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# The Dombrowski-Type Suit as an Effective Weapon for Social Change: Reflections from without and Within

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# THE *DOMBROWSKI*-TYPE SUIT AS AN EFFECTIVE WEAPON FOR SOCIAL CHANGE: REFLECTIONS FROM WITHOUT AND WITHIN

## PART II—THE VIEW FROM WITHIN

*Robert Allen Sedler\**

### I. THE *DOMBROWSKI* REMEDY FROM THE POLITICAL PERSPECTIVE

The *Dombrowski* remedy means that injunctive and declaratory relief is available in the federal courts against vague and overbroad laws regulating or applicable to acts of expression and against improper action by governmental officials designed to inhibit the exercise of free expression. Part I of this article<sup>1</sup> examined this remedy in the context of its effect upon the inevitable conflict between those who are seeking to bring about social change and those who are using their control of the governmental apparatus to resist it. Control of the governmental apparatus is obviously a powerful weapon and the availability of the *Dombrowski* remedy helps to redress the balance between those seeking to bring about social change and those seeking to resist it.

This portion of the article will elaborate on how this balance is redressed, particularly from what may be termed the political perspective. The term, "political" is used, in its broadest sense, primarily to refer to the impact of the availability of the *Dombrowski*-type remedy on the remainder of society—those whom the advocates of social change are trying to influence. There are two elements to this "political impact" thesis. The first is that insofar as the successful *Dombrowski*-type suit restrains governmental action against the advocates of social change, it removes one of the most effective weapons from the government's arsenal, namely the use of law enforcement to turn public opinion against social change. Law enforcement, particularly by way of criminal prosecutions, enables the government to brand the advocates of social change as "wrongdoers" or "subversives." The threat of such enforcement will deter many people from participating in movements for social change and will cause them to "stay away" from those who are so engaged. In addition, prosecutions require the advocates of social change to "go on the defensive," to expend time and money defending themselves, thereby rendering them less effective in achieving their primary objective. To the extent that movement people are in fact imprisoned, even temporarily, they are diverted from this objective and are "removed from the scene." All of this was recognized by the Supreme Court in *Dombrowski*, and clearly was the basis for making this remedy available to the targets of governmental action.

The second element of the thesis is that the *Dombrowski*-type remedy may have political significance *even if the suit itself is unsuccessful*. The fact that

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<sup>1</sup> 18 KAN. L. REV. 237 (1970).

those threatened by governmental action can initially put the government on the defensive may, particularly if combined with direct political action, also prevent or minimize the repressive power of government. This can occur in a number of ways. The *Dombrowski*-type suit gives the "social change people" the opportunity to try to expose the real purpose behind the threatened governmental action and to obtain public support for their position. The fact that a suit has been filed—just as the fact that a prosecution has been initiated—implies some form of "wrongdoing" on the part of the defendants, even if the suit is ultimately unsuccessful. Likewise the filing of a suit encourages the "potential victims" and, psychologically, provides an "umbrella of protection," encouraging resistance to the repressive action and the continuation of efforts to achieve social change. Finally, the threat of a *Dombrowski*-type suit may in some cases cause governmental officials to hesitate before acting against the advocates of social change. In other words, *Dombrowski* may go further toward redressing the balance than realized. It may provide not only a legal weapon against repression, but an important "political-legal" one as well.

The above conclusion is based on the author's "reflections from within." The possibility of a *Dombrowski*-type suit when repression<sup>2</sup> is threatened or begun has, in the author's observation, firmed up the determination to resist. It has provided a rallying point and reduced the "fallout" that usually results when the government indicates its intention to act against those trying to achieve social change. It has had effects going beyond the suit itself and independent of the "legal result."

Both elements of this thesis will be illustrated by a detailed consideration from the political perspective of two *Dombrowski*-type suits in which the author was involved. The first grew out of the arrests of anti-poverty workers in Pike County, Kentucky, and their prosecutions for "teaching sedition." The *Dombrowski*-type suit, *McSurely v. Ratliff*,<sup>3</sup> in which the author represented the Kentucky Civil Liberties Union as amicus curiae,<sup>4</sup> was successful and the prosecutions were stopped. If the prosecutions had been allowed to continue, the efforts to bring about social change in that part of Appalachian Kentucky would have been severely hindered, even though any convictions would ultimately have been reversed. It is this case which will illustrate the first element of my thesis, which may be called the "recognized" one,<sup>5</sup> that law enforcement, even if unsuccessful, has great political significance in repressing efforts at social change.

The second situation involved two "legally unsuccessful suits," *Braden v. Nunn*,<sup>6</sup> and *Black Unity League of Kentucky v. Miller*,<sup>7</sup> designed to halt the

<sup>2</sup> That what is happening constitutes "repression" represents my value judgment. Others may see it as the "upholding of law and order" and the "protection of society from revolution."

<sup>3</sup> 282 F. Supp. 848 (E.D. Ky. 1967).

<sup>4</sup> Both in seating arrangement and in the practical conduct of the case, the counsel for plaintiffs and the counsel for the amicus curiae were as one. See Krislov, *The Amicus Curiae Brief: From Friendship to Advocacy*, 72 YALE L.J. 694 (1963).

<sup>5</sup> In *Dombrowski* itself. See 380 U.S. 479 (1965).

<sup>6</sup> No. 18,849 (6th Cir. May 5, 1969).

<sup>7</sup> 394 U.S. 100 (1969).

operations of the Kentucky Un-American Activities Committee (KUAC). Although the suits were unsuccessful, KUAC ceased to function and never succeeded in becoming an effective instrument of repression. It is my belief, and the belief of those who organized against KUAC, that the immediate filing of a *Dombrowski*-type suit was the focal point of this organized opposition and had a great deal to do with the ultimate political victory. If this remedy had not been available, the history of KUAC in Kentucky might have been very different. It is these reflections from within that truly persuade me that the *Dombrowski* remedy demonstrates most clearly how the law of remedies operates as a social institution.

## II. SEDITION IN PIKE COUNTY: THE POLITICAL SIGNIFICANCE OF PREVENTING A CRIMINAL PROSECUTION

Pike County, Kentucky, lies in the heart of Appalachia, and as one writer has observed, "has all the attributes associated with that colonized poverty pocket."<sup>8</sup> It is perhaps the largest coal-producing county in the nation,<sup>9</sup> but as in the rest of Appalachia this fact has not brought prosperity to the people. The situation has been described by Harry Caudill, a noted eastern Kentucky lawyer and author,<sup>10</sup> as follows:

Appalachia is a beautiful country whose major resource is bituminous coal. Its wooded hills are stuffed with the fuel, and mining has shaped its tragic history. . . .

Until about 1948 coal was an immense industry, the counterpart of steel. As a mass employer, it was beset by oil and gas and advancing mining technology, and collapsed abruptly. Scores of coal companies were forced out of business in the 1950's, and those remaining in operation were compelled to mechanize to an astonishing degree. Thus hordes of industrial workmen were left stranded in the mining communities. They were men who had been educated for the mines; their communities were poorly built and were without decent schools, hospitals or roads. In the last decade the jerry-built communities have turned into people-sties. The land is scarred with crumbling shacks, tipples, commissaries, and culm heaps. The demoralized people, long dependent on public assistance for their bread, have littered the roadsides and streams with countless automobile hulks and trash dumps. The creeks and rivers are reeking sewers.<sup>11</sup>

The local leadership in these areas has been described by another writer as consisting of "a few closely knit families that run the town, self-reliant, wary of outsiders, puritanical and conservative."<sup>12</sup> In all of Eastern Kentucky it is accurate to refer to a "power structure," comprised of political leaders, banking, coal and business interests. It is they who control what employment is avail-

<sup>8</sup> Mason, *The Subversive Poor*, 207 NATION 721 (1968).

<sup>9</sup> *Id.*

<sup>10</sup> His book, *NIGHT COMES TO THE CUMBERLANDS* (1962), is a classic work in the study of Appalachian Kentucky.

<sup>11</sup> Caudill, *Misdeal in Appalachia*, 215 ATLANTIC MONTHLY 45 (1965).

<sup>12</sup> Arnold, *Sedition in the Hills and Hollows of Kentucky*, National Observer, Aug. 28, 1967, at 1, col. .... In a larger area such as Pike County different groups compete for political power along traditional party lines.

able; the political leaders administer the welfare program, the primary source of income for many people living there.

It is into this situation that "anti-poverty" workers—young, nonconformist and frequently uncompromising<sup>18</sup>—have been coming for the last few years. The position of the "power structure" in Pike County, as expressed by Thomas B. Ratliff, the prosecuting attorney and former president of the Independent Coal Operators Association, is that "[a]ll AV (Appalachian Volunteers)<sup>14</sup> is doing is agitating and organizing, stirring up rich against poor and class hatred. Its director is a member of a number of far-left-wing radical organizations . . . . Our government is spending millions of dollars to fight communism 10,000 miles away in Vietnam while communism gains a foothold here at home."<sup>15</sup> "What you had was a bunch of damn long-haired barefoot beatniks and hippies running around town up to no good and setting up this Highlander folk school right in Pikeville. Why they had a plan for infiltrating the schools and churches. They tried to start a Red Guard like in China with our teenagers. We don't want them. Let them go back to Berkeley where they belong."<sup>16</sup> From the standpoint of the anti-poverty workers, as expressed by Joe Mulloy, one of those charged with "teaching sedition": "The people who control things are the ones who are making money off the present system. That's why they're so dead set against AV, because its their pocketbooks that will be hurt by change."<sup>17</sup> It was not difficult to foresee that the Pike County "power structure" would wish to use that power to repress the anti-poverty workers in their efforts to "change things in the mountains."

Experience indicates, however, that repression will not be undertaken until the efforts at achieving social change show some signs of being effective. On the whole, such efforts had not been particularly effective in Eastern Kentucky. A traditional conservatism and suspicion of outsiders, coupled with a rather fatalistic philosophy, had made any effort at social change most difficult. Added to this was the dependency, real or imagined, on "the government" for welfare payments as the principal source of livelihood for many people. While local government officials had been annoyed at the anti-poverty workers, they had not felt themselves threatened. But, in Pike County, in the summer of 1967, they began to feel themselves threatened.

The threat came in the form of organized opposition to strip-mining, which opposition succeeded in preventing at least one strip-mining operation. Strip-mining essentially consists of cutting around the contour of a mountain so that the miners can get directly at the coal. Such an operation may produce harmful side effects.<sup>18</sup> In that regard, the Kentucky General Assembly stated:

<sup>18</sup> *Id.*

<sup>14</sup> The Appalachian Volunteers (AV) is an anti-poverty organization, which has been supported by Office of Economic Opportunity grants as well as by private contributions.

<sup>15</sup> Arnold, *supra* note 12, at 13.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> See Berry, *Strip-Mine Morality: The Landscaping of Hell*, 202 NATION 96 (1966).

[T]he unregulated strip mining of coal causes soil erosion, stream pollution, the accumulation of stagnant water and the seepage of contaminated water, increases the likelihood of floods, destroys the value of land for agricultural purposes, counteracts efforts for the conservation of soil, water and other natural resources, destroys or impairs the property rights of citizens, creates fire hazards, and in general creates hazards to life and property, so as to constitute an imminent and inordinate peril to the welfare of the Commonwealth.<sup>19</sup>

In 1966 the General Assembly enacted a comprehensive system regulating strip-mining, but the effectiveness of the regulations has been a matter of some dispute.<sup>20</sup> The situation of the landowner on whose property strip-mining may be done is aggravated by the fact that in Kentucky standard "broad form" mineral deeds have been construed to allow strip-mining, and to relieve the operator from liability for the resulting damage to the surface.<sup>21</sup> The strip-mining controversy pitted the coal operators and commercial interests against the small landowners whose property is covered by broad form deeds, the residents of the "hollows" who fear landslides and destruction of their property, and the conservationists who see the beauty of the region being despoiled.

Various citizens' groups, such as the Appalachian Group to Save the Land and People, have been formed to resist the continuation of strip mining by educational programs and political action. However, in the spring and summer of 1967 a more active kind of resistance was under way. In Knott County night raiders blew up a \$50,000 diesel-powered shovel at its stripping site.<sup>22</sup> But the most dramatic and publicized resistance took place in Pike County. There a small landowner, Jink Ray, and his neighbors lay down in front of the bulldozers of the Puritan Coal Co. which were about to strip-mine his land. The company obtained an injunction against such interference, but it was disregarded. In the meantime "Jink Ray's stand" was receiving widespread publicity, and Governor Edward Breathitt ordered a temporary suspension of Puritan's permit under the state strip-mining law on the ground that it would endanger homes in the hollow. On August 1, the State Department of Natural Resources revoked Puritan's permit to strip-mine in Pike County.<sup>23</sup>

One of the most prominent figures in "Jink Ray's stand" was Joe Mulloy, a young anti-poverty worker employed by the Appalachian Volunteers.<sup>24</sup> The Appalachian Volunteers had been aiding the Appalachian Group to Save the Land and People and Mulloy stood out in this effort. During the last week of July, 1967, the Pike County Sheriff, a representative of the Small Business Administration, and Robert Holcomb, president of the Pikeville Chamber of Commerce, made a brief visit to Mulloy's home, and questioned him about what he was doing in Pike County and specifically about his anti-strip-mining

<sup>19</sup> KY. REV. STAT. § 350.020 (1969) (Declaration of Legislative Policy and Finding of Fact).

<sup>20</sup> Fetterman, *Kentucky's Still Ravaged Land*, Louisville Courier-Journal & Times, Sept. 10, 1967 (Magazine), at 4.

<sup>21</sup> See *Martin v. Kentucky Oak Mining Co.*, 429 S.W.2d 395 (Ky., 1968).

<sup>22</sup> Mason, *supra* note 8, at 722.

<sup>23</sup> Good, *Kentucky's Coal Beds of Sedition*, 205 NATION 167, 168 (1967).

<sup>24</sup> When he subsequently announced that he would resist the draft, he was discharged by the AV's. He was then employed by the Southern Conference Educational Fund.

activities. That evening Holcomb called for an investigation of the Appalachian Volunteers in Pike County.<sup>25</sup>

At the same time attention was also focused on Alan and Margaret McSurely, anti-poverty workers employed by the Southern Conference Educational Fund. That organization was the plaintiff in the original *Dombrowski* suit and it was as "popular" with governmental officials in Kentucky as it had been in Louisiana. The McSurelys, however, were not engaged in organizing activities, but were primarily producing literature for future distribution and were developing a "strategy for organizing."<sup>26</sup> They were close friends of Joe Mulloy and his wife and Pike County officials were aware of the association. The Jink Ray affair marked a clear change in organizing tactics and objectives. As Joe Mulloy observed: "We wasted our time for a couple of years setting up community centers, repairing school houses, providing fun and games for the youngsters—all of which is incidental to the main concern. A life and death struggle is going on in strip mining here that can spell doom to the future of this area. The only way to end it is to organize people, to get them together to voice their demands."<sup>27</sup> The Jink Ray affair may also have shown what was meant by effective organizing—a means by which poor people could get together and make their influence felt. And if Jink Ray's land was saved, could not other strip-miners be opposed as well? It was time for the "power structure" to respond.<sup>28</sup>

The response took place on August 11, 1967. Led by Prosecutor Thomas B. Ratliff, who was also the Republican candidate for Lieutenant-Governor in the fall election, and Pike County Sheriff, Perry Justice, a party of fifteen armed men, pursuant to a warrant, conducted midnight raids on the Mulloy and McSurely homes, ransacking them and among other things impounding "564 loose books, twenty-six posters, and twenty-two boxes of books, pamphlets, and other private and published documents found in the McSurely home."<sup>29</sup> Books and papers found in the Mulloy home were also seized. Mulloy, Alan McSurely, and his wife, Margaret, who was six months pregnant, were arrested and charged with the offense of "teaching sedition."<sup>30</sup> Prosecutor Ratliff commented on the raids, saying that the material taken from the McSurelys included a "white paper on how to take over Pike County from the power structure and put it in the hands of the poor." "Every piece of evidence we have points to just one objective," said Ratliff, "to stir up dissension and create turmoil among our poor." He also promised that the confiscated material would be made available "to Washington," and that it would be used to try to convince the Office of Economic Opportunity that federal funds should be withdrawn from the Appalachian Volunteers and VISTA.<sup>31</sup> Mulloy was released

<sup>25</sup> Mason, *supra* note 8, at 722.

<sup>26</sup> Arnold, *supra* note 12, at 13.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *McSurely v. Ratliff*, 282 F. Supp. 848, 850 (E.D. Ky. 1967).

<sup>30</sup> *Louisville Courier-Journal*, August 13, 1967, at ..., col. ....

<sup>31</sup> Joe Mulloy's wife, Karen, was employed as a VISTA. She was not arrested, however.

on bond, but the McSurelys remained in jail and filed a motion for release on habeas corpus. This was denied,<sup>32</sup> and they eventually made bail. There was an immediate "political fallout." The state Attorney-General promised his support to the Pike County officials, stating that he was "really concerned about an organization such as the Southern Conference Educational Fund operating in Kentucky."<sup>33</sup> On August 18, three days after the federal suit had been filed, Governor Edward T. Breathitt and Office of Economic Opportunity Director Sergeant Shriver issued a joint announcement that the Appalachian Volunteers would lose all federal funding in Kentucky as of September 1.<sup>34</sup> The Governor recommended the cutoff "in the best interest of the needy people in Kentucky," and the community action council director of a program covering Pike County stated, "The people here just don't want them, it would behoove us to get them out of our area."<sup>35</sup> Some of the OEO funds were later reinstated, but no new funds were granted despite a confidential OEO report that laid the arrests to "obvious political interests."<sup>36</sup>

The first hearing before the three-judge federal court was held on September 1. At that time Prosecutor Ratliff promised the court that he would take no action against Mulloy and the McSurelys until the court issued its ruling.<sup>37</sup> However, on September 5, Pike County Circuit Judge James B. Stephenson ordered the Grand Jury to proceed with its investigation of the charges despite Ratliff's assurances to the federal court. He ordered Ratliff and the other defendants in the federal suit to answer questions, and not surprisingly they complied.<sup>38</sup> On September 11, the Grand Jury issued a report and returned indictments not only against Mulloy and the McSurelys, but also against Carl Braden and his wife Anne.<sup>39</sup> Anne Braden had never been in Pike County and Carl had been there only once before. They were going there at the time to post bond for the McSurelys and when they were late in arriving, the judge issued a bench warrant for their arrest. They refused to post bond and were imprisoned.<sup>40</sup> The indictment of the Bradens, who had never been involved in Pike County activities, demonstrates most clearly the political nature of the proceedings. Carl Braden, the defendant in an earlier sedition case, is Kentucky's "red scare," just as James Dombrowski, the director of the Southern Conference Educational Fund at the time of the New Orleans raids, was Louisiana's "red scare." By indicting the Bradens, the trial would necessarily be one of "communists," and since Mulloy and the McSurelys would be identified with the Bradens, they would be "communists" also.

The report of the Grand Jury made clear the line of attack. Anti-poverty efforts in Pike County were a part of a "communist plot to overthrow the

<sup>32</sup> Louisville Courier-Journal, August 15, 1967, at ..., col. ....

<sup>33</sup> Louisville Courier-Journal, August 15, 1967, at ..., col. ....

<sup>34</sup> Lexington Leader, August 18, 1967, at ..., col. ....

<sup>35</sup> *Id.*

<sup>36</sup> Mason, *supra* note 8, at 722.

<sup>37</sup> Louisville Courier-Journal, September 2, 1967, at ..., col. ....

<sup>38</sup> Louisville Courier-Journal, September 12, 1967, at ..., col. ....

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

government of Pike County by force and violence." The Grand Jury stated the following conclusions:

1. That a well-organized and well-financed effort is being made to promote and spread the communistic theory of the violent and forceful overthrow of the government of Pike County.
2. That communist organizers have been sent to Pike County by radical organizations which have paid them, supported them, furnished them with printed propaganda materials, controlled them and directed their work.
3. That some employees of the Appalachian Volunteers and other federally-financed anti-poverty programs have collaborated with known communist organizers to help them organize and promote the violent overthrow of the constitutional government of Pike County . . . .
4. That local officials of the A.V. have cooperated with known communist organizers by allowing them to conduct training sessions among Vista workers, Peace Corps trainees, A.V. workers, and local citizens *in which sessions these organizers were allowed to state their views*.
5. That local officials of the A.V. have permitted known communists to take part in the writing of editorials in A.V. sponsored community newspapers and in directing schools sponsored and supported by the A.V.
6. That A.V. have permitted known communists to infiltrate, influence and take part in community protests and projects when the A.V. knew full well that the purpose of these organizers was to exploit the local people and their cause so as to promote violence against the local government and the local courts.
7. That communist organizers have attempted, without success thus far, to promote their beliefs among our school children by infiltrating our local government.
8. That communist organizers are attempting and planning to infiltrate local churches and labor unions in order to cause dissension and to promote their purposes.
9. That communist organizers are attempting to form Community Unions with the eventual purpose of organizing armed groups to be known as "Red Guards" and through which the actual forceful overthrow of the local government would be accomplished.<sup>41</sup>

It recommended, among other things, that the federal grant to the Appalachian Volunteers be cancelled, and that if the present sedition laws were declared unconstitutional, the legislature should pass new laws "which would control such activities in the future." Finally, it concluded that there was no evidence that the charges "were made or were prompted because of strip mining or for political purposes," and that "in fact we found very little evidence that those accused have played any constructive or sincere part in protesting coal mining practices in Pike County."

Presumably at the trial, evidence to support these charges would have been introduced. The Bradens would have been made out as "communists," and the McSurelys, employed by the Southern Conference Educational Fund, would probably have been shown to be "communists" as well. Mulloy and the other Appalachian Volunteers would have been tainted as "communist sympathizers" or "dupes." All attacks that had been made against the "power structure"

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<sup>41</sup> Report of the Grand Jury of Pike County for September, 1967, pp. 3-5 (emphasis added). See also Louisville Courier-Journal, *supra* note 38.

would then have been seen as part of a "communist plot" to overthrow the government of Pike County. The "good people" of Pike County would probably have refused to associate with the "communists," either in strip mining protests or in anything else. As defendants in the criminal prosecution, Mulloy, the McSurleys and the Bradens would have been placed in an impossible situation. To the extent that they would have tried to deny the "communist" charge, they would have been playing into the hands of the prosecutor, who could say that "every communist denies this." The suspicion would be planted. It is almost impossible to believe that the jury would not have returned a verdict of guilty. This would indelibly have branded the anti-poverty workers as "communists" in the minds of the people in the area. Assuming that the conviction would later have been reversed, it could be said that this was on a technicality. In other words, if the case were allowed to come to trial, the government officials would have the political victory irrespective of the final result. They would have succeeded in their objective of branding the anti-poverty workers as "communists"—"after all, the jury said they were communists, didn't they?"—thereby destroying their effectiveness:

On September 14, the three-judge court held a hearing on the plaintiffs' motion for a temporary restraining order to block the prosecutions. At that time prosecutor Ratliff indicated specifically the kind of evidence he would have introduced at the state trial and how that trial would have been conducted.<sup>42</sup> He proposed to show that:

- (1) Mrs. McSurely and the Bradens attended a meeting in Nashville, Tennessee, at which Stokely Carmichael spoke, and riots broke out in Nashville immediately afterwards;
- (2) That Mrs. McSurely was formerly a worker for the Student Non-Violent Coordinating Committee;
- (3) That the McSurelys were distributing literature advocating a Viet Cong victory in Vietnam and discussing the views of various "communist philosophers."

On cross-examination Mrs. McSurely also was asked whether she knew H. Rap Brown, which she admitted. Prosecutor Ratliff prompted laughter on the part of the spectators—most of whom were University of Kentucky law students—when he asked Mrs. Braden, "Have you ever been a card-carrying member of the Communist Party?"<sup>43</sup> She replied that she had never seen such a card.<sup>44</sup> All in all, the proceedings in the federal court that day demonstrated the kind of "political trial" that would have occurred if the prosecutions had been allowed to continue.

But they were not. Much to the surprise of everyone, including the plaintiffs, the court immediately rendered a decision on the merits, holding that the *Dombrowski*-type suit was proper and that the statute was unconstitutional on

<sup>42</sup> Lexington Leader, September 14, 1967, at ....., col. ....

<sup>43</sup> Carl Braden observed afterwards that when this question was asked at his "first sedition trial," there was a hushed silence in the courtroom. Things have changed for the better somewhat.

<sup>44</sup> Lexington Herald, September 15, 1967, at ....., col. ....

its face as violative of the first amendment as well as being superseded by federal law. All further prosecutions were enjoined. One judge dissented on the ground that federal injunctive relief was barred by 28 U.S.C. § 2283.<sup>45</sup>

At this point it may be well to consider what would have happened if the *Dombrowski*-type remedy had not been available. The statute under which Mulloy and the McSurelys were indicted was such that in the words of the court, "It is difficult to believe that capable lawyers could seriously contend that this statute is constitutional."<sup>46</sup> Its unconstitutionality was so evident that it was almost impossible to write a brief outlining all the reasons why. It was enacted in 1920, and had never been interpreted by the Kentucky Court of Appeals. No conviction under it had ever been sustained.<sup>47</sup> As the federal court observed:

The statute in question is clearly unconstitutional even under the most flexible yardstick. It is too broad and too vague. It contravenes the First Amendment to the Constitution of the United States because it unduly prohibits freedom of speech, freedom of the press, and the right of assembly. It fails to distinguish between the advocacy of ideas and the advocacy of action. It makes it a criminal offense merely to possess, with intent to circulate, literature on the subject of sedition. It imposes the penalty of imprisonment for advocating an unpopular political belief. It would turn the courts into a forum for argument of political theories with imprisonment the penalty for the loser. It contains no requirement of criminal intent. The unwary and the ignorant could be enmeshed in the dragnet as easily as the covert plotter.<sup>48</sup>

But this was equally true in 1954 when Carl Braden, now the Executive Director of the Southern Conference Educational Fund, who was also charged in *McSurely*, was convicted of sedition in a state court in Louisville. The circumstances leading to the conviction—which arose from the fact that he purchased a home for a Negro in a "white suburb" have been detailed elsewhere.<sup>49</sup> The charge was "advocating, suggesting or teaching the duty, necessity, propriety or expediency of criminal syndicalism or sedition." Carl Braden's trial lasted from November 29, 1954 to December 13, 1954. He was convicted and sentenced to fifteen years' imprisonment. The following description of the trial is taken from the report in *I. F. Stone's Weekly*:<sup>50</sup>

Before the jury . . . were paraded some of the most notorious informers employed by the immigration service and the F.B.I. Ben Gitlow, Matt Svetic and Maurice Melkin were on hand to testify on the nature of the Communist conspiracy and the literature seized in a raid on the homes of the indicted. "Mere possession of such literature," the Commonwealth's Attorney, Hamilton, argued "raises a presumption of guilt."

. . . .

<sup>45</sup> 282 F. Supp. at 855.

<sup>46</sup> 282 F. Supp. at 852.

<sup>47</sup> See *Braden v. Commonwealth*, 291 S.W.2d 843 (Ky. 1956); *Loveless v. Commonwealth*, 241 Ky. 82, 43 S.W.2d 348 (1931); *Gregory v. Commonwealth*, 226 Ky. 617, 11 S.W.2d 432 (1928).

<sup>48</sup> 282 F. Supp. at 851.

<sup>49</sup> A. BRADEN, *THE WALL BETWEEN* (1958).

<sup>50</sup> December 20, 1954, p. 4.

Braden denied that he ever was or ever had been a Communist but admitted to being a lifelong socialist, interested in many labor and peace causes. "They want us to disarm," the prosecutor said in his summation to the jury, "so we can be taken over without much difficulty."

The prosecutor asked the jury to convict and make the case "a milestone" in ending "this setting whites against blacks . . . ."

The result in the trial of Carl Braden was exactly the result which the court in *McSurely* prophesied would have occurred had a prosecution under that law been allowed to take place. It had already happened in 1954. Carl Braden's bond was set at \$40,000 and he languished in prison for eight months until it could be raised. When the case reached the Kentucky Court of Appeals, it was reversed on the narrow ground of federal pre-emption, because the indictment also charged teaching sedition against the United States.<sup>51</sup> The Court did not reach the first amendment question and specifically referred to the possibility of a prosecution for sedition "directed exclusively against the Commonwealth of Kentucky." In Carl Braden's "first sedition case" it was almost two years from arrest to "vindication." In his second, the *McSurely* case, it was three days for him and his wife, and a month for the others. This alone demonstrates one difference that the availability of the *Dombrowski* remedy makes.

More importantly, the same kind of "political trial" that occurred in Carl Braden's case could have occurred in the Pike County case as well. This is evidenced by the action of the state courts in denying the *McSurely*'s motion for release on habeas corpus, the prosecutor's statements concerning the kind of evidence that he would have introduced if the trial had been allowed to proceed, and the "political fallout" noted above. Thus the effect of the *Dombrowski*-type remedy—a little more than a month after the first arrests had been made, the threat of prosecution and a political trial were no more. In the eyes of the public the plaintiffs had been vindicated, or at least had not been "proved" to be communists. The officials had been found "in the wrong" by the federal courts, and it may be significant to note that prosecutor Ratliff failed to carry Pike County in his race for Lieutenant-Governor. An effective political weapon—prosecutions for "teaching sedition" so as to brand anti-poverty workers as "communists"—had been removed from the arsenal of the Pike County officials. The *Dombrowski*-type remedy, which prevented the prosecutions from taking place,<sup>52</sup> had demonstrated its political significance in the struggle between anti-poverty workers and the "power structure" in Pike County, Kentucky.<sup>53</sup>

<sup>51</sup> *Braden v. Commonwealth*, 291 S.W.2d 843 (Ky. 1956). The reversal was on the basis of *Pennsylvania v. Nelson*, 350 U.S. 497 (1956).

<sup>52</sup> See the text at note 1, *supra*.

<sup>53</sup> The story does not have a happy ending. After protracted litigation, the Sixth Circuit ordered that the seized documents be returned. *McSurely v. Ratliff*, 398 F.2d 817 (6th Cir. 1968). In the meantime, they had been turned over to the Senate Permanent Subcommittee on Investigations, commonly referred to as the McClellan Committee, which had copied them and returned them to what was purportedly "official custody." That Committee issued a subpoena *duces tecum*, requiring the *McSurelys* to produce the documents before the committee. Upon their refusal to do so, they were indicted for contempt. They

### III. THE KENTUCKY UN-AMERICAN ACTIVITIES COMMITTEE: "LEGAL DEFEAT" AND "POLITICAL VICTORY"

A most powerful weapon for the inhibition and suppression of dissent has been the legislative investigating committee, looking into "subversion," "un-American activities," "internal security," and the like. Although the Supreme Court may have stated that, "There is no congressional power to expose for the sake of exposure,"<sup>54</sup> this is in fact what such committees constantly do and what they are set up to do. Kentucky had been spared this institution until the spring of 1968, when the General Assembly by concurrent resolution established the Kentucky Un-American Activities Committee. The likely targets of legislative wrath were "communist organizations" operating in Kentucky, anti-poverty workers who were "stirring up our poor," black militants, who were beginning to appear in the urban areas, and the "radical" professors who were creating "student dissidents" at the state-supported schools. The preamble to House Resolution No. 84 stated:

WHEREAS, this state and this country face grave public danger from enemies both within and without our boundaries, and

WHEREAS, these subversive groups and persons under color of protection afforded by the Bill of Rights of the United States Constitution seek to destroy us and the ideals for which we fought to preserve and subject us to the domination of foreign powers and ideologies, . . . .

The committee was directed to:

. . . study, analyze and investigate all facts relating directly or indirectly to the subject expressed in the recitals of this resolution; to the activities of groups and organizations which have as their objectives, or as part of their objectives, the overthrow of the Commonwealth of Kentucky, or of the United States by force, violence or other unlawful means; to all organizations known to be or suspected of being dominated or controlled by a power seeking to impose a foreign political theory upon the government and people of the United States; to all persons who belong to or are affiliated with such groups or organizations; and to the manner and extent to which such activities affect the safety, welfare and security of this state in National Defense, the functioning of any state agency, unemployment relief and other forms of public assistance, educational institutions in this state including but not limited to the operation, effect, administration, enforcement and needed revision of any and all laws in any way bearing upon or relating to the subject of this resolution.<sup>55</sup>

The usual powers, including the subpoena power, were granted.

While the mandate itself makes it clear that the purpose of the committee was not limited to "providing information for legislation," the statements of

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then brought a *Dombrowski*-type suit against the committee members, and both the suit and the contempt proceeding are now pending. On December 13, 1968, their home was dynamited, and they barely escaped death or serious injury. They subsequently left Pike County. Joe Mulloy, anticipating induction into the Armed Forces following the refusal of his draft board to classify him as a conscientious objector, also left Pike County. He is currently under a five-year prison sentence for refusing induction. Organizing activities are still going on in Pike County, but the victims of the 1967 raids remain under attack.

<sup>54</sup> *Watkins v. United States*, 354 U.S. 178, 187, 200 (1954).

<sup>55</sup> House Resolution No. 84, Kentucky General Assembly, March 11, 1968.

the sponsor and other legislators show rather conclusively that the only purpose was to "expose subversion in Kentucky." The sponsor of the bill, Rep. Lloyd Clapp, was quoted in a newspaper interview as follows:

Rep. Clapp told the Kernel that the committee was created for a "dual purpose"—to institute an educational and informational system and to "show the points where the Communists are working on our weaker points."

He said he envisions a return of the American people to the "neighborliness" of former times.

"This is not a witch hunt," Rep. Clapp said. "I just want to point out to the American people that we are losing our sense of discipline toward government, patriotism and love of government."

He said the immediate event that motivated his sponsorship of the bill came when the Southern Conference Educational Fund moved its office to Louisville.

"If members of a group believe in a foreign form of government," he said, "they should not be allowed free speech."<sup>56</sup>

The floor debates were equally enlightening. One senator said that the chief benefit of the committee was that it would "bring into light the activities of the Southern Conference Educational Fund," which he identified as a "key apparatus of communism in the United States," observing that, "We need to enlighten the people of Kentucky what the Communist Party is doing right here on their front door."<sup>57</sup> Another legislator stated, "We don't realize it, but Communists are working all around us," while still another warned that, "These hippies and beatniks and assorted reds and pinks are right in our midst."<sup>58</sup>

In the pre-*Dombrowski* days a legislative investigating committee ordinarily would have a free hand and any response would have to be a defensive one.<sup>59</sup> The committee could conduct its hearings, usually with great fanfare, first calling "friendly" witnesses to expose the "subversives." Then the "subversives" would be called. If they refused to appear, they could be cited for contempt. If they appeared, they would be subject to questioning about their beliefs and associations and to the pillorying that usually accompanied such an investigation.<sup>60</sup> If they refused to answer such questions, they could be labelled as "Fifth or First Amendment communists," and could also be cited for contempt. Some time later they might be vindicated,<sup>61</sup> but even this was not always true.<sup>62</sup> In any event, the threat of investigation by a legislative committee was a formidable weapon to be wielded against "subversives" working for social change.

<sup>56</sup> Kentucky Kernel, March 26, 1968, at ..., col. ....

<sup>57</sup> Louisville Times, March 16, 1968, at ..., col. ....

<sup>58</sup> Louisville Courier-Journal, March 12, 1968, at ..., col. ....

<sup>59</sup> See *Pauling v. Eastland*, 288 F.2d 126 (D.C. Cir. 1960), *cert. denied*, 364 U.S. 900 (1960). Cf. *Jordan v. Hutcheson*, 323 F.2d 597 (4th Cir. 1963).

<sup>60</sup> It was the alleged pillorying by the House Un-American Activities Committee that was the basis of the plaintiffs' claim in *Stamler v. Willis*, 415 F.2d 1365 (7th Cir. 1969).

<sup>61</sup> See, e.g., *DeGregory v. Attorney-General of New Hampshire*, 383 U.S. 825 (1966); *Gibson v. Florida Legislative Investigation Comm.*, 372 U.S. 539 (1963); *Sweezy v. New Hampshire*, 354 U.S. 234 (1957); *Watkins v. United States*, 354 U.S. 178 (1954).

<sup>62</sup> See *Braden v. United States*, 365 U.S. 431 (1961); *Wilkinson v. United States*, 365 U.S. 399 (1961); *Barenblatt v. United States*, 360 U.S. 109 (1959); *Uphaus v. Wyman*, 360 U.S. 72 (1959).

Doubtless, sponsors of the Kentucky Un-American Activities Committee envisioned the same role for their "creation." The Kentucky Legislature was going to act against subversives, and KUAC, like the other "little HUACS," was going to be its instrument. It was going on the offensive and would expose the "communists" and "subversives" who had infiltrated the universities, the anti-poverty programs, and indeed every "movement for social change."

The final approval for the establishment of the committee was given by the Kentucky Senate on March 15, 1968.<sup>63</sup> Under the resolution, which did not go into effect until 90 days after the end of the legislative session, the Governor was to appoint the ten members of the committee, five from the House and five from the Senate. The first suit, *Braden v. Nunn*,<sup>64</sup> was filed on March 25, shortly after the legislature adjourned. The plaintiffs fell into three categories: (1) organizations working for social change in Kentucky; (2) officials of those organizations; (3) university professors, numbered among whom was the author. The Southern Conference Educational Fund and the Bradens, express targets of the committee according to its sponsors, were considered our "most affected plaintiffs," though under our theory the other plaintiffs were affected as well. The relief sought was a declaration that the resolution was void on its face and an injunction restraining the Governor from appointing anyone to the committee.

We realized that standing would be our most difficult problem. Our theory was as follows: The *existence* of a legislative investigating committee operating under a vague and overbroad mandate and established for the purpose of exposing "subversion" would have a chilling effect upon the exercise of first amendment rights by our plaintiffs and members of the class they represented, namely persons seeking to achieve social change through the exercise of those rights. Secondly, it was contended that the investigations would be undertaken for the purpose of harassing and intimidating our plaintiffs and the class of which they were members so as to deter them from exercising their first amendment rights. In other words, we were contending that the *Dombrowski* remedy carried with it its own standing rule: persons and groups working to achieve social change have standing to challenge the operations of a legislative investigating committee on the ground that the mandate under which the committee is operating will have a chilling effect on their first amendment activities and on the ground that the committee was established to harass and intimidate them in the exercise of their first amendment rights. Relying on *Liveright v. Joint Legislative Investigating Committee*,<sup>65</sup> we contended that the resolution establishing the committee created the impermissible chilling effect, so that the suit could be maintained even prior to the time the committee was appointed and began its activities. Implicit in our standing argument was the argument that *Dombrowski* requires that the operations of a

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<sup>63</sup> Louisville Courier-Journal, March 16, 1968, at ...., col. ....

<sup>64</sup> No. 18,849 (6th Cir., May 5, 1969).

<sup>65</sup> 279 F. Supp. 205 (M.D. Tenn. 1968).

committee operating under a vague and overbroad mandate and for the purpose of "harassment" be halted as soon as possible, and that persons whose activities would necessarily be chilled by those operations were the proper ones to make that challenge.<sup>66</sup>

The District Judge was not impressed, and on May 27, 1968, he dismissed the suit, refusing to certify the necessity for the convention of a three-judge court on the ground that the complaint was "obviously without merit." But this was not before the attorneys for the state<sup>67</sup> had at the hearing made a very interesting response to our challenge. As far as they were concerned, all the committee was going to do was to investigate the operations of the agencies of the state government and "things that have an effect on it." Gone was the talk about "exposing Communists" and "showing where the Communists are working on our weaker points." As the Deputy Attorney-General assured the court: "This resolution is not a witch hunt. It's not an exposure for exposure's sake, as the federal cases talk about. It is simply designed to allow the Legislature of Kentucky, through a duly authorized legislative committee of the Legislature, to determine what needs to be done to better administer and enforce our law. . . ." The statements of the sponsors of the resolution were also specifically disclaimed.<sup>68</sup> This kind of response pointed up very clearly the dilemma that the filing of a *Dombrowski*-type suit necessarily creates for a legislative investigating committee. To the extent that the committee carries on in the "normal way," it verifies the contentions of the plaintiffs that its purpose is one of harassment and exposure. If it does not engage in those activities, then it cannot serve as an effective instrument of repression, and it may as well not have been created. All the while its activities are potentially subject to the scrutiny of the federal courts. We took an appeal to the Sixth Circuit and announced our intention to continue the legal attack.

The filing of the suit had the additional effect of making people clearly aware of the committee's existence and of what we believed to be its real purpose. A few days after the suit was filed, the Kentucky Conference of the American Association of University Professors passed a resolution "expressing concern with recent developments in the state which imply limitation on full freedom of expression and association on campuses throughout Kentucky," referring primarily to the establishment of the committee.<sup>69</sup> The respected Louisville Courier-Journal, the only newspaper of state-wide circulation, editorialized on March 31 that: "Invariably committees of this sort have been nothing but instruments to stifle dissent and to harass individuals and institutions who displease the members of the committee."<sup>70</sup> The plaintiffs in

<sup>66</sup> On appeal we argued that *Flast v. Cohen*, 392 U.S. 83 (1968), which had been decided subsequently, lent further support to this contention of "appropriate party to assert First Amendment claim."

<sup>67</sup> The Governor and the Attorney-General, who were of opposite political parties, appeared by separate attorneys, but conducted a joint defense.

<sup>68</sup> Transcript of Testimony, at 23-25, *Braden v. Nunn*, No. 316 (E.D. Ky., May 27, 1968).

<sup>69</sup> Louisville Courier-Journal, March 31, 1968, at . . . , col. . . .

<sup>70</sup> The subject of the editorial was the Governor's statement that he "was distressed" that a University of Kentucky law professor was involved as counsel, and his observation that, "We are going to have to take a long hard look at some of the people to whom our youth are exposed."

*Braden v. Nunn* also took the lead in creating Kentuckians Against KUAC, and this organization led the "political attack" against the committee. It held a number of workshops in Louisville and Lexington and distributed literature throughout the state.

The relationship between the political and the legal attack was important. The lawsuit provided the focal point for organizing against the committee, and in a sense—primarily psychological—provided an "umbrella of protection." At all anti-KUAC meetings some of the *Braden* lawyers were present and discussed the legal aspects of opposition. Persons who might be called before the committee were assured that they would have legal representation. In addition, the fact that the committee had been sued even before its members had been appointed would put it "under a cloud" in the eyes of many people. Most importantly, the opponents of the committee had taken the offensive and the lawsuit reflected this fact. It was indeed fortunate that the initials of the committee enabled it to be referred to as "QUACK," and, as the *Courier-Journal* observed in another editorial, "Quack is the logical pronunciation and probably summarizes the proposed activities as well as any other single word."<sup>71</sup>

The committee also was a matter of concern within the legislature itself. The Kentucky Legislature meets ever yother year, and in the interim functions through committees, administered by the Legislative Research Commission. The members of these committees only receive their expenses, but the resolution establishing KUAC provided that the members would receive per diem pay of \$25 whenever they met. Only \$50,000 had been appropriated for the operations of all committees, and there was the fear that KUAC would use a disproportionate amount of this money. As one Legislative Research Commission staff member stated privately, "Just one big witch hunt, and we're broke for every other cause."<sup>72</sup> The Commission asked the Attorney-General whether it had the authority to limit appropriations to KUAC, and he replied in the affirmative.<sup>73</sup> Ultimately the committee was funded by the Governor out of his contingency fund,<sup>74</sup> which meant that it was entirely dependent upon him for financial support.

On June 13, the Governor appointed the members of the committee and announced that he had requested that they investigate the racial disorders which had occurred in Louisville's West End in May.<sup>75</sup> The committee met in secret session on June 21 and announced that it would hold hearings on the Louisville disorders in September.<sup>76</sup> It was the view of our Louisville people that the purpose of these hearings would be to place the blame for the disorders on black militants and their white supporters rather than on the conditions that existed in the West End ghetto. The Jefferson County (Louisville) grand

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<sup>71</sup> Louisville *Courier-Journal*, June 15, 1968, at ..., col. ....

<sup>72</sup> Louisville *Courier-Journal*, April 12, 1968, at ..., col. ....

<sup>73</sup> Louisville *Times*, June 13, 1968, at ..., col. ....

<sup>74</sup> Louisville *Courier-Journal*, June 14, 1968, March 29, 1969.

<sup>75</sup> Louisville *Times*, June 13, 1968, at ..., col. ....

<sup>76</sup> See 394 U.S. 100 (1969).

jury had issued a report two days earlier, also requesting that the committee undertake such an investigation, since "certain signs pointed to a planned eruption."<sup>77</sup> Finally the prosecuting attorney had singled out a number of civil rights organizations before the grand jury, and he announced that he would turn over information on these organizations to the committee.<sup>78</sup>

This gave rise to the "second KUAC suit," *Black Unity League of Kentucky v. Miller*.<sup>79</sup> The plaintiffs in this suit were the organizations named by the prosecuting attorney, and it proceeded on the same general theory as *Braden v. Nunn*, except that the claim of "injury" was somewhat more direct, because particular organizations had been singled out and presumably would be "investigated" by the committee.<sup>80</sup> The suit was filed on July 10, 1968. Since the hearings were not scheduled until September 24, we were in no hurry to proceed with the case. Organizing meetings were being held in Louisville to make people aware of the committee's probable purpose in holding the hearings and to discuss strategies for opposing them. Again the lawsuit served as a focal point and provided the psychological "umbrella of protection." It was also agreed that if any of our people were called as witnesses by the committee, they could intervene as plaintiffs in the suit.

It was for these reasons that we did not ask for an immediate hearing on our motion for the convention of a three-judge court. The defendants filed a motion to dismiss, and we assumed that this would be heard at the same time as our motion. Much to our surprise, the District Judge had certified the necessity for the convention of a three-judge court on his own, and on September 4, the three-judge court, without a hearing, entered an order dismissing the complaint. It held that the plaintiffs were required to exhaust state remedies, since in its view the resolution was not "unconstitutional on its face," and "there have been no prosecutions and no sanctions levied against the plaintiffs whereby irreparable injury will result to plaintiffs from our failure to act." We then filed a "motion for emergency relief," principally on the ground that we had not been afforded a hearing. The court responded by invoking a local court rule requiring that a response to any motion be filed within five days of its receipt, and held that our failure to reply to the defendants' motion to dismiss constituted a waiver of any claim to a hearing. We then took a direct appeal to the Supreme Court.

The committee held its hearings at Frankfort, the state capitol, on September 24 and 25. It limited itself to "friendly witnesses" and did not subpoena any of our people. However, it subsequently invited three of them to voluntarily appear before the committee since they had been "mentioned" at the hearings, and under the committee's rules, this gave them the right to appear before the committee and "defend themselves." They did not "take the bait,"

<sup>77</sup> Louisville Courier-Journal, June 22, 1968, at ..., col. ....

<sup>78</sup> Louisville Times, June 20, 1968, at ..., col. ....

<sup>79</sup> 394 U.S. 100 (1969).

<sup>80</sup> The suit also attacked the resolution adopted by the committee as vague and overbroad and its rules of procedure as violative of the fourteenth amendment.

and advised the committee that they would continue their attack on it in the courts. The hearings produced no sensational disclosures and had little impact. The committee appeared to be trying very hard to show that it was not engaged in a "witchhunt"—as the state's lawyers had assured the court in *Braden v. Nunn*—and its failure to subpoena any of our people was interpreted as a sign of weakness on its part. Kentuckians Against KUAC continued the "political attack," and all the while the two suits against the committee were pending.

Its next venture involved hearings at Pikeville—the home of *McSurely v. Ratliff*—in early October. Those hearings revolved around opposition to a proposed water district, which opposition was allegedly being led by Appalachian Volunteers. The basis of the opposition was that the rates were discriminatory against the poor people living in the district, and it was very effective. So few people were signing up that there was the danger that a promised federal grant would be lost. Somehow there was something "un-American" about all this, and the committee proceeded to investigate "Appalachian problems" and the "groups and activities that might be causing strife among the people." Again the committee limited itself primarily to "friendly witnesses" except for the chairman of the citizens' group formed to oppose the water district. It did not subpoena any members of the Appalachian Volunteers, although they were "invited" to appear before the committee, which they refused to do. Following the two-day hearing the committee issued an Interim Report, which concluded that, "the Appalachian Volunteer Program, particularly in Pike County, has served as a tremendous detriment to the deserving people of this region."<sup>81</sup> It recommended that the Governor "take whatever steps are necessary to make certain that the Appalachian Volunteer Program is permanently discontinued," and further recommended that "the news media and all public officials in the State of Kentucky and Pike County, and all Public Service Organizations endeavor to see that the Water District is put into operation before the Federal Grant and the guaranteed loan are lost."<sup>82</sup> The Appalachian Volunteers subsequently filed a complaint with the Civil Rights Division of the Department of Justice, charging that the committee was attempting to intimidate them and prevent them from carrying on their activities.<sup>83</sup>

By this time it seemed rather clear that the committee was unable to function as an effective instrument of repression. Opposition to the water district continued in Pike County, as did the activities of the Appalachian Volunteers. Representatives of Kentuckians Against KUAC met with the local people in Pike County in anticipation of the next hearings, which were scheduled for early December, and continued to circulate literature and sponsor programs attacking the committee. It may have been an indication of the committee's

<sup>81</sup> Interim Report of the Joint Legislative Committee on Un-American Activities Concerning the Pikeville Hearings, November 27, 1968.

<sup>82</sup> *Id.*

<sup>83</sup> At this time the Appalachian Volunteers were still receiving federal funds.

weakness that when they finally did subpoena one of the Appalachian Volunteers, a local staff person, for the December hearings, she did not hesitate to appear. Not only did she appear, but as reported in the *Louisville Courier-Journal*:

A graying mother of four yesterday scolded the Kentucky Committee on Un-American Activities for recommending that the Appalachian Volunteers be ordered from the state without "knowing all the facts." At the same time, she accused Pike County officials of conspiring against poor people.

Mrs. Edith Easterling, director of the Marrowbone Folk School, an Appalachian Volunteers (AV) outpost some 20 miles south of Pikeville, told the committee that instead of criticizing and investigating the AV's, it should go out in the hollows and see the people who have to go to bed hungry.

"The only day poor people are recognized here is on election day," she added later, "when they bring a bag of money out to buy their votes."<sup>84</sup>

The *Courier-Journal* followed with a blistering editorial, entitled "Hearings Threaten to Be Ridiculous":

If the Kentucky Committee on Un-American Activities is to have even nominal value to the state, it must show fairness and responsibility in the conduct of its investigations, and must avoid appearing ridiculous. It has failed on all of these points in its Pike County hearings into the activities of the Appalachian Volunteers.

The most ludicrous moment of the hearings, however, came during the questioning of Mrs. Edith Easterling, who testified that she had been threatened because of her work with the Volunteers. Asked what threats she had received, she testified that she had gotten threatening telephone calls and that windows of her home had been shot out.

"I don't call that threats," scoffed committee member Charles Upton. Perhaps not. It isn't likely to be confused with a visit from the Welcome Wagon, either. We have an idea that had a Volunteer threatened Mr. Upton with a phone call and subsequently shot the windows out of his home, he would have considered it at least an unfriendly gesture.<sup>85</sup>

The committee did not announce plans to hold other hearings and issued no further reports. On March 3, 1969, the Supreme Court came down with its decision in *Black Unity League of Kentucky v. Miller*.<sup>86</sup> In a *per curiam* opinion, Justice Douglas dissenting, it granted the defendants' motion to affirm, observing as follows:

They (appellant organizations) did not allege that any of their officers or members had been called as witnesses, or that any subpoenas had been issued, or that any criminal prosecutions had been begun. The allegations of harassment were entirely conclusionary. Appellees moved to dismiss, and appellants failed to respond, as was required by local court rules . . . . We hold that in this procedural context the trial court could take appellants' conclusionary allegations as insubstantial and could dismiss the complaint for failure to allege sufficient irreparable injury to justify federal intervention at this early stage.

<sup>84</sup> *Louisville Courier-Journal*, December 4, 1968, at . . . , col. . . .

<sup>85</sup> *Louisville Courier-Journal*, December 6, 1968, at . . . , col. . . .

<sup>86</sup> 394 U.S. 100 (1969).

The Sixth Circuit, which had previously denied a motion to affirm in *Braden v. Nunn*,<sup>87</sup> now affirmed on the basis of the Supreme Court decision in *Black Unity League*. The legal battle had been lost.

In retrospect, it would appear that we erred in not requesting a hearing on our motion for the convention of a three-judge court and in ignoring the defendants' motion to dismiss. Quite frankly we were unaware of the local court rule, and expected that motion to be heard in conjunction with our motion for convention, which was the practice the federal courts in Kentucky had followed in other *Dombrowski*-type suits. Our "political-legal" strategy also dictated that the suit be kept pending as long as possible. In any event, the decision in *Black Unity League* implied that we would be able to bring another suit if any of our people were subpoenaed, and in light of subsequent cases, this interpretation appears to be correct.<sup>88</sup> Our plaintiffs publicly stated that this is what would be done.

It was unnecessary. On March 28, 1969, the newspapers reported that the committee was "going out of business."<sup>89</sup> It had used up its initial grant from the Governor's contingency fund, and the Governor decided that he would not provide any further grants. The three-man staff was discharged, and although the chairman referred to the committee as being "temporarily at anchor," the vice-chairman and sponsor of the resolution stated that unless the committee found some unexpected source of funds, it would likely hold no further hearings.<sup>90</sup> The victory was made complete when early in the 1970 legislative session, the House, by a vote of 47 to 38, refused to appropriate money to finance the committee's operations for the next biennium.<sup>91</sup> It had become "respectable" to vote against KUAC. The legal battle had been lost, but the political battle had been won. The committee had been unable to operate as an effective instrument of repression.

It would be presumptuous to say that the filing of the suits alone was the cause of the committee's demise. Nonetheless, it is the belief of the people who organized against the committee that the filing of those suits—the availability of the *Dombrowski*-type remedy—had a very significant effect upon the ultimate political victory. Newspaper accounts of the committee's activities always referred to the fact that it was involved in lawsuits from its inception.<sup>92</sup> The suits served as a rallying point for the opposition to the committee and as we have said, provided a psychological "umbrella of protection." They also put the committee on the defensive. Even before it was created, it promised, through the state's attorneys, that it would not "engage in a witchhunt."<sup>93</sup> The statements of its sponsors that it would "expose communism" and the

<sup>87</sup> No. 18,849 (6th Cir., Map 5, 1969).

<sup>88</sup> See *Stamler v. Willis*, 415 F.2d 1365 (7th Cir. 1969); *Goldman v. Olson*, 286 F. Supp. 35 (W.D. Wisc. 1968).

<sup>89</sup> Louisville Courier-Journal, March 29, 1969, at ..., col. ....

<sup>90</sup> *Id.*

<sup>91</sup> Louisville Courier-Journal, January 27, 1970, at ..., col. ....

<sup>92</sup> Louisville Courier-Journal, March 29, 1969, at ..., col. ....

<sup>93</sup> Transcript of testimony, at 24, *Braden v. Nunn*, No. 316 (E.D. Ky., May 27, 1968).

like were also disclaimed.<sup>94</sup> Most importantly, it was forced to carry out its operations *under the potential scrutiny of the federal courts*. If it did attempt to operate as an instrument of repression, it would make federal intervention all the more probable, but if it was to avoid such intervention, it could not do what it was set up to do. All that can be said is that the Kentucky Un-American Activities Committee was not able to repress efforts to bring about social change, and in the view of those who organized against it, the filing of the suits was a very significant factor in this regard. If it had not been for the availability of the *Dombrowski*-type remedy, notwithstanding the fact that the suits were not "legally successful," the history of KUAC in Kentucky might have been very different. At least many so believe.

#### IV. CONCLUSION

This two-part article has attempted to assess the significances of the *Dombrowski*-type remedy in redressing the balance between those who seek to achieve social change and those who would use their control of the organs of government to resist it. It is the author's thesis that the availability of the *Dombrowski*-type remedy goes very far to redress the balance, and that this may only to some extent be affected by the outcome of the legal action. To the author this demonstrates most clearly how the law of remedies does indeed operate as a social institution.

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<sup>94</sup> *Id.* at 24-25.

