AN ACCOMMODATION OF THE *YOUNGER* DOCTRINE AND THE DUTY OF THE FEDERAL COURTS TO ENFORCE CONSTITUTIONAL SAFEGUARDS IN THE STATE CRIMINAL PROCESS

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I. INTRODUCTION

A coalition of civil-liberties and public-interest-law groups recently addressed a letter of protest to the distinguished jurists and lawyers attending a national conference on law reform.[1] The letter decried recent decisions of the Supreme Court that drastically limited access to the federal courts and accused the Court of "embark[ing] on a dangerous and destructive journey designed to dilute the power of the federal judiciary to serve as guardian of federal constitutional rights."[2] The letter contended further that "[i]f the trend . . . is not reversed . . . constitutional rights and liberties will be imperiled, and the people will be unable to defend themselves against arbitrary and unconstitutional actions of state officials . . . ."[3]

The authors of the letter were reacting in large part to the

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[1] The Conference was entitled "The National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice," in commemoration of Harvard Law School Dean Roscoe Pound's speech of the same title given in 1906. N.Y. Times, Apr. 7, 1976, at 11, col. 3.

[2] Letter from Aryeh Neier, *et al.*, to participants in the "Pound Revisited" Conference, Apr. 7, 1976, at 2, on file with the American Civil Liberties Union, 22 E. 40th St., N.Y., N.Y. 10016 [hereinafter cited as Letter].

[3] *Id.* The Chief Justice defended the Court's record at a news conference the following day. Chief Justice Burger cited increased federal caseloads and the development of prisoners' rights law in rebuttal to the charges. N.Y. Times, Apr. 9, 1976, at 51, col. 8. Public criticism of decisions limiting access to the federal courts, however, has continued. N.Y. Times, Oct. 10, 1976, § 1, at 31, col. 1; Editorial, *The Court and Freedom*, N.Y. Times, May 31, 1976, at 14, col. 1; Oelsner, *The Diminishing Right to Fight City Hall in Court*, N.Y. Times, Apr. 11, 1976, § 4 (The Week in Review), at 9, col. 1.

ever-widening application of the nonintervention doctrine articulated in *Younger v. Harris*.[4] In *Younger* and its companion cases,[5] the Supreme Court held that principles of federalism, comity, and equity forbid a federal court from enjoining or effectively halting a state criminal prosecution, except when the moving party has no adequate remedy at law and will suffer great and immediate irreparable injury if denied relief.[6] This doctrine has been interpreted recently by some federal courts to ban federal injunctive or declaratory relief against unconstitutional state criminal practices and procedures that are either ancillary or completely unrelated to the criminal proceedings themselves.[7] Moreover, the Supreme Court has suggested that certain alternate remedies, which are only arguably sufficient in theory and probably futile in practice, constitute adequate remedies at law.[8] Thus, even though the *Younger* doctrine as properly understood reflects the sound policy of avoiding unnecessary federal interference with state proceedings, some courts have extended the doctrine to situations in which the potential interference is minimal and federal court action is essential to the vindication of the complainants' constitutional rights.

Wallace v. Kern (III),[9] which forbade federal intervention to correct constitutional deficiencies in state bail practices, illustrates dramatically the use of the *Younger* doctrine to curtail the role of the federal courts in enforcing constitutional rights in the state criminal process. In *Wallace v. Kern (III)*, the district court found that bail determinations in the Brooklyn courts were made perfunctorily, subject to frequent delays, and often based

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[4] 401 U.S. 37 (1971); *see* Letter, *supra* note 2, at 2-3. For other discussions of the *Younger* doctrine, see Comment, *Federal Equitable Relief in Matters Collateral to State Criminal Proceedings*, 44 FORDHAM L. REV. 597 (1975); Comment, *Federal Intervention in State Proceedings: Inadequate Remedies in Adequate Forums*, 63 GEO. L.J. 1143 (1975).

[5] Samuels v. Mackell, 401 U.S. 66 (1971); Boyle v. Landry, 401 U.S. 77 (1971); Perez v. Ledesma, 401 U.S. 82 (1971); Dyson v. Stein, 401 U.S. 200 (1971); Byrne v. Karalexis, 401 U.S. 216 (1971).

[6] The Court also held that "the cost, anxiety, and inconvenience of having to defend against a single criminal prosecution [does not constitute irreparable injury] in the special legal sense of that term," 401 U.S. at 46, and that the opportunity to raise federal claims in the pending state proceeding, with the possibility of ultimate review by the Supreme Court, constitutes an adequate remedy at law. *Id.* at 49. Bad faith on the part of state officials was held to be a special circumstance warranting federal intervention. *Id.*

[7] *See* text accompanying notes 124-27 *infra*.

[8] *See, e.g.*, Hicks v. Miranda, 422 U.S. 332, 350 n.18 (1975).

[9] 520 F.2d 400 (2d Cir. 1975), *cert. denied*, 96 S. Ct. 1109 (1976).

on incomplete or inaccurate information. The reasons a particular bail was set were rarely disclosed to the accused or to the supreme court judge who would review the bail determination. Furthermore, this appellate review tended to be cursory.[10] The district court held that such practices denied accused persons due process of law, and it granted injunctive relief.[11]

The Court of Appeals for the Second Circuit reversed on the ground that the lower court order ran afoul of the *Younger* doctrine. The district court had concluded that injunctive relief in the case before it was not precluded by *Younger*, because the relief was not directed at the state proceedings themselves but at the pretrial detention, the legality of which is not at issue in criminal trials.[12] Nonetheless, the Second Circuit held that "[t]he proposition that the principles underlying *Younger* are applicable only where the federal court is seeking to enjoin a pending state criminal prosecution is not supportable,"[13] and found that the relief ordered by the district court was impermissible because it "would indirectly accomplish the kind of interference that *Younger v. Harris* . . . and related cases sought to prevent."[14] The court went on to hold that the plaintiffs could not rely upon the exceptions to the *Younger* rule because bail review within the state system by way of habeas corpus constituted an adequate remedy at law.[15]

If the *Younger* doctrine continues to be applied as freely as it was in *Wallace v. Kern (III)*, federal relief in civil rights actions that are brought to modify constitutionally defective state criminal practices and procedures will be effectively foreclosed. Such a result would involve a tragic abdication by the federal courts of their responsibility to protect individuals from unconstitutional state action.[16] In the discussion that follows, a middle course is

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[10] *Id.* at 402-03.

[11] Specifically, the court ordered that an evidentiary bail hearing be held upon demand, with five days notice to the district attorney, at any time after 72 hours from the original arraignment or whenever new evidence justified reassessment of pretrial release conditions. If the prosecutor recommended imposition of money bail, he would be required to present evidence demonstrating that nonfinancial release conditions would not assure the presence of the accused at trial. *Id.* at 403 n.7.

[12] *Id.* at 405 & n.9.

[13] *Id.* at 405 (footnotes omitted).

[14] *Id.* at 406 (quoting O'Shea v. Littleton, 414 U.S. 488, 500 (1974)). *O'Shea* is discussed in text accompanying notes 96-100 *infra*.

[15] 520 F.2d at 406-08.

[16] The Civil Rights Act of 1871, 42 U.S.C. § 1983 (1970), was designed "to afford a federal right in federal courts because, by reason of prejudice, passion, neglect, intolerance or otherwise" a state might fail to take steps that are necessary to vindicate rights

suggested[17] that would allow the federal courts to play a substantial role in vindicating the constitutional rights of criminal defendants while limiting the courts' role to avoid the overly broad interference with state proceedings that the *Younger* doctrine seeks to prevent.[18] Initially, the historical development of the *Younger* doctrine will be examined in order to help define the proper scope of that doctrine.

II. A BRIEF HISTORY OF THE NONINTERVENTION DOCTRINE OF *YOUNGER V. HARRIS*— A STUDY IN JUDICIAL FLEXIBILITY

The nonintervention doctrine, a judicially developed policy of self-restraint[19] combining long-established and distinct princi-

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guaranteed by the fourteenth amendment. Monroe v. Pape, 365 U.S. 167, 180 (1961). The Act was specifically directed at situations "where the state remedy, though adequate in theory, was not available in practice." *Id.* at 174. Therefore, the state remedy need not be sought and refused before federal relief is sought. *Id.* at 183. The "legislative history makes evident that Congress clearly conceived that it was altering the relationship between the States and the Nation with respect to the protection of federally created rights . . . ." Mitchum v. Foster, 407 U.S. 225, 242 (1972). Thus, the Supreme Court has emphasized that since the Act of 1871, the federal courts have become "the *primary* and powerful reliances for vindicating every right given by the Constitution, the laws, and treaties of the United States." Zwickler v. Koota, 389 U.S. 241, 247 (1967) (emphasis supplied by the Court) (quoting F. FRANKFURTER & J. LANDIS, THE BUSINESS OF THE SUPREME COURT 65 (1927)); *see* Wechsler, *Federal Courts, State Criminal Law and the First Amendment*, 49 N.Y.U. L. REV. 740, 744-45, 848-57, 877-81 (1974).

[17] *See* text accompanying notes 81-83 *infra*.

[18] *See* text accompanying notes 96-105 *infra*.

[19] This doctrine is often confused with its statutory counterpart, the Anti-Injunction Act of 1793, which provided that a "writ of injunction [shall not] be granted [by any federal court] to stay proceedings in any court of a state . . . ." Act of Mar. 2, 1793, ch. 22, § 5, 1 Stat. 334, *as amended*, 28 U.S.C. § 2283 (1970). As Professor Burton Wechsler has noted, "Act and doctrine have influenced each other but are distinct and independent, and if Congress were to repeal the Act tomorrow the judicial doctrine would not necessarily be eradicated." Wechsler, *supra* note 16, at 749. *See also* Hobbs v. Thompson, 448 F.2d 456, 463 (5th Cir. 1971). As amended in 1948, the Act provides three exceptions to the original prohibition against all federal intervention. Such intervention is permitted when injunctive relief is (1) "expressly authorized by Act of Congress," (2) "necessary in aid of [the court's] jurisdiction," or (3) needed "to protect or effectuate [the court's] judgments." 28 U.S.C. § 2283 (1970), *amending* Act of Mar. 2, 1793, ch. 22, § 5, 1 Stat. 334. In Mitchum v. Foster, 407 U.S. 225, 242-43 (1972), the Supreme Court held that the Act does not apply to actions brought under 42 U.S.C. § 1983 (1970) because such actions fall within the first exception noted above. Nearly all federal lawsuits challenging state criminal practices and procedures are brought pursuant to § 1983, and thus the Anti-Injunction Act is relevant to the present discussion only insofar as it influenced the development of its judicial counterpart. On the Act generally, see P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1245-54 (2d ed. 1973) [hereinafter cited as HART & WECHSLER]; Note, *Federal Power to Enjoin State Court Proceedings*, 74 HARV. L. REV. 726 (1961); Note, *Federal Court Stays of State Court Proceedings: A Re-Examination of Original Congressional Intent*, 38 U. CHI. L. REV. 612 (1971).

ples of comity,[20] equity,[21] and federalism,[22] requires that the federal courts refrain from enjoining a pending state criminal proceeding unless the complainant has no adequate remedy at law and will suffer irreparable injury if denied relief. The Supreme Court has taken a flexible approach to this doctrine throughout its history. During periods of judicial activism, the doctrine has been read narrowly and sometimes ignored, only to be reasserted during periods of judicial restraint.

The Supreme Court first addressed the issue of the propriety of the federal courts' intervening in state criminal proceedings in *In re Sawyer*.[23] There the Court relied primarily on the

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[20] In the context of the relationship between the federal and state courts, comity refers to the federal courts' respect for "the principle that state courts have the solemn responsibility, equally with the federal courts, 'to guard, enforce, and protect every right granted or secured by the Constitution . . . .'" Steffel v. Thompson, 415 U.S. 452, 460-61 (1974) (quoting Robb v. Connolly, 111 U.S. 624, 637 (1884)). Since the early days of the English common law, considerations of comity have dictated that a court should not intervene to divest a court in another judicial system of a cause if the other court previously acquired jurisdiction. McCormack, *Federalism and Section 1983: Limitations on Judicial Enforcement of Constitutional Protections*, 60 VA. L. REV. 1, 45 (1974); Warren, *Federal and State Court Interference*, 43 HARV. L. REV. 345, 349 (1930).

[21] Equity concerns those general principles that, irrespective of federalism and comity, militate against the granting of injunctive relief. Limitations on the equitable powers of courts originated from the disputes in the sixteenth and seventeenth centuries between the Court of Chancery and the courts of common law in England. *See generally* 1 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 459-65 (7th ed. 1956); F. MAITLAND, EQUITY, ALSO THE FORMS OF ACTION AT COMMON LAW 3-10 (1909); H. POTTER, HISTORICAL INTRODUCTION TO ENGLISH LAW 159-60 (4th ed. 1958). Eventually, it was established that a court of equity could act only when the moving party was without an adequate remedy at law and would suffer irreparable injury if denied equitable relief. These prerequisites to the exercise of a court's equitable powers have survived to the present day. Allee v. Medrano, 416 U.S. 802, 814-15 (1974); Younger v. Harris, 401 U.S. 37, 43-44 (1971); Holiday Inns of America, Inc. v. B & B Corp., 409 F.2d 614, 618 (3d Cir. 1969).

Ancient equitable principles also prevented the courts of equity from interfering with criminal proceedings. *See* Whitten, *Federal Declaratory and Injunctive Interference with State Court Proceedings: The Supreme Court and the Limits of Judicial Discretion*, 53 N.C.L. REV. 591, 597-600 (1975). This principle was abrogated in America at the turn of the century. *See* text accompanying notes 25-33 *infra*.

[22] Federalism is a broad concept requiring . . . "the National Government . . . to vindicate and protect federal rights and federal interests . . . in ways that will not unduly interfere with the legitimate activities of the States." Younger v. Harris, 401 U.S. 37, 44 (1971). As Chief Justice Stone explained in Douglas v. City of Jeannette, 319 U.S. 157 (1943):

> Congress, by its legislation, has adopted the policy, with certain well defined statutory exceptions, of leaving generally to the state courts the trial of criminal cases arising under state laws, subject to review by this Court of any federal questions involved. Hence, courts of equity in the exercise of their discretionary powers should conform to this policy by refusing to interfere with or embarrass . . . proceedings in state courts save in . . . exceptional cases.

Id. at 163.

[23] 124 U.S. at 200 (1888). The Supreme Court failed to consider this issue earlier

principle of judicial comity and proscribed without exception federal intervention in a pending state prosecution instituted prior to the federal action. This strict policy of nonintervention, however, quickly became incompatible with the Court's perceived need for a more active judicial role in reviewing state economic legislation. Thus, in the early 1900's, the Court acknowledged the authority of the federal courts to enjoin the prospective enforcement of state criminal statutes that violated constitutionally guaranteed property rights.[24] During the period of large-scale economic expansion at the turn of the century, many states enacted laws regulating interstate commerce. Large corporations turned often to the federal courts for injunctions that would restrain state officials from enforcing the criminal sanctions contained in such legislation.[25] One focal point of the struggle between the corporations and the state governments concerned attempts by the states to fix maximum railroad rates. In a series of cases beginning with *Chicago, Milwaukee & St. Paul Railway v. Minnesota*[26] and culminating in the landmark decision of *Ex Parte Young*,[27] the Supreme Court held that the rate statutes in question deprived the railroads and their stockholders of property without due process of law,[28] and enjoined the pro-

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probably because of the belief that the federal courts were without jurisdiction in such cases. A defendant in a criminal action was usually a citizen of the same state as the prosecutorial authority, and thus diversity jurisdiction rarely existed. More importantly, during most of America's first century, Congress relied on the state courts to vindicate federal rights, Zwickler v. Koota, 389 U.S. 241, 245 (1967), and it was not until 1875 that the lower federal courts were granted "original cognizance, concurrent with the courts of the several states, of all suits . . . arising under the Constitution or laws of the United States . . . ." Act of Mar. 3, 1875, ch. 137, § 1, 18 Stat. 470. Because most requests for federal intervention in state criminal proceedings are based on alleged violations of federal statutory or constitutional rights, such requests probably would not have been considered cognizable in the lower federal courts prior to 1875. *See generally* Chadbourn & Levin, *Original Jurisdiction of Federal Questions*, 90 U. PA. L. REV. 639 (1942); Forrester, *The Nature of a "Federal Question,"* 16 TUL. L. REV. 362 (1942); Wechsler, *supra* note 16, at 744-45.

[24] The Anti-Injunction Act, 28 U.S.C. § 2283 (1970), discussed at note 19 *supra*, by its terms applies only to stays of pending proceedings. Dombrowski v. Pfister, 380 U.S. 479, 484 n.2 (1965). Thus, injunctions against threatened prosecutions are not barred by the Act.

[25] *See generally* CONGRESSIONAL RESEARCH SERVICE, THE CONSTITUTION OF THE UNITED STATES OF AMERICA 770-77 (1973); *Developments in the Law—Injunctions*, 78 HARV. L. REV. 994, 1024 (1965).

[26] 134 U.S. 418 (1890).

[27] 209 U.S. 123 (1908). Other important cases in this series include: Prout v. Starr, 188 U.S. 537 (1903); Smyth v. Ames, 169 U.S. 466 (1898); Reagan v. Farmers' Loan & Trust Co., 154 U.S. 362 (1894).

[28] The development of the substantive economic due process doctrine in the railway rate cases is traced in E. CORWIN, AMERICAN CONSTITUTIONAL HISTORY 83-87 (1964). For a review of subsequent rate regulation cases, see FPC v. Hope Natural Gas

spective enforcement of the laws.[29] The states argued in these cases that actions against state officials were barred by the eleventh amendment, which prohibits any federal "suit . . . commenced . . . against one of the United States by Citizens of another State,"[30] and that the federal courts lacked jurisdiction to enjoin threatened state criminal proceedings. The Court rejected both of these contentions.[31]

In *Ex parte Young*, the Court made short shrift of the state's argument that contesting the statute's constitutionality as a defense in a state criminal proceeding constituted an adequate remedy at law, the availability of which barred equitable relief. The Court noted wryly that "there would not be a crowd of agents offering to disobey the law,"[32] given the possible fine and imprisonment facing railroad employees who charged more than the authorized maximum rates. Furthermore,

> [t]o await proceedings against the company in a state court grounded upon a disobedience of the act, and then, if necessary, obtain a review in this court by writ of error to the highest state court, would place the company in peril of large loss . . . if it should be finally determined that the act was valid. This risk the company ought not to be required to take.[33]

Co., 320 U.S. 591 (1944), especially the separate opinions of Justices Black and Frankfurter. *See also* Cook, *History of Rate-Determination Under Due Process Clauses*, 11 U. CHI. L. REV. 297 (1944); Jourolomon, *The Life and Death of Smyth v. Ames*, 18 TENN. L. REV. 347, 663, 756 (1944). On the rise of the substantive economic due process doctrine, see generally G. GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW 548-76 (9th ed. 1975) [hereinafter cited as GUNTHER].

[29] The lower federal courts were also active in enjoining county attorneys and attorneys general from initiating criminal prosecutions under allegedly invalid state liquor and railroad rate laws during this period. *See* Warren, *supra* note 20, at 373 & n.137.

[30] U.S. CONST. amend. XI.

[31] 209 U.S. at 149, 159-62. The decision in *Ex parte Young* has been called "indispensable to the establishment of constitutional government and the rule of law." C. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS § 48, at 186 (2d ed. 1970). As Justice Brennan pointed out in Perez v. Ledesma, 401 U.S. 82 (1971) (concurring in part & dissenting in part);

> *Ex parte Young* was the culmination of efforts by this Court to harmonize the principles of the Eleventh Amendment with the effective supremacy of rights and powers secured elsewhere in the Constitution. . . . These two statutes [The Civil Rights Act of 1871 and the Judiciary Act of 1875], together, after 1908, with the decision in *Ex parte Young*, established the modern framework for federal protection of constitutional rights from state interference.

Id. at 106-07.

[32] 209 U.S. at 164.

[33] *Id.* at 165. *See generally* Note, *Federal Relief Against Threatened State Prosecutions: The Implications of* Younger, Lake Carriers *and* Roe, 48 N.Y.U.L. REV. 965, 975-79 (1973); text accompanying notes 157-72 *infra*.

In the years following *Ex parte Young*, the Supreme Court continued to examine the constitutionality of state regulatory statutes containing criminal sanctions, and to enjoin enforcement of those it found unconstitutional.[34] In 1926, however, the Court in *Fenner v. Boykin*[35] announced what was heralded later as a major modification of the relatively permissive standards that previously had governed federal intervention in such cases:

> *Ex parte Young* . . . and following [decisions] have established the doctrine that when absolutely necessary for the protection of constitutional rights courts of the United States have power to enjoin state officers from instituting criminal actions. But this may not be done except under extraordinary circumstances where the danger of irreparable loss is both great and immediate. Ordinarily, there should be no interference with such officers . . . . The accused should first set up and rely upon his defense in the state courts. . . . An intolerable condition would arise if, whenever about to be charged with violating a state law, one were permitted freely to contest its validity by an original proceeding in some federal court.[36]

This statement indeed represents an important change in the then-prevailing doctrine. First, the Court limited federal intervention in state criminal proceedings to those instances in which such action was "absolutely necessary for the protection of constitutional rights." *Ex parte Young* had held without this restriction that state officials who threaten "proceedings, either of a civil or criminal nature, to enforce . . . an unconstitutional act . . . may be enjoined by a Federal court of equity from such action."[37] Furthermore, decisions before *Fenner* had not required

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[34] For example, in Truax v. Raich, 239 U.S. 33 (1915), and Western Union Tel. Co. v. Andrews, 216 U.S. 165 (1910), the Court held that the enforcement of unconstitutional statutes could be enjoined. In Hall v. Geiger Jones Co., 242 U.S. 539 (1917), and Lindsley v. National Carbonic Gas Co., 220 U.S. 61 (1911), state statutes were found not unconstitutional after consideration of the merits. In Hygrade Provision Co. v. Sherman, 266 U.S. 497 (1925), Packard v. Banton, 264 U.S. 140 (1924), and Terrace v. Thompson, 263 U.S. 197 (1923), the Court stated that it would intervene to protect property rights and enjoin the enforcement of unconstitutional statutes, but found the statutes before it constitutional. For an encyclopedic compendium of such cases, see Wechsler, *supra* note 16, at 779-85, 779 n.154, 784 n.169. *See also* B. WRIGHT, THE GROWTH OF AMERICAN CONSTITUTIONAL LAW 154 (1942).

[35] 271 U.S. 240 (1926).

[36] *Id.* at 243-44.

[37] 209 U.S. at 156.

a complainant to demonstrate, as a prerequisite to federal action, the danger of "both great and immediate . . . irreparable loss" if relief were denied. Finally, *Ex parte Young* and subsequent cases had held that the opportunity to test the constitutionality of a state law by way of defense in a state criminal proceeding did not constitute an adequate remedy at law.[38] The *Fenner* decision, however, required a person threatened with prosecution to "set up and rely upon his defense in the state courts."[39]

Fenner v. Boykin was largely ignored during the next decade, and the Supreme Court continued to apply pre-*Fenner* standards in reviewing the constitutionality of state regulatory statutes containing criminal sanctions.[40] *Fenner*, however, proved to have more staying power than many other cases of the era. With the coming of the Great Depression, the rigorous substantive economic due process analysis that had reigned since the 1890's fell into disfavor,[41] and the federal judiciary became increasingly

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[38] *See* text accompanying notes 32-33 *supra*. In Terrace v. Thompson, 263 U.S. 197 (1923), decided only three years before *Fenner*, the Court had reaffirmed this stance, noting that to be considered adequate, a potential legal remedy must be as "complete, practical and efficient as that which equity could afford." *Id.* at 214.

[39] *Fenner* might be distinguished from some earlier cases on the ground that the plaintiffs in *Fenner* already had violated the statute at issue, and thus could challenge the statute's constitutionality in defense of a state criminal proceeding without being forced to violate it further.

[40] The Court upheld some of these statutes, *see, e.g.*, A. Magnano Co. v. Hamilton, 292 U.S. 40 (1934); State Bd. of Tax Comm'rs v. Jackson, 283 U.S. 527 (1931); Carley & Hamilton, Inc. v. Snook, 281 U.S. 66 (1930); Gulf Fisheries Co. v. MacInerney, 276 U.S. 124 (1928); Interstate Busses Corp. v. Holyoke St. Ry., 273 U.S. 45 (1927), and invalidated others, *see, e.g.*, Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511 (1935); Cudahy Packing Co. v. Hinkle, 278 U.S. 460 (1929); Williams v. Standard Oil Co., 278 U.S. 235 (1929); Cline v. Frink Dairy Co., 274 U.S. 445 (1927); Tyson & Brother v. Banton, 273 U.S. 418 (1927). During this period, the Court rarely discussed its power to intervene in threatened criminal proceedings. When the issue was mentioned, the Court usually enunciated pre-*Fenner* standards. *See, e.g.*, Williams v. Standard Oil Co., *supra* at 239; Tyson & Brother v. Banton, *supra* at 428.

[41] The doctrine's fall from favor was quite abrupt. First, in Nebbia v. New York, 291 U.S. 502 (1934), the Court held that a New York law regulating maximum and minimum permissible retail milk rates was not violative of due process. Subsequently, in West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937), the Court upheld the constitutionality of a Washington State minimum wage law for women, and overruled Adkins v. Children's Hosp., 261 U.S. 525 (1923), in which the Court had held a similar District of Columbia provision invalid under the due process clause of the fifth amendment. In United States v. Carolene Prods. Co., 304 U.S. 144 (1938), the Court rejected a constitutional challenge to a federal law that prohibited the shipment of "filled milk" in interstate commerce, and in United States v. Darby, 312 U.S. 100 (1941), the Court rejected a similar challenge to a statute that fixed maximum hours and minimum wages for employees engaged in the production of goods for interstate commerce. *See also* Olsen v. Nebraska, 313 U.S. 236 (1941). By 1943, Justice Jackson was able to remark that "the laissez-faire conception or principle of non-interference has withered at least as to economic affairs." West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 640 (1943). On the decline of the doctrine of substantive economic due process, see gener-

reluctant to scrutinize state regulatory legislation. Many of the statutes challenged during this period contained criminal sanctions, and the Supreme Court often avoided ruling on the merits by citing *Fenner*[42] and strictly applying the nonintervention doctrine.[43]

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ally Corwin, *The Passing of Dual Federalism,* 36 VA. L. REV. 1 (1950); Stern, *The Commerce Clause and the National Economy, 1933-46,* 59 HARV. L. REV. 645 (1946).

[42] For example, in Spielman Motor Sales Co. v. Dodge, 295 U.S. 89 (1935), the petitioner asked the Court to invalidate a New York law regulating the sale of automobiles. Relying heavily on *Fenner,* the Court held that the complaint failed to state a case within the equitable jurisdiction of the district court:

> The general rule is that equity will not interfere to prevent the enforcement of a criminal statute even though unconstitutional. . . . To justify such interference there must be exceptional circumstances and a clear showing that an injunction is necessary in order to afford adequate protection of constitutional rights. . . . We have said that it must appear that the "danger of irreparable loss is both great and immediate"; otherwise, the accused should first set up his defense in the state court, even though the validity of a statute is challenged. . . .
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> [The] complaint failed to meet this test . . . . [It] contained general allegations of irreparable damage and deprivation of . . . due process . . . [b]ut . . . failed to state facts sufficient to warrant such conclusions. . . . [T]he case presented . . . was the ordinary one of a criminal prosecution which would afford appropriate opportunity for assertion of appellant's rights.

Id. at 95-96 (citations omitted). A few years later, challenges to both a Nebraska statute that regulated railroad crew size and a Florida statute that outlawed combinations in restraint of trade in copyrighted musical compositions met the same fate in Beal v. Missouri Pac. R.R., 312 U.S. 45 (1941), and Watson v. Buck, 313 U.S. 387 (1941). Thus, "[f]or all practical purposes . . . federal courts [were foreclosed] from hearing cases contesting state economic regulatory statutes containing criminal sanctions." Wechsler, *supra* note 16, at 805.

[43] The nonintervention, or abstention, doctrine discussed in this Article should not be confused with the abstention doctrine enunciated in Railroad Comm'n v. Pullman Co., 312 U.S. 496 (1941). The *Pullman* and *Younger* types of abstention often are blurred together in the case law. *See, e.g.,* Dombrowski v. Pfister, 380 U.S. 479 (1965); Blouin v. Dembitz, 489 F.2d 488 (2d Cir. 1973); Zwickler v. Koota, 261 F. Supp. 985 (E.D.N.Y. 1966) (three-judge court), *rev'd,* 389 U.S. 241 (1967). According to *Pullman,* a federal district judge should postpone hearing a constitutional question in those cases in which (1) the court is faced with both an issue of federal constitutional law and an issue of state law; (2) decision of the state law issue may obviate the need for decision of the constitutional question; and (3) the proper resolution of the state issue under state law is unclear. 312 U.S. at 498-500. The federal court should, however, retain jurisdiction of the case while the parties obtain a resolution of the state law question in state court. *Id.* at 501-02; *see* England v. Louisiana State Bd. of Medical Examiners, 375 U.S. 411 (1964).

Pullman abstention differs from the *Younger* doctrine in a number of ways. Under *Pullman,* a federal court may *decline* to exercise jurisdiction only in limited circumstances, while under *Younger,* a federal court may *exercise* jurisdiction only in special circumstances. Furthermore, *Pullman* abstention involves merely the postponement of a federal court's consideration of a constitutional issue. *Younger* abstention, on the other hand, requires dismissal of the action.

Pullman abstention has fallen from favor in recent years. *See, e.g.,* Zwickler v. Koota, 389 U.S. 241 (1967); Baggett v. Bullitt, 377 U.S. 360, 375-80 (1964). *See generally* HART & WECHSLER, *supra* note 19, at 985-1009; Field, *Abstention in Constitutional Cases: The Scope of the* Pullman *Abstention Doctrine,* 122 U. PA. L. REV. 1071 (1974); Note, *Federal-Question Abstention: Justice Frankfurter's Doctrine in an Activist Era,* 80 HARV. L.

At the same time that the Supreme Court was limiting federal intervention in the economic field, it was expanding the federal courts' role in protecting individual liberties from state encroachment, particularly in first amendment cases.[44] This effort often involved the Court's reviewing the constitutionality of state statutes containing criminal sanctions and, when appropriate, enjoining their enforcement.[45] This policy of judicial activism in the individual liberties area resulted in a restricted application of the nonintervention doctrine. Frequently, the Court did not even mention the propriety of federal equitable intervention in the state criminal process.[46] In *Douglas v. City of Jeannette*,[47] however, the Court (citing *Fenner*[48]) refused to enjoin prospective prosecutions under a statute that provided criminal

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REV. 604 (1967); *Comment, The Abstention Doctrine: Some Recent Developments*, 46 TUL. L. REV. 762 (1972).

[44] Commentators often point to Chief Justice Stone's famous footnote in United States v. Carolene Products Co., 304 U.S. 144, 152-53 n.4 (1938), as heralding increased judicial solicitude for Bill of Rights freedoms during this period. *See, e.g.*, GUNTHER, *supra* note 28, at 1051-56; McKay, *The Preference for Freedom*, 34 N.Y.U.L. REV. 1182, 1183 (1959).

[45] For example, in Grosjean v. American Press Co., 297 U.S. 233 (1936), the Court invalidated a Louisiana statute imposing a two percent gross receipts tax on newspapers, with fine and imprisonment for nonpayment. Likewise, in Hague v. CIO, 307 U.S. 496 (1939), the Court overturned two New Jersey criminal statutes that outlawed public assembly without a permit from the Director of Public Safety, who was given absolute discretion to deny permit requests.

[46] *See, e.g.*, Hague v. CIO, 307 U.S. 496 (1939); Grosjean v. American Press Co., 297 U.S. 233 (1936).

[47] 319 U.S. 157 (1943).

[48] The *Douglas* Court also cited Watson v. Buck, 313 U.S. 387 (1941), *discussed in* note 42 *supra*; Beal v. Missouri Pac. R.R., 312 U.S. 45 (1941), *discussed in* note 42 *supra*; and Spielman Motor Sales Co. v. Dodge, 295 U.S. 89 (1935), *discussed in* note 42 *supra*, as supporting its denial of relief.

Although *Douglas* is treated often as a landmark case restricting federal intervention in state prosecutions brought pursuant to statutes allegedly violative of the Bill of Rights, *see, e.g.*, Younger v. Harris, 401 U.S. 37, 45-47 (1971); HART & WECHSLER, *supra* note 19, at 1009, its impact should be assessed in light of the Supreme Court decisions in Murdock v. Pennsylvania, 319 U.S. 105 (1943), and West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943). In *Murdock*, which was decided the same day as *Douglas*, the Court reversed the convictions of the complainants in *Douglas* on first amendment grounds. The Court in *Douglas* based its refusal to intervene in part on the assumption that prospective injunctive relief was unnecessary after the decision in *Murdock*: "And in view of the decision rendered today in *Murdock* . . . , we find no ground for supposing that the intervention of a federal court, in order to secure petitioners' constitutional rights, will be either necessary or appropriate." 319 U.S. at 165.

Within six weeks of the decisions in *Douglas* and *Murdock*, the Supreme Court reversed its earlier decision in Minersville School Dist. v. Gobitis, 310 U.S. 586 (1940), and enjoined the West Virginia Board of Education from enforcing compulsory flag-salute regulations against Jehovah's Witnesses, despite the fact that children of that faith had been expelled from school and their parents prosecuted (for causing delinquency) under ancillary criminal statutes. West Virginia State Bd. of Educ. v. Barnette, *supra* at 629-30.

penalties for selling religious literature door-to-door without paying a license tax.[49]

Having examined in the 1930's and early 1940's the propriety of federal court intervention in state criminal proceedings, the Court rarely mentioned the issue again until its 1965 decision in *Dombrowski v. Pfister*.[50] The nonintervention doctrine was ignored in the interim probably because strict application of the doctrine would have seriously hindered the Court's efforts to end de jure segregation in the South. When the Court held in *Brown v. Board of Education*[51] that separate schools were "inherently unequal," it failed to mention that one of the suits consolidated in the case challenged provisions of a South Carolina law declaring it a crime to enroll black and white children in the same school.[52] Subsequently, the Court affirmed lower court decisions enjoining the operation of other state criminal laws designed to enforce segregation in public schools[53] and on public carriers.[54]

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[49] The Court distinguished Hague v. CIO, 307 U.S. 496 (1939), *discussed in* note 45 *supra*, on the ground that "local officials forcibly broke up meetings of the complainants and in many instances forcibly deported them from the state without trial." 319 U.S. at 164. In *Douglas*, on the other hand, "[i]t [did] not appear from the record that petitioners [had] been threatened with any injury other than that incidental to every criminal proceeding brought lawfully and in good faith." *Id.*

[50] 380 U.S. 479 (1965). One notable exception was Steffanelli v. Minard, 342 U.S. 117 (1951), in which the Supreme Court, relying on *Douglas*, refused to order the suppression of evidence in a pending state prosecution. The decision was significant because the Court modified by implication its former flat prohibition against intervention in *pending* state criminal proceedings. *See id.* at 122-23; note 72 *infra*.

[51] 347 U.S. 483, 495 (1954).

[52] *Id.* at 486 n.1. The South Carolina constitution mandated that schools be racially segregated, S.C. CONST. art. 11, § 7 (1942), and the South Carolina Code, S.C. CODE ANN. § 21-751 (1962), made it unlawful to enroll children of one race in schools provided for persons of another race.

[53] In 1961, Louisiana enacted two amendments to its criminal code punishing the acts of inducing or influencing parents to send their children to a school operated "in violation of any law of this State." Nos. 3, 5 [1961] La. Acts 2d Extraordinary Sess. 89, 92 (codified at LA. REV. STAT. ANN. §§ 14:119.1, 14:122.1 (1974)). In a suit brought to enjoin enforcement of these provisions, the district court rejected summarily the state attorney general's suggestion that the constitutional issue should be raised first in defense of state criminal prosecutions:

> True, "it is a familiar rule that courts of equity do not ordinarily restrain criminal prosecutions." Douglas v. City of Jeannette . . . . And this principle has special force when application is made to a federal court to enjoin the enforcement of state criminal statutes, for then considerations of comity add their weight to suggest abstention. *Beal* v. *Missouri Pacific R. Co.* . . . But the rule cannot be applied mechanically. . . . Special circumstances will sometimes compel a federal court to act. . . . This is such a case.

Bush v. Orleans Parish School Bd., 194 F. Supp. 182, 185 (E.D. La. 1961) (three-judge court) (citations & footnote omitted), *aff'd per curiam sub nom.* Gremillion v. United States, 368 U.S. 11 (1961). The district court held the statutes unconstitutional and enjoined their enforcement, and the Supreme Court affirmed.

[54] In Browder v. Gayle, 142 F. Supp. 707 (M.D. Ala. 1956) (three-judge court)

When the Supreme Court in *Dombrowski v. Pfister*[55] considered the propriety of federal court intervention in state criminal proceedings, it appeared to liberalize the strict standards developed in the 1930's and early 1940's. On the facts of *Dombrowski*, the Court held that federal intervention was justified because defending against the state criminal charge would not ensure protection of the plaintiffs' first amendment rights. The plaintiffs had alleged that their rights were in danger because the statutes in question, Louisiana's subversive activities laws, were overbroad on their face, and because the state prosecution was undertaken in bad faith for the purpose of discouraging protected civil rights activity. The Court distinguished *Douglas v. City of Jeannette* on the ground that the plaintiffs in *Douglas* had neither questioned the facial validity of the city ordinance requiring door-to-door solicitors to pay a license tax,[56] nor been "threatened with any injury other than that incidental to every criminal proceeding brought lawfully and in good faith . . . ."[57] In *Dombrowski*, on the other hand, the plaintiffs alleged that "a substantial loss or impairment of freedoms of expression" would occur if they were forced to await the outcome of protracted state court litigation.[58] Noting that all statutes that regulate expression risk inhibiting the exercise of first amendment rights, and that this danger is particularly acute when the statute

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aff'd, 352 U.S. 903 (1956) (per curiam), the district court rejected the contention that it should abstain on comity grounds from enjoining enforcement of state statutes and municipal ordinances containing criminal sanctions designed to maintain segregated buses: "The short answer is that doctrine has no application where the plaintiffs complain that they are being deprived of constitutional civil rights, for the protection of which the Federal courts have a responsibility as heavy as that which rests on the State courts." *Id.* at 713. Again, the Supreme Court affirmed. 352 U.S. 903 (1956) (per curiam). *See also* Morrison v. Davis, 252 F.2d 102 (5th Cir.), *cert. denied*, 356 U.S. 968 (1958), in which the Fifth Circuit affirmed the lower court's decision to enjoin enforcement of a Louisiana public carrier statute similar to that invalidated in *Browder v. Gayle:*

> [Browder v. Gayle] disposes of the contention that the federal court should not grant an injunction against the application or enforcement of a state statute, the violation of which carries criminal sanctions. . . . To the extent that this is inconsistent with Douglas v. City of Jeannette, . . . we must consider [that] case modified.

Id. at 103 (citation omitted). During this period, the Supreme Court also sustained a temporary injunction enjoining the enforcement of a Louisiana statute that imposed criminal sanctions on social or fraternal organizations that failed to file annual membership lists with the Secretary of State. Louisiana *ex rel.* Gremillion v. NAACP, 366 U.S. 293 (1961).

[55] 380 U.S. 479 (1965).

[56] *Id.* at 489-90.

[57] *Id.* at 485 (quoting Douglas v. City of Jeannette, 317 U.S. 157, 164 (1943)).

[58] *Id.* at 486.

is alleged to have "an overbroad sweep," the Court found "[t]he assumption that defense of a criminal prosecution will generally assure ample vindication of constitutional rights [to be] unfounded in such cases."[59] The Court thus concluded that the plaintiffs' "allegations, if true, clearly show irreparable injury."[60]

Dombrowski, however, was limited only six years later by *Younger v. Harris*[61] and its companion cases.[62] These decisions signalled the reemergence of the strict standards that had been enunciated in *Douglas* but largely ignored for thirty years. In *Younger v. Harris*, Harris was charged with violating California's Criminal Syndicalism Act.[63] He filed suit in federal court, alleging that the prosecution and the existence of the California statute chilled the exercise of his first amendment rights, and he asked that the district attorney be enjoined from prosecuting him. A three-judge district court, holding the statute unconstitutionally vague and overbroad, issued the injunction. The Supreme Court reversed, relying on principles of equity, comity, and federalism.[64] The Court stated that "courts of equity should not act, and particularly should not act to restrain a criminal prosecution, when the moving party has an adequate remedy at law and will not suffer irreparable injury if denied equitable relief."[65] This doctrine was stated to be particularly "important under our Constitution, in order to . . . avoid a duplication of legal proceedings and legal sanctions where a single suit would be adequate to protect the rights asserted."[66] The Court observed further that the nonintervention doctrine was "reinforced by an even more vital consideration, the notion of 'comity,' that is, a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments . . . ."[67]

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[59] *Id.*

[60] *Id.*

[61] 401 U.S. 37 (1971).

[62] Samuels v. Mackell, 401 U.S. 66 (1971); Boyle v. Landry, 401 U.S. 77 (1971); Perez v. Ledesma, 401 U.S. 82 (1971); Dyson v. Stein, 401 U.S. 200 (1971); Byrne v. Karalexis, 401 U.S. 216 (1971).

[63] CAL. PENAL CODE §§ 11400-01 (West 1970).

[64] The Court noted the long-standing congressional policy against federal intervention in state court proceedings, citing the Anti-Injunction Act, 28 U.S.C. § 2283 (1970), *see* note 19 *supra*, but did not discuss whether the Act "would in and of itself be controlling under the circumstances of this case." 401 U.S. at 54.

[65] 401 U.S. at 43-44.

[66] *Id.* at 44.

[67] *Id.*

The *Younger* Court cited its previous decisions in the area[68] for the propositions that injunctions against state prosecutorial officials should be issued only "under extraordinary circumstances where the danger of irreparable loss is both great and immediate," and that "[t]he accused should first set up and rely upon his defense in the state courts . . . unless it plainly appears that this course would not afford adequate protection."[69] The Court added that "[c]ertain types of injury, in particular, the cost, anxiety, and inconvenience of having to defend against a single criminal prosecution, could not by themselves be considered 'irreparable' . . . ." Rather, "the threat to plaintiff's federally protected rights must be one that cannot be eliminated by his defense against a single criminal prosecution."[70]

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[68] In particular, the Court cited Douglas v. City of Jeannette, 319 U.S. 157 (1943), *discussed in* notes 48-49 *supra* & accompanying text; Watson v. Buck, 313 U.S. 387 (1941), *discussed in* note 42 *supra*; Beal v. Missouri Pac. R.R., 312 U.S. 45 (1941), *discussed in* note 42 *supra*; Spielman Motor Sales Co. v. Dodge, 295 U.S. 89 (1935), *discussed in* note 42 *supra*; Fenner v. Boykin, 271 U.S. 240 (1926), *discussed in* text accompanying notes 35-39 *supra*.

[69] 401 U.S. at 45 (quoting Fenner v. Boykin, 271 U.S. 240, 243-44 (1926)).

[70] *Id.* at 46. The Court concluded by carefully limiting *Dombrowski* to its facts. Although admitting that "there are some statements in the *Dombrowski* opinion that would seem to support" the argument that "federal courts may give equitable relief, without regard to any showing of bad faith or harassment, whenever a state statute is found 'on its face' to be vague or overly broad, in violation of the first Amendment," *id.* at 50, the Court held that the chilling effect on the free exercise of first amendment freedoms caused by prosecution under a statute regulating expression "should not by itself justify federal intervention," *id.* Because there was no suggestion that the single prosecution against Harris was brought in bad faith, and because the injury he faced was solely "that incidental to every criminal proceeding brought lawfully and in good faith," *id.* at 49 (quoting Douglas v. City of Jeannette, 319 U.S. 157, 164 (1943)), Harris was instructed to seek vindication of his rights in state court.

In the companion case of Samuels v. Mackell, 401 U.S. 66 (1971), the Court held that the *Younger* rule applies with equal force to actions for declaratory relief when issuance of a declaratory judgment would have "virtually the same practical impact as a formal injunction . . . ." *Id.* at 72. The Court reasoned that declaring New York's criminal anarchy statute unconstitutional would halt the plaintiffs' prosecution as effectively as an injunction and thus refused to make such a declaration. Dyson v. Stein, 401 U.S. 200 (1971) (per curiam), and Byrne v. Karalexis, 401 U.S. 216 (1971) (per curiam), were factually similar to *Younger* in that *Dyson* and *Byrne* involved requests to declare state criminal statutes unconstitutional and to enjoin their enforcement against the plaintiffs. The Supreme Court did not order dismissal of these actions, however, but instead remanded them for further consideration of the nature and extent of the injury suffered. In Perez v. Ledesma, 401 U.S. 82 (1971), the three-judge lower court upheld the constitutionality of a Louisiana obscenity statute while ruling that the arrest of the plaintiffs and the seizure of allegedly obscene materials pursuant to the statute was invalid for lack of a prior adversary hearing on the character of the materials. Although the lower court did not enjoin present or future prosecutions, it did order suppression and return of the seized materials. The Supreme Court reversed, reasoning that the suppression of the materials obviously would result in the effective termination of the case, and thus would have the same effect as an injunction issued against the prosecu-

Younger made another extremely important, but less obvious, change in the law. As was noted above,[71] when the Court first addressed the nonintervention issue in *In re Sawyer* in 1888, it barred without exception federal injunctions against pending state prosecutions that antedated the federal suit. The Court adhered steadfastly to this rule in the years following the *Sawyer* decision.[72] Thus, the propriety of federal intervention had really been in issue almost exclusively in suits to enjoin prospective, rather than pending, prosecutions.[73] Given this historical de-

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tion. In Boyle v. Landry, 401 U.S. 77 (1971), the Court reversed the lower court's decision that an Illinois statute, ILL. ANN. STAT. ch. 38, § 12-6 (Smith-Hurd 1972), was void for overbreadth. The Court held that the plaintiffs failed to show that they were in any jeopardy of suffering irreparable harm. Indeed, no one was being prosecuted or even threatened with prosecution under the challenged statute.

[71] See text accompanying notes 23-24 *supra*.

[72] For example, in Cline v. Frink Dairy Co., 274 U.S. 445 (1927), the Court explicitly reaffirmed this rule. In *Cline*, a number of dairy companies that were charged with alleged violations of Colorado's antitrust act, along with several individuals threatened with prosecution, sought relief in the federal courts. A three-judge district court held the act unconstitutional and enjoined all pending and threatened prosecutions. The court relied on the following dictum in Davis & Farnum Mfg. Co. v. Los Angeles, 189 U.S. 207, 218 (1903):

> It would seem that, if there were jurisdiction in a court of equity to enjoin the invasion of property rights through the instrumentality of an unconstitutional law, that jurisdiction would not be ousted by the fact that the State had chosen to assert its power to enforce such law by indictment or other criminal proceeding.

Beatrice Creamery Co. v. Cline, 9 F.2d 176, 181 (D. Colo. 1925), *rev'd in part sub nom.* Cline v. Frink Dairy Co., 274 U.S. 445 (1927). The Supreme Court reversed with regard to the pending cases, relying on the following contrary dictum in *Ex parte Young*: "But the Federal court cannot, of course, interfere in a case where the proceedings were already pending in a state court." 274 U.S. at 453 (quoting *Ex parte* Young, 209 U.S. 123, 162 1908)).

Not until 1951, in Stefanelli v. Minard, 342 U.S. 117 (1951), did the Court indicate some willingness to permit lower federal courts to enjoin a pending state prosecution in exceptional circumstances. In *Stefanelli*, the Court refused to grant an injunction to suppress illegally seized evidence in a pending state prosecution. After reviewing the principles of equity, comity, and federalism the Court noted that "[i]f these considerations limit federal courts in restraining State prosecutions merely threatened, how much more cogent are they to prevent federal interference with proceedings once begun." *Id.* at 122-23. The Court may have been implying here that although the Court might be more reluctant to intervene in pending prosecutions, essentially the same standards that apply in cases involving threatened prosecutions also apply when pending prosecutions are involved.

[73] *See* Dombrowski v. Pfister, 380 U.S. 479 (1965); Douglas v. City of Jeannette, 319 U.S. 157 (1943); Watson v. Buck, 313 U.S. 387 (1941); Beal v. Missouri Pac. R.R., 312 U.S. 45 (1941); Spielman Motor Sales Co. v. Dodge, 295 U.S. 89 (1935); Fenner v. Boykin, 271 U.S. 240 (1926); and *Ex parte* Young, 209 U.S. 123 (1908). All of the above cited cases involved merely the threat of state prosecution at the time the federal action was begun. After *Dombrowski*, however, the lower federal courts did not hesitate to apply the new standards to pending state criminal proceedings. *See* Wechsler, *supra* note 16, at 861 n.542.

velopment, it is remarkable that *Younger* and its companion cases limited the application of nonintervention principles to instances involving pending prosecutions, and "express[ed] no view about the circumstances under which federal courts may act when there is no prosecution pending in state courts at the time the federal proceeding is begun."[74] Even more remarkable is the Court's statement made soon after *Younger* in *Lake Carriers' Association v. MacMullan*[75] that the relevant principles of equity, comity, and federalism "have little force in the absence of a pending state proceeding."[76]

Subsequently, in *Steffel v. Thompson*,[77] the Court held that the threat of arrest and prosecution under an allegedly invalid state statute permitted the complainant to seek a declaratory judgment regarding the constitutionality of the statute without a showing of bad faith enforcement or other special circumstances.[78] In *Doran v. Salem Inn, Inc.*,[79] the Court extended the *Steffel* rule to requests for preliminary injunctive relief. Thus, after originally having held that a federal court could enjoin a threatened prosecution only in special circumstances and could never enjoin a pending prosecution, the Court has now held that a pending prosecution can be enjoined in special circumstances and that a threatened prosecution can be enjoined merely upon a showing that the state statute under which the prosecution would be brought is unconstitutional.[80]

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[74] 401 U.S. at 41; *accord*, *id.* at 55 (Stewart & Harlan, JJ., concurring); Samuels v. Mackell, 401 U.S. 66, 73-74 (1971).

[75] 406 U.S. 498 (1972).

[76] *Id.* at 509. As the Court explained in Steffel v. Thompson, 415 U.S. 452 (1974):

> When no state criminal proceeding is pending at the time the federal complaint is filed, federal intervention does not result in duplicative legal proceedings or disruption of the state criminal justice system; nor can federal intervention, in that circumstance, be interpreted as reflecting negatively upon the state court's ability to enforce constitutional principles. In addition, while a pending state prosecution provides the federal plaintiff with a concrete opportunity to vindicate his constitutional rights, a refusal on the part of the federal courts to intervene when no state proceeding is pending may place the hapless plaintiff between the Scylla of intentionally flouting state law and the Charybdis of foregoing what he believes to be constitutionally protected activity in order to avoid becoming enmeshed in a criminal proceeding.

Id. at 462.

[77] 415 U.S. 452 (1974).

[78] The police had twice threatened to arrest petitioner if he did not stop handbilling on an exterior sidewalk of a shopping center. His companion, who continued leafleting, was arrested. *Id.* at 455-56.

[79] 422 U.S. 922 (1975).

[80] In Hicks v. Miranda, 422 U.S. 332 (1975), the Court limited severely the availability of the federal forum in cases in which a state prosecution is merely threatened.

III. DEFINING STANDARDS FOR FEDERAL INTERVENTION

Over the years, the Supreme Court has applied the nonintervention doctrine in a flexible manner—construing it to permit federal intervention in state proceedings when the Court sought an active role in vindicating constitutional rights, and interpreting it to forbid intervention when the Court eschewed federal court involvement in state affairs. In defining the scope of permissible federal relief in civil rights actions brought to obtain modification of constitutionally deficient state criminal practices and procedures, the federal courts should avoid the more ex-

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For almost 100 years, only state proceedings that antedated the filing of the federal suit were considered "pending" for comity purposes. Belle Terre v. Boraas, 416 U.S. 1, 3 n.1 (1974); Cline v. Frink Dairy Co., 274 U.S. 445, 453 (1927); *Ex parte* Young, 209 U.S. 123, 162 (1908); *In re* Sawyer, 124 U.S. 200, 211 (1888). In *Hicks*, however, the Supreme Court signaled an end to this policy, holding that "where state criminal proceedings are begun against the federal plaintiffs after the federal complaint is filed but before any proceedings of substance on the merits have taken place in the federal court, the principles of *Younger v. Harris* should apply in full force." 422 U.S. at 349. As Justice Stewart pointed out in dissent, this new rule does not eliminate the unseemly race to the courthouse door, *id.* at 354 (Stewart, J., with whom Douglas, Brennan & Marshall, JJ., join dissenting), and unfortunately, the rule "is an open invitation to state officials to institute state proceedings in order to defeat federal jurisdiction," *id.* at 357 (Stewart, J., dissenting). Moreover, the precise meaning of "proceedings of substance on the merits" is far from clear. *Id.* at 353-54 n.1 (Stewart, J., dissenting).

Numerous problems concerning the threatened/pending distinction have yet to be resolved. For example, the Court has never made clear what action by state officials is necessary to begin a criminal prosecution for *Younger* purposes. The courts have assumed generally that a prosecution begins with either an indictment or the filing of formal charges. *See, e.g.*, Spielman Motor Sales Co. v. Dodge, 295 U.S. 89, 96 (1935); Cline v. Frink Dairy Co., 274 U.S. 445, 452 (1927); Jones v. Wade, 479 F.2d 1176, 1181 (5th Cir. 1973); Marks v. City of Newport, 344 F. Supp. 675, 677 (E.D. Ky. 1972). Some courts, however, have held that a prosecution is instituted by an arrest. *See* Rialto Theatre Co. v. City of Wilmington, 440 F.2d 1326, 1327 (3d Cir. 1971); Eve Prods., Inc. v. Shannon, 439 F.2d 1073, 1074 (8th Cir. 1971). A few courts have held that even more preliminary actions suffice to invoke *Younger*. *See, e.g.*, Modern Social Educ., Inc. v. Preller, 353 F. Supp. 173, 179-80 (D. Md. 1973), *modified sub nom.* Age of Majority Educ. Corp. v. Preller, 512 F.2d 1241, 1243-45 (4th Cir. 1975) (application for search warrant begins prosecution for *Younger* purposes); Puglia v. Cotter, 333 F. Supp. 940, 941 (D. Conn.) (*semble*), *aff'd*, 450 F.2d 1362 (2d Cir. 1971), *cert. denied*, 405 U.S. 1073 (1972) (*Younger* applies in action to halt grand jury investigation).

The courts have also not made clear whether prospective prosecutions can be enjoined when such relief would effectively halt a pending prosecution against either the moving party or someone else. *Compare* Hicks v. Miranda, *supra*, *with* Doran v. Salem Inn, Inc., 422 U.S. 922, 928-29 (1975). *See also* Rakes v. Coleman, 359 F. Supp. 370, 373-79 (E.D. Va. 1973). *See generally* Comment, *Federal Equitable Restraint: A* Younger *Analysis in New Settings*, 35 MD. L. REV. 483, 493 n.52 (1976); Note, *supra* note 33, at 980-87. For a well-reasoned discussion criticizing the use of the threatened/pending distinction to determine the appropriateness of federal relief, see Whitten, *Federal Declaratory and Injunctive Interference with State Court Proceedings: The Supreme Court and the Limits of Judicial Discretion*, 53 N.C.L. REV. 591, 675-83 (1975).

treme positions taken in the past and instead adopt a middle course that would allow them to play an important but realistically limited role in enforcing the constitutional rights of persons involved in the state criminal process.

In formulating the appropriate standards for federal intervention, this Article will first examine the proper scope of the *Younger* doctrine. The starting point for this inquiry is the statement in *Younger* that "courts of equity should not act, and particularly should not act to restrain a criminal *prosecution*, when the moving party has an adequate remedy at law and will not suffer irreparable injury if denied equitable relief."[81] Federal courts are simply not able to monitor all aspects of state practice and procedure, or to provide individual review each time a defendant's rights are arguably violated in the course of a state prosecution; therefore, a federal court should not grant coercive relief directed against a state prosecution except under extraordinary circumstances. Federal courts should deny requests for relief by individual criminal defendants that would necessitate federal review of substantive state court rulings regarding issues considered traditionally during the course of the state court proceeding.

The *Younger* doctrine should also apply to preclude blanket injunctions when such orders would replace individual factual determinations or would require second-guessing the discretionary decisions of state judges. When the proper relief depends on individual determinations, relief by blanket injunctions will be insufficient for some individuals and unwarranted for others. Furthermore, the policies of federalism and comity require application of the *Younger* doctrine when plaintiffs seek such extensive reform of the state criminal process that the federal district court would be required to oversee the day-to-day workings of the state judicial system.

On the other hand, because the policies of the *Younger* doctrine concern the relationship between the federal and the state courts, *Younger* should not restrict a federal court when the requested relief would not interfere with substantive aspects of pending state judicial proceedings. Thus, a federal court should be permitted to grant relief concerning matters ancillary or unrelated to the criminal proceeding that cannot be raised in defense against the prosecution itself. Federal courts have ordered,

[81] 401 U.S. at 43-44 (emphasis supplied).

and should continue to order, simple procedural reforms[82] to ensure that state criminal processes affecting large numbers of people meet minimum constitutional standards. Similarly, the policies of the *Younger* doctrine do not apply when the requested relief is directed at the unconstitutional actions of nonjudicial state officials. Finally, *Younger* should not bar class actions brought by persons requesting equitable relief from probable future arrests or prosecutions.

In addition to identifying the situations in which the *Younger* doctrine should or should not apply, examining the proper scope of the exceptions to the *Younger* rule in those cases in which the doctrine ordinarily would apply is also necessary. The Court in *Younger* stated that the federal courts should intervene to protect the constitutional rights of citizens when the complainants will (1) suffer irreparable injury if denied relief and (2) have no adequate remedy at law. There is some dispute, however, over what constitutes an "irreparable" injury and an "adequate" remedy. Although the "cost, anxiety, and inconvenience of having to defend against a single criminal prosecution"[83] do not alone constitute irreparable injury, the harm may become irreparable if a person has to defend against multiple prosecutions, or if a class of persons is subjected to unconstitutional state practices. Moreover, unlawful imprisonment inevitably causes irreparable harm.

To be considered adequate, a remedy at law should afford the complainant a timely and complete resolution of his federal claims, either through defense against the pending criminal proceeding or through some other means. When no state procedure exists for review of the federal claim, or when a theoretical remedy is inadequate in practice to protect the complainant's constitutional rights, the complainant lacks an adequate alternate remedy to federal declaratory or injunctive relief.

A. *Defining the Proper Scope of the* Younger *Doctrine*

1. Situations in Which *Younger* Should Apply

The principles of comity, equity, and federalism, which form the basis of the *Younger* doctrine, concern primarily the

[82] *E.g.*, Morrissey v. Brewer, 408 U.S. 471 (1972) (requiring a hearing before parole is revoked).

[83] Younger v. Harris, 401 U.S. 37, 46 (1971).

relationship between the federal and the state courts.[84] Therefore, the *Younger* doctrine should bar relief requested by individual criminal defendants that would hinder seriously the orderly adjudication of state prosecutions by involving federal courts in the piecemeal determination of issues considered traditionally during the course of state court proceedings. State prosecutions would be disrupted intolerably if each defendant could obtain interlocutory federal review of every determination by a state judge that had constitutional implications.

A number of federal courts have adopted this position. In *Bryant v. Morgan*,[85] the Fifth Circuit cited *Younger* in rejecting summarily a constitutional attack on trial jury selection procedures brought by persons under indictment in state court.[86] In *Manns v. Koontz*,[87] the Fourth Circuit held that *Younger* barred a suit contesting the constitutionality of a state law that placed exclusive original jurisdiction of the complainant's criminal case in a domestic relations court that did not afford a jury trial.[88] Similarly, in *United States* ex rel. *Hudson v. Wollenzien*,[89] a Wisconsin district court relied on *Younger* in dismissing a case in which the complainant sought a declaration that he was entitled to a jury determination on the issue of the reasonableness of his refusal to submit to a blood alcohol test in proceedings brought to suspend his driving privileges. Granting the relief requested in *Bryant*, *Manns*, or *Hudson* would have blocked or substantially

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[84] *See* text accompanying notes 61-74 *supra*.

[85] 451 F.2d 354 (5th Cir. 1971).

[86] Similarly, in Puglia v. Cotter, 333 F. Supp. 940 (D. Conn.), *aff'd*, 450 F.2d 1362 (2d Cir. 1971), *cert. denied*, 405 U.S. 1073 (1972), a Connecticut district court held that *Younger* barred an attack, brought by a person subpoenaed to testify before a grand jury, on Connecticut's one-man grand jury system. *Cf.* Penn v. Eubanks, 360 F. Supp. 699 (M.D. Ala. 1973), in which an Alabama district court found "no questions of comity presented" by a suit challenging jury selection procedures in Montgomery County. *Id.* at 701 n.1. In so holding, the district court relied on the fact that the plaintiffs were not facing criminal prosecution in state court, but were instead free citizens challenging the systematic exclusion from jury service of persons of their racial, sexual, and income groups. This decision is correct, because the plaintiffs obviously could not raise their claims in defense of nonexistent prosecutions. Furthermore, because the plaintiffs were not awaiting trial, equitable relief that would not unduly interfere with pending criminal trials could be fashioned by modification of jury selection procedures over time. Moreover, suits similar to *Penn* were approved by the Supreme Court in Carter v. Jury Comm'n, 396 U.S. 320 (1970) and Turner v. Fouche, 396 U.S. 346 (1970). *But see* Bradley v. Judges of the Superior Court, 372 F. Supp. 26, 30 (C.D. Cal. 1974) (comity considerations suggest that state courts should consider plaintiff's contentions first).

[87] 451 F.2d 1344 (4th Cir. 1971).

[88] The state law did allow for a jury trial on appeal to the local court of general jurisdiction. VA. CODE § 16.1-214 (Repl. Vol. 1975).

[89] 345 F. Supp. 436 (E.D. Wis. 1972).

impeded state criminal prosecutions. Furthermore, the claims raised in these cases all related to jury matters, which traditionally have been considered first in the context of the state prosecution. Thus, the courts held correctly that *Younger* barred relief.[90]

The federal courts have also properly refused to grant requests for blanket injunctions, particularly when such orders would supplant individual factual determinations or would require second-guessing discretionary decisions of state judges. In *Wallace v. Kern (II)*,[91] the Second Circuit vacated a lower court directive that each detainee awaiting trial before the Kings County Supreme Court for more than six months (nine months when the detainee is accused of murder) be allowed to demand a trial and be released on his own recognizance if not brought to trial within forty-five days of demand. The Second Circuit, relying on the authority of *Barker v. Wingo*,[92] held that "[r]elief from

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[90] The Court of Appeals for the First Circuit faced an analogous problem in Guerro v. Mulhearn, 498 F.2d 1249 (1st Cir. 1974). In *Guerro*, while appeals from their convictions were pending in state court, plaintiffs filed a federal action seeking money damages against state prosecutorial officials for alleged violations of their civil rights committed during the course of their state criminal proceedings. In analyzing the comity considerations, the court held that "[t]he touchstone for any decision to defer a civil rights damage action which is parallel to state criminal proceedings is whether the federal court will be making rulings whose necessary implication would be to call in question the validity of the state conviction." *Id.* at 1254. The court noted that if a federal court were to make such rulings, "the potential for federal-state friction is obvious," because "[t]he federal ruling would embarrass, and could even intrude into, the state proceedings," causing delay or derailment of the state action. *Id.* at 1253. The court was careful to point out, however, that deferral would not always be appropriate because a "denial of constitutionally protected rights," even though occurring in the course of criminal proceedings, "may only be marginally relevant, or may even be entirely irrelevant, to the trial and appeal." *Id.* at 1254. *But cf.* Martin v. Merola, 532 F.2d 191, 194-95 (2d Cir. 1976) (even though such a suit would not have interfered directly with the criminal proceedings, the court cited principles of comity in holding that a civil rights suit alleging a violation of the plaintiff's right to a fair trial could not be brought until after the criminal proceedings had terminated); Fulford v. Klein, 529 F.2d 377 (5th Cir. 1976) (relying on principles of comity, the court held that a claim under § 1983 could not be brought by a convicted defendant whose case was on appeal until all state remedies had been exhausted).

Federal courts have held quite properly that civil rights damage actions against state prosecutorial or police officials for misconduct are not barred by *Younger* when the state criminal proceedings are completely concluded. Sartin v. Comm'r of Pub. Safety, 535 F.2d 430 (8th Cir. 1976); *cf.* Bursey v. Weatherford, 528 F.2d 483 (4th Cir. 1975), *cert. granted*, 96 S. Ct. 3165 (1976). The Supreme Court recently limited such actions in another way, however, by holding state prosecutors who act within the scope of their duties immune from suit under 42 U.S.C. § 1983 (1970). Imbler v. Pachtman, 424 U.S. 409 (1976).

[91] 499 F.2d 1345 (2d Cir. 1974), *cert. denied*, 420 U.S. 947 (1975).

[92] 407 U.S. 514 (1972).

unconstitutional delays in criminal trials is not available in wholesale lots."[93] The circuit court found the imposition of an automatic six-month time limit to be "curiously arbitrary" and concluded that the decision lacked the "fine, albeit difficult, case-by-case determination of whether a prejudicial delay exists as to any individual inmate."[94]

The *Younger* doctrine has also been applied correctly to bar relief that would entail extensive reform of a state's criminal process and thereby cast "a federal district court in the role of receiver for a state judicial branch."[95] For example, in *O'Shea v. Littleton*[96] the plaintiffs mounted a frontal attack on the entire criminal justice system of Cairo, Illinois. The plaintiffs accused the state's attorney, his investigator, and the police commissioner of intentionally practicing racial discrimination in the performance of their duties, with the alleged result that the law was deliberately applied more harshly against blacks than against whites. The plaintiffs also claimed that a county magistrate and a judge had employed unconstitutional bail procedures that im-

[93] 499 F.2d at 1351.

[94] *Id.* at 1350. Similar considerations underlie certain Second Circuit decisions involving the right to counsel. In Bedrosian v. Mintz, 518 F.2d 396 (2d Cir. 1975), the plaintiffs requested that the court direct a state judge to assign out-of-state counsel to represent them on criminal indictments arising out of the Attica riot. The state judge had denied the application because he was unfamiliar with the competence of the out-of-state lawyers. Additionally, the state court had found that there were local counsel who were willing to accept assignment and felt that the added expenses involved in assigning out-of-state lawyers would unduly burden the taxpayers. *Id.* at 398. The Second Circuit held that the state court's ruling did not violate the plaintiffs' sixth amendment rights. The court also held that the state court's ruling was a discretionary decision on a local matter, not correctable by federal injunction. The court, in a footnote, cited Stefanelli v. Minard, 342 U.S. 117 (1951), for the proposition that federal courts should refrain from piecemeal intervention concerning collateral issues. It quoted dictum from *Stefanelli* that included the "[a]sserted unconstitutionality . . . in the failure to appoint counsel" as an example of the type of collateral issue that should not be decided. 518 F.2d at 399 n.5 (quoting Stefanelli v. Minard, 342 U.S. 117, 123 (1951)). It must be remembered, however, that *Stefanelli* was written over a decade before Gideon v. Wainwright, 372 U.S. 335 (1963), and referred to the then *discretionary* appointment of counsel. Nonetheless, the concern of both the *Stefanelli* and *Bedrosian* courts was that a federal court not substitute its determinations of fact for those of the state court.

In Inmates of Attica Correctional Facility v. Rockefeller, 453 F.2d 12 (2d Cir. 1971), the plaintiff class requested appointment of counsel before or during investigative in-prison questioning. The court, in rejecting this request, noted that several of the inmate-plaintiffs already were represented by zealous counsel. The court also noted the lack of substantial evidence of any improper questioning of prisoners. Moreover, the court stressed that any person ultimately indicted would be assigned counsel and would have the opportunity to suppress any improperly solicited statements. *Id.* at 20-21.

[95] Ad Hoc Comm. on Judicial Admin. v. Massachusetts, 488 F.2d 1241, 1246 (1st Cir. 1973), *cert. denied*, 416 U.S. 986 (1974).

[96] 414 U.S. 488 (1974).

posed harsher sentences and conditions on black defendants, and that required indigents to pay jury fees. Finally, the plaintiffs charged all the state officials with intentionally using their powers to deter the plaintiffs from peacefully protesting racist practices in Cairo. The plaintiffs sought far-reaching injunctive relief against these discriminatory practices.

The Supreme Court dismissed the case on standing grounds because "[n]one of the named plaintiffs [was] identified as himself having suffered any injury in the manner specified"[97] and because the prospect of future injury was tenuous. The Court stated in dicta, however, that the kind of relief sought by the plaintiffs necessarily would entail "abrasive and unmanageable intercession"[98] into the day-to-day conduct of local criminal proceedings. Because the plaintiffs alleged the existence of pervasive racial and wealth discrimination throughout the criminal process, effective relief would have required a wholesale federal take-over of Cairo's prosecutorial and judicial systems. By seeking "an injunction aimed at controlling or preventing the occurrence of specific events that might take place in the course of future state criminal trials," the plaintiffs appeared to "contemplate interruption of state proceedings to adjudicate assertions of noncompliance" in an "ongoing federal audit of state criminal proceedings."[99] The amorphous nature of the class and the vague allegations of injury compounded the problem of fashioning precise and effective relief. Thus, the Court found that granting the relief requested "would indirectly accomplish the kind of interference that *Younger v. Harris* . . . and related cases sought to prevent."[100]

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[97] *Id.* at 495.

[98] *Id.* at 504.

[99] *Id.* at 500.

[100] *Id.* In Gardner v. Luckey, 500 F.2d 712 (5th Cir. 1974), *cert. denied*, 423 U.S. 841 (1976), the Fifth Circuit held that the considerations outlined in *O'Shea v. Littleton* barred a class action brought by convicted state prisoners seeking broad declaratory and injunctive relief against the Florida Public Defender Offices. The plaintiffs, who had been represented by individual public defenders, asserted that the representation failed to meet minimum constitutional standards. The plaintiffs made "inadequate funding and excessive caseloads a key claim in their suit," *id.* at 713, and asked the court to remedy these problems. As in *O'Shea*, the court held that the named plaintiffs lacked standing to sue because none alleged "that he himself was injured by the conduct of the Public Defenders." *Id.* at 714. Furthermore, the court noted that effective relief would interrupt state prosecutions during the period necessary to adjudicate assertions of noncompliance, and would require the kind of ongoing audit of state criminal proceedings condemned in *O'Shea*. *Id.* at 715. Thus, the court denied the requested relief. Similarly, in Karr v. Blay, 413 F. Supp. 579 (N.D. Ohio 1976), the federal district court refused to grant injunctive relief despite a finding that state judges had acted uncon-

In *Ad Hoc Committee on Judicial Administration v. Massachusetts*[101] the plaintiffs alleged that the state's "failure to provide 'court facilities, judges, clerical personnel, and other facilities' violate[d] their Sixth and Fourteenth Amendment rights," and they asked the federal judiciary "to order enlargement and restructuring of the entire state court system."[102] The First Circuit held that the case was nonjusticiable. Noting that the complaint centered on the existence of substantial delays in the state courts, the court pointed out that granting relief would entail the court's performing the impossible task of "translat[ing] the due process clause into formulae and timetables establishing the maximum permissible delay" in "all types and classes of litigation."[103] Fashioning a remedy and determining whether the state was in sufficient compliance with the court's orders would be equally difficult.[104] The court concluded that although "[t]he dictates of a federal court might seem to promise easy relief . . . they would more likely frustrate and delay meaningful reform . . . in a system so complex."[105]

2. Situations in Which *Younger* Should Not Apply

As noted above,[106] the policies of the *Younger* doctrine involve primarily the relationship between the federal and the state courts. Therefore, the doctrine should not apply when the relief sought entails virtually no interference with substantive aspects of pending state judicial proceedings, even if other aspects of the state criminal process are involved. For example, if suit were brought against state officials for disseminating incomplete or erroneous criminal histories,[107] or against municipal officials in charge of courthouse detention facilities for refusing to

stitutionally by confining indigents who were unable to pay fines. The court stated that "principles of equity, comity, and federalism prevent this Court from imposing an ongoing federal audit and day-to-day supervision of state judicial proceedings." *Id.* at 585. *See also* Bonner v. Circuit Court, 526 F.2d 1331 (8th Cir. 1975) (en banc), *cert. denied*, 96 S. Ct. 1418 (1976), which cited *O'Shea* and *Younger* in dismissing an action brought by 20 black prisoners claiming that local judges, prosecutors, and defense attorneys had joined in a racially motivated conspiracy to coerce guilty pleas. *Compare* Gardner v. Luckey, *supra*, *with* Wallace v. Kern (I), 392 F. Supp. 834 (E.D.N.Y.), *rev'd*, 481 F.2d 621 (2d Cir. 1973), *cert. denied*, 414 U.S. 1135 (1974).

[101] 488 F.2d 1241 (1st Cir. 1973), *cert. denied*, 416 U.S. 986 (1974).

[102] *Id.* at 1243.

[103] *Id.* at 1244.

[104] *Id.* at 1244-45.

[105] *Id.* at 1246.

[106] *See* text accompanying notes 61-74 *supra*.

[107] *See, e.g.*, Tatum v. Rogers, No. 75 Civ. 2782-CBM (S.D.N.Y., filed June 10, 1975). *See also* Paul v. Davis, 96 S. Ct. 1155 (1976).

provide adequate facilities for pretrial detainees to consult privately with their attorneys,[108] or against court reporters for failing to transcribe trial minutes promptly,[109] the federal courts should be allowed to grant relief directed against these nonjudicial officials as long as the relief sought does not interfere with pending judicial proceedings.

In *Cinema Classics, Ltd. v. Busch*,[110] the plaintiffs sought the return of a large quantity of allegedly obscene materials, which they claimed where seized illegally by state officials. The district court granted relief on the ground that the mass seizure, conducted without a prior adversary hearing or a judicial determination that the material was obscene, constituted an illegal prior restraint on the dissemination of material presumptively protected by the first amendment. The court found *Younger* and its companion cases inapplicable, because the state officials would be left with ample copies of each item seized for use as evidence in the criminal proceedings. Thus, an injunction ordering the return of most of the material would "in no way halt, inhibit, prejudice, or handicap the state in the prosecution . . . now pending or any other prosecution that may later be commenced."[111]

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[108] *See, e.g.*, Wallace v. Kern (III), No. 72 C 898, (E.D.N.Y., Feb. 18, 1975), *rev'd*, 520 F.2d 400 (2d Cir. 1975), *cert. denied*, 96 S. Ct. 1109 (1976). *See also* Jordan v. Malcolm, No. 75 Civ. 1971-CHT (S.D.N.Y., filed Mar. 4, 1975).

[109] *See, e.g.*, Simmons v. Maslysnky, 45 F.R.D. 127 (E.D. Pa. 1968); Washington v. Official Court Steno., 251 F. Supp. 945 (E.D. Pa. 1966). *See also* Isrile v. Benjamin, No. 74 Civ. 4710-WC (S.D.N.Y., filed Oct. 25, 1975).

[110] 339 F. Supp. 43 (C.D. Cal.) (three-judge court), *aff'd*, 409 U.S. 807 (1972), 414 U.S. 946 (1973).

[111] *Id.* at 49. *See also* Bradford v. Wade, 376 F. Supp. 45 (N.D. Tex. 1974); Sooner State News Agency, Inc. v. Fallis, 367 F. Supp. 523, 530 (N.D. Okla. 1973); Star Distribs., Ltd. v. Hogan, 337 F. Supp. 1362, 1365 (S.D.N.Y. 1972).

The Supreme Court in dicta suggested recently that the policies that underlie the *Younger* doctrine are equally applicable to cases in which the plaintiffs seek relief against unconstitutional action by nonjudicial state officials, even when such relief would not involve any interference with state criminal proceedings. In Rizzo v. Goode, 96 S. Ct. 598 (1976), the Court reversed a lower court decision requiring the Philadelphia Police Department to submit a plan for the improvement of the handling of citizen complaints. The Court based the reversal on the absence of a sufficient case or controversy between the individually named plaintiffs and defendants, and upon the failure of plaintiffs to demonstrate that the Mayor and high police officials affirmatively authorized or approved police misconduct. *Id.* at 604-06. The Court, however, went on to state that:

> the principles of federalism which play such an important part in governing the relationship between federal courts and state governments . . . likewise have applicability where injunctive relief is sought not against the judicial branch of the state government, but against those in charge of an executive branch of an agency of state or local governments such as respondents here.

A more difficult question concerning the application of the *Younger* doctrine is presented in cases in which the plaintiffs raise claims of constitutional deficiencies in pretrial practices and procedures. When such claims cannot be raised easily in defense against state prosecutions, even though the claims might be raised in state habeas proceedings, and when granting the requested relief would not involve enjoining the plaintiffs' prosecutions either directly or indirectly, but would result in some interference with the state criminal process, the *Younger* doctrine normally should not be applied. Although the plaintiffs in such cases may succeed in obtaining federal relief if state post-conviction remedies are deemed inadequate,[112] regardless of whether the plaintiffs can bring their case within the exceptions to the *Younger* rule[113] *Younger* should not apply to these cases in the first instance because of the tangential effect of federal relief on the state prosecutions. Were the *Younger* doctrine held not to apply to cases involving challenges to pretrial practices and procedures, a federal court could grant systemic relief, which would be otherwise unavailable, to a large class of criminal defendants.

Lower court decisions in cases exhibiting these characteristics are evenly split between those allowing relief and those denying it. The Third Circuit recently granted relief in *Conover v. Montemuro*,[114] which involved a constitutional challenge to the intake procedures of the Philadelphia family court. The plaintiffs requested injunctive and declaratory relief on behalf of themselves and all other juvenile arrestees who were subjected to a standardless "intake interview" by probation officers, and who were denied a preliminary hearing. The court held that *Younger* was not controlling because modification of intake procedures would not necessarily hinder the state adjudicative process or substitute federal fact-finding for that of the state court.[115] Judge Adams elaborated on this point in his concurring opinion:

> [P]laintiffs are here attempting to secure only a federal court judgment that holding juveniles without a pre-

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Id. at 608. *Rizzo* represents an unwarranted limitation on the ability of the federal courts to fashion remedies for violations of federal constitutional rights. *See* Letter, *supra* note 2, at 2. If carried to its logical conclusion, *Rizzo* could result in a ban on all federal suits directed against state officials who allegedly violate such rights.

[112] *See* note 171 *infra*.

[113] For a discussion of the exceptions to the *Younger* rule, see text accompanying notes 146-72 *infra*.

[114] 477 F.2d 1073 (3d Cir. 1973).

[115] *Id.* at 1082.

> liminary hearing or an equivalent proceeding to ascertain probable cause is unconstitutional. Under these circumstances, a federal court's declaration of unconstitutionality or an injunction requiring the officials to institute a preliminary hearing procedure would in no way adversely affect the state's legitimate interest in conducting its *delinquency hearings* without direct interference. No delinquency hearings would be enjoined. Indeed, the sole effect of giving the plaintiffs the relief they seek would be a requirement that, in the future, preliminary hearings or an equivalent proceeding to determine probable cause be held.[116]

Similarly, a district court in *Gilliard v. Carson*[117] held *Younger* inapplicable to a civil rights class action challenging assignment-of-counsel practices in the Municipal Court of Jacksonville, Florida. The plaintiffs alleged that the local court was not properly applying *Argersinger v. Hamlin*,[118] which held that in the absence of a knowing and intelligent waiver no person can be imprisoned unless represented by counsel. After reviewing the Jacksonville procedures governing assignment of counsel, the court concluded that the plaintiffs' rights as announced in *Argersinger* and in *Tate v. Short*[119] were being violated, and granted

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[116] *Id.* at 1091 (emphasis in original) (footnote omitted). *See also* Fuentes v. Shevin, 407 U.S. 67 (1972); Pugh v. Rainwater, 483 F.2d 778 (5th Cir. 1973), *aff'd in part, rev'd in part sub nom.* Gerstein v. Pugh, 420 U.S. 103 (1975), *Supreme Court decision discussed in* text accompanying notes 128-34 *infra*; Joiner v. City of Dallas, 380 F. Supp. 754 (N.D. Tex.) (three-judge court), *aff'd*, 419 U.S. 1042 (1974). In the context of state civil proceedings, the Supreme Court in *Fuentes v. Shevin* held that *Younger* did not bar declaratory and injunctive relief against continued enforcement of Florida and Pennsylvania statutes that allowed a private party to obtain a prejudgment writ of replevin by submitting an *ex parte* application and posting a double bond. In holding that the statutes deprived the plaintiffs of their property without due process of law, the Court brushed aside the vigorous contention of the dissenting Justices that the *Younger* doctrine required dismissal. The majority held *Younger* inapplicable because "[n]either Mrs. Fuentes nor the [other] appellants . . . sought an injunction against any pending or future court proceedings as such. . . . Rather, they challenged only the summary extrajudicial process of prejudgment seizure of property to which they had already been subjected." 407 U.S. at 71 n.3. The Supreme Court might have distinguished *Younger* on the ground that a civil, rather than criminal, proceeding was involved. Its failure to do so presaged its later decision in Huffman v. Pursue, Ltd., 420 U.S. 592 (1975). In *Huffman*, the Court extended the *Younger* rule to civil actions that are quasi-criminal in nature.

[117] 348 F. Supp. 757 (M.D. Fla. 1972).

[118] 407 U.S. 25 (1972).

[119] 401 U.S. 395 (1971). *Tate* held that "the Constitution prohibits [a] State from imposing a fine as a sentence and then automatically converting it into a jail term solely because the defendant is indigent and cannot forthwith pay the fine in full." *Id.* at 398

detailed injunctive relief.[120] The court distinguished *Younger* on the ground that "[t]he plaintiffs in the present case do not ask that enforcement of any ordinance of the City of Jacksonville or any law of the State of Florida be enjoined or that any ordinance or law be invalidated. They do not ask that any conduct be made unpunishable."[121]

In *Utz v. Cullinane*,[122] the District of Columbia Circuit held that considerations of comity did not bar an injunction against the routine transmittal of arrest records to the Federal Bureau of Investigation by local police:

> Since this is not an action for expungement (the merits of which depend on the peculiar facts of the specific case), but an action to enjoin the practice of routinely disseminating arrest records (the merits of which depend on general principles of constitutional law which apply in all preconviction situations and on construction of a local ordinance), there was no reason for the District Court to abstain in favor of action by the presiding judge of any local criminal prosecution.[123]

Other federal courts faced with similar factual situations have refused to grant relief against unconstitutional state criminal pretrial practices and procedures. For example, in *Kinney v. Lenon*,[124] the Ninth Circuit affirmed the dismissal of a class action that was brought to overturn an Oregon statute that denied juveniles the right to be released from detention on bail. The

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(quoting Morris v. Schoonfield, 399 U.S. 508, 509 (1970)). *See also* Williams v. Illinois, 399 U.S. 235 (1970).

[120] 348 F. Supp. at 762-63.

[121] *Id.* at 762. A case quite similar to *Gilliard v. Carson* arose in Pennsylvania when indigents facing prosecution in Allegheny County were denied the assistance of counsel at preliminary hearings in violation of the Supreme Court decision in Coleman v. Alabama, 399 U.S. 1 (1970). Conley v. Dauer, 463 F.2d 63 (3d Cir.), *cert. denied*, 409 U.S. 1049 (1972). The district court granted declaratory relief, but, in order to allow the state courts time to comply with *Coleman*, refused to grant an injunction. 321 F. Supp. 723 (W.D. Pa. 1970). Noting that "[i]t is now more than 20 months since *Coleman* and County authorities have yet to comply with its mandate," the Third Circuit remanded the case to the district court for action to ensure compliance. 463 F.2d at 66. The Court of Appeals skirted the *Younger* issue, stating only that the lower court's decision "may have called for a different result on appeal had appellees taken a cross appeal from that declaratory judgment." *Id.* at 66 n.14. Had it wished to do so, however, the circuit court clearly could have raised the *Younger* objection on its own motion and reversed the lower court's decision.

[122] 520 F.2d 467 (D.C. Cir. 1975).

[123] *Id.* at 473 n.9.

[124] 447 F.2d 596 (9th Cir. 1971).

court found the reasoning used to distinguish *Younger* in *Conover v. Montemuro* and *Gilliard v. Carson* unpersuasive:

> Although the injunction sought would not have terminated the entire proceeding, the interference would have been substantial. The juvenile court's jurisdiction attaches at the point the child is taken into custody. . . . The detention hearing at which the determination is made on whether to release the child pending a hearing on the merits is characterized by appellants themselves as a "critical stage" in the juvenile proceeding. There are elaborate statutory provisions concerning the detention question, designed to properly address the delicate problem of dealing with juvenile offenders. . . . Any interference at this stage would clearly be at odds with the principles of comity and federalism which underlie *Younger*.[125]

Similarly, in *Harrington v. Arceneaux*,[126] a Louisiana district court dismissed a civil rights action challenging a statute that denied bail in capital cases. The court rejected the complainant's argument that because he did not request that the court enjoin his state prosecution, *Younger* was inapplicable:

> Though Douglas v. City of Jeannette and Younger v. Harris . . . direct attention to the policy against enjoining state proceedings, this court is of the opinion that the principles of comity and federalism stated therein are controlling in this case, even though granting of the relief prayed for would not affect the state proceedings. The district court, in the absence of compelling circumstances, should not enjoin the legitimate activities of a state in the administration of its own criminal laws.[127]

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[125] *Id.* at 601. The Ninth Circuit later reaffirmed its stance in *Kinney* in a case involving a similar challenge to California's juvenile detention statutes. The court rejected "the interesting argument that [*Younger*] does not apply because the substance of the attack here was not to stay state court proceedings, but to attack a 'procedural incident related to such prosecutions.' " Rivera v. Freeman, 469 F.2d 1159, 1164 (9th Cir. 1972).

[126] 367 F. Supp. 1268 (W.D. La. 1973).

[127] *Id.* at 1272. *See also* Leslie v. Matzkin, 450 F.2d 310 (2d Cir. 1971), *cert. denied*, 406 U.S. 932 (1972). In *Matzkin*, indigent plaintiffs alleged that Connecticut violated their constitutional rights by refusing to supply them with free copies of their preliminary hearing minutes, which would assist their trial preparation. The plaintiffs sought an order directing the defendant state officials to supply free transcripts. Even though

The Supreme Court appeared to resolve this conflict among the circuits in *Gerstein v. Pugh*,[128] siding with the courts that had held that *Younger* did not bar federal relief. In *Gerstein*, detainees awaiting state criminal proceedings brought a civil rights class action to obtain declaratory and injunctive relief against the state practice of detaining persons prior to trial without a judicial determination of probable cause, solely on the basis of a prosecutor's information. The district court granted the desired relief and ordered the defendants "to submit a plan providing preliminary hearings in all cases instituted by information."[129] Subsequently, a final order was issued by the district court that "prescribed a detailed post-arrest procedure."[130]

The Supreme Court disagreed with the lower court on the merits, and reversed in part and remanded for further proceedings. Specifically, the Court agreed that the Constitution does require a judicial determination of probable cause, but held that the adversary safeguards necessary at a "critical stage" of the prosecution were not required for the probable cause determination because of the nature of the fourth amendment probable cause standard.[131] The Court stated, however, that the lower court possessed the power to enter its order:

> The District Court correctly held that respondents' claim for relief was not barred by the equitable restrictions on federal intervention in state prosecutions, *Younger v. Harris* . . . . The injunction was not directed at the state prosecutions as such, but only at the legality of pretrial detention without a judicial hearing, an issue

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the plaintiffs did not seek to enjoin their prosecutions, the Second Circuit held that the "case clearly calls for deference to the state's procedures for the vindication of constitutional claims" and refused to grant relief. *Id.* at 312. Although *Matzkin* was decided incorrectly on this issue, *see* discussion of Gerstein v. Pugh, 420 U.S. 103 (1975), in text accompanying notes 128-34 *infra*, the *Matzkin* result appears to be correct on the merits, because the record showed that counsel representing indigent defendants could pass the cost of transcripts on to the state as part of the expense incurred in representing their clients. 450 F.2d at 311.

[128] 420 U.S. 103 (1975).

[129] *Id.* at 108.

[130] *Id.* Under the district court's plan, upon arrest, an accused would be taken before a magistrate for a "first appearance hearing." The magistrate would be required to explain the charge, to advise the accused of his rights, to appoint counsel, and to proceed with a probable cause determination unless either side was unprepared. If more time were requested, the magistrate would set a date for a preliminary hearing within four days if the accused is in custody, and within ten days if he has been released. The accused would be entitled to the full panoply of procedural safeguards at the hearing. The plan provided sanctions for failure to hold the hearing within the prescribed time.

[131] *Id.* at 119-26.

> that could not be raised in defense of the criminal prosecution. The order to hold preliminary hearings could not prejudice the conduct of the trial on the merits. See *Conover v. Montemuro* . . . ; cf. *Perez v. Ledesma* . . . ; *Stefanelli v. Minard* . . . .[132]

In so holding, the Court apparently determined that *Younger* does not close the federal courts to litigants seeking relief from unconstitutional state practices merely because the requested relief affects the way in which state criminal proceedings are conducted. Rather, the federal courts may act to modify constitutionally deficient state criminal practices and procedures (1) if the claims pressed in the federal action cannot be raised in defense of the state criminal charges, and (2) if the relief requested is not directed at the prosecution as such and cannot prejudice the conduct of the trial on the merits.[133] The

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[132] *Id.* at 108 n.9 (citations omitted). It is difficult to determine what significance, if any, should be accorded the fact that the Court's entire treatment of the *Younger* issue is contained in one footnote. Perhaps the Court thought the result to be so obvious that it was not worth textual elaboration. On the other hand, the Court may have treated the issue in a footnote to avoid the implication that it was making a major statement concerning the scope of the *Younger* doctrine. *See also* Gold v. Connecticut, 531 F.2d 91 (2d Cir. 1976). In *Gold*, a criminal defendant challenged a "gag order" that the trial judge had imposed on his attorneys. Citing footnote nine of *Gerstein*, the court declared that "federal review may be available where such orders affect First Amendment rights not capable of vindication through direct appeal from conviction." *Id.* at 92. The court held that intervention was inappropriate in this case, however, because the appellant had failed to demonstrate the absence of state court remedies for his complaint.

[133] Kinney v. Lenon, 447 F.2d 596 (9th Cir. 1971), *discussed in* text accompanying notes 124-25 *supra*, and Rivera v. Freeman, 469 F.2d 1159 (9th Cir. 1972), *discussed in* note 125 *supra*, exhibited the same characteristics that lifted *Gerstein* out of the *Younger* realm. The plaintiffs in *Kinney* and *Rivera* did not attack their prosecutions; rather, they challenged the constitutionality of laws denying bail to juveniles, an issue that could not be raised in defense of the charges against them. Furthermore, had the federal court ordered modification of the pretrial release standards, this relief could not have prejudiced the conduct of the plaintiffs' trials. Thus, these cases were decided wrongly according to the rationale enunciated later in *Gerstein*.

Wallace v. Kern (III), 520 F.2d 400 (2d Cir. 1975), *cert. denied*, 96 S. Ct. 1109 (1976), *discussed in* text accompanying notes 9-16 *supra*, also exhibited all of the characteristics that removed *Gerstein* from the reach of the *Younger* doctrine, and it thus appears to have been decided wrongly. In *Wallace v. Kern (III)*, the Second Circuit refused to order the federal relief necessary to correct constitutional deficiencies in state bail practices. The court attempted to distinguish *Gerstein* on the ground that "the federal plaintiffs there had no right to institute state habeas corpus proceedings except perhaps in exceptional circumstances." 520 F.2d at 406. Reliance on this distinction was misplaced, however, because *Younger* was not properly applicable to *Gerstein* and *Wallace v. Kern (III)* in the first instance, and the plaintiffs thus should not have been required to demonstrate that they came within one of the exceptions to the *Younger* rule. *See* text accompanying notes 144-72 *infra*. Regarding the adequacy of state remedies for vindicating the constitutional rights of plaintiffs who raise claims similar to those raised in *Wallace v. Kern (III)*, see text accompanying notes 157-72 *infra*.

Court thus implied that the application of the *Younger* doctrine to constitutional challenges of state pretrial practices and procedures is limited primarily to situations, such as in *Younger* itself, in which the complainant asserts a claim that could be raised in defense of the state charges and asks the federal court to enjoin the pending state prosecution.[134]

One final class of cases in which the *Younger* doctrine ordinarily should not apply is that in which the complainants seek only prospective relief. As was noted above,[135] the doctrine limiting federal intervention in state criminal proceedings evolved in large part in the context of threatened prosecutions, the Supreme Court in *Younger* and subsequent cases held that the doctrine has no force when a prosecution is merely threatened. This raises the interesting possibility that plaintiffs in a civil rights class action challenging the constitutionality of state criminal practices and procedures might avoid the application of the *Younger* doctrine by requesting only prospective relief. Such a course presupposes, however, that some members of the class, and perhaps the named plaintiffs themselves, will be found sufficiently likely to be arrested in the future so that the standing problems that arose in *O'Shea v. Littleton*[136] and *Gardner v. Luckey*[137] could be avoided. Moreover, in assessing whether such relief is permissible, a court should consider the extent to which ordering reform of procedures in future prosecutions might interfere with presently pending cases.[138]

A Virginia district court wrestled with these questions in *Rakes v. Coleman*,[139] an action brought on behalf of all persons "convicted or being convicted"[140] under a public drunkenness

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[134] Lower federal courts also have ordered reform of state pretrial criminal practices an procedures when necessary to ensure constitutional conditions of confinement in state pretrial detention facilities. For example, the First Circuit required Boston officials to continue funding the Bail Appeal Project at the Suffolk County Jail to ensure that a court-ordered program of single-cell occupancy was not endangered. Inmates of Suffolk County Jail v. Eisenstadt, 518 F.2d 1241 (1st Cir. 1975). Similarly, a Texas district court ordered extensive reform in local bail, calendar, and hearing practices to alleviate the inhumane overcrowding of inmates in Harris County detention facilities. Alberti v. Sheriff of Harris County, 406 F. Supp. 649 (S.D. Tex. 1975). *Younger* and its progeny were not mentioned in either decision.

[135] *See* text accompanying notes 71-80 *supra*.

[136] 414 U.S. 488 (1974).

[137] 500 F.2d 712 (5th Cir. 1974), *cert. denied*, 423 U.S. 841 (1976); *see* note 100 & text accompanying notes 96-100 *supra*.

[138] *See* note 90 *supra*.

[139] 359 F. Supp. 370 (E.D. Va. 1973).

[140] *Id.* at 372.

statute. The plaintiffs claimed that the eighth amendment requires the courts to recognize the disease of alcoholism as a defense to such prosecutions. The court held that it was barred by *Younger* and its companion cases from interfering with any pending prosecutions, but it inferred from the phrase "being convicted" that the plaintiffs intended to challenge future prosecutions as well. Rakes and other members of the plaintiff class were found to have standing to challenge future prosecutions because "[their] continuing odyssey from jail to jail on drunk charges satisfie[d] the Court that, upon release [they would] again be charged with drunkenness, denied the defense of alcoholism and incarcerated without rehabilitation."[141] Although the court failed to consider the extent to which granting prospective relief might have affected pending prosecutions,[142] the court's conclusion that *Younger* does not necessarily bar requests for prospective relief is sound.

In summary, a federal court should not grant coercive relief directed against a state prosecution as such except under the extraordinary circumstances discussed below.[143] It should not issue an order that will have the effect, either directly or indirectly, of bringing the plaintiff's state criminal proceedings to a halt. A federal court may, however, grant relief either directed against nonjudicial officials or related to matters ancillary to the criminal proceedings that cannot be raised in defense against the criminal prosecution.

The scope of the federal relief provided should be limited as well. Blanket injunctions issued in lieu of individual determinations usually will be inappropriate. Relief that necessitates federal review of decisions of state court judges on substantive issues or interferes directly with such decisions also should not be granted. Moreover, a federal court should not engage in ongoing monitoring and supervision of such decisions. A federal

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[141] *Id.* at 373.

[142] The court was without the benefit of the Supreme Court decisions in Steffel v. Thompson, 415 U.S. 452 (1974), *discussed in* text accompanying notes 77-80 *supra*, and Doran v. Salem Inn, Inc., 422 U.S. 922 (1975), *discussed in* text accompanying notes 79-80 *supra*; thus, it assumed that the standards enunciated in Fenner v. Boykin, 271 U.S. 240 (1926), *discussed in* text accompanying notes 35-39 *supra*, which involved only a threatened prosecution, applied to the case at hand. The court found, however, that the threat of irreparable injury from future incarceration was sufficiently great to merit federal intervention if the plaintiffs could prevail on the merits. 359 F. Supp. at 378-79. *See also* Maynard v. Wooley, 406 F. Supp. 1381 (D.N.H. 1976) (three-judge court), *prob. juris. noted*, 44 U.S.L.W. 3738 (U.S. June 21, 1976) (No. 75-1453).

[143] *See* text accompanying notes 144-72 *infra*.

court may, however, grant and enforce simple, workable relief that directs a state to afford, or declares that a state should afford, certain procedural safeguards for accused persons. Moreover, in some cases in which *Younger* might otherwise be held applicable, a court may avoid dismissing the action by granting prospective relief only and in that way avoiding interference with pending prosecutions.

B. *Defining Exceptions to the* Younger *Rule*

In discussing standards for federal intervention in state criminal matters, this Article has thus far attempted to determine when *Younger* should apply in the first instance to particular cases brought before the federal courts. Merely because a particular case comes within the scope of the *Younger* doctrine, however, the federal court is not necessarily barred from hearing the case; if that case falls within one of the exceptions to the *Younger* rule, the federal court may reach the substantive issues of the complaint.

Younger, itself, provides little specific guidance for determining when the nonintervention doctrine should not be invoked, despite its facial applicability to a particular case. The Court in *Younger* concentrated on identifying circumstances that are not sufficiently "special" to justify federal intervention. The Court did state, however, that to merit relief a complainant must be threatened with both great and immediate irreparable injury[144] and have no adequate remedy at law.[145]

1. Irreparable Injury

The Court in *Younger* stated that the mere "cost, anxiety, and inconvenience of having to defend against a single criminal prosecution"[146] does not constitute an irreparable injury. Moreover, a prospective injury is not irreparable if it can be eliminated through defense of a single criminal prosecution.[147]

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[144] 401 U.S. at 45-47.

[145] *Id.* at 43-44.

[146] *Id.* at 46.

[147] *Id.* The Court also included in its definition of the "special circumstances" that merit federal intervention cases such as Dombrowski v. Pfister, 380 U.S. 479 (1965), in which the plaintiffs were subjected to harassment and bad faith prosecutions brought merely to discourage the exercise of constitutionally protected rights without any real hope of obtaining convictions. 401 U.S. at 47-50. *See generally* text accompanying notes 55-60 *supra*. *But see* Kugler v. Helfant, 421 U.S. 117 (1975). The practices and procedures under discussion in this Article rarely involve the malicious and intentional de-

Many criminal defendants are incarcerated on the basis of constitutionally defective pretrial practices,[148] however, and the courts agree generally that any unconstitutional deprivation of liberty, regardless of length, involves irreparable injury. For example, when an indigent complainant was threatened with imminent incarceration because he was unable to comply with a Georgia statute making monetary restitution to the victim of a crime committed by the convicted perpetrator a condition of probation, the Fifth Circuit declared the statute unconstitutional and enjoined its enforcement. The Court stated that to "await actual incarceration would not merely be draconian; it would involve irreparable injury to the probationer."[149] Similarly, in *Gilliard v. Carson*,[150] the court ordered modification of unconstitutional assignment-of-counsel practices in a Florida municipal court because indigents facing prosecution were in "imminent danger" of having "their clearly established constitutional rights violated and suffer[ing] irreparable harm by being unlawfully deprived of their personal liberty."[151]

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privation of rights by state officials that occurred in *Dombrowski*. Therefore, this exception to the *Younger* rule will not be discussed further.

[148] *See, e.g.*, Gerstein v. Pugh, 420 U.S. 103 (1975); Wallace v. Kern (III), 520 F.2d 400 (2d Cir. 1975), *cert denied*, 424 U.S. 912 (1976); Conover v. Montemuro, 477 F.2d 1073 (3d Cir. 1973); Gilliard v. Carson, 348 F. Supp. 757 (M.D. Fla. 1972). *See generally* NATIONAL ADVISORY COMM'N ON CRIMINAL JUSTICE STANDARDS & GOALS, REPORT ON COURTS 77-82 (1973); PRESIDENT'S COMM'N ON LAW ENFORCEMENT & ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE COURTS (1967) [hereinafter cited as TASK FORCE REPORT].

[149] Morgan v. Wofford, 472 F.2d 822, 826 (5th Cir. 1973). The Fifth Circuit has also noted that "even temporary unconstitutional deprivations of liberty" may constitute "great and immediate irreparable injury." Pugh v. Rainwater, 483 F.2d 778, 782-83 (5th Cir. 1973), *aff'd in part, rev'd in part sub nom.* Gerstein v. Pugh, 420 U.S. 103 (1975), *discussed in* text accompanying notes 128-34 *supra*.

[150] 348 F. Supp. 757 (M.D. Fla. 1972), *discussed in* text accompanying notes 117-21 *supra* & 167-68 *infra*.

[151] *Id.* at 761-62. *See also* Rakes v. Coleman, 359 F. Supp. 370, 378 (E.D. Va. 1973). Several other federal courts, including the Supreme Court, have implied strongly that an imminent danger of unlawful incarceration constitutes a sufficient threat of great and immediate irreparable injury to warrant federal intervention. In Schlesinger v. Councilman, 420 U.S. 738 (1975), a serviceman facing court-martial for the alleged sale and possession of marijuana sought an injunction against the proceedings on the ground that the offenses charged were not "service connected" and thus were not within court-martial jurisdiction. In support of his complaint, the plaintiff claimed that "he would incur 'great and irreparable damage in that he [might] be deprived of his liberty without due process of law. . . .'" *Id.* at 754. The Supreme Court was plainly skeptical of the plaintiff's allegations, and found that his chances of incarceration were slim. The plaintiff was not incarcerated pending trial, and it was doubtful that, if convicted, plaintiff would be incarcerated pending review within the military system. Furthermore, according to the Court, "there was no reason to believe that his possible conviction inevitably would be affirmed," even if one supposed that his "service-connection contention almost certainly would be rejected on any eventual military re-

The threat of irreparable injury also exists when complainants must risk multiple prosecutions. When the *Younger* Court held that to be considered irreparable, an injury had to consist of something more than the burden of defending against a *single* prosecution, it implied that being forced to defend against multiple prosecutions might involve irreparable injury. Subsequently, a number of lower federal courts so held. In *International Society for Krishna Consciousness, Inc. v. Conlisk*,[152] for example, the court enjoined the prosecutions of members of a religious sect for alleged violations of Chicago ordinances governing peddling, begging, and public exhibitions. Federal intervention was held to be appropriate in part because "given the multiplicity of actions, individuals and charges involved in the pending state court actions, [the plaintiffs] are burdened with significantly more than the mere 'cost, anxiety, and inconvenience of having to defend against a single criminal prosecution. . . .' "[153] Similarly, the Ninth Circuit in *Krahm v. Graham*[154] found that the repeated, groundless prosecutions of bookstore owners and clerks in Phoenix, Arizona for the sale of allegedly obscene books and magazines was causing irreparable injury:

> Surely the damage from this sort of activity is both irreparable and "great and immediate." It can put the plaintiffs out of business without ever convicting any of them of anything. Nor can the threat to plaintiffs' first amendment rights be eliminated by defense against the state prosecutions. Successful defense against eleven of them . . . brought the filing of fourteen more . . . ."[155]

Many actions challenging criminal practices and procedures are brought as class actions. Arguably, because the class as a whole is being subjected to multiple prosecutions, the aggregate injury is sufficiently great to be considered irreparable. The

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view . . . ." *Id.* Thus, the Court concluded that he was threatened with no injury other than that incidental to every criminal proceeding brought lawfully and in good faith. The implication of the Court's decision was that if the plaintiff had demonstrated a credible threat of incarceration, the injury involved would have been sufficiently great to merit federal intervention. *See also* Lynch v. Snepp, 472 F.2d 769, 776 (4th Cir. 1973), *cert. denied*, 415 U.S. 983 (1974); Horodner v. Cahn, 360 F. Supp. 602, 605 n.6 (E.D.N.Y. 1973).

[152] 374 F. Supp. 1010 (N.D. Ill. 1973).

[153] *Id.* at 1014.

[154] 461 F.2d 703 (9th Cir. 1972).

[155] *Id.* at 707. *See also* International News Distribs., Inc. v. Shriver, 488 F.2d 1350 (6th Cir. 1973).

Supreme Court, in *Roe v. Wade*,[156] left open the question whether a class action might be treated differently for *Younger* purposes than a case brought by a single plaintiff. To date, neither the Supreme Court nor any other federal court has answered this question.

2. Inadequate Remedy at Law

The Supreme Court has stated that a complainant has an adequate state remedy at law if he is given "the opportunity to raise and have timely decided by a competent state tribunal the federal issues involved."[157] The federal courts have generally been willing to find that a plaintiff lacks an adequate remedy at law either when no procedural mechanism exists within the state system by which he might raise the claim pressed in federal court, or when a state remedy "exists in theory, but in practice [is] cumbersome and inefficacious."[158]

Morgan v. Wofford[159] provides an example of the former situation. In *Morgan*, at the time the plainfiff brought his federal action, no state procedure existed by which he could raise his constitutional challenges to the Georgia statute mandating that he pay restitution as a condition of probation. The Fifth Circuit held that "[a]bstention under the doctrine of *Younger v. Harris* . . . was never intended where there is no possible state proceeding through which appellant may raise his constitutional objections to a state proceeding which has already occurred."[160] Similarly, in *Callahan v. Sanders*,[161] in issuing an injunction prohibiting justices of the peace from hearing traffic cases when

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[156] 410 U.S. 113, 127 n.7 (1973).

[157] Gibson v. Berryhill, 411 U.S. 564, 577 (1973). In *Younger*, the Court held that the pending state criminal proceedings themselves provided an adequate remedy at law because the plaintiff could raise his constitutional challenges to the relevant statute as a defense in those proceedings. 401 U.S. at 49. *See also* Roe v. Wade, 410 U.S. 113, 126 (1973); United States *ex rel.* Husdon v. Wollenzien, 345 F. Supp. 436, 438 (E.D. Wis. 1972). In Leslie v. Matzkin, 450 F.2d 310, 312 (2d Cir. 1971), *cert. denied*, 406 U.S. 932 (1972), *discussed in* note 127 *supra*, the Second Circuit held that the plaintiffs had an adequate remedy at law because, if necessary, they could raise on appeal from their convictions their constitutional objections to the state court's refusal to provide them with free preliminary hearing minutes.

Traditionally, to be considered adequate, a legal remedy had to be "as complete, practical and efficient as that which equity could afford." Terrace v. Thompson, 263 U.S. 197, 214 (1923). *See also* Potwora v. Dillon, 386 F.2d 74, 77 (2d Cir. 1967).

[158] G.I. Distribs., Inc. v. Murphy, 336 F. Supp. 1036, 1039 (S.D.N.Y.), *rev'd on other grounds*, 469 F.2d 752 (2d Cir. 1972), *vacated*, 413 U.S. 913 (1973).

[159] 472 F.2d 822 (5th Cir. 1973), *discussed in* text accompanying note 149 *supra*.

[160] *Id.* at 826 (citation omitted).

[161] 339 F. Supp. 814 (M.D. Ala. 1971).

they had a pecuniary interest in convicting alleged violators, the district court noted that "[t]here is no provision for review of the legality of the proceedings before the Justice of the Peace upon appeal . . . ."[162]

The federal courts also have found theoretically available remedies to be inadequate in practice in cases in which the state tribunal was biased against the plaintiffs, the state courts had definitively rejected the substance of the plaintiffs' claims in previous cases, or state review could not come quickly enough to avoid irreparable injury. In *Gibson v. Berryhill*,[163] the Supreme Court held that "the predicate for a *Younger v. Harris* dismissal was lacking," because the district court had found that the Alabama State Board of Optometry "was incompetent by reason of bias to adjudicate the issues pending before it."[164] In *Cleaver v. Wilcox*,[165] which involved a suit challenging the constitutionality of the California practice of conducting child dependency proceedings without assigning counsel to indigent parents, the Ninth Circuit held that the plaintiffs' claim would "not receive an effective hearing and vindication in a state proceeding" because "[t]he California courts have repeatedly denied or refused to hear these claims in the past."[166] Finally, in *Gilliard v. Carson*,[167]

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[162] *Id.* at 818 (quoting Hulett v. Julian, 250 F. Supp. 208, 209 (M.D. Ala. 1966) (three-judge court)). In *Sanders*, the court probably assumed that there was little point in challenging the conduct of the justices of the peace before the justices themselves. *See also* Tucker v. Board of Comm'rs, 410 F. Supp. 494 (M.D. Ala. 1976) (three-judge court).

[163] 411 U.S. 564 (1973).

[164] *Id.* at 577.

[165] 499 F.2d 940 (9th Cir. 1974).

[166] *Id.* at 943-44. Similarly, in G.I. Distribs., Inc. v. Murphy, 336 F. Supp. 1036 (S.D.N.Y.), *rev'd on other grounds*, 469 F.2d 752 (2d Cir. 1972), *vacated*, 413 U.S. 913 (1973), and in Vali Books, Inc. v. Murphy, 343 F. Supp. 841 (S.D.N.Y. 1972), the court ordered injunctive relief after finding that it would be futile for the plaintiffs to seek in state court the return of a large quantity of allegedly obscene matter seized during a police raid. The court based this finding on a New York Court of Appeals ruling that a prior adversary hearing is not a prerequisite for a search warrant in the usual motion picture case. In Detco, Inc. v. Breier, 349 F. Supp. 537 (E.D. Wis. 1972), a Wisconsin district court held that plaintiffs who were seeking to enjoin enforcement of Wisconsin's obscenity statute had no adequate remedy at law in light of recent Wisconsin Supreme Court decisions construing that statute in a way violative of the first amendment. *See also* Bruno v. Warren, 344 F. Supp. 97 (E.D. Wis. 1972). Finally, in Anderson v. Nemetz, 474 F.2d 814, 820 n.2 (9th Cir. 1973), the court held that a plaintiff who was seeking an injunction against the prospective enforcement of an Arizona vagrancy law should not be denied relief when he had raised his constitutional objections in state courts on four previous occasions without success. *But see* Hicks v. Miranda, 422 U.S. 332, 350 n.18 (1975); Anonymous v. Association of the Bar, 515 F.2d 427, 434-35 (2d Cir.), *cert. denied*, 423 U.S. 863 (1975).

[167] 348 F. Supp. 757 (M.D. Fla. 1972), *discussed in* text accompanying notes 117-21, 150 *supra*.

in granting injunctive relief modifying assignment-of-counsel practices in the Jacksonville municipal court, the district court held that the alternative of each indigent citizen's petitioning for a writ of habeas corpus after being confined unlawfully was "manifestly inadequate," because that remedy would not be available "until after irreparable damage has been sustained and may, because of the time necessarily involved in such proceedings, prove unavailable at all."[168]

These cases suggest that once a federal court determines that the *Younger* doctrine applies, it must take a realistic look at whether theoretically available remedies are truly adequate in fact. Other practical considerations support this position. For example, judges in state criminal courts often "face long calendars with the certain knowledge that their calendars tomorrow and the next day will be, if anything, longer."[169] As a result, the courts are preoccupied usually with rapid consideration and disposition of individual cases, and it is often difficult, if not impossible, for them to consider broad constitutional challenges to their practices and procedures.[170] Similar considerations often reduce the effectiveness of individual appeals and state habeas corpus proceedings[171] in providing relief from unconstitutional state practices and procedures.[172] Although the considerations of

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[168] *Id.* at 762; *see* Newton v. Burgin, 363 F. Supp. 782 (W.D.N.C. 1973) (three-judge court), *aff'd*, 414 U.S. 1139 (1974). In *Burgin*, the court overturned a North Carolina statute allowing state officials to seize and hold a child for up to five days without a hearing if the child appeared to be in danger. The court held that deprivation of custody of the child for five days was an irreparable injury to the child's family for which there was no adequate legal remedy, because the injury would occur regardless of the outcome of the eventual hearing. *Id.* at 785.

[169] PRESIDENT'S COMM'N ON LAW ENFORCEMENT & ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 128 (1967).

[170] *See id.* 128-29; TASK FORCE REPORT, *supra* note 148, at 31-34.

[171] Individual state habeas corpus petitions, commonly suggested as an adequate state remedy, *see e.g.*, Wallace v. Kern (III), 520 F.2d 400, 407 (2d Cir. 1975), *cert. denied*, 424 U.S. 912 (1976), are often inadequate to correct injuries caused to victims of assembly-line justice. The type of relief available through a state habeas corpus petition is limited to the release of the person illegally detained; thus the state court judge cannot issue an injunction ordering systemic changes in criminal practices and procedures. *See, e.g.*, People *ex rel.* Gonzalez v. Warden, 21 N.Y.2d 18, 233 N.E.2d 265, 286 N.Y.S.2d 240 (1967), *cert. denied*, 390 U.S. 973 (1968). Moreover, the adequacy of state habeas corpus may be vitiated by the fact that it tests the legality of detention, and thus is not available until after irreparable injury caused by deprivation of liberty already has occurred.

[172] For example, a voluntary guilty plea results in a waiver of all prior nonjurisdictional defects "not logically inconsistent with the valid establishment of factual guilt." Menna v. New York, 423 U.S. 61, 63 n.2 (1975); *see* United States *ex rel.* Glenn v. McMann, 349 F.2d 1018 (2d Cir. 1965), *cert. denied*, 383 U.S. 915 (1966). *See also* Wallace v. Heinze, 351 F.2d 39 (9th Cir. 1965), *cert. denied*, 384 U.S. 954 (1966). Except

comity, federalism, and equity militate against federal relief in every case, the federal courts must look beyond the remedies theoretically available to the complainant and examine whether the realities of the particular case ensure adequate state relief.

In summary, a federal court should not grant relief that would effectively halt a pending state criminal proceeding unless the plaintiff would suffer irreparable injury if relief were denied. Although the cost, anxiety, and inconvenience incidental to defending against a single criminal proceeding do not by themselves constitute irreparable injury, the injury becomes irreparable if the plaintiff has to defend against multiple prosecutions, or if a class of plaintiffs is subjected to unconstitutional state criminal practices. Moreover, unlawful incarceration constitutes irreparable harm per se.

Regardless of what injury might occur in the absence of any remedy, however, a federal court should not enjoin or effectively halt a pending state criminal proceeding when the plaintiff has an adequate remedy at law. A remedy at law is adequate when the complainant can obtain a timely and complete resolution of his federal claims before a state tribunal, either in defense of the pending criminal proceeding, or in some other way. A plaintiff lacks an adequate remedy at law, however, when no procedural mechanism exists within the state system by which the complainant may raise his federal claims, or when a remedy that exists in theory is inadequate in fact to protect the plaintiff's constitutional rights.

IV. CONCLUSION

The foregoing represents an attempt to chart a workable middle course for the federal courts in civil rights actions challenging the constitutionality of state criminal practices and procedures. Such lawsuits raise particularly acute problems in federal-state relations. Adoption of the suggested standards should enable the federal courts to play an important role in vindicating the constitutional rights of criminal defendants without engaging in overly broad interference with state proceedings.

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for challenges to the validity of the plea itself, this rule eliminates most challenges to pretrial practices and procedures on appeal.