CONSTITUTIONAL LAW—DOSSIERS AND CIVIL LIBERTIES—*Anderson v. Sills*, 56 N.J. 210, 265 A.2d 678 (1970).

On April 23, 1969, Arthur J. Sills, the Attorney General of New Jersey, distributed a memorandum entitled "Civil Disorders—The Role of Local, County and State Government" to all the local law enforcement units of the state.[1] Intended "to provide local officials with information concerning the legal and practical ramifications of handling civil disorders,"[2] the Sills Memorandum was precipitated by the 1967 disturbances that included some costly riots, and was promulgated pursuant to a conference between the Governor and the mayors of New Jersey municipalities. It deals with many aspects of the civil disorder problem, such as methods of advance planning, mutual assistance between municipalities, summoning assistance from the State Police and the National Guard, the legalities of proclaiming an emergency, and the control of false rumors that might escalate such a disorder.[3] A small segment of the forty-three page communication, entitled "Potential Problems," describes the close working relationship that had developed between state and local authorities, and the former's familiarity with the latter's problems. To facilitate continuing insight of central authorities, the municipalities are urged to communicate "vital intelligence" requested in two security reports, on a continuing and routine basis, so that it might be evaluated and disseminated.[4]

One security form is designed for reporting data relating to "incidents," such as civil disturbances, riots, rallies, protests, demonstrations, marches, confrontations, etc., and calls for the name of the

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1 Anderson v. Sills, 56 N.J. 210, 215, 265 A.2d 678, 681 (1970). [The memorandum is hereinafter referred to as the Sills Memorandum].

The recipients of the Sills Memorandum were independent local agencies outside the Attorney General's official chain of command. Therefore, it was not a directive, regulation, or order, but only a "communication." *Id.* The power "to preserve the public peace and order and to prevent and quell riots, disturbances and disorderly assemblages" is primarily with the local municipality. Since a failure to quell riots within its jurisdiction will render the municipality liable to property owners for damages resulting from such riots, N.J. STAT. ANN. § 2A:48-1 *et seq.* (Supp. 1969); A & B Auto Stores v. City of Newark, 106 N.J. Super. 491, 256 A.2d 110 (L. Div. 1969), it is quite understandable that the local agencies would do their utmost to cooperate with the state. Note, *Municipal Liability for Riot Damage*, 16 HAST. L.J. 459 (1965).

2 *Id.* at 216 n.1, 265 A.2d at 681 n.1. *See* Momboisse, *Riot Prevention and Survival*, 45 CHI.-KENT L. REV. 143 (1969).

3 Anderson v. Sills, 106 N.J. Super. 545, 548, 256 A.2d 298, 299 (Ch. 1969).

4 Sills Memorandum at 19, quoted in Anderson v. Sills, 56 N.J. at 216-17, 265 A.2d at 682.

organization participating therein, the type of organization, and a description of its involvement. The other form relates to individuals and solicits comprehensive information describing them and their activities in the occurrences.[5]

A number of adult citizens and the Jersey City Chapter of the National Association for the Advancement of Colored People (NAACP) sued, individually and on behalf of a class similarly situated, the Attorney General and local law enforcement officials, as individuals, officials and representatives of the class of similar officials. A declaratory judgment that the use of such a reporting system violates the United States Constitution and injunctive relief to prevent its continued use were sought.[6]

When the Attorney General moved to dismiss the complaint for failing to state a cause of action, the plaintiffs countered with a motion for summary judgment.[7] The Superior Court of New Jersey, Chancery Division, considered two primary issues,[8] standing and constitutionality. The Attorney General contended that, since the plaintiffs did not allege facts indicating that they had been aggrieved, they had no standing. Pointing out that the United States Supreme Court has relaxed the standards of justiciability where it is alleged that governmental action inhibits the exercise of first amendment rights, the court disposed of that argument. Judge Matthews observed that the standing question was related to the substantive problem, whether the intelligence gathering system infringes on constitutional rights, and turned his attention to the latter.[9]

While admitting the validity of the government's concern over the danger to life and property presented by civil disorders, and that the Attorney General's objectives fell well within the established police power, the court pointed out that

> when a state official, in exercising his powers, comes in conflict with those individual liberties protected by the Bill of Rights, it

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[5] Security Incident Reports (Form 420) and Security Summary Reports (Form 421) and the accompanying instructions are reproduced in an addendum to the court's opinion in Anderson v. Sills, 56 N.J. at 231-39, 265 A.2d at 690-96. For the highlights of the report on individuals *see* Anderson v. Sills, 106 N.J. Super. at 552-53, 256 A.2d at 300.

[6] Anderson v. Sills, 106 N.J. Super. 545, 547, 256 A.2d 298, 299.

[7] *Id.* at 549, 256 A.2d at 300.

[8] These questions were raised and discussed at length in *Chilling Political Expression By Use of Police Intelligence Files: Anderson v. Sills*, 5 HARV. CIV. RIGHTS—CIV. LIB. L. REV. 71 (1970), a comment concentrating on these two questions which was published before the chancery division's decision was reversed and remanded.

[9] 106 N.J. Super. at 549-51, 256 A.2d at 300-01.

> is the delicate and difficult task of the courts to determine whether the resulting restriction on freedom can be tolerated.[10]

Before deciding the case, the court arrived at three concomitant conclusions. First, the Attorney General did not show (in the Memorandum) how the information gathered would be helpful in preventing civil disorders.[11] In addition, the activities to be conducted by the governmental authorities might reasonably be expected to interfere with the exercise of first amendment rights.[12] Finally, the Sills Memorandum contravened the principles established in the overbreadth and vagueness doctrines, in that individuals might be reluctant to participate in legal activities for fear of being included in the data bank and because its instructions could be too freely interpreted by law enforcement officials.[13] Judge Matthews held that

> [t]he secret files . . . maintained as a result of this intelligence gathering system are inherently dangerous and by their very existence tend to restrict those who would advocate, within the protected areas, social and political change.[14]

Therefore, the court adjudged the completion, maintenance and distribution of the forms under the Sills Memorandum to be violative of the first amendment of the Constitution. The Attorney General was directed to rescind his Memorandum and destroy all forms, files and any information collected thereunder, except that data to be used in charging people with specific criminal offenses.[15]

The decision precipitated an instantaneous and vigorous discussion among legal writers of conflicting viewpoints. Its conclusions were defended, placed "on a more solid doctrinal footing,"[16] and praised as evidence of new standards of first amendment interpretation by some writers,[17] while others attacked the reasoning as unique but legally unsound.[18] Perhaps this discussion was premature, for the

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10 *Id.* at 552, 256 A.2d at 302.

11 *Id.* at 553, 256 A.2d at 302.

12 *Id.* at 554, 256 A.2d at 303, citing Lamont v. Postmaster General, 381 U.S. 301 (1965), and Dombrowski v. Pfister, 380 U.S. 479 (1965).

13 *Id.* at 556-57, 256 A.2d at 304, citing and discussing United States v. Robel, 389 U.S. 258 (1967).

14 *Id.* at 557, 256 A.2d at 305.

15 *Id.* at 557-58, 256 A.2d at 305.

16 Comment, *supra* note 8.

17 Askin, *Police Dossiers and Emerging Principles of First Amendment Adjudication*, 22 STAN. L. REV. 196, 220 (1970). Professor Frank Askin participated in preparing the plaintiffs' briefs.

18 Comment, *Secret Files: Legitimate Police Activity or Unconstitutional Restraint on Dissent?*, 58 GEO. L.J. 569 (1970):

> *Anderson v. Sills* is the first case to enjoin police information gathering per se,

Supreme Court of New Jersey, after certifying the matter before the appeal to the appellate division was argued, reversed and remanded the case.[19] In a unanimous opinion, the court held that the trial court should have refused to grant the summary judgment because "[t]he constitutional issue was presented in a hypothetical way within an aura of surmise and speculation,"[20] and the trial record was inadequate for a decision upon the merits.[21]

Chief Justice Weintraub characterized as "hypothetical horribles" the plaintiffs' visions of first amendment right violations by a widespread harassment of citizens participating in constitutionally protected conduct. "There is not an iota of evidence that anything of the kind has occurred or will, or that any person has been deterred by that prospect."[22]

The court's opinion contravened the reasoning of the chancery division, especially in its treatment of the areas covered by the latter's three preliminary conclusions. As to the first requirement that the Attorney General show in his Memorandum the usefulness of the information in preventing civil disorders, the court stated:

> Nor should an injunction issue on the assumption that there will be unwarranted police action because a judge cannot on the basis of his own experience understand the relevancy of the . . . items plaintiffs stress in their academic attack. Law enforcement is a specialty, and its needs may not be within the expertise of a court. That is why a hearing is essential for an informed decision in a case of this kind. It may well be that a hearing will establish that some of these items are wholly unrelated to the police obligation with respect to anyone involved in any type of incident, but we should not merely assume that this is so. We cannot know how little we know until we listen.[23]

As for the contention that the governmental activities might interfere with first amendment rights, the court first pointed out the lack of evidence that the Memorandum was intended by the Attorney General or interpreted by local officials to call for any action that invaded a constitutionally protected area.[24] Emphasizing that court interference with measures adopted by the executive branch to protect the citizenry is a serious affair, the chief justice reiterated the court's

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without regard to the manner which it is to be employed; the mere scope of the information sought was deemed to transgress constitutional limits.

Id. at 571.

19 Anderson v. Sills, 56 N.J. 200, 231, 265 A.2d 678, 689.

20 *Id.* at 215, 265 A.2d at 681.

21 *Id.*

22 *Id.* at 218, 265 A.2d at 682.

23 *Id.* at 225-26, 265 A.2d at 687.

24 *Id.* at 220, 265 A.2d at 683.

unwillingness to do so on the strength of a hypothetical statement of constitutional problems.

> Rather the premise must be accepted, absent proof the other way, that the Memorandum assumed a lawful exercise of the judgment and discretion vested in the local police. The Memorandum did not originate the duty of the local police unit to decide what situations harbor the potential of disaster and what data should be gathered for responsible performance in office. The forms do not enlarge upon that power and responsibility.[25]

That a "chilling effect" on speech or association might occur was regarded to be of subsidiary importance. Instead, the pivotal question was regarded to be the legality of the activity, although the amount of "chill" might be relevant to that issue. First amendment rights must be weighed against competing interests. "If a properly drawn measure is within the power of government, it is no objection that the exercise of speech or association is thereby 'chilled.' "[26]

The court cited cases upholding investigative powers of the legislature, administrative bodies, and grand juries to support similar powers of the police. In fact, the preventive role of the police was perceived to require even wider investigative responsibilities and authority for them.[27]

With regard to the overbreadth and vagueness problems, the court observed that "[w]e are not dealing with a statute imposing criminal liability for its violation . . . ."[28] Unlike a statute, the Memorandum neither imposes restrictions on a citizen nor requires a police officer to take action against a citizen. Instead of commanding, it provides information, advice and encouragement. Although first amendment problems can arise elsewhere than under statutes, regulations, or directives, "it would be unreasonable to require that intragovernmental communications be drafted with a precision the Constitution demands of a legislative enactment."[29] It is arguable that the framer of the Memorandum could have assumed that police authorities were aware of the restrictions on their power.[30]

The gathering of information was found to be essential to the prevention of criminal activity, a police function as important as the

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25 *Id.* at 225-26, 265 A.2d at 686-87.

26 *Id.* at 226-27, 265 A.2d at 687.

27 *Id.* at 227-28, 265 A.2d at 687-88. Watkins v. United States, 354 U.S. 178, 187 (1957) (legislative investigatory power); United States v. Powell, 379 U.S. 48, 57 (1964) (administrative agency investigatory power); *In re* Addonizio, 53 N.J. 107, 123-27, 248 A.2d 531, 541-43 (1968) (grand jury investigatory power).

28 56 N.J. at 220, 265 A.2d at 684.

29 *Id.* at 221, 265 A.2d at 684.

30 *Id.*

investigating of past criminal events. There must be an awareness of tension and preparations, as well as of the existent forces. In fact, the National Advisory Commission on Civil Disorders encouraged information gathering activities.[31] Refusing to strike down such activities on the basis of "mere abstraction,"[32] the court decided that

> [t]he basic approach must be that the executive branch may gather whatever information it reasonably believes to be necessary to enable it to perform the police roles, detectional and preventive. A court should not interfere in the absence of proof of bad faith or arbitrariness.[33]

Perhaps the theme of the opinion is best stated in the court's own words:

> Lawlessness has a tyranny of its own, and it would be folly to deprive government of its power to deal with that tyranny merely because of a figment of a fear that government itself may run amuck.[34]

As for the plaintiffs' standing, the scant but favorable treatment by the supreme court denotes approval of the disposition of that issue below.[35]

This discussion will focus upon the constitutional issue highlighted by the conflicting opinions of the two courts, namely, whether the information collection and dissemination system created by the Sills Memorandum is inherently unconstitutional. May the state utilize a system that does not contain its own safeguards to prevent its use in constitutionally protected areas? Throughout this treatment, the two conflicting social interests will constantly appear: (1) a democratic society demands freedom of thought and exchange of ideas in order to function; and (2) some degree of public tranquility is necessary so that the citizenry can be secure in person and property.

CONSTITUTIONALLY PROTECTED CONDUCT

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.[36]

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31 *Id.* at 222-23, 265 A.2d at 684-85.

32 *Id.* at 226, 265 A.2d at 687.

33 *Id.* at 229, 265 A.2d at 688.

34 *Id.*, 265 A.2d at 689.

35 *Id.* at 220, 265 A.2d at 683-84.

36 U.S. Const. amend. I, *see generally* Meiklejohn, *What Does the First Amendment*

This restraint upon the federal government has been held fully applicable to the states.[37] In *Anderson v. Sills*, the plaintiffs championed "first amendment rights—to protest, demonstrate, rally, march, etc."[38] These are derived from the specified rights of free speech and assembly as well as the implied rights of free association, access to a forum and privacy embodied within the Bill of Rights.[39]

There are vital distinctions between "pure" speech, the verbalization of ideas and thoughts, and "symbolic conduct" or "speech-plus," combinations of speech and conduct.[40] Although the first amendment affords more protection to the former, both types of activities are protected from blanket prohibitions and abridgments.[41] Group activities, such as demonstrations, picketing and protests must be conducted in conformance with reasonable governmental regulations.[42]

It is now beyond dispute that an individual's right of free association is protected by the first amendment.[43] It is closely related to the rights to believe as one chooses, to have a privacy in those

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Mean?, 20 U. CHI. L. REV. 461 (1953); Emerson, *Toward A General Theory of the First Amendment*, 72 YALE L.J. 877 (1963).

37 *See generally* Annot., 18 L. Ed. 2d 1388 (1967); and Annot. 23 L. Ed. 2d 985 (1969). The same standards apply to both federal and state governments. Benton v. Maryland, 395 U.S. 784 (1969); Williams v. Rhodes, 393 U.S. 23 (1968).

38 Plaintiffs' Brief in Support of Motion for Summary Judgment at 4, Anderson v. Sills, 106 N.J. Super. 545, 256 A.2d 298 (Ch. 1969).

39 Griswold v. Connecticut, 381 U.S. 479 (1965); DeJonge v. Oregon, 299 U.S. 353, 364-65 (1937), stating that the right of peaceful assembly is cognate to those of free speech and press and equally fundamental to the concept that government can be responsive to the will of the people and that changes may be obtained by peaceful means only when opportunities for free political advocacy and discussion exist. *See* Schact v. United States, 398 U.S. 58 (1970); Brandenberg v. Ohio, 395 U.S. 444 (1969); Williams v. Rhodes, 393 U.S. 23 (1968); Louisiana *ex rel.* Gremillion v. NAACP, 366 U.S. 293 (1961). *See generally* Douglas, *The Right of Association*, 63 COLUM. L. REV. 1361 (1963); Horning, *The First Amendment Right to a Public Forum*, 1969 DUKE L.J. 931; Kalven, *The Concept of the Public Forum: Cox v. Louisiana*, 1965 SUP. CT. REV. 1.

40 Note, *Symbolic Conduct*, 68 COLUM. L. REV. 1091 (1968); Askin, *supra* note 17, at 199-200.

41 Note, *Regulation of Demonstrations*, 80 HARV. L. REV. 1773 (1967). *See* Cox v. Louisiana, 379 U.S. 536 (1965).

42 Shuttlesworth v. City of Birmingham, 394 U.S. 147, 152 (1969); Gregory v. City of Chicago, 394 U.S. 111, 118 (1969) (concurring opinion); *cf.* DeJonge v. Oregon, 299 U.S. 353, 364 (1937). *See also* Williams v. Rhodes, 393 U.S. 23, 38 (1968) wherein Justice Douglas (concurring) states:

> The right of association is one form of "orderly group activity" (NAACP v. Button, 371 U.S. 415, 430), protected by the First Amendment.

43 Talley v. California, 362 U.S. 60, 64-65 (1960). In *Talley*, the Supreme Court held that a municipal ordinance making it a criminal offense to distribute "any handbill in any place under any circumstances," unless it had printed on it the names and addresses of the persons who prepared, distributed or sponsored it was void on its face. The Court stated "that such an identification requirement would tend to restrict freedom to distribute information and thereby freedom of expression." *Id.* at 64.

beliefs, and the freedom to communicate them to others while remaining anonymous. These rights create a shield of anonymity that allows minority thinkers to freely express their viewpoints to people who can freely listen. Such protection is necessary because of the understandable fears of being identified with unorthodox or unpopular opinions.[44] Without this anonymity, many express rights in the Constitution lose their meaning.[45]

STATE INTEREST

There is a state interest in the prevention of civil disorders. Society and its government must be protected from chaos that would threaten the security necessary for democracy.[46] Likewise, government is obligated to protect the citizenry from crime.[47] Prevention of future crime, as distinguished from the detection of past criminal acts, requires that the state be able to investigate illegal activities and associations.[48]

Even first amendment rights must be regulated to some extent

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[44] Boorda v. Subversive Activities Control Board, 421 F.2d 1142, 1147 (D.C. Cir. 1969), citing United States v. Robel, 389 U.S. 258, 263 (1967) and Bates v. City of Little Rock, 361 U.S. 516, 523 (1960). *See* Douglas, *supra* note 39 at 1363, quoting from de Tocqueville, 1 *Democracy in America* 20 (Bradley ed. 1954):

> The most natural privilege of man, next to the right of acting for himself, is that of combining his exertions with those of his fellow creatures and of acting in common with them. The right of association therefore appears to me almost as inalienable in its nature as the right of personal liberty. No legislator can attack it without impairing the foundations of society.

[45] Beaney, *The Right to Privacy and American Law*, 31 LAW AND CONTEMP. PROB. 253, 260 (1966). This right of anonymity has never been specifically articulated in conjunction with the exercise of first amendment freedoms, but a line of cases certainly emphasizes a right to join and participate in controversial yet lawful associational group activity without restraint or fear of subsequent punishment. *See* Bates v. City of Little Rock, 361 U.S. 516 (1960); NAACP v. Alabama, 357 U.S. 449 (1958). "The reason for those holdings was that identification and fear of reprisal might deter perfectly peaceful discussions of public matters of importance." Talley v. California, 362 U.S. 60, 65 (1960). It has been asserted that the rights to full expression and association often depend upon the power of individuals to control the flow of information concerning or describing them. Miller, *Personal Privacy in the Computer Age—The Challenge of a New Technology in an Information Oriented Society*, 67 MICH. L. REV. 1091 (1969); Fried, *Privacy*, 77 YALE L.J. 475 (1968). The common law right of privacy has its roots in doctrines developed in the law of contracts, property, and torts. Warren and Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890); A. Westin, PRIVACY AND FREEDOM (1958).

[46] *See* Barenblatt v. United States, 360 U.S. 109 (1959). The government has a right to collect information about subversives and subversive activities that would destroy the present system.

[47] *See* Terry v. Ohio, 392 U.S. 1 (1968).

[48] *See* Moreland, *Congressional Investigations and Private Persons*, 40 S. CAL. L. REV. 189 (1967).

to protect the tranquility of our society.[49] The government is empowered to prevent violent or imminently violent picketing or mass demonstrations to achieve that end.[50] But undifferentiated fear or apprehension of disturbance does not justify restriction of the freedom of expression.[51]

PROTECTED CONDUCT V. STATE INTEREST

The problem facing the courts in all first amendment litigation has been the reconciliation of the guaranteed freedoms of speech and association with the legitimate and necessary governmental activities. The two concepts inherently collide. In attempting to adjudicate this issue, the United States Supreme Court has employed various tests.

The "clear and present danger" test was important in the post-World War I period.[52] More recently, the "balancing" test has been employed.[53] This method of reconciliation was defined in *Dennis v. United States*,[54] and stated concisely in *American Communications Association v. Dowds*:

> When particular conduct is regulated in the interest of public order, and the regulation results in an indirect, conditional, partial abridgment of speech, the duty of the courts is to determine which of the two conflicting interests demands the greater protection under the particular circumstances presented.[55]

This test has been criticized due to seemingly inconsistent applications, which can be found in factually similar cases.[56] It has been asserted

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49 Cox v. Louisiana, 379 U.S. 536, 554 (1965) (license requirement for a parade on a public highway); Kovacs v. Cooper, 336 U.S. 77 (1949) (prohibiting sound trucks in residential areas at night).

50 Youngdahl v. Rainfair, Inc., 355 U.S. 131, 138-39 (1957); Milk Wagon Drivers Local 753 v. Meadowmoor Dairies, Inc., 312 U.S. 287 (1941) (both cases dealt with enjoining union picketing).

51 Tinker v. Des Moines School Dist., 393 U.S. 503, 508 (1969). *See* Terminello v. Chicago, 337 U.S. 1 (1949).

52 Abrams v. United States, 250 U.S. 616 (1919); Debs v. United States, 249 U.S. 211 (1919); Schenck v. United States, 249 U.S. 47, 52 (1919). *See* Antieau, *The Rule of Clear and Present Danger-Its Origin and Application*, 13 U. DET. L.J. 198 (1950); Z. Chafee, FREE SPEECH IN THE UNITED STATES, 80-140 (1941).

53 *See, e.g.*, Uphaus v. Wyman, 360 U.S. 72, 80 (1959).

54 341 U.S. 494 (1951). The Court adopted the statement of Chief Judge Learned Hand in the opinion below. *Id.* at 510:

> In each case (courts) must ask whether the gravity of the "evil," discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger. [Dennis v. United States, 183 F.2d 201, 212 (2d Cir. 1950).]

55 339 U.S. 382, 399 (1950). *See also* Barenblatt v. United States, 360 U.S. 109, 126 (1959).

56 Emerson, *supra* note 36, at 912-14; Frantz, *The First Amendment in the Balance*,

that *United States v. Robel*[57] was the culmination of a series of cases that eroded the "balancing" test to such a degree that it is now meaningless notwithstanding the fact that its words are still mouthed.[58] In fact the *Robel* Court expressly declined to utilize that test in the matter at bar.[59]

Justice Black has viewed the first amendment to mean that the government cannot regulate protected speech merely because it is related to unprotected activity; it can only regulate the latter when it stands alone.[60] This view, called the "absolutist test,"[61] has not yet been expressly adopted by a majority of the Court. A new test was formulated in *Gibson v. Florida Legislative Investigation Commission*,[62] wherein the state was not allowed to intrude on constitutionally protected areas, absent a convincing showing of an overriding and compelling state interest.

This reconciliation of conflicting interests, a difficult task in itself, will not even be attempted unless a relationship can be established between the restriction and a valid governmental interest.[63] If there is no such relationship, or "nexus," even the most crucial state interest could not support the infringement since the interest is not furthered by it.

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71 YALE L.J. 1424 (1962); Meiklejohn, *The Balancing of Self-Preservation Against Political Freedom*, 49 CALIF. L. REV. 4, 7-14 (1961).

57 389 U.S. 258 (1967).

58 Askin, *supra* note 17, at 207-10, citing Keyishian v. Board of Regents, 385 U.S. 589 (1967); Elfbrandt v. Russell, 384 U.S. 11 (1966); Dombrowski v. Pfister, 380 U.S. 479 (1965); Bagget v. Bullitt, 377 U.S. 360 (1964).

59 United States v. Robel, 389 U.S. 258, 268 n.20 (1967):

> It has been suggested that this case should be decided by "balancing" the governmental interests . . . against the First Amendment rights asserted by the appellee. This we decline to do.

60 *See* Askin, *supra* note 17, at 209.

61 Comment, *supra* note 18, at 573. Justice Black's logic is expressed in his dissenting opinion in Barenblatt v. United States, 360 U.S. 109, 143 (1959):

> To apply the Court's balancing test . . . is to read the First Amendment to say "Congress shall pass no law abridging freedom of speech, press, assembly and petition, unless Congress and the Supreme Court reach the joint conclusion that on balance the interest of the Government in stifling these freedoms is greater than the interest of the people in having them exercised."

62 372 U.S. 539, 546 (1963).

63 United States v. O'Brien, 391 U.S. 367, 377 (1968):

> [A] government regulation is sufficiently justified if it is within the constitutional power of the Government; *if it furthers an important or substantial governmental interest*; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest (emphasis added).

Barenblatt v. United States, 360 U.S. 109, 127-28 (1959); *accord*, Gibson v. Florida Legislative Investigation Comm., 372 U.S. 539 (1963); Bates v. City of Little Rock, 361 U.S. 516, 525 (1960).

Two additional concepts restrict the government's enacting of measures which curtail fundamental rights. A statute will be declared "overbroad" when it prohibits the free exercise of constitutional rights, not only of those people intended to be affected, but also of those not so intended.[64] Moreover, if such protected activities are to be regulated, the legislation must be carefully aimed at the specific area to be forbidden.[65] "Vague" statutes raise a closely related problem in failing to clearly delineate the prohibited area to obviate uncertainty as to the legality of borderline activities.[66] Such an enactment tends to be overly restrictive in that most people avoid questionable conduct.[67] If a measure has either of those characteristics, the Court will strike it down.[68]

CHILLING EFFECT

The harmful effect of a vague or overly broad statute has been termed "chilling effect."[69] Although those words were not used, at least one writer thoroughly understood the concept as early as 1831:

> When some kinds of associations are prohibited and others allowed, it is difficult to distinguish the former from the latter beforehand. In this state of doubt men abstain from them altogether, and a sort of public opinion passes current which tends to cause any association what-so-ever to be regarded as a bold and almost illicit enterprise.[70]

In *Dombrowski v. Pfister*,[71] the Supreme Court granted injunctive relief to the petitioners who were threatened with criminal pros-

64 Shuttlesworth v. City of Birmingham, 394 U.S. 147 (1969); Cox v. New Hampshire, 312 U.S. 569, 575-76 (1941). In Elfbrandt v. Russell, 384 U.S. 11 (1966), and Scales v. United States, 367 U.S. 203, 229 (1961), the Supreme Court ruled that when a "quasi political party" or other group embraced both legal and illegal aims, affiliation with and membership in that group were constitutionally protected except for those who join with the specific intent to further illegal action.

65 Gregory v. City of Chicago, 394 U.S. 111, 118 (1969) (concurring opinion). *See generally, The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844 (1970); McKay, *The Preference for Freedom*, 34 N.Y.U.L. REV. 1182 (1959).

66 Ashton v. Kentucky, 384 U.S. 195 (1966); Note, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67 (1960).

67 Unenforced laws have been held to have a deterrent effect because they restrain the conscientious citizen who believes that it is his obligation to obey the law. *See* Thornhill v. Alabama, 310 U.S. 88, 97-98 (1940); United Steelworkers of America v. Bagwell, 383 F.2d 492, 496 (4th Cir. 1967).

68 Shelton v. Tucker, 364 U.S. 479 (1960).

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

70 See Douglas, *supra* note 39, at 1379, quoting from de Tocqueville, 2 DEMOCRACY IN AMERICA 125 (Bradley ed. 1954).

71 380 U.S. 479 (1965).

ecution under subversive activity and communist propaganda control laws. Despite the invalidation of previous arrests and records seizures by state courts, the petitioners and their supporters, all active in the civil rights movement, were repeatedly subjected to harassment under the same statutes. The Court struck down sections of the enactments, reasoning that their susceptibility to sweeping and improper application had an unconstitutional "chilling effect" on first amendment rights.[72] The logic of *NAACP v. Button*[73] was utilized, namely that the threat of criminal sanctions may deter the uninhibited, robust debate envisioned by the framers of the first amendment,[74] almost as effectively as their application.[75]

Although *Dombrowski* involved statutory measures that were void either inherently or in their application, its reasoning was later applied in cases dealing with bad faith prosecutions under valid enactments.[76] Its rationale has also been applied where legislative investigations or pronouncements required organizations to disclose the identity of their members or individuals to reveal their associational ties.[77] The Court has protected legal organizations and relationships, utilizing the "chilling effect" doctrine.

Moreover, it has been held that loyalty oaths must be drawn so that they do not preclude prospective public employees from maintaining relationships that are questionable, but not illegal.[78] One must not be forced to guess what conduct, utterance or affiliation might preclude him from government employment, since he will probably steer unduly far wide of the circumscribed area.[79]

The "chilling effect" concept of *Dombrowski*, although unenunciated at the time, includes the policy reasons stated in a case which revised two procedural doctrines in constitutional law. In *McNeese v. Board of Education*,[80] a school segregation suit, the Court eliminated the abstention and exhaustion doctrines as bars to suits under the Civil Rights Act,[81] holding that a litigant need not exhaust all

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72 *Id.* at 486.

73 371 U.S. 415 (1963).

74 New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

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

76 *E.g.*, United States v. McLeod, 385 F.2d 734, 740-41 (5th Cir. 1967).

77 United States v. Robel, 389 U.S. 258 (1967); Keyishian v. Board of Regents, 385 U.S. 589, 604, 609 (1967); Gibson v. Florida Legislative Investigation Comm., 372 U.S. 539, 544 (1963).

78 *See* Whitehill v. Elkins, 389 U.S. 54 (1967).

79 Speiser v. Randall, 357 U.S. 513, 526 (1958).

80 373 U.S. 668 (1963).

81 42 U.S.C. § 1983 (1970).

available state or administrative remedies as a condition precedent to the granting of extraordinary relief in a federal court.[82] In this context, a "chilling effect" exists when there is a need to resort to protracted state administrative procedures before a fundamental and protected right can be exercised.

This variety of examples highlights the usefulness of the broad rule that prevents governmental measures from checking truly undesirable activities, if legal activities are likewise curtailed.

DOSSIERS AND CIVIL LIBERTIES: *Anderson v. Sills*

In deciding that the system espoused by the Sills Memorandum was not inherently unconstitutional, the New Jersey Supreme Court stated that the "chilling effect" was not the pivotal issue.[83] Rather, the court said, the issue is "whether the activity is legal", although it admitted the possible relevancy of the "amount of chill" to that issue.[84]

It is submitted that the court erred in underestimating the "chilling effect" inherent in the controversial system. Under it, police can conduct surveillances of legal activities in order to collect data that will later be collated, stored, and disseminated. The magnitude of the "chilling effect" problem is obvious on those facts alone. Undeniably, people wishing to participate in peaceful picketing or other legal activities might forego them rather than be the subject of a police file.

Potential abuses of the system are easily imagined. No guarantee that the information compiled under it will not become available to other parties is sufficient. If even the existence of such a file were known by unauthorized individuals, the possibilities for harmful results would abound.[85] Moreover, the broad scope of the forms themselves implies that additional investigation may be not only permitted, but encouraged.[86] Would it not be seriously harmful to have police authorities seek information from an individual's bank or employer? The forms are designed for data which probably can only be obtained from such sources.[87] When it is recalled that all this might

82 McNeese v. Board of Education, 373 U.S. 668 (1963); *cf.* Monroe v. Pape, 365 U.S. 167, 183 (1961).

83 56 N.J. at 226, 265 A.2d at 687.

84 *Id.*

85 Karst, *"The Files": Legal Controls Over the Accuracy and Accessibility of Stored Personal Data*, 31 LAW & CONTEMP. PROB. 342, 365-71 (1966).

86 *See* 56 N.J. at 231-39, 265 A.2d at 690-96.

87 *E.g.*, Occupation, Employer/Business, Employer's Address, Associates, Financial/Credit status.

ensue from legal activities, the magnitude of the unfairness appears staggering.

To support its statement that "[i]f a properly drawn measure is within the power of government, it is no objection that the exercise of speech or association is thereby 'chilled' ",[88] the court cited *Cameron v. Johnson*[89] and *United States v. O'Brien*.[90] The "chilling effect" in those cases was incidental to regulations for which a "nexus" had already been established. Moreover, the "chill" was indirect in that the thrust of the regulations was impersonal.

A direct and personal "chilling effect" constitutes a substantial infringement of first amendment rights.[91] If the state is to prevail, it must show that its activity meets the following requirements: (1) legitimate state objectives,[92] (2) "a reasonable relationship to the achievement of the governmental purpose asserted as its justification",[93] (3) a lack of alternative means of attaining the state objective,[94] and (4) a narrowly drawn scheme directed only at the activity sought to be prevented.[95]

The New Jersey Supreme Court avoided the nexus requirement by observing that an injunction could not issue "on the assumption that there will be unwarranted police action because a judge cannot on the basis of his own experience understand the relevancy" of some of the information. For

> [l]aw enforcement is a specialty, and its needs may not be within the expertise of a court. That is why a hearing is essential for an informed decision in a case of this kind. It may well be that a hearing will establish that some of these items are unrelated . . . , but we should not assume that this is so. We cannot know how little we know until we listen.

Such a statement contravenes the requirement that the state prove the relationship between its actions and a valid state interest. If such proof was found by the court, there is no allusion to it. There should certainly be no presumption that participants in organized demonstrations are likely to engage in criminal acts. The *Report of the National Advisory Commission on Civil Disorders* stated:

88 56 N.J. at 227, 265 A.2d at 687.

89 390 U.S. 611 (1968).

90 391 U.S. 367 (1968).

91 *See* notes 67 thru 82 *supra*, and accompanying text.

92 Griswold v. Connecticut, 381 U.S. 479 (1965); Bates v. City of Little Rock, 361 U.S. 516 (1960).

93 Bates v. City of Little Rock, 361 U.S. 516, 525 (1960).

94 Griswold v. Connecticut, 381 U.S. 479, 498 (1965) (concurring opinion).

95 United States v. Robel, 389 U.S. 258, 265 (1967).

> On the basis of all the information collected the Commission concludes that the urban disorders of 1967 were not caused by, nor were they the consequence of, any organized plan or "conspiracy." Specifically, the Commission has found no evidence that all or any of the disorders or the incidents that led to them were planned or directed by any organization or group, international, national or local.[96]

If that is the case, what is the purpose of the intelligence gathering system established under the Sills Memorandum?

If a sufficient case has not already been stated, the court's point that the Sills Memorandum is not a statute so that it need not be drawn with the precision demanded of the latter can be described as less than meaningful. Words taken from the opinion make this evident: "[T]he Memorandum imposes no liability or obligation or restriction whatever upon the citizen."[97] But this premise is incorrect; the scope of the information sought in the memorandum produces a direct "chill" on those legally wishing to take part in protests or demonstrations. The chill is as present as if the memorandum were a statute.

It is submitted that the critical questions to be answered in determining the constitutionality of the scheme on trial in *Anderson* are whether the "chilling effect" was so substantial as to infringe on first amendment rights, and whether the state must show a "nexus" between the scheme and the prevention of civil disorders. The answer to both must be a resounding "yes."

Howard C. Trueger

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96 56 N.J. at 222-23, 265 A.2d at 689. *See* Note, *Black Power Advocacy: Criminal Anarchy or Free Speech*, 56 CALIF. L. REV. 702 (1968) which critically analyzed the theory that outside agitators "cause" riots. The Note analyzed over 100 ghetto disturbances during the period July, 1964 to September, 1967. The conclusion was that in over 93% of the riots inflammatory advocacy was not present. In another 3% advocacy was not a factor, and in the remaining 4% other mediating factors made it difficult to prove a causal connection between the advocacy and the violence.

97 56 N.J. at 221, 265 A.2d at 684.