prosecutions would be totally defeated in non-indictable cases; for a criminal accused could hardly complain of discrimination or harassment before he was charged, and after the prosecutor's charge, the § 2283 bar would apply. Many criminal defendants entitled to a Dombrowski injunction would also be whipsawed between the equitable requirement of imminent harm, on the one hand, and § 2283 on the other. Suit too soon would be condemned as premature, see Zwickler v. Koota, 261 F. Supp. 985 (E.D.N.Y. 1966)(three-judge court), probable jurisdiction noted, 386 U.S. 906 (O.T. 1967, No. 29); and suit too late would be barred by the statute. In any case, the upshot of such a rule would be to encourage the most unseemly sort of race to the courthouse door. This would trivialize both the vital federal constitutional rights declared by Dombrowski and the federal judicial process which Dombrowski recognized to protect those rights. Far from serving the principles of comity embodied in § 2283, it would disserve them; for putative defendants would be compelled to sue their possible prosecutors, often needlessly and always precipitately, in order to preserve their Dombrowski rights.

(3) For these reasons it is no accident, we believe, that no case can be found which applies §2283 as a bar to an

injunction in circumstances which satisfy the Dombrowski criteria for injunctive relief. (None of the cases cited in the first paragraph of note 13, supra, which hold that 42 U.S.C. § 1983 is not a general exception to § 2283, are Dombrowski cases. Indeed, in none of them was an adequate showing made to justify equitable relief within traditional irreparable-injury and case-law comity principles; and the Sixth and Seventh Circuit cases are dubiously within § 1983 on the merits.) On the other hand, Hulett v. Julian, supra, enjoined a pending state prosecution in a Dombrowski situation; and Guyot v. Pierce, 372 F.2d 658 (5th Cir. 1967), authorized the district court to enjoin pending prosecutions in another. We submit that those decisions are plainly right; that this Court should follow them; and that 28 U.S.C. § 2283 is no bar to the injunction plaintiffs seek of Plaintiff Sobol's Plaquemines Parish prosecution.[21]

(4) In view of the circumstance that the defendants herein have predicated a motion for summary judgment upon § 2283, we believe we should add that in no event -- even if § 2283 barred the injunction of the Plaquemines prosecution -- would § 2283 terminate all of the rights of the plaintiffs to relief. Plaintiffs would still be entitled to (a) declaratory relief, and (b) injunction of future prosecutions of Sobol under L.S.A. - R.S. §§ 37:213, 37:214. The authorities on these points

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21/ We also submit that the allegations of the complaint, that Sobol's prosecution is designed and effective to harass and intimidate him in his functioning as a member of the bar of this Court plainly brings this case within the "aid of its jurisdiction" proviso of § 2283, as the Supreme Court has liberally conare too clear to require elaboration. (a) Guyot v. Pierce, 372 F.2d 658 (5th Cir. 1967); Ware v. Nichols, 266 F. Supp. 564 (N.D. Miss. 1967)(three-judge court); see County of Allegheny v. Frank Mashuda Co., 360 U.S. 185, 197-198 (1959). (b) Hague v. C.I.O., 307 U.S. 496 (1939); Strother v. Thompson, 372 F.2d 654 (5th Cir. 1967); Carmichael v. Allen, 267 F. Supp. 985 (N.D. Ga. 1966)(three-judge court). Elaboration also seems purposeless since, as we have shown, § 2283 does not bar injunction of the Plaquemines prosecution.

D. Standing.

In Part III infra, we develop on the merits arguments predicated both on the rights of Plaintiff Sobol and on the rights of the class of client plaintiffs, represented by Plaintiffs Duncan and Reynolds. This leads us to discuss at the present juncture two related questions of standing. The discussion will be brief, since the applicable principles are settled.

1. Plaintiff Sobol has standing to assert the rights of his clients and prospective clients. This arises both because of his professional relationship to them, see, e.g., Griswold v. Connecticut, 381 U.S. 479 (1965); Sperry v. Florida, 373 U.S. 379 (1963); N.A.A.C.P. v. Button, 371 U.S. 415 (1963); Spanos v. Skouras Theatres Corp., 364 F.2d 161 (2d Cir. 1966)(en banc),

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strued that proviso. Capital Service, Inc. v. N.L.R.B., 347 U.S. 501 (1954).

and because it is he who is being prosecuted, and whose prosecution is being made the instrument to affect their interests, see, e.g., Meyer v. Nebraska, 262 U.S. 390 (1923); Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123 (1951); Barrows v. Jackson, 346 U.S. 249 (1953); N.A.A.C.P. v. Alabama ex rel. Patterson, 357 U.S. 449 (1958).

2. The client class plaintiffs have standing to enjoin Plaintiff Sobol's prosecution, and the enforcement of the challenged Louisiana statutes against him, because that prosecution and enforcement vitally affect their interests, see, e.g., Truax v. Raich, 239 U.S. 33 (1915); Pierce v. Society of Sisters, 268 U.S. 510 (1925), and jeopardize their constitutional rights, e.g., Morrison v. Davis, 252 F.2d 102 (5th Cir. 1958).

We turn, then, to the merits.

III. THE MERITS

A. The Causes of Action.

It will facilitate plaintiffs' submissions to identify at the outset each of the seven Causes of Action contained in the Amended Complaint and to state, for each, (a) its general legal theory, (b) the sources of law on which it stands, and (c) its factual elements. The authorities and arguments supporting plaintiffs' contentions will be subsequently presented, in Subpart III(B) *infra*.

(1)(a) The First Cause of Action (Amended Complaint, ¶ 14) asserts that Plaintiff Sobol is being unconstitutionally prosecuted because the conduct for which he is charged consists of nothing more than the gratuitous representation of Plaintiff Duncan, in association with Louisiana counsel, in a criminal matter involving substantial federal defensive issues. (b) The Cause is based upon (i) Duncan's rights in the criminal prosecution, including his Sixth Amendment right to counsel and his underlying federal defensive claims in the *Duncan* case; (ii) Duncan's rights under the federal Privileges and Immunities Clause (Amend. XIV, § 1) and the Supremacy Clause (Art. VI, cl. 2) to an adequate presentation of his federal contentions in a criminal prosecution against him; and (iii) Sobol's reciprocal rights to represent Duncan and his own Privilege and Immunity (Amend. XIV, § 2) as a member of the bar of the Supreme Court and of the relevant lower federal courts, to present and preserve Duncan's federal contentions for ultimate decision by those courts. (c) The facts supporting this Cause are: that Sobol is an attorney, a member of the bar of the Supreme Court, the Court of Appeals for the Fifth

Circuit and this Court; that, as staff counsel for LCDC, he is particularly learned and experienced in federal constitutional matters, and in civil-rights and civil-liberties matters; that, in association with Messrs. Collins and Douglas of the Louisiana bar, he undertook to represent Plaintiff Duncan gratuitously in a criminal prosecution, wherein substantial federal defensive contentions were available, which he duly presented; and that the criminal charge against Sobol is based upon his actions in representing Duncan, which are not asserted to be beyond the proper scope of an attorney's professional services to a client. (Additionally, it may be noted that Sobol was introduced to the Plaquemines courts at his first appearance in the Duncan case by attorney Collins; that all papers in the matter were subscribed by Collins; that no objection was taken to Sobol's appearance in the Duncan case at any time on the grounds of his not being admitted to the Louisiana bar, although he had been introduced to Judge Leon at the outset as an attorney from Washington, D.C.; that the federal issues preserved in the Duncan case have in fact been carried to the Supreme Court of the United States by direct appeal from the Louisiana courts, by a jurisdictional statement timely filed in Duncan v. Louisiana, O.T. 1967, No. 410. These facts support, but are not necessary to the establishment of, plaintiffs' First Cause of Action.)

(2)(a) The Second Cause of Action (Amended Complaint, ¶¶ 15-18) asserts that Louisiana may not prohibit Plaintiff Sobol from, or punish him for, his limited activities in the State, consisting exclusively of the furnishing of gratuitous legal assistance in matters involving federal issues, as an expert in those federal issues and in association with counsel admitted to the Louisiana bar. (b) The Cause is based upon (i) the rights of the class of client plaintiffs (A) under the federal Privileges and Immunities Clause (Amend. XIV, §1) and the Supremacy Clause (Art. VI, cl. 2), to (1) an adequate opportunity to vindicate their federal rights by being duly advised concerning those rights and fully heard in the state and federal courts on assertions of those rights; and (2) to representation by an expert attorney of their choice in matters of federal law (subject only to Louisiana's legitimate interest in control of the legal profession within its borders, which is fully satisfied by the requirement that the attorney of their choice be associated with local counsel); and (3) to representation by an attorney of their choice in criminal prosecutions against them (subject to the same legitimate interest of the State of Louisiana); and (B) under the First and Fourteenth Amendments, to employ litigation as a means of political expression, both in affirmative lawsuits seeking to establish and protect their federal rights, and by defending against criminal prosecutions which jeopardize those rights; and (ii) Plaintiff Sobol's reciprocal rights, and his own rights (A) under the Supremacy and Privileges and Immunities Clauses (Art. IV, cl. 1; Amend. XIV, § 1) to be heard as an attorney (1) on federal issues in state and federal courts, and (2) particularly in the federal courts to whose bars he is admitted; (B) under the First and Fourteenth Amendments, to engage in litigation as a means of political expression; and (C) under the Fourteenth Amendment, to practice his profession without arbitrary interference (all subject to the legitimate interest of the State of Louisiana, described above). (c) The facts supporting this Cause are:

that Sobol is an attorney, a member of the bar in good standing in New York and the District of Columbia, and a member of the bar of the Supreme Court, the Court of Appeals for the Fifth Circuit and this Court; that, as staff counsel for LCDC, he is particularly learned and experienced in federal constitutional matters, and in civil-rights and civil-liberties matters; that he handles legal matters in Louisiana, as an expert in the federal issues involved, without charge to the client or compensation in any form from the client, and only in association with the firm of Collins, Douglas and Elie, whose members are admitted to the Louisiana bar; and that the subject matter of the cases which Sobol handles involves the vindication of federal civil rights and liberties, and rights of racial equality, whose assertion is a means of free expression protected by the First Amendment. (Additionally, it may be noted that there is a scarcity of attorneys who will and can adequately handle civil rights and civil liberties matters in Plaquemines Parish and Louisiana, particularly where clients cannot afford a fee; that counsel are not appointed for criminal defendants in misdemeanor cases; and that the class of client plaintiffs herein have a reasonable basis for placing unique confidence in Sobol, his Louisiana associates (Collins, Douglas and Elie), LCDC, and LCDC volunteer attorneys in civil rights matters; and a reasonable basis for lack of confidence in local white attorneys in such matters. These facts support, but are not necessary to the establishment of, plaintiffs' Second Cause of Action.)

(3)(a) The Third Cause of Action (Amended Complaint, ¶¶ 19-20) asserts that L.S.A. - R.S. §§ 37:213, 37:214 (set out at pp. 4-6 supra) are unconstitutional as applied to Plaintiff Sobol's conduct, for the reasons set out more fully in connection with the First and Second causes, supra. The Third Cause is (b) based on the same sources of law, and (c) supported by the same facts, as the First and Second Causes.

(4)(a) The Fourth Cause of Action (Amended Complaint, ¶¶ 21-24) asserts (i) that Plaintiff Sobol's conduct is not within the ban of L.S.A. - R.S. §§ 37-213, 37-214; (ii) that his prosecution is groundless, and maintained arbitrarily and discriminatorily with the design and effect of harassment and intimidation; and (iii) that, if L.S.A. - R.S. §§ 37:213, 37:214 do ban Plaintiff Sobol's conduct, they are facially unconstitutional. (b) The Cause is based upon the terms of L.S.A. - R.S. §§ 37:213, 37:214, the Due Process and Equal Protection Clauses of the Fourteenth Amendment, and the other federal constitutional provisions identified in connection with the Second Cause of Action, supra, together with the doctrines of vagueness and overbreadth by which the Supreme Court has given those constitutional provisions "breathing space" (N.A.A.C.P. v. Button, 371 U.S. 415, 433 (1963)) and shielded them from the "chilling effect" (Dombrowski v. Pfister, 380 U.S. 479, 487 (1965)), of overbearing state regulation. The facts supporting the Cause are (as to theories (i) and (ii)) those recited above in connection with the First Cause of Action; (as to theory (iii)) the fact that Sobol's prosecution has exerted and is exerting a severe repressive effect upon his professional activities in Louisiana, as those activities are described in connection with the Second Cause of Action. (The other facts supporting the Second Cause of Action also support theory (iii), but are not necessary to establish it.)

(5)(a) The Fifth Cause of Action (Amended Complaint, ¶¶ 25-26) asserts that Plaintiff Sobol's prosecution is unconstitutional because it is designed and effective to harass and intimidate him and the class plaintiffs in the exercise of their federal rights. (b) The Cause is based on the Due Process and Equal Protection Clauses of the Fourteenth Amendment and the other constitutional provisions identified in connection with the First and Second Causes of Action, supra. (c) The facts supporting the Cause are that Plaintiff Sobol's prosecution is groundless under the terms of L.S.A. - R.S. §§ 37:213, 37:214; that other out-state attorneys are permitted to appear in Plaquemines Parish and Louisiana courts in association with Louisiana counsel; that there is intense hostility to federal civil rights on the part of Plaquemines Parish officials, and a history of threats against and intimidation of civil rights activity in the Parish; and that the present prosecution is a part of that pattern of resistance to federal civil rights.

(6)(a) The Sixth Cause of Action (Amended Complaint, ¶¶ 27-29) asserts that Plaintiff Sobol's prosecution is unconstitutional because it is designed and effective to harass and intimidate him on account of his representation of civil rights clients in actions in federal court; and to harass and intimidate the class plaintiffs in their federal civil rights, including those guaranteed by a decree of this Court, by reason of race and the unpopularity of their egalitarian views. (b) The Cause is based on the Due Process and Equal Protection Clauses of the Fourteenth Amendment, the other constitutional provisions identified in connection with the First and Second Causes of Action, supra, and 42 U.S.C. § 1981. (c) The facts supporting the Cause are those stated in connection with the Fifth Cause of Action, together with the facts that the class of client plaintiffs are engaged in activity which asserts their federal civil rights, and that Plaintiff Sobol has handled and is handling numerous civil rights cases on the dockets of this Court, the Court of Appeals, and the Supreme Court of the United States.

(7)(a) The Seventh Cause of Action (Amended Complaint, ¶¶ 30-31) asserts that Louisiana and Plaquemines Parish particularly, by long-established custom and usage, deny Negroes and civil rights workers access to the courts, legal representation, and legal advocacy equal to that which is given whites. (b) The Cause is based on the Due Process and Equal Protection Clauses of the Fourteenth Amendment and 42 U.S.C. § 1981. (c) The facts supporting the Cause are that Negroes and civil rights workers have traditionally not been given adequate representation by white attorneys; that the number of available Negro attorneys is insufficient to handle their matters adequately; and that the prosecution of Plaintiff Sobol supports the practice of furnishing inadequate and unequal legal representation to Negroes and civil rights workers.

The foregoing enumeration of factual matters describes the basic elements of plaintiffs's several Causes of Action, but does not purport to be an exhaustive statement of plaintiffs' proof on the trial of this matter.

B. Plaintiffs' Legal Submissions.

In the following numbered subsections we set forth the plaintiffs' legal submissions, any one of which suffices to dispose of the case in their favor. The relationship of their submissions to the several Causes of Action of the Amended Complaint is detailed in Part III(A), immediately preceding. Before discussing the details of the legal principles on which this lawsuit rests, we hope the Court will indulge us -- in a matter of this importance -- in making one general observation touching the essence of what is at issue here.

It is a lamentable but indisputable fact that vast numbers of persons in this country today are without vital legal services. The recognition of that truth has engendered the recent burgeoning of public and private legal aid and defender associations, the growth of organizations of professional and volunteer attorneys dedicated to public service, and the launching by the federal government of its O.E.O. Legal Services Program. These developments are promising, but they are now -- and for the forseeable future will be -- a drop in the bucket. They are insufficiently extensive to meet the needs of our citizens who are deprived from birth by poverty. And they strike obliquely, if at all, toward solution of the needs of those still more intensely needy, whose congenital deprivations include poverty, and race, and injustice, and the unhappy calling of having to demand justice where justice is unpopular -- and the inevitable resulting frustration and alienation.

It is another lamentable but indisputable fact that this most intense state of deprivation is today the lot of the mass of southern Negroes. That is not the fault of one man, or of one group of men, or of one generation of men, or of one section of the country. But, however complex its causes, and however diffuse the responsibility for it, the unshakable fact remains that Negroes in those areas where segregation and discrimination are long-rooted traditions must resort to law, and courts, and lawyers inordinately frequently to obtain the most rudimentary recognition of their rights; while at the same time, in the same areas, there exists the "problem ... of an apparent dearth of lawyers who are willing to undertake such litigation." Lefton v. City of Hattiesburg, 333 F.2d 280, 286 (5th Cir. 1964), quoting N.A.A.C.P. v. Button, 371 U.S. 415, 443 (1963).

The Supreme Court of the United States and the Court of Appeals for the Fifth Circuit have judicially noticed this problem and (as we shall see) they have done something about it. But attorneys in various parts of the country have also noticed it and, refusing to shrug off their own responsibilities for the problem, have undertaken to do something about it too. Some southern attorneys have given themselves unsparingly, at considerable personal cost and sometimes at considerable risk. There are not enough of them, unhappily, to meet the enormous need. Northern attorneys, like Richard B. Sobol, have come to support them in the effort, to shoulder a part of their common responsibility, and to make their part of a common contribution to at least that partial, incomplete response which is the best our society can offer in the face of demands that far outmaster its resources.

For attorneys such as Sobol, like their southern counterparts, the making of that contribution is a work of dedication. Their choice to make it is attended by sacrifice, impelled by urgings that reflect the highest aspirations and most cherished traditions of what Elihu Root called "the public service of the profession of the law." ROOT, ADDRESSES ON GOVERNMENT AND CITIZENSHIP 542 (Bacon & Scott eds., 1916). That is cause for commendation, one would suppose; not for criminal prosecution. Still, we believe that something more protects these lawyers in this choice, in this assumption of responsibility, than the aspirations and traditions of the Bar. They are protected, and their clients are protected, by the Constitution of the United States. We propose next to show how this is so. Here, we do no more than to suggest the importance of the question whether it is so. Richard Sobol is only one man. But there are few to do the work he does. LCDC is only one organization. There are two or three more somewhat like it. But through Sobol, this prosecution strikes at all such lawyers; and through LCDC, at all such organizations. Through the lawyers and these few organizations, it strikes at the large masses of deprived persons whom they serve; and through those persons, at the fabric of society. The point was finely made in a recent presentation to Congress:[22/]

22/ Joint Statement of Orison S. Marden, President-Elect, American Bar Association; Revius O. Ortique, Jr., President, National Bar Association; Theodore Voorhees, President, National Legal Aid and Defender Association; John W. Cummiskey, Chairman, American Bar Association's Standing Committee on Legal Aid and Indigent Defendants, In Support of the Legal Services Program of the Office of Economic Opportunity, Before

> If a man believes that he is oppressed, that he lacks opportunity, that the power of society is both against him and irresistible, and that there is no one who is interested in or capable of protecting him from the forces that are holding him down, he will stay forever in the slum in which fortune has deposited him. Such people seem to lack the motivation to pull themselves upward. What then can a legal service accomplish that can alter his situation?
>
> The short answer is, of course, that providing him with a belief in the existence of justice will restore the self-reliance, the hope, the ambition that he may have lost in early childhood. Injustice, as Reginald Heber Smith has pointed out, makes men want to tear things down.

In thus emphasizing the importance of a free Bar, constitutionally free to serve the needs of the underprivileged and the unpopular, we do not for one moment ignore the importance of legal regulation of the legal profession. We do not dispute or doubt the interest of a State in controlling the practice of law within its boundaries, nor deny it commensurate powers. In the case of an out-state attorney, the State may properly demand that he have proper credentials in the jurisdiction from which he comes; it may require his association with counsel licensed in the jurisdiction where he acts; it may hold him to every obligation of honesty, efficiency, and professional performance to which other attorneys in the State are subject. Perhaps, where only questions of state law are involved in what he does, or where his business is a fee-generating sort, the State's regulation may be even more extensive. But there are limits to State power in this regard, limits

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the Subcommittee on Employment, Manpower and Poverty, of the Senate Committee on Labor and Public Welfare, June 24, 1966, pp. 5-6.

necessarily implicit in federal law, and in the coexistence of federal and state law under the Constitution. "A State could not, by invoking the power to regulate the professional conduct of attorneys, infringe in any way the right of individuals and the public to be fairly represented in [matters of federal law]...." Brotherhood of Railroad Trainmen v. Virginia ex rel. Virginia State Bar, 377 U.S. 1, 7 (1964). That, we submit, is exactly what the prosecution of Richard B. Sobol in Plaquemines Parish does.

1. The Sixth and Fourteenth Amendments Give Plaintiff Duncan the Right to be Represented by Plaintiff Sobol in the Duncan prosecution; They Give the Class of Client Plaintiffs the Right to Representation by Plaintiff Sobol in Other Criminal Prosecutions; and They Give Plaintiff Sobol Reciprocal Protection Against Punishment for Such Representation.

The major constitutional battles fought in the past decade concerning the right to counsel have involved the "incorporation" of the Sixth Amendment, the right to have a lawyer in the police station or on an appeal, and the obligation of court appointment of counsel for indigent criminal defendants. The outcome of these battles has reinforced the fundamental nature of the Sixth Amendment's guarantee to a criminal accused that he shall "have the Assistance of Counsel for his defence." But the battles have ranged far beyond the narrow point involved here. That is not surprising, since the Supreme Court had declared, as early as Powell v. Alabama, 287 U.S. 45, 69 (1932), that "If in any case, civil or criminal, a state or federal court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing, and, therefore, of due process in the constitutional sense." The Sixth Amendment right of a criminal defendant to the unimpaired and unimpeded services of counsel of his choice had been declared in the most categorical terms in Glasser v. United States, 315 U.S. 60 (1942). And even before the incorporation of the Sixth Amendment into the Fourteenth, the Court had squarely held that, putting aside questions of appointment of counsel for the indigent, a state criminal defendant's "right to be heard through his own counsel was unqualified." Chandler v. Fretag, 348 U.S. 3, 9 (1954); accord: Reynolds v. Cochran, 365 U.S. 525 (1961).[23/]

The Sixth Amendment has now been brought to bear with its full force upon the States, Gideon v. Wainwright, 372 U.S. 335 (1963), and in misdemeanor as well as felony cases, Harvey v. Mississippi, 340 F.2d 263 (5th Cir. 1965); McDonald v. Moore, 353 F.2d 106 (5th Cir. 1965). The effect of that Amendment is plain. For under its impulsion the courts have consistently held that only circumstances of the most compelling urgency can ever justify denying a criminal defendant who wishes to be represented by a

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23/ That theme has been repeated in a host of varying contexts. See Ferguson v. Georgia, 365 U.S. 570 (1961); Escobedo v. Illinois, 378 U.S. 478 (1964); Specht v. Patterson, 386 U.S. 605 (1967); In re Gault, ___ U.S. ___ (1967) [87 S. Ct. 1428].

lawyer of his choice that precious right, and instead forcing him to elect between accepting unwanted counsel or going to trial without a lawyer. Lee v. United States, 235 F.2d 219 (D.C. Cir. 1956); United States v. Mitchell, 354 F.2d 767 (2d Cir. 1966); Patton v. North Carolina, 315 F.2d 643 (4th Cir. 1963); United States v. Johnston, 318 F.2d 288 (6th Cir. 1963). The reason for these holdings is quite basic. The lawyer-client relationship known to our traditions and guaranteed by the Sixth Amendment unequivocally supposes (as Lee points out) a condition of trust and confidence in the lawyer by his client; and this is both the more difficult and the more important to assure where the client or his cause is unpopular (see Michell, supra, 354 F.2d at 769). The client's choice of a lawyer is limited by the practical realities of availability, of course; and the unpopular client's choice is, unhappily, more restricted thereby than most. But to restrict his choice still further by artificial confinements unsupported by extraordinarily imperative countervailing considerations[24/] denies him exactly what the Sixth Amendment commands he shall have.

Although none of these cases involved an out-state attorney, we think their logic controls this case. For there is no imperative, no compelling -- indeed, no substantial -- reason to deny a criminal defendant the right to choose an

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24/ We would suppose that if a criminal defendant's chosen lawyer was so overcommitted that he could not meet reasonable trial dates, or if a defendant employed a series of eve-of-trial switches of counsel to frustrate court calendars and prosecution witnesses, for example, the client's choice could at some point be abridged.

out-state attorney for his defense, so long as all of the legitimate interests of the State which prosecutes him are met (as they are here) by the association of out-state counsel with a member of the local bar. In such a case, local counsel can be relied upon both for familiarity with local practice, to the extent that is needed, and for accountability to local professional standards, to the extent these are implicated; and, of course, the out-state lawyer himself may be subjected, in connection with any matter he handles, to all of the same regulations that govern the conduct of other attorneys. So it was held in United States v. Bergamo, 154 F.2d 31 (3d Cir. 1946), that a criminal accused may insist upon the right to be represented as chief counsel by a lawyer from another jurisdiction who is not admitted to practice in the State of the trial but is associated with local counsel. And the Court of Appeals for the Fifth Circuit has recently approved the Bergamo holding that "where local counsel are associated in the case to comply with court rules, non-local counsel chosen by the parties may nevertheless take the lead in the direction and argument of the case." Lefton v. City of Hattiesburg, 333 F.2d 280, 285 (5th Cir. 1964). Lefton involved a state criminal prosecution removed to a federal district court, and rested its holding flatly upon the Sixth Amendment, as had the Third Circuit in Bergamo.25/

25/ The Bergamo holding has been approved in dictum in United States v. Bradford, 238 F.2d 395, 397 (2d Cir. 1956); Joseph v. United States, 321 F.2d 710, 712 n. 1 (9th Cir. 1963). The Third Circuit in Cooper v. Hutchinson, 184 F.2d 119, 122-123 (3d Cir. 1950), With deference, we submit that these decisions are correct and that they are dispositive.[26/] Plaintiff Duncan had and has a Sixth Amendment right to Plaintiff Sobol's representation, in association with attorneys Collins and Douglas, in the Duncan case. The class of client plaintiffs has the same right in state criminal prosecutions against them. Sobol therefore has a reciprocal right, a "like protection which the State cannot abridge." Brotherhood of Railroad Trainmen v. Virginia ex rel. Virginia State Bar, 377 U.S. 1, 8 (1964). See Holt v. Virginia, 381 U.S. 131 (1965).[27/] That right should be declared by this Court, and his present and and any future prosecutions violating it should be enjoined.

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raised some question whether the Sixth Amendment ground of Bergamo controlled a state criminal prosecution -- although the holding on the merits in Cooper itself gave substantial protection to a state criminal accused's choice of an out-state attorney. There remains, after Gideon, no need to puzzle out the fringe questions raised by Cooper, for it is now settled that the "right to counsel guaranteed by the Sixth Amendment ... [is] to be enforced against the States under the Fourteenth Amendment according to the same standards that protect [the right] ... against federal encroachment.... The Court ... has rejected the notion that the Fourteenth Amendment applies to the States only a 'watered-down, subjective version of the individual guarantees of the Bill of Rights.'" Malloy v. Hogan, 378 U.S. 1, 10-11 (1964).

26/ We have found no decisions sustaining State power to deny a criminal defendant the right of representation by out-state counsel of his choice, associated with local counsel, under the Sixth and Fourteenth Amendments. See generally, Note, Retaining Out-of-State Counsel: The Evolution of a Federal Right, 67 COLUM. L. REV. 731 (1967); Recent Development, Constitutional Right to Engage an Out-of-State Attorney, 19 STAN. L. REV. 856 (1967); Note, Attorneys: Interstate and Federal Practice, 80 HARV. L. REV. 1711 (1967).

27/ We submit it is also clear that once Sobol was introduced to Judge Leon and permitted to appear in the Duncan case, he could not thereafter be arbitrarily excluded, nor punished for his participation in the matter. This is the holding of Cooper v. Hutchinson, note 25 supra. No objection was ever made to Sobol's appearance in Duncan on the ground that he was not a member of the Louisiana bar. His prosecution on that ground now is just such an "indefensible

2. The Supremacy Clause (Art VI, cl. 2) and the Federal Privileges and Immunities Clause (Amend. XIV, § 1) Give Plaintiff Duncan the Right to Be Represented by Plaintiff Sobol in the Duncan Prosecution; They Give the Class of Client Plaintiffs the Right to Be Advised by Plaintiff Sobol on Matters of Federal Law and to Be Represented by Him in Litigation Involving Federal Issues; and They Give Plaintiff Sobol Reciprocal Protection, Together with a Personal Right to Be Heard as an Attorney on Issues of Federal Law and to Present and Preserve Those Issues for Determination by the Federal Courts Where He is Admitted to Practice.

It has long been recognized that the right to advise and be advised concerning federal rights is itself a federal right, protected by the federal Privileges and Immunities and the Supremacy Clauses. Hague v. C.I.O., 307 U.S. 496 (1939); cf. Brotherhood of Railroad Trainmen v. Virginia ex rel. Virginia State Bar, 377 U.S. 1 (1964). It is also a constitutional commonplace that these Clauses, together with the Due Process Clause, protect "the right of free access to ... courts of justice in the several states," Slaughter-House Cases, 16 Wall. 36, 79 (1873), and thus forbid state obstruction of the presentation of federal contentions in either state or federal courts.[28/] For numerous differing exemplifications of the principle, see Ex parte Hull, 312 U.S. 546 (1941); White v. Ragen, 324 U.S. 760, 762 n. 1 (1945),

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sort of entrapment" as the Supreme Court constitutionally condemned condemned in Raley v. Ohio, 360 U.S. 423 (1959), and Cox v. Louisiana, 379 U.S. 559, 568-573 (1965).

28/ Mr. Justice Holmes captured the principle in a famous passage in Davis v. Wechsler, 263 U.S. 22, 24-25 (1923): "Whatever springes the state may set for those who are endeavoring to assert rights that the state confers, the assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice.... This is familiar as to the substantive law, and for the same reasons it is necessary to see that local practice shall not be allowed to put unreasonable obstacles in the way." See also, e.g., Henry v. Mississippi, 379 U.S. 443 (1965); Douglas v. Alabama, 380 U.S. 415 (1965).

and cases cited; Dowd v. United States ex rel. Cook, 340 U.S. 206 (1951); Terral v. Burke Construction Co., 257 U.S. 529 (1922); Testa v. Katt, 330 U.S. 386 (1947); Patton v. North Carolina, 4th Cir., No. 11,005, decided June 14, 1967 (per Sobeloff, J.); Lefton v. City of Hattiesburg, 333 F.2d 280 (5th Cir. 1964); Smartt v. Avery, 370 F.2d 788 (6th Cir. 1967); Johnson v. Avery, 252 F. Supp. 783 (M.D. Tenn. 1966).

These principles converge to establish the right of a citizen to be advised and represented in matters of federal law by an attorney of his choice who is an expert in such federal-law matters; and the concomitant right of the attorney to give such advice and representation. The rights are of course not absolute, for they must be reconciled with the legitimate interests and consequent appropriate powers of the States to control the legal profession.[29/] A State "undoubtedly has broad powers to regulate the practice of law within its borders; but ... in regulating the practice of law a State cannot ignore the rights of individuals secured by the Constitution." Brotherhood of Railroad Trainmen v. Virginia ex rel. Virginia State Bar, supra, 377 U.S. at 6. The presently determinative test for reconciling these competing interests was described in N.A.A.C.P.

29/ Compare Konigsberg v. State Bar, 366 U.S. 36 (1961), and In re Anastaplo, 366 U.S. 82 (1961), with Schware v. Board of Bar Examiners, 353 U.S. 232 (1957), and Konigsberg v. State Bar, 353 U.S. 252 (1957). Thus, for example, a State may require that attorneys in regular practice outside of the State, and admitted to the bar where they regularly practice, associate with local counsel of record when handling legal matters within the State -- at least, where civil matters not involving federal law are concerned. Martin v. Walton, 368 U.S. 25 (1961). (Whether a State could impose this requirement in criminal cases, or in matters involving federal law, is left unanswered by the Martin case. Nor are these questions posed in the present litigation.)

v. Button, 371 U.S. 415 (1963), and reiterated in the Brotherhood case, supra. At the very least, these cases establish that the federal interest in effective representation concerning federal-law matters must prevail in the absence of "any substantial regulatory interest, in the form of substantive evils flowing from [the regulated] ... activities, which can justify ... prohibitions" of the nature and scope of those which the State seeks to impose. Button, supra, 371 U.S. at 444; Brotherhood, supra, 377 U.S. at 8.[30] The denial to litigants or potential litigants or claimants of legal services needed to effectuate their rights under federal law cannot be supported where the State's regulatory interest might be adequately served by means of less restrictive controls that do not impede the vindication of federal rights. Button, supra, 371 U.S. at 438-439; cf. Shelton v. Tucker, 364 U.S. 479, 488-489 (1960); Louisiana ex rel. Gremillion v. N.A.A.C.P., 366 U.S. 293, 296-297 (1961). This is only a threshold test, since even state regulations that are narrowly designed and appropriate to preserve substantial state interests may fall afoul of necessarily inconsistent superior federal concerns. See Sperry v. Florida, 373 U.S. 379 (1963), forbidding a State to prohibit the practice of law by laymen within the State, in the presence of an express congressional authorization. However, such questions are not presented here; the threshold test of Button and Brotherhood suffices to void the application of Louisiana's unauthorized-practice legislation to Plaintiff Sobol.

30/ Differing sorts of state regulations pose differing sorts of constitutional questions, of course. We do not deal here, for example, with a narrowly framed provision designed to impose an exaction in the nature of a franchise tax, or anything of the sort. Compare Lathrop v. Donohue, 367 U.S. 820 (1961).

That proposition is established, we believe, by the recent _en banc_ decision of the Second Circuit in _Spanos_ v. _Skouras Theatres Corp._, 364 F.2d 161, 168 (2d Cir. 1966). Spanos was a member of the California bar who specialized in federal anti-trust law relating to the motion picture industry. He was retained by Skouras, a New York corporation, to work with New York counsel in connection with an anti-trust suit that Skouras proposed to bring in a New York federal court. At the time Spanos came into the case, a draft complaint had already been drawn and circulated among the prospective defendants. Spanos attended several settlement conferenes and did considerable research on the matter. He had agreed to, and he did, move his residence and principal place of business to New York City. He worked in direct consultation with Skouras; and his association with New York counsel was rather attenuated. The federal-court anti-trust suit was filed by other counsel; Spanos neither appeared in the federal court nor asked general or _pro hac vice_ admission to its bar, since there was apparently little thought that he would try the case. After a time, Spanos decreased, then ceased, his work on the Skouras matter. Following a favorable settlement of the litigation, Spanos demanded his fee, whose payment was resisted on the ground that Spanos was engaged in the unauthorized practice of law under the applicable New York criminal statute and decisions. Pretty clearly, these condemned Spanos' New York activities without admission to the New York bar, and precluded recovery of his fee if New York law was controlling. The Court of Appeals nonetheless allowed the fee, holding, first, that his right to recover could be based upon estoppel of Skouras not to move Spanos' pro hac vice admission in the federal district court; and, second, that irrespective of Spanos' status in the federal-court lawsuit, the New York regulation could not constitutionally be applied to prohibit what Spanos had done.

> ... For we hold that under the privileges and immunities clause of the Constitution no state can prohibit a citizen with a federal claim or defense from engaging an out-of-state lawyer to collaborate with an in-state lawyer and give legal adviceconcerning it within the state.
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> We recognize that the guarantee against abridgement of the privileges and immunities of citizens of the United States could lend itself to "mischievous uses" if its scope were not confined to those interests "growing out of the relationship between the citizen and the national government, created by the Constitution and federal laws." ... We are persuaded, however, that where a right has been conferred on citizens by federal law, the constitutional guarantee against its abridgment must be read to include what is necessary and appropriate for its assertion. In an age of increased specialization and high mobility of the bar, this must comprehend the right to bring to the assistance of an attorney admitted in the resident state a lawyer licensed by "public act" of any other state who is thought best fitted for the task, and to allow him to serve in whatever manner is most effective, subject only to valid rules of courts as to practice before them. Cf. Lefton v. City of Hattiesburg, 333 F.2d 280, 285 (5th Cir. 1964). Indeed, in instances where the federal claim or defense is unpopular, advice and assistance by an out-of-state lawyer may be the only means available for vindication. The broadening of [federal]district court rules as to admission ... is no adequate solution. The federal matter on which the help of a non-resident specialist is sought may be pending in a different state or may not be a suit at all, and specialized legal advice may be needed without the delay or expense incident toadmission by a federal court

> before which the attorney may not have any intention of practicing, even if that were available and would afford sufficient validation.... (164 F.2d at 170.)

The court reserved the questions whether "the New York Penal Law could apply if the client in such a case dispensed with the local attorney or if the matter were one in which federal jurisdiction rested only on diverse citizenship" or if the "lawyer not admitted to practice by a state maintains an office there and holds himself out to give advice to all comers on federal matters." Id. at 171. In the present case also, these questions do not arise. For Plaintiff Sobol does not assert the right to transact legal business in Louisiana -- nor has he done so -- except in association with local counsel that is far more intimate than the association involved in Spanos; and, far from holding himself out to serve all comers in matters of federal law, Sobol entertains a highly selective and exclusively charitable civil rights practice.[31/] As the Supreme Court recognized in Button, supra, in this situation, where "no monetary stakes are involved, there is no danger that the attorney will desert or subvert the paramount interests of his client to enrich himself or an outside sponsor." 371 U.S. at 443. "We realize that an NAACP lawyer must derive personal satisfaction from participation in litigation on behalf of Negro rights, else he would hardly be inclined to participate at the risk of financial sacrifice. But this would not seem to

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31/ Compare Kovrak v. Ginsburg, 358 U.S. 52 (1958)(per curiam).

be the kind of interest or motive which induces criminal conduct." Id. at 444. And, just as the state interest in regulation is less in such cases of entirely gratuitous non-fee-generating legal practice, so is the federal interest greater by reason of the "preferred,"[32/] the "delicate and vulnerable,"[33/] nature of the federal rights with which Sobol's practice is entirely concerned. "[W]here, as here, the basic public interest involved is the protection of fundamental constitutional rights ..., courts must give special heed to the teachings of the Supreme Court to permit neither indirect nor direct 'means to bar [those claiming such rights] ... from resorting to the courts to vindicate their legal rights. The right to petition the courts cannot be so handicapped.'" Lefton v. City of Hattiesburg, 333 F.2d 280, 285-286 (5th Cir. 1964).

Under these authorities and for these reasons, we submit, Sobol may not be prohibited by the State of Louisiana from advising and representing Plaintiff Duncan and the other plaintiffs of the client class, as an expert in federal law matters, civil or criminal, without fee or othercompensation from the client, and in association with Louisiana counsel. Insofar as they purport to prohibit such activity, L.S.A. - R.S. §§ 37:213, 37:214 are unconstitutional in their application to Sobol. Their enforcement against him, and his prosecution, should be enjoined.

32/ See text and note at note 4 supra.

33/ N.A.A.C.P. v. Button, 371 U.S. 415, 433 (1963).

3. <u>The First Amendment Protects Plaintiff Sobol's Representation of Plaintiff Duncan and of the Class of Client Plaintiffs; That Amendment Preserves the Rights of Sobol to Give, and of His Clients, to Receive, His Advice and Representation in Civil Rights Matters, and of Both to Engage in Litigation as a Form of Political Expression; and the Amendment Therefore Forbids Louisiana to Prohibit or Punish Sobol's Conduct as an Attorney Within the Limits of His Present Mode of Practice in the State.</u>

Although the First Amendment lies at the heart of this case, we see no need to extend our discussion of it. After the <u>Button</u> and <u>Brotherhood</u> decisions, <u>supra</u>, no substantial question can remain but that both Sobol's clients and Sobol himself have a First Amendment interest in the maintenance of litigation as a form of political expression directed to the vindication of federal civil rights and civil liberties.

> ...[A]bstract discussion is not the only species of communication which the Constitution protects; the First Amendment also protects vigorous advocacy, certainly of lawful ends, against governmental intrusion.... In the context of NAACP objectives, litigation is not a technique of resolving private differences; it is a means for achieving the lawful objectives of equality of treatment by all government, federal, state and local, for the members of the Negro community in this country. It is thus a form of political expression. Groups which find themselves unable to achieve their objectives through the ballot frequently turn to the courts. Just as it was true of the opponents of New Deal legislation during the 1930's, for example, no less is it true of the Negro minority today. And under the conditions of modern government, litigation may well be the sole practicable avenue open to a minority to petition for redress of grievances.
>
> ....
>
> The NAACP is not a conventional political

> party; but the litigation it assists, while serving to vindicate the legal rights of members of the American Negro community, at the same time and perhaps more importantly, makes possible the distinctive contribution of a minority group to the ideas and beliefs of our society. For such a group, association for litigation may be the most effective form of political association. (N.A.A.C.P. v. Button, 371 U.S. 415, 430-431 (1963).)

See also Dombrowski v. Pfister, 380 U.S. 479 (1965); Jordan v. Hutcheson, 323 F.2d 597 (4th Cir. 1963); cf. N.A.A.C.P. v. Alabama ex rel. Patterson, 357 U.S. 449 (1958); N.A.A.C.P. v. Alabama ex rel. Flowers, 377 U.S. 288 (1964); N.A.A.C.P. v. Thompson, 357 F.2d 831 (5th Cir. 1966).

Since both civil-rights litigation itself and association for such litigation are "form[s] of political expression" protected by the First Amendment, their abridgment can be constitutionally justified only in the service of a compelling and subordinating state interest, and to the precise extent necessary to effectuate that interest. "In a series of decisions this Court has held that, even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose." Shelton v. Tucker, 364 U.S. 479, 488 (1960). Accord: e.g., Aptheker v. Secretary of State, 378 U.S. 500 (1964), and cases cited; Elfbrandt v. Russell, 384 U.S. 11 (1966).

> ... Thus it is no answer to the constitutional claims ... to say ... that the purpose of these regulations was merely to insure high professional standards and not to curtail free expression. For a State may not, under the guise of prohibiting professional misconduct, ignore constitutional rights.... 'In the domain of these indispensable liberties, whether of speech, press or association, the decisions of this Court recognize that abridgment of such rights, even though unintended, may inevitably follow from varied forms of governmental action.'... [I]n Bates v. Little Rock, 361 U.S. 516, 524, we said, "[w]here there is a significant encroachment upon personal liberty, the State may prevail only upon showing a subordinating interest which is compelling.' Most recently, in Louisiana ex rel. Gremillion v. N.A.A.C.P., 366 U.S. 293, 297 ..., we reaffirmed this principle: ' ... regulatory measures ... no matter how sophisticated, cannot be employed in purpose or in effect to stifle, penalize, or curb the exercise of First Amendment rights." (N.A.A.C.P. v. Button, 371 U.S. 415, 438-439 (1963).)

In the preceding subsection of this memorandum we have discussed in some detail the constitutional standard of the Button and Brotherhood cases, reflected in the excerpt from Button just quoted. We have applied that standard to the Louisiana unauthorized-practice legislation insofar as that legislation purports to forbid Plaintiff Sobol to advise and represent Negroes and civil rights workers in matters seeking to vindicate their federal rights -- all such advice and representation being uncompensated and undertaken in association with counsel admitted to the Louisiana bar. We have demonstrated that the Louisiana legislation badly fails the Button-Brotherhood test, in this application, because there is no legitimate Louisiana interest in forbidding Sobol's sort of practice altogether on the sole ground that he is not locally licensed, which cannot be adequately achieved by merely requiring him to practice (as he does exclusively) in association with locally-licensed attorneys.[34] We shall not repeat that demonstration. The First Amendment rights of Sobol and his clients have been and are being unjustifiably and intolerably curtailed, and injunctive process of this Court is required to preserve them.

4. Plaintiff Sobol Also Has a Due Process Right to Practice His Profession Without Arbitrary Interference by the State, Unjustified by any Legitimate State Concern; and That Right is Infringed by His Prosecution and by the Application to Him of L.S.A. - R.S. §§ 37:213, 37:214.

The Supreme Court has long made it clear that the "liberty" protected by the Due Process Clause of the Fourteenth Amendment "denotes not merely freedom from bodily restraint, but also the right of the individual ... to engage in any of the common occupations of life ..." Meyer v. Nebraska, 262 U.S. 390, 399 (1923). This

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34/ See Note, Retaining Out-of-State Counsel: The Evolution of a Federal Right, 67 COLUM. L. REV. 731, 750 (1967); Recent Development, Constitutional Right to Engage an Out-of-State Attorney, 19 STAN. L. REV. 856, 864 (1967); Note, Attorneys: Interstate and Federal Practice, 80 HARV. L. REV. 1711, 1719-1720 (1967).

conception is, of course, the root of the doctrine that ran amok in the "economic due process" era, and its extravagances have since been sharply trimmed back. But the principle itself is both sound and viable; in Greene v. McElroy, 360 U.S. 474 (1959), for example, the Court reaffirmed it in its classic terms. "[T]he right to hold specific private employment and to follow a chosen profession free from unreasonable governmental interference comes within the 'liberty' and 'property' concepts" of the Due Process Clause. Id. at 492. The Meyer case protected the professional calling of a foreign language teacher; it was recently approved in a case concerned in part with the professional calling of a doctor, Griswold v. Connecticut, 381 U.S. 479 (1965); and, in memorable cases, its principles have been applied to protect the professional calling of attorneys. Schware v. Board of Bar Examiners, 353 U.S. 232 (1957); Konigsberg v. State Bar, 353 U.S. 252 (1957).

Considerable state regulation of the professions is obviously allowable notwithstanding the Due Process guarantee, and to meet the constitutional standard (as distinguished from the more stringent onesdiscussed in the preceding subsections in connection with the First Amendment and the constitutional guarantees of primacy of federal law) a regulation needs only respond in a reasonably appropriate fashion to some legitimate state concern. Put another way, the State's interest that is advanced to support the regulation must real, not fanciful or imaginary; and the regulation must bear some rational relationship to its effectuation. The test is not a stringent one, but it is fundamental to the basic guarantee of Due Process that government not be arbitrary when it moves to affect the lives and choices of citizens.

We submit that a wholesale prohibition of Plaintiff Sobol's chosen form of professional activity in Louisiana fails to meet this test. We concede that a State may compel an out-state lawyer to associate with local counsel, see Martin v. Walton, 368 U.S. 25 (1961); and it may, of course, control his legal activities within the State. But it may not exclude him entirely. For, even before the promulgation of the Fourteenth Amendment it was settled that the States could not simply draw a line of fire at their borders and keep the outlander lawyer out. He had the right, expressly recognized in Article IV, § 2 of the Constitution, of the "citizen of one State to pass through, or to reside in any other state, for the purposes of trade, agriculture, professional pursuits, or otherwise." Corfield v. Coryell, 4 Wash. C.C. 371, 6 Fed. Cas. 546, 552 (No. 3,230)(C.C.E.D. Pa. 1823). See, e.g., Crandall v. Nevada, 6 Wall. 35, 48-49 (1867); Edwards v. California, 314 U.S. 160 (1941). These decisions make clear that it is not a legitimate state objective to exclude attorneys from other jurisdictions simply because they are from other jurisdictions. State concerns that will pass muster under the Due Process Clause must therefore be sought within a narrower compass -- in some realistic apprehension of a specific danger that the out-state lawyer poses. There are several of these, certainly: possibly inferior professional qualifications, ignorance of local law, unaccountability to local discipline, competition with the local bar. The plain fact of the matter is, however, that none of these concerns touch the case of an outstate attorney specializing in federal law, associated with local counsel, and offering his services entirely gratuitously in civil rights cases. The prohibition of Sobol's form of practice is, therefore, totally arbitrary, wholly unjustified, and, as such, the sort of capricious interference with his pursuit of a profession which the Due Process Clause condemns. Schware v. Board of Bar Examiners, supra.

5. L.S.A. - R.S. §§ 37:213, 37:214 Do Not Prohibit Plaintiff Sobol's Conduct; His Prosecution Under Those Statutes is an Arbitrary Act of Harassment and Intimidation Condemned by the Due Process and Equal Protection Clauses; But If the Statutes Do Make His Conduct Criminal, They Are Facially Unconstitutional as Vague and Overbroad Regulations of Free Expression Protected by the First Amendment.

Although the relationships between the prohibitions of L.S.A. - R.S. § 37:213 and § 37:214 are unclear, the latter section seems to exempt from the ban of the unauthorized-practice legislation outstate attorneys "temporarily present in this state" who act "in association with some attorney duly licensed" in the State. These terms, also, are exceedingly obscure. But giving them their meaning in common parlance, their ostensible and most apparent purport, we fail to see by what reasoning Plaintiff Sobol is not "temporarily present in this state" and acting "in association with" local counsel.

We make this point not because we ask the Court to dispose of the case on the state-law ground.[35/] Rather, we think the visibly unsupportable character of the prosecution, coupled with the identity of the plaintiffs and the history of resistance to federal civil rights, and wholesale suppression of civil rights activity, in Plaquemines Parish, leads irresistibly to the conclusion that Sobol's prosecution is still another "'planned prosecutional abuse of a [state criminal] statute'" Cox v. Louisiana, 348 F.2d 750, 751 (5th Cir. 1965)(Wisdom, J.), a prosecution maintained "without any hope of ultimate success, but only to discourage [plaintiffs'] ... civil rights activities," Dombrowski v. Pfister, 380 U.S. 479, 490 (1965). If it is, the prosecution violates Due Process and Equal Protection alike, and -- as Cox says and Dombrowski holds -- should be federally enjoined. See also United States v. Wood, 295 F.2d 772 (5th Cir. 1961). For whether its purpose be racial harassment, see Yick Wo v. Hopkins, 118 U.S. 356 (1886), or suppression of civil rights activities, see N.A.A.C.P. v. Thompson, 357 F.2d 831 (5th Cir. 1966), or intimidation of Sobol and his clients in and on account of their resort to federal and state judicial process for the vindication of federal rights,

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35/ The Court could, of course, rely upon the state-law ground if it chose to do so. See note 1 supra; and see Siler v. Louisville & Nashville R.R. Co., 213 U.S. 175 (1909). We note that the obscurity of the state-law question is no ground for abstention in a case of this sort. Keyishian v. Board of Regents, 385 U.S. 589 (1967), and authorities cited in note 9 thereof;

see Terral v. Burke Construction Co., 257 U.S. 529 (1922); Smartt v. Avery, 370 F.2d 788 (6th Cir. 1967), such a prosecution is constitutionally intolerable in design and effect.

We suppose that the professed basis of the prosecution is that Sobol is not "temporarily" in Louisiana, or that § 37:214 does not qualify § 37:213, or some other non-obvious quirk in the general obscurity of the statutory scheme. Such contentions might avoid the charge of palpable groundlessness of the prosecution, but only by exposing a far more fundamental defect in its origins. For they serve to point up what we submit is evident in any event: that §§ 37:213, 37:214 are facially vague, overbroad, and hence unconstitutional regulations of First Amendment freedoms. They present an amorphous and pervasive prohibition, as broadly repressive as its scope is uncertain -- a dangerous tangle of words "susceptible of sweeping and improper application," N.A.A.C.P. v. Button, 371 U.S. 415, 433 (1963), furnishing a convenient tool for "harsh and discriminatory enforcement by prosecuting officials against

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Harman v. Forssenius, 380 U.S. 528 (1965); and see Subpart II(B) supra of this memorandum, particularly note 9, at pp. 23-24. The entire premise of Dombrowski v. Pfister, 380 U.S. 479 (1965), discussed in that Subpart, is that there exist a state statute whose vagueness makes it susceptible to narrowing state-law constructions. But where such a statute overreaches First Amendment rights, Dombrowski holds, pursuit of a narrowing construction is the obligation of the State, after a federal court has properly enjoined the statute in its unconstrued broad sweep. Id. at 491. The risks and delays incident to state-court proceedings aimed at statutory construction, in other words, are the "burden" of the prosecution, ibid., lest they function as a burden on the First Amendment during "an undue length of time, a result quite costly where the vagueness of a statute may inhibit the exercise of First Amendment freedoms." Baggett v. Bullitt, 377 U.S. 360, 378-379 (1964).

particular groups deemed to merit their displeasure," Thornhill v. Alabama, 310 U.S. 88, 97-98 (1940), and thus lending itself to "selective enforcement against unpopular causes," N.A.A.C.P. v. Button, supra, at 435.

Here again we touch upon settled constitutional doctrine. "[S]tandards of permissible statutory vagueness are strict in the area of free expression." N.A.A.C.P. v. Button, supra, 371 U.S. at 432. "Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity." Id. at 433. Consistently, the Court has condemned for vagueness and overbreadth statutes whose seeming broad sweep and uncertainties of application cast a repressive pall over the exercise of freedoms within the scope of the Amendment's concern. E.g., Stromberg v. California, 283 U.S. 359 (1931); Smith v. California, 361 U.S. 147 (1959); Cramp v. Board of Public Instruction, 368 U.S. 278 (1961); Baggett v. Bullitt, 377 U.S. 360 (1964); Aptheker v. Secretary of State, 378 U.S. 500 (1964); Dombrowski v. Pfister, 380 U.S. 479 (1965); Elfbrandt v. Russell, 384 U.S. 11 (1966); Keyishian v. Board of Regents, 385 U.S. 589 (1967). And this has been so even though the same statutory terms would have escaped constitutional invalidation if they had been used to regulate sorts of conduct other than free expression. See United States v. National Dairy Prods. Co., 372 U.S. 29, 36 (1963).

There are several reasons for the peculiarly stringent test of statutory specificity applied in First Amendment cases. First, the problem of fair notice of criminal liability -- an essential condition of due process of law -- is intensified where statutory unclarity is compounded by the unclarity of the line of First Amendment protection,[36/] and the effects of unclarity are particularly vicious where unanticipated punishment attends conduct which the Amendment apparently protects. See _Cantwell_ v. _Connecticut_, 310 U.S. 296 (1940); _Edwards_ v. _South Carolina_, 372 U.S. 229 (1963); _Ashton_ v. _Kentucky_, 384 U.S. 195 (1966). Second, vague and overbroad prohibitory legislation lends itself to arbitrary, discriminatory and overbearing administration by judges, juries, prosecutors and law enforcement officers, to whom it gives _de facto_ censorial powers, see _Cox_ v. _Louisiana_, 379 U.S. 536, 555-558 (1965); _Shuttlesworth_ v. _City of Birmingham_, 382 U.S. 87 (1965); and see _Herndon_ v. _Lowry_, 301 U.S. 242, 263 (1937); _Thornhill_ v. _Alabama_, _supra_; _N.A.A.C.P._ v. _Button_, _supra_, akin to those under licensing laws, see, e.g., _Lovell_ v. _Griffin_, 303 U.S. 444 (1938); _Staub_ v. _Baxley_, 355 U.S. 313 (1958); _Guyot_ v. _Pierce_, 372 F.2d 658 (5th Cir. 1967). "Instinct with its ever-present potential for arbitrarily suppressing First Amendment liberties, that kind of law bears the hallmark of a police State." _Shuttlesworth_ v. _City of Birmingham_, _supra_,

36/ See Mr. Justice Harlan's concurring opinion in _Garner_ v. _Louisiana_, 368 U.S. 157, 185, 207 (1961).

382 U.S. at 90-91. Third, the unclarity and breadth of potential prohibition exert a deterrent effect that is unduly stifling where free expression is affected. First Amendment "freedoms are delicate and vulnerable, as well as supremely precious in our society. The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions." N.A.A.C.P. v. Button, supra, 371 U.S. at 433. Thus, an "overly broad statute also creates a 'danger zone' within which protected expression may be inhibited.... So long as the statute remains available to the State the threat of prosecutions of protected expression is a real and substantial one. Even the prospect of ultimate failure of such prosecutions by no means dispels their chilling effect on protected expression." Dombrowski v. Pfister, supra, 380 U.S. at 494.

L.S.A. - R.S. §§ 37:213, 37:214 manifestly affront all of these constitutional concerns. Section 37:213 defines unauthorized practice in terms of unlimited breadth that forbid any person, for example, to "Furnish attorneys or counsel" or "Render or furnish legal services or advice" -- sweeping strictures that include conduct which Louisiana is constitutionally unable to prohibit under the plain terms of the Brotherhood case. Brotherhood of Railroad Trainmen v. Virginia ex rel. Virginia State Bar, 377 U.S. 1 (1964). An exception is made by §37:214 for out-state attorneys "temporarily" present in the State and acting "in association with" local counsel. This language is simply a trap, as its threatened application in Plaintiff Sobol's case evidences. "Temporarily," peculiarly, is a term of endemic uncertainty. This is not the ordinary sort of pro hac vice admission statute, addressing attention to court appearances in specific cases. An outstate lawyer may practice in Louisiana if he is there "temporarily," but not too long. How long is too long, we submit, is entirely unfathomable. But "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process." Connally v. General Construction Co., 269 U.S. 385, 391 (1926). See also, e.g., Cline v. Frink Dairy Co., 274 U.S. 445 (1927); Lanzetta v. New Jersey, 306 U.S. 451 (1939); Bouie v. City of Columbia, 378 U.S. 347 (1964). Section 37:214 fails to give the constitutionally requisite fair warning, and hence is void.

It is true, of course, that numerous statutes employing relatively imprecise language have been sustained against vagueness attack where (a) they regulated areas that did not touch First Amendment concerns, and (b) the area of regulation was such that statutory specificity was impracticable. E.g., Sproles v. Binford, 286 U.S. 374 (1932); United States v. Petrillo, 332 U.S. 1 (1947); Boyce Motor Lines, Inc. v. United States, 342 U.S. 337 (1952); United States v. National Dairy Prods. Co., supra. But legal practice within the broad definitions of §37:213

fundamentally implicates the First Amendment, see subsection III(B)(3), pp. 61-64 supra; and there can hardly be the slightest doubt that Louisiana could be more precise than "temporarily" in delimiting the number of occasions on which, or the period of time within which, outstate attorneys may practice law in this State without being locally licensed. This is the kind of matter that particularly lends itself to specific, indeed, mathematically precise, regulation. The choice to be vague is not compelled by practicality, but is a purposeful one, quite plainly intended to allow the broadest sort of discretion to judges in the first instance -- and thereafter to prosecutors -- in determining the range of allowable local practice by outstate counsel. This is exactly the sort of censorial discretion, however, that the Supreme Court's decisions condemn -- for the solid reason perfectly exemplified by Plaintiff Sobol's case, that the discretion inaugurates a regime of arbitrary favoritism and censorship, under which the advocate for locally unpopular causes is forbidden to do what more acceptable lawyers may. Some causes may be pleaded, some clients may be heard, through outstate counsel -- at the unfettered sufferance of the court. The result, for the locally disfavored client particularly, is a wholly uncontrolled censorship of the ideas, positions, interests and legal theories that may be judicially presented.

The additional, inevitable result is an impermissibly broad deterrence of unpopular advocacy. Plaintiff Sobol and LCDC are uninformed and cannot know what they will or will not be permitted to do in Louisiana. They can find this out only by proceeding to "render or furnish legal services or advice," "furnish attorneys or counsel," and awaiting prosecution, with its attendant risk of harsh criminal penalties. Sobol and the LCDC volunteers may be arrested and amerced at any time, and the danger is the greater because the decision to prosecute lies in the hands of their legal adversaries. Exactly when a prosecutor will take offense at outstate defense counsel's legal submissions and rebut them with an information or affidavit for his arrest is at the prosecutor's pleasure. The only safe course for the outstae lawyer is to avoid the State. We submit that such a regulatory scheme, in the First Amendment area, is facially unconstitutional and should be so declared by this Court.

6. Plaintiff Sobol's Prosecution and the Application to Him of L.S.A. - R.S. §§ 37:213, 37:214 Support a Custom and Usage of Discriminating Against Negroes and Civil Rights Workers in Access to Legal Services and Legal Representation in Plaquemines Parish and Louisiana, and Hence They are Condemned by the Equal Protection Clause and 42 U.S.C. § 1981.

The extent to which Negroes and civil rights workers in Plaquemines Parish are in fact deprived of equal access to legal advice and legal representation will be developed at the hearing of this matter. But "there comes a point where this Court should not be ignorant as judges of what we know as men." Mr. Justice Frankfurter, in Watts v. Indiana, 338 U.S. 49, 52 (1949). Plaquemines is (at the least) not an a monopoly of legal practitioners makes it responsible for what those practitioners do. The very instrument of creation of the monopoly, L.S.A. - R.S. §§ 37:213, 37:214, is being applied to Plaintiff Sobol, and the method and effect of its application is to support the unconstitutional patterns, practices, customs and usages of providing differential access to legal services for Negroes and whites. The prosecution is therefore prohibited by the Equal Protection Clause and its statutory supplement, 42 U.S.C. § 1981.

Respectfully submitted,

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needs no demonstration. That discrimination was condemned by even the separate-but-equal doctrine that preceded the 1954 school desegregation decisions.

CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of September, 1967, I personally served a copy of the foregoing Memorandum of Law upon Sidney W. Provensal, Jr., Attorney for the Defendants.

Alvin J. Bronstein