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FEDERAL INTERFERENCE WITH STATE PROSECUTIONS: THE NEED FOR PROSPECTIVE RELIEF

Six years ago, in *Younger v. Harris*[1] and *Samuels v. Mackell*,[2] the Supreme Court announced major restrictions on the power of federal courts to interfere with state prosecutions. These cases generally require dismissal of federal suits challenging state laws whenever there is a state prosecution pending against the federal plaintiff. Every subsequent Term has produced cases explicating these restrictions.[3]

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[1] 401 U.S. 37 (1971).

[2] 401 U.S. 66 (1971).

[3] Trainor v. Hernandez, 97 S. Ct. 1911 (1977); Ohio Bureau of Empl. Servs. v. Hodory, 97 S. Ct. 1898, 1903–04 (1977); Wooley v. Maynard, 97 S. Ct. 1428 (1977); Juidice v. Vail, 97 S. Ct. 1211 (1977); Lockport v. Citizens for Community Action, 430 U.S. 259, 264 n.8 (1977); Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 816–17 (1976); Rizzo v. Goode, 423 U.S. 362 (1976); Doran v. Salem Inn, Inc., 422 U.S. 922 (1975); Hicks v. Miranda, 422 U.S. 332 (1975); Ellis v. Dyson, 421 U.S. 426 (1975); Kugler v. Helfant, 421 U.S. 117 (1975); McLucas v. DeChamplain, 421 U.S. 21, 33–34 (1975); Schlesinger v. Councilman, 420 U.S. 738, 753–61 (1975); Huffman v. Pursue, Ltd., 420 U.S. 592 (1975); Gerstein v. Pugh, 420 U.S. 103, 108 n.9

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A critical assumption underlying these cases is that defense of the pending prosecution usually furnishes an adequate remedy for any violation of the defendant's federal rights.[4] This assumption stands unjustified by the Court majority, unchallenged by the dissenters, and substantially unexamined by the commentators.[5] The major thesis of this article is that in many cases the criminal defense cannot provide an adequate remedy, because the criminal court cannot grant interlocutory, prospective, or class relief. These remedial limitations follow from the nature of the criminal process and are independent of conflicting views concerning the willingness of state judges to protect federal rights. Thus, even if one accepts the core of *Younger*—that federal relief should be withheld where the pending state remedy is adequate—a pending prosecution should not be a near automatic bar to a federal action. The federal court should consider whether the state remedy is actually adequate on each set of facts and provide supplemental relief where needed.

I. Younger and Its Progeny

Subject to a handful of narrow exceptions, which few federal plaintiffs have successfully invoked, *Younger* made federal relief unavailable to test the constitutionality of a state statute when there is pending a state criminal proceeding in which the constitutional challenge may be raised. It is this rule and its extensions which are now generally referred to as the *Younger* doctrine or as *Younger* "abstention."[6] Despite the abstention label, the rule requires dismis-

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(1975); Sosna v. Iowa, 419 U.S. 393, 396–97 n.3 (1975); Allee v. Medrano, 416 U.S. U.S. 802 (1974); Village of Belle Terre v. Boraas, 416 U.S. 1, 3 n.1 (1974); Steffel v. Thompson, 415 U.S. 452 (1974); Speight v. Slaton, 415 U.S. 333 (1974); O'Shea v. Littleton, 414 U.S. 488 (1974); Gibson v. Berryhill, 411 U.S. 564 (1973); Braden v. 30th Jud. Circuit Court of Ky., 410 U.S. 484, 491–92 (1973); Roe v. Wade, 410 U.S. 113, 123–29 (1973); Fuentes v. Shevin, 407 U.S. 67, 71 n.3, 98 (1972); Lake Carriers' Ass'n v. MacMullan, 406 U.S. 498, 509–10 (1972); Lynch v. Household Finance Corp., 405 U.S. 538, 556, 560 (1972); see also McGautha v. California, 402 U.S. 183, 259 n.10 (1971); Byrne v. Karalexis, 401 U.S. 216 (1971); Dyson v. Stein, 401 U.S. 200 (1971); Perez v. Ledesma, 401 U.S. 82 (1971); Boyle v. Landry, 401 U.S. 77 (1971). (Hereinafter these cases will be identified in footnotes by the name of the first party.)

[4] See *Trainor*, 97 S. Ct. at 1916–17; *Kugler*, 421 U.S. at 124; *Huffman*, 420 U.S. at 600–03; *Steffel*, 415 U.S. at 460, 462; *Younger*, 401 U.S. at 43, 45–46.

[5] But see Fiss, *Dombrowski*, 86 Yale L. J. 1103, 1125 (1977); Gilbert, *Questions Unanswered by the February Sextet*, 1972 Utah L. Rev. 14, 15–17; Note, 90 Harv. L. Rev. 1133, 1305–08, 1321 (1977).

[6] For a more detailed review of the doctrine's development, see Fiss, note 5 *supra*.

sal rather than a stay pending the state proceedings.[7] *Younger* abstention applies to requests for injunctions against enforcement[8] and to requests for declaratory judgments that statutes are unconstitutional.[9] The federal courts must now abstain not only when there is a state criminal proceeding but also when there is a state civil proceeding in aid of the criminal law,[10] a state civil contempt proceeding,[11] or a civil enforcement action brought by a state in its sovereign capacity.[12] The doctrine requires deference not only to state proceedings pending when the federal case is commenced but to subsequent state proceedings commenced before "any proceedings of substance on the merits" in the federal case.[13] Once a state case is pending, the would-be federal plaintiff must pursue all state appellate remedies; he cannot end the state case by refusing to litigate it.[14] The doctrine is derived from "principles of equity, comity, and federalism,"[15] and the Court has said that those same principles preclude ongoing federal injunctive interference in the nonjudicial parts of the state criminal justice system, apparently without regard to whether a state case is pending in which a remedy could be had.[16]

There are, however, limits to the doctrine's expansion. After some initial uncertainty,[17] the Court held the doctrine inapplicable when no state proceeding is pending.[18] Thus *Younger* does not require that the would-be federal plaintiff initiate state proceedings which might provide a remedy,[19] and no one joined Chief Justice

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[7] *Gibson*, 411 U.S. at 577; *cf.* Railroad Comm'n v. Pullman Co., 312 U.S. 496 (1941) (abstention to permit construction of ambiguous state law); England v. Louisiana State Bd. of Medical Exam'rs, 375 U.S. 411 (1964) (right to return to federal court after *Pullman* abstention); Reetz v. Bozanich, 397 U.S. 82, 85, 87 (1970) (federal court should retain jurisdiction pending *Pullman* abstention).

[8] *Younger*, 401 U.S. 37.

[9] *Samuels*, 401 U.S. 66.

[10] *Huffman*, 420 U.S. at 603–07.

[11] *Juidice*, 97 S. Ct. 1211.

[12] *Trainor*, 97 S. Ct. 1911.

[13] *Hicks*, 422 U.S. at 349 (alternative holding); accord, *Doran*, 422 U.S. 922.

[14] *Huffman*, 420 U.S. at 607–11.

[15] *Steffel*, 415 U.S. at 460.

[16] *Rizzo*, 423 U.S. at 380; *O'Shea*, 414 U.S. at 499–504; see Fiss, note 5 *supra*, at 1148–60.

[17] *Younger*, 401 U.S. at 45–47; Becker v. Thompson, 459 F.2d 919 (5th Cir. 1972), rev'd *Steffel*, 415 U.S. 452.

[18] *Steffel*, 415 U.S. 452; *Doran*, 422 U.S. 922.

[19] *Lake Carriers' Ass'n*, 406 U.S. at 510.

Burger last Term when he suggested that state administrative remedies be exhausted as a prerequisite to any federal relief, even direct review of a criminal conviction.[20] The Court has explicitly held open the question whether *Younger* abstention is required when state administrative proceedings are pending[21] or when ordinary civil litigation between private parties is pending.[22] The benefits of the doctrine may be waived by state officials.[23]

II. The Unexamined Question

Although the *Younger* doctrine does not apply when no prosecution is pending, it would be incorrect to say that the doctrine does not prevent injunctions against future prosecutions. Once the doctrine comes into play, it requires dismissal of the federal lawsuit.[24] *Younger* does not merely deny an injunction against the pending prosecution; it denies any relief that depends on resolution of the constitutional issue raised in the state case.[25] This result is based on a fear that federal resolution of the constitutional issue will indirectly interfere with the pending prosecution. But its effect has been to deny prospective relief—relief directed to future violations and future prosecutions—without attention to whether defense of a pending prosecution for a past violation can provide such relief.

The Court's opinions have not directly addressed the problem. The opinion in *Younger* offered one possible answer when it suggested that the standards there announced had historically been applied not only to requests to enjoin pending prosecutions but also to requests to enjoin threatened future prosecutions.[26] But that is quite misleading. As has been extensively documented,[27] the cases

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[20] Moore v. City of East Cleveland, 97 S. Ct. 1932, 1947–52 (1977).

[21] *Gibson*, 411 U.S. at 574–75; *Ohio Bureau*, 97 S. Ct. at 1904 n.10.

[22] *Trainor*, 97 S. Ct. at 1919 n.8; *Juidice*, 97 S. Ct. at 1218 n.13; *Huffman*, 420 U.S. at 607.

[23] *Ohio Bureau*, 97 S. Ct. at 1904; *Sosna*, 419 U.S. at 396–97 n.3.

[24] *Doran*, 422 U.S. 922; *Samuels*, 401 U.S. 66.

[25] *Trainor*, 97 S. Ct. at 1920 (opinion of the Court); *id.* at 1923–24 (Brennan, J., dissenting); *Gerstein*, 420 U.S. at 108 n.9 (1975); see also cases cited in note 24 *supra*.

[26] 401 U.S. at 45.

[27] Wechsler, *Federal Courts, State Criminal Law, and the First Amendment*, 49 N.Y.U. L. Rev. 740 (1974); 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, 629–39 (1975).

cited as to threatened future prosecutions were aberrations. Although a few prominent cases said that federal injunctions against future prosecutions should be hard to get,[28] in practice after *Ex parte Young*[29] in 1908 they became routine. They were the staple business of special district courts convened under the Three Judge Court Act,[30] and scores of these cases reached the Supreme Court.[31]

The reasons for such injunctions were repeatedly stated.[32] They were the same reasons relied on in *Steffel v. Thompson*, in which the Court reaffirmed the availability of declaratory relief in the absence of pending state proceedings. Unless some prospective remedy is available, a citizen can test the validity of a state law only by violating it and running the risk of criminal penalties. Describing this as "the Scylla of intentionally flouting state law and the Charybdis of forgoing what he believes to be constitutionally protected activity,"[33] the Court in *Steffel* held that *Younger* does not preclude prospective relief where no prosecution is pending. *Steffel* is the direct descendant of *Ex parte Young* and the many other cases given such short shrift in *Younger*.

This brief history frames the issue on which this article focuses. Given the citizen's long acknowledged need for prospective relief and the likelihood that such relief will interfere with any pending prosecution, what rules should govern claims for prospective relief when a prosecution for a past violation is pending?

The Court has handled this problem by assuming it away: it assumes that the pending prosecution eliminates the need for pros-

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[28] Douglas v. City of Jeannette, 319 U.S. 157, 162–65 (1943); Williams v. Miller, 317 U.S. 599 (1942); Watson v. Buck, 313 U.S. 387, 400–01 (1941); Beal v. Missouri Pacific R. Co., 312 U.S. 45, 49–51 (1941); Spielman Motor Sales Co. v. Dodge, 295 U.S. 89, 95–97 (1935); Fenner v. Boykin, 271 U.S. 240, 243–44 (1926).

[29] 209 U.S. 123 (1908).

[30] Act of June 18, 1910, Chap. 309 § 17, 36 Stat. 539, 557, codified as 28 U.S.C. § 2281 (1970), repealed by Pub. L. No. 94–381, § 1, 90 Stat. 1119 (1976).

[31] See Wechsler, note 27 *supra*, at 779–93, 800–27 and n.376, 866–67 n.562.

[32] Toomer v. Witsell, 334 U.S. 385, 391–92 (1948); AFL v. Watson, 327 U.S. 582, 593–95 (1946); Gibbs v. Buck, 307 U.S. 66, 77–78 (1939); Grosjean v. American Press Co., 297 U.S. 233, 242 (1936); Lee v. Bickell, 292 U.S. 415, 421 (1934); Cline v. Frink Dairy Co., 274 U.S. 445, 451–52 (1927); Pierce v. Society of Sisters, 268 U.S. 510, 535–36 (1925); Terrace v. Thompson, 263 U.S. 197, 214–16 (1923); Dawson v. Kentucky Distilleries Co., 255 U.S. 288, 295–96 (1921); Rast v. Van Deman & Lewis, 240 U.S. 342, 355 (1916); Ohio Tax Cases, 232 U.S. 576, 587 (1914); Savage v. Jones, 225 U.S. 501, 520–21 (1912); Ex parte Young, 209 U.S. 123, 161–68 (1908).

[33] 415 U.S. at 462.

pective relief.[34] The Court has failed to consider the possibility of major remedial inadequacies in the criminal defense. Although it has acknowledged certain "extraordinary circumstances,"[35] they seem to get narrower each time the Court construes them. These circumstances have given rise to *Younger*'s limited exceptions.

One exception applies where the prosecution is brought in bad faith "without any hope of ultimate success."[36] But claims of bad faith have been almost impossible to prove.[37] Another exception applies if the state forum is "so biased by prejudgment and pecuniary interest that it could not constitutionally" decide the case.[38] A third possible exception arguably relevant to the analysis here, first suggested in dictum but ignored ever since, would apply where a series of prosecutions is threatened.[39] Another exception, which does not relate to the adequacy of the state remedy, is said to apply where the challenged statute is "flagrantly and patently violative of express constitutional prohibitions in every clause, sentence and paragraph, and in whatever manner and against whomever an effort might be made to apply it."[40] This exception has become meaningless since *Trainor v. Hernandez*.[41] The Court has also said that *Younger* does not apply where the constitutional issue cannot be raised in the state proceeding.[42] This may be characterized either as an exception,

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[34] *Ibid.*

[35] *Kugler*, 421 U.S. at 124–25; *Younger*, 401 U.S. at 53.

[36] Dombrowski v. Pfister, 380 U.S. 479, 490 (1965); see also *Kugler*, 421 U.S. at 124; *Younger*, 401 U.S. at 47–49.

[37] *Juidice*, 97 S. Ct. at 1218–19; *Doran*, 422 U.S. at 929–30 n.3; *Allee*, 416 U.S. at 804–09, 811–21 (opinion of the Court); *id.* at 822–26, 833–46 (Burger, C.J., dissenting in part); *Perez*, 401 U.S. at 118 n.11 (Brennan, J., dissenting in part); Cameron v. Johnson, 390 U.S. 611, 619–22 (opinion of the Court); *id.* at 622–28 (Fortas, J., dissenting). For a review of lower court cases, see Fiss, note 5 *supra*, at 1115–16, n.36.

[38] *Gibson*, 411 U.S. at 578; see also *Trainor*, 97 S. Ct. at 1920 n.10 (opinion of the Court); *id.* at 1931 n.15 (Stevens, J., dissenting); *Juidice*, 97 S. Ct. 1211; *Kugler*, 421 U.S. at 127–29.

[39] *Younger*, 401 U.S. at 49; *cf. Wooley*, 97 S. Ct. at 1434 (multiple prosecutions justify injunction instead of declaratory judgment, where other reasoning justified federal intervention in the first place); *Doran*, 422 U.S. at 929–30 n.3 (multiple prosecution exception not mentioned in list of recognized exceptions).

[40] *Younger*, 401 U.S. at 53–54, quoting from Watson v. Buck, 313 U.S. 387, 402 (1941); see also *Kugler*, 421 U.S. at 125 n.4.

[41] 97 S. Ct. at 1920 (opinion of the Court); *id.* at 1928 (Stevens, J., dissenting); see also *id.* at 1925–26 (Brennan, J., dissenting).

[42] *Trainor*, 97 S. Ct. at 1920 (opinion of the Court); *id.* at 1923–24 (Brennan, J., dissenting); *Gerstein*, 420 U.S. at 108 n.9; *Fuentes*, 407 U.S. at 71 n.3.

based on the inadequacy of the state remedy, or as a situation outside the scope of the doctrine.

The inability of criminal courts to give prospective relief is a much more important remedial inadequacy. The analysis of that inadequacy that follows applies to federal plaintiffs who wish to repeat their violation and to pending criminal prosecutions. Where no repetition is contemplated, prospective relief is unnecessary. Where the pending state litigation is civil, prospective relief may be obtainable within it.[43]

The possibility of state civil relief suggests another question. Assuming a state criminal defendant needs relief unavailable from a criminal court, is he entitled to federal relief, or should he be sent to a state civil court? Careful analysis of that question must be reserved until the competing considerations have been more fully developed. But the presumptive answer is that the relevant jurisdictional statutes[44] give plaintiffs an unrestrained choice of forum, and the Court has always so construed them.[45] The *Younger* doctrine has so far been limited to situations where, in the Court's view, the federal claimant is not entitled to become a plaintiff at all, because he has an adequate remedy as a defendant. To require a federal claimant to initiate state litigation and submit his federal claim to a state court, without any prospect of returning to the federal district court, would be unprecedented, squarely inconsistent with the jurisdictional statutes, and only tenuously related to the policies *Younger* serves.

III. The Inadequacy of the Criminal Defense

Three important powers of equity courts are not available to criminal courts in Anglo-American jurisprudence: the power to give interlocutory relief, the power to give prospective relief, and the power to give class relief. Interlocutory relief is used here to mean relief available before the end of litigation, based on a tentative assessment of the law and facts, to minimize hardship pending

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[43] *Cf.* Stainback v. Mo Hock Ke Lok Po, 336 U.S., 368, 381–84 (1949) (threatened civil enforcement action in court of equity).

[44] 28 U.S.C. § 1343 (1970); 28 U.S.C. § 1331 (1970).

[45] Douglas v. Seacoast Products, Inc., 97 S. Ct. 1740, 1744–45 n.4 (1977); *Doran*, 422 U.S. at 930; *Steffel*, 415 U.S. at 472–73; *Lake Carriers' Ass'n*, 406 U.S. at 510; Zwickler v. Koota, 389 U.S. 241, 248 (1967); McNeese v. Board of Educ., 373 U.S. 668, 671–74 (1963); Monroe v. Pape, 365 U.S. 167, 183 (1961).

final adjudication of the merits. Interlocutory relief is always future oriented; it is a special form of prospective relief. Class relief means relief given to a defined class of litigants, as under Federal Civil Rule of Procedure 23 or comparable state procedures. Although class relief may be retrospective, as in a class action for damages, the only form of class relief relevant here is prospective class relief.

Prospective relief in this context means relief directed to contemplated future violations of the challenged statute—an injunction against enforcement or a binding judgment that the statute cannot constitutionally be applied to the contemplated conduct. To be useful, prospective relief must be available in a pending proceeding or in a proceeding the citizen has power to initiate. In suits for prospective relief, the litigation is focused on future events, and a prospective judgment determines that the contemplated future conduct may or may not be punished. In contrast, a criminal judgment is retrospective. A criminal trial is focused on past events, and the judgment determines only that the alleged past conduct did or did not occur or may or may not be punished. An acquittal, dismissal, or conviction may give rise to inferences about the consequences of future conduct, but it does not determine those consequences of its own force. Some of the inferences that can be drawn from a criminal judgment are based on res judicata and stare decisis; these are indirect but binding consequences of the judgment. As a practical matter, there will often be additional, informal consequences. The Court's opinion may be persuasive even if not binding; the prosecutor may acquiesce, though he is not so bound. The Supreme Court's easy acceptance of the view that a pending prosecution furnishes an adequate remedy may rest on the belief that, if the first decision invalidates the statute, the prosecutor will give up.

It is easy, however, to overestimate the informal consequences of a criminal judgment. Many *Younger* cases involve bitter disputes. *Dombrowski v. Pfister*,[46] *Cameron v. Johnson*,[47] *O'Shea v. Littleton*,[48] and *Allee v. Medrano*[49] involved prolonged battles between entrenched local power structures and political activists seeking a share of that power. *Huffman v. Pursue, Ltd.*,[50] *Hicks v. Miranda*,[51]

[46] 380 U.S. 479 (1965).
[47] 390 U.S. 611 (1968).
[48] 414 U.S. 488 (1974).
[49] 416 U.S. 802 (1974).
[50] 420 U.S. 592 (1975).
[51] 422 U.S. 332 (1975).

and *Doran v. Salem Inn, Inc.*[52] pitted profitable businesses against officials determined to shut them down. In *Gibson v. Berryhill*,[53] a substantial portion of the income of every independent optometrist in Alabama was believed to be at stake. In such litigation, neither side is likely to give up until every legal possibility is exhausted or until the federal plaintiffs are financially unable to continue. *Dombrowski*[54] and *Cameron v. Johnson*[55] went to the Supreme Court twice. *Allee*[56] spent eight years getting there the first time, and there was a related state appeal.[57] After two opinions indicating the probable unconstitutionality of one ordinance regulating the Salem Inn,[58] the Town of North Hempstead enacted another.[59] After that was struck down,[60] the State of New York initiated liquor license revocation proceedings.[61] With nothing but principle at stake for either side, the plaintiff in *Wooley v. Maynard* was arrested three times in five weeks.[62]

When passengers sought to integrate the Jackson, Mississippi, bus terminal, more than 300 prosecutions were brought.[63] There were fifteen directed acquittals,[64] and the Supreme Court ordered a single judge to hold the statute unconstitutional, finding the state's contentions so frivolous that a three-judge court was not required.[65] But these developments did not cause the prosecutor to acquiesce, and due to standing problems the prosecutions were not enjoined.[66]

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[52] 422 U.S. 922 (1975).

[53] 411 U.S. 564 (1973).

[54] Dombrowski v. Eastland, 387 U.S. 82 (1967); Dombrowski v. Pfister, 380 U.S. 479 (1965).

[55] 390 U.S 611 (1968); 381 U.S. 741 (1965).

[56] 416 U.S. at 805–11.

[57] United Farm Wkrs. Organ. Comm. v. La Casita Farms, Inc., 439 S.W.2d 398 (Tex. Civ. App. 1968).

[58] Salem Inn, Inc. v. Frank, 501 F.2d 18 (2d Cir. 1974).

[59] Salem Inn, Inc. v. Frank, 522 F.2d 1045, 1046 (2d Cir. 1975).

[60] *Id.* at 1047.

[61] Salem Inn, Inc. v. Frank, 408 F. Supp. 852 (E.D.N.Y. 1976).

[62] 97 S. Ct. at 1434.

[63] Lusky, *Racial Discrimination and The Federal Law: A Problem in Nullification*, 63 COLUM. L. REV. 1163, 1179–80 (1963).

[64] *Id.* at 1180.

[65] Bailey v. Patterson, 369 U.S. 31, 33–34 (1962).

[66] *Id.* at 32–33.

There were 300 convictions. Many defendants gave up for lack of funds, and the appeals of the others dragged through the state courts[67] while various federal litigants made two more trips to the Court of Appeals.[68]

The Supreme Court's docket includes an unusually high percentage of such bitterly fought cases, but they exist throughout the system. The press reported recently that the United States attorney for the District of New Mexico pledged to prosecute violations of the Antiquities Act of 1906[69] "with vigor, wherever they occur,"[70] despite repeated rulings that the act was unconstitutionally vague.[71] Chicago's disorderly-house ordinance [72] is still enforced[73] after having been held unconstitutional.[74] Professor Amsterdam has collected his own set of examples.[75] Where a challenge is to a statute as applied, the prosecutor may find it especially easy to justify not acquiescing in an initial adverse decision. The point is not that judgments have no informal effects but that such effects cannot be relied on in place of judicial prospective relief.

A. INTERLOCUTORY RELIEF

The original articulation of the inadequacy of the criminal defense in *Ex parte Young* recognized the importance of both interlocutory and permanent prospective relief.[76] And in the post-*Younger* period the Court has reaffirmed the need for both types of relief where no prosecution is pending. *Steffel* made permanent

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[67] Lusky, note 63 *supra*, at 1180.

[68] Bailey v. Patterson, 323 F.2d 201 (5th Cir. 1963); United States v. City of Jackson, 318 F.2d 1 (5th Cir. 1963).

[69] 16 U.S.C. § 433 (1970).

[70] "Warn artifact diggers on U.S. land despite court ruling," Chicago Sun-Times, 29 Aug. 1977, p. 26, col. 1, reporting United States v. Camazine (D.N.M. 1977).

[71] United States v. Diaz, 499 F.2d 113 (9th Cir. 1974); United States v. Camazine, Chicago Sun-Times, 29 Aug. 1977, p. 26, col. 1 (D.N.M. 1977).

[72] See Foster v. Zeeko, 540 F.2d 1310, 1311 (7th Cir. 1976).

[73] Counsel in *Foster v. Zeeko*, note 72 *supra*, stated in an interview that he has been retained by another client arrested in a situation substantially identical with the one there.

[74] Foster v. Zeeko, No. 73 C 891 (N.D. Ill. 1975), *rev'd in part, on other grounds*, 540 F.2d 1310 (7th Cir. 1976).

[75] Amsterdam, *Criminal Prosecution Affecting Federally Guaranteed Civil Rights: Federal Removal and Habeas Corpus Jurisdiction to Abort State Court Trial*, 113 U. PA. L. REV. 793, 841–42 (1965).

[76] 209 U.S. 123, 165 (1908).

prospective relief available in the form of a declaratory judgment.[77] *Doran* affirmed interlocutory relief: a preliminary injunction against enforcement pending a declaratory judgment proceeding, because "unless preliminary relief is available upon a proper showing, plaintiffs in some situations may suffer unnecessary and substantial irreparable harm."[78]

The Court did not feel obliged to cite authority for that proposition. In a wide variety of contexts, it has noted the need to protect against forfeiture of asserted constitutional rights during the pendency of litigation. Temporary losses of rights are important in themselves and may also entail serious consequences in some fact situations. Plaintiffs in *Doran* were tavern owners, threatened by "a substantial loss of business and perhaps even bankruptcy,"[79] if they had to comply with the challenged ordinance. Since states and state and local officials have total or partial immunity from suits for damages[80] and the liability of municipalities is unsettled,[81] there was no assurance that interim losses could be recovered in the event that the statute should ultimately be held unconstitutional. Thus, even easily measurable financial losses are irreparable in this context, as the pre-*Younger* Court explicitly recognized.[82]

Where the federal plaintiff is engaged in political speech, the effect of delay may be the collapse of his candidacy or movement. "A delay of even a day or two may be of crucial importance in some instances."[83] "[E]ach passing day may constitute a separate and cognizable infringement of the First Amendment . . . any First

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[77] 415 U.S. at 462.

[78] 422 U.S. at 931.

[79] *Id.* at 932.

[80] Edelman v. Jordan, 415 U.S. 651 (1974) (states); Tenney v. Brandhove, 341 U.S. 367 (1951) (legislators); Pierson v. Ray, 386 U.S. 547 (1967) (judges); Imbler v. Pachtman, 424 U.S. 409 (1976) (prosecutors); Scheuer v. Rhodes, 416 U.S. 232 (1974) (other officials and employees of the executive branch); Wood v. Strickland, 420 U.S. 308 (1975) (same); Kattan, *Knocking on* Wood: *Some Thoughts on the Immunities of State Officials to Civil Rights Damage Actions*, 30 VAN. L. REV. 941 (1977).

[81] *Compare* Monroe v. Pape, 365 U.S. 167, 187–92 (1961); *with* Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388 (1971); City of Kenosha v. Bruno, 412 U.S. 507, 514 (1973); see Note, 89 HARV. L. REV. 922, 955–58 (1976).

[82] *Compare* Toomer v. Witsell, 334 U.S. 385, 392 (1948); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 584–85 (1952), *with Byrne*, 401 U.S. at 220; see also Sampson v. Murray, 415 U.S. 61, 90–91 (1974) (applying pre-*Younger* analysis to a suit against federal official).

[83] Carroll v. Princess Anne, 393 U.S. 175, 182 (1968), quoting with approval A Quantity of Copies of Books v. Kansas, 378 U.S. 205, 224 (1964) (Harlan, J., dissenting).

Amendment infringement that occurs with each passing day is irreparable."[84]

The importance of temporary deprivations has also been recognized in other contexts, including property rights[85] and racial integration.[86] The preliminary injunction is one of the classic remedies where temporary deprivations impose hardship.[87]

Despite this well-settled law, the Court has ignored the inability of a pending prosecution to furnish interlocutory relief. As a result, it has failed to realize that, even if a pending prosecution is an adequate remedy for a completed violation, it is often no remedy at all for a contemplated future violation.

In *Roe v. Wade*,[88] where the issue was squarely presented, the Court failed to see that past and contemplated future violations can be present in the same case. In fact, both are present whenever, as is common in *Younger* cases, the plaintiff is engaged or desires to engage in a continuing course of conduct. In *Roe*, the Court denied relief to plaintiff Dr. Hallford because prosecutions for abortion were pending against him.[89] The doctor sought "to distinguish his status as a present state defendant from his status as a 'potential

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[84] Nebraska Press Ass'n v. Stuart, 423 U.S. 1327, 1329 (1975) (Blackmun, J., in chambers). See also National Socialist Party v. Village of Skokie, 97 S. Ct. 2205, 2206 (1977); Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 560–61 (1976); Walker v. City of Birmingham, 388 U.S. 307, 324–25; *id.* at 331 (Warren, C.J., dissenting); *id.* at 336 (Douglas, J., dissenting); *id.* at 348–49 (Brennan, J., dissenting) (1967).

[85] North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601, 606, 608 (1975); Mitchell v. W. T. Grant Co., 416 U.S. 600, 608 (1974); *Fuentes*, 407 U.S. at 81–82, 84–86; Goldberg v. Kelly, 397 U.S. 254, 264 (1970); Sniadach v. Family Finance Corp., 395 U.S. 337, 339 (1969); Oklahoma Natural Gas Co. v. Russell, 261 U.S. 290, 293 (1923).

[86] Carter v. West Feliciana Parish School Bd., 396 U.S. 290 (1970); Alexander v. Holmes County Bd. of Educ., 396 U.S. 19 (1969); Rogers v. Paul, 382 U.S. 198, 199–200 (1965); Bradley v. School Bd., 382 U.S. 103, 105 (1965); Griffin v. County School Bd., 377 U.S. 218, 233–34 (1964); Watson v. City of Memphis, 373 U.S. 526, 532–33, 539 (1963).

[87] See *Doran*, 422 U.S. at 930–34; Brown v. Chote, 411 U.S. 452, 456–57 (1973); Carter v. West Feliciana Parish School Bd., 396 U.S. 226 (1969); Rogers v. Paul, 382 U.S. 198, 199–200 (1965); City of New Orleans v. Barthe, 376 U.S. 189 (1964), *aff'g* 219 F. Supp. 788 (E.D. La. 1963); Gremillion v. United States, 368 U.S. 11 (1961), *aff'g* Bush v. Orleans Parish School Bd., 194 F. Supp. 182 (E.D. La. 1961); Tugwell v. Bush, 367 U.S. 907 (1961), *aff'g* Bush v. Orleans Parish School Bd., 194 F. Supp. 182 (E.D. La. 1961); Louisiana ex rel. Gremillion v. NAACP, 366 U.S. 293 (1961); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 584–85 (1952); Oklahoma Natural Gas Co. v. Russell, 261 U.S. 290, 293 (1923); Ex parte Young, 209 U.S. 123, 165 (1908).

[88] 410 U.S. 113 (1973).

[89] *Id.* at 125–27.

future defendant' and to assert only the latter for standing purposes" in federal court.[90] The Court rejected the argument in seven words with no analysis at all: "We see no merit in that distinction."[91]

The Court did not look very hard. If Hallford's constitutional claims had been vindicated, he would ultimately have been acquitted, and the prosecutions would have furnished a remedy with respect to the two completed abortions. But meanwhile, what was he to do with subsequent patients? As to them, he faced precisely the dilemma described in *Steffel:* he could perform the abortions, risking further indictments and consecutive sentences if his constitutional claims were rejected, or he could await the outcome of the pending litigation, forever forfeiting his asserted rights with respect to patients who reached term and delivered or sought abortions elsewhere during the pendency of the litigation. The pending prosecutions would furnish no remedy at all with respect to those patients.

An equity court confronted with Hallford's case may well have denied interlocutory relief. Motions for preliminary injunctions against enforcement of abortion laws presented extraordinarily difficult questions before the Supreme Court's decisions on the merits. But refusal to recognize the federal claimant's status as a potential future defendant keeps the case out of the equity court altogether and prevents those questions from even being explored. In the abortion litigation subsequent to the Supreme Court's landmark decisions, requests for interlocutory relief were much simpler, for the probabilities of success on the merits had dramatically shifted. But federal claimants who were prosecuted could not present such requests; they were barred from the equity court.

Another example is *Cameron v. Johnson.*[92] There, beginning in January 1964, civil rights organizations picketed the courthouse in Hattiesburg, Mississippi, staying within a "march route" designated by the sheriff to facilitate public access to the courthouse. On April 8, Mississippi passed a new Anti-picketing Law, and on April 9, the sheriff dispersed the Hattiesburg picketers. They reappeared on the morning of April 10 and were arrested. More arrests were made on the afternoon of April 10 and on April 11. The federal complaint was filed April 13; arrests resumed on May 18. Picketing then

[90] *Id.* at 126.

[91] *Ibid.*

[92] 390 U.S. 611 (1968).

stopped and had not been resumed when the Supreme Court denied relief four years later.

The arrests stopped the picketing, and the pending prosecutions were no remedy. Equity could have protected the picketers' rights by defining a nonobstructive march area and enjoining arrests as long as the picketers stayed within it. The remedy could have been implemented quickly, by temporary restraining order or preliminary injunction, and adjusted as necessary thereafter. The criminal courts could do none of these things, and ultimate acquittals may not revive a dead movement.

In *Doran v. Salem Inn*, where the Court affirmed a preliminary injunction, it denied relief to coplaintiff M & L Restaurant.[93] M & L was defendant in a pending prosecution filed after the federal complaint but before the district court issued the preliminary injunction. Salem Inn had avoided prosecution by complying with the new ordinance until the preliminary injunction was obtained; the two plaintiffs were otherwise similarly situated.

Why the delay that would irreparably injure Salem Inn would not injure M & L or how the state criminal court could alleviate such injury was not explained. The Court simply said that the case was controlled by *Younger* and *Samuels* and that M & L could not "complain that its constitutional contentions are being resolved in a state court," because it had "violated the ordinance, rather than awaiting the normal development of its federal lawsuit."[94]

The Court did leave open for consideration on remand M & L's claim "that it was the subject of 'repetitive harassing criminal prosecutions aimed at suppressing' " topless dancing, declining to consider the issue on the "spare record" before it.[95] That record showed that each day's violation was a separate offense and that M & L and its dancers had been criminally charged on four consecutive days after they resumed dancing.[96] No further proceedings are reported with respect to this aspect of the remand. It is not clear what additional showing the Court expected. Perhaps, given the wording of M & L's contention, the Court was thinking in terms of the prosecutor's motive or a claim of bad-faith harassment. What is clear is that every day M & L and its dancers had to decide whether to risk violating the statute, knowing that they could be arrested on the spot or charged later in a massive multicount indictment and that

[93] 422 U.S. at 924–25, 929.

[94] *Id.* at 929.

[95] *Id.* at 929–30 n.3.

[96] *Id.* at 925 & n.1.

their potential punishment at least equalled the maximum penalty times the number of days within the statute of limitations. The pending prosecutions furnished no remedy for their dilemma, and equitable relief should not depend on speculation about prosecutorial motive. Once one prosecution is filed, "even an accused relatively confident of the unlikelihood or impermissibility of conviction may well refuse to take the added risk of further criminal penalties that might obtain if he guesses wrong."[97]

These examples are not atypical; they illustrate a general principle.[98] If the challenged statute regulates a citizen's course of conduct, then immediately after his first indictment he faces the *Steffel* dilemma more acutely than ever before. He must now decide whether to repeat his violation, knowing that he could be prosecuted for each repetition and that the prosecutor's attention is focused on him. Under present law, he has forfeited any federal forum for the prospective relief he needs. To obtain relief, he had to obey the statute from its enactment (or from the time he first contemplated his course of conduct) until he got an injunction against enforcement or until substantial proceedings on the merits had occurred in federal court. It is possible to read *Wooley v. Maynard*[99] as substantially changing these requirements, but that is probably not what the Court intended.

The Court has decided sixteen major cases under *Younger* and the previous leading case, *Dombrowski v. Pfister*.[100] Eleven of these cases involved continuing courses of conduct to which the foregoing analysis is fully applicable.[101] Moreover, ten of the eleven were speech cases,[102] and seven of those involved political speech.[103]

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[97] A Quantity of Copies of Books v. Kansas, 378 U.S. 205, 224 (1964) (Harlan, J., dissenting).

[98] For a similar but more limited analysis, see Note, note 5 *supra*, at 1305–08.

[99] 97 S. Ct. 1428 (1977); see text *infra* at 212–14.

[100] 380 U.S. 479 (1965).

[101] The five major cases not involving continuing courses of conduct are *Trainor*, 97 S. Ct. 1911 (due process challenge to state procedure); *Juidice*, 97 S. Ct. 1211 (same); *Kugler*, 421 U.S. 117 (same); *Rizzo*, 423 U.S. 362 (challenge to police brutality); *O'Shea*, 414 U.S. 488 (challenge to alleged racial discrimination in criminal justice system).

[102] *Wooley*, 97 S. Ct. 1428; *Doran*, 422 U.S. 922; *Hicks*, 422 U.S. 332; *Huffman*, 420 U.S. 592; *Allee*, 416 U.S. 802; *Steffel*, 415 U.S. 452; *Samuels*, 401 U.S. 66; *Younger*, 401 U.S. 37; *Cameron*, 390 U.S. 611; *Dombrowski*, 380 U.S. 479; the nonspeech case is *Gibson*, 411 U.S. 564.

[103] The three exceptions are *Doran*, *Hicks*, and *Huffman*.

There are hints in some of Mr. Justice Rehnquist's opinions that citizens should not be allowed to violate challenged statutes pending adjudication of their validity.[104] But it is not necessary that such violations be always permitted or always forbidden. The law relating to interlocutory injunctions is well developed and expressly designed to make individual determinations concerning such issues. The equity judge must consider the probable final result as well as the consequences to each side of an erroneous preliminary determination.[105] The injunction may be conditional if that is necessary to protect all the parties,[106] as it could have been, for example, in *Cameron v. Johnson*.[107]

In speech cases, the balance of hardships and probability of success will often tip decidedly in favor of the federal court plaintiff. Yet *Younger* has denied protection to speech for significant periods of time. Of course, it is not entirely fair to compare the promptness of a federal TRO with the delay of three appeals. To compare the potential timeliness of relief, one must assume that both courts will vindicate the constitutional claim at their first opportunity. Thus the comparison is between the federal TRO and the final judgment in the state trial court. How soon that judgment may be obtained depends on several factors: whether the constitutional issue requires factual development or can be resolved on the pleadings, whether state procedure allows the issue to be raised on the pleadings,[108] and whether the state docket is current. But it is clear that a criminal court can never responsibly reach final judgment as quickly as an equity court can grant preliminary relief. Even where the statute is "patently and flagrantly unconstitutional on its face," a criminal court judge should permit briefs before dismissing the indictment. An equity judge could immediately restrain enforcement pending final judgment. Moreover, in assessing the consequences of delay in any particular case, the equity judge must consider the possibility that one or more appeals might be required to vindicate the federal right in the criminal case.

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[104] *Doran*, 422 U.S. at 929 (opinion of the Court by Rehnquist, J.); *Steffel*, 415 U.S. at 479–80 (Rehnquist, J., concurring).

[105] *Doran*, 422 U.S. at 931; Diversified Mortgage Investors v. U.S. Life Title Ins. Co., 544 F.2d 571, 576 (2d Cir. 1976); Fiss, Injunctions 168–69 (1972).

[106] Locomotive Eng'rs v. Missouri-Kan.-Tex. R. Co., 363 U.S. 528, 531–32 (1960).

[107] 390 U.S. 611 (1968); see text *supra*, at note 92.

[108] *Younger*, 401 U.S. at 57 n.* (Brennan, J., concurring).

This does no violence to the Supreme Court's assumption that the state courts will protect federal rights; it simply acknowledges the reality that errors occur in any system.

The interlocutory injunction is not a complete remedy. It does not forever prevent prosecution of violations committed under its protection; it temporarily prevents prosecution of all violations described in the order. If the final judgment holds the statute valid, dissolves the interlocutory injunction, and denies permanent relief, state officials would be free to prosecute any violation within the limitations period. To prevent that, the federal court would have to enjoin permanently prosecutions for any violations committed while the interlocutory injunction was in effect.

There are cases indicating that such injunctions should be issued,[109] but they do not squarely address the difficult questions involved. While the case for protecting litigants who relied in good faith on the interlocutory order of a federal court is strong, so is the argument that there is no federal power to enjoin enforcement of a constitutional state statute. One source of such authority may be the power to do complete equity in the case once jurisdiction is assumed, but that argument is clouded by recent decisions emphasizing that "federal remedial power may be exercised 'only on the basis of a constitutional violation.' "[110] Another possibility is to hold that the state denies due process when it imposes penalties in ways which deter access to normal judicial remedies.[111] As long as this issue remains unresolved or if it is resolved adversely to federal court plaintiffs, the risk of ultimate prosecution may have some chilling effect despite an interlocutory injunction.

The risk of ultimate prosecution does not make the interlocutory injunction unimportant. In political speech cases or cases where time

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[109] Oklahoma Operating Co. v. Love, 252 U.S. 331, 338 (1920); Wadley Southern Ry. v. Georgia, 235 U.S. 651, 659 (1915); City of Marysville v. Standard Oil Co., 27 F.2d 478, 487 (8th Cir. 1928), *aff'd on other grounds*, 279 U.S. 582 (1929).

[110] Milliken v. Bradley, 418 U.S. 717, 738 (1974), quoting with approval from Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 16 (1971); accord, Hills v. Gautreaux, 425 U.S. 284, 293 (1976).

[111] North Carolina v. Pearce, 395 U.S. 711, 723–26 (1969); St. Regis Paper Co. v. United States, 368 U.S. 208, 225–27 (1961); Natural Gas Pipeline Co. v. Slattery, 302 U.S. 300, 309–10 (1937); Life & Casualty Co. v. McCray, 291 U.S. 566, 574–75 (1934); Oklahoma Gin Co. v. Oklahoma, 252 U.S. 339 (1920); Wadley Southern Ry. v. Georgia, 235 U.S. 651 (1915); Missouri Pacific Ry. Co. v. Tucker, 230 U.S. 340 (1913); Ex parte Young, 209 U.S. 123, 145–48 (1908); Cotting v. Kansas City Stockyards Co., 183 U.S. 79, 99–102 (1901); *cf.* Bounds v. Smith, 97 S. Ct. 1491, 1495 (1977) (right of meaningful access to courts for prisoners); Wolff v. McDonnell, 418 U.S. 539, 579 (1974) (same); but see Yakus v. United States, 321 U.S. 414, 437–43 (1944).

is of the essence, litigants may be willing to risk prosecution at some indefinite future time, if they are free to speak or act at the critical moment without interruption by arrests, arraignments, and jailings. Their courage should get a further boost from a preliminary judicial determination that the statute is probably unconstitutional. In most cases, the preliminary determination will stand. In nonpolitical cases, if the statute is upheld and the federal plaintiff indicates an intention to comply, the primary dispute may be over. The prosecutor may choose not to bring multiple prosecutions for all the violations which took place under protection of the preliminary injunction or even any of them. Such violations do not show disrespect for law, and there is no reason to prosecute except vindictiveness. Of course, where the litigation is one battle in a larger underlying dispute, there may be multiple prosecutions simply to intimidate. If prosecutions are brought, reliance on the injunction may be a defense.[112] Where it is not a defense, the sentencing judge may take it into consideration.

These possibilities depend in part on the Court's assumption that state officials will act in good faith. Some will act in good faith even if all will not. And if major penalties are imposed for no apparent reason except retaliation for the federal lawsuit, the argument for federal intervention under the Due Process Clause is substantially strengthened.[113]

None of these considerations, individually or collectively, insures that a federal plaintiff can rely on an interlocutory injunction with complete safety. But they do suggest that an interlocutory injunction against enforcement significantly reduces the deterrent effect of an allegedly unconstitutional statute and thus significantly eases the dilemma described in *Steffel*. The remedy is thus far more practical and efficient, and more nearly complete, than the defense of a pending prosecution. That is the traditional test for determining the adequacy of a legal remedy.[114]

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[112] United States v. Mancuso, 139 F.2d 90, 92 (3d Cir. 1943); City of Marysville v. Cities Service Oil Co., 133 Kan. 692 (1931); *cf.* United States v. Barker, 546 F.2d 940, 946–54 (D.C. Cir. 1976) (Wilkey, J., concurring); *id.* at 954–57 (Merhige, J., concurring) (mistake of law defense); A.L.I., MODEL PENAL CODE § 2.04(3)(b)(ii) (Prop. Off. Draft, 1962) (reliance on erroneous judicial opinion).

[113] *Cf.* North Carolina v. Pearce, 395 U.S. 711, 723–26 (1969) (increased sentence after retrial in retaliation for appealing first conviction denies due process).

[114] American Life Ins. Co. v. Stewart, 300 U.S. 203, 214–15 (1937); Terrace v. Thompson, 263 U.S. 197, 214 (1923); May v. LeClaire, 11 Wall. 217, 236 (1870); 30 C.J.S., *Equity* § 25 (1965) (collecting cases).

Of course there is some possibility that there will be no additional punishment for multiple violations pending a test case. But it would be foolhardy for defendants to assume that result and act on it and unreasonable for courts to expect them to do so. Reliance on one's own partisan view that a statute is unconstitutional is not nearly as persuasive an extenuating circumstance as reliance on an interlocutory injunction against enforcement. In *Steffel*, the Court referred to acting on one's own view of constitutionality as "intentionally flouting state law."[115]

The only informal solution worthy of serious consideration is a promise to bring only one test prosecution until the constitutional issue is resolved. The Court considered such a representation irrelevant in *Ex parte Young*[116] but relied on it in two of the deviant cases cited in *Younger*.[117]

A bare promise not to bring further prosecutions during the test case is inadequate. It includes no promise to refrain from prosecution of later violations committed during the pendency of the test case if the state wins it, no hope for permanent injunctive protection from such prosecutions, and no interlocutory determination of probable constitutionality to reduce the risk of reliance. Furthermore, it is not at all clear that such representations would be enforceable, either in state[118] or in federal court. Federal power to enjoin prosecutions in violation of such a representation must be based on an estoppel theory,[119] on a theory that due process requires that representations which induced the withholding of relief be enforced, or on the power to do complete equity in the case.[120] It

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[115] 415 U.S. at 462; see text *supra*, at note 33; *Doran*, 422 U.S. at 934 (Douglas, J., dissenting in part).

[116] 209 U.S. at 171–72 (Harlan, J., dissenting).

[117] Beal v. Missouri Pacific R. Co., 312 U.S. 45, 50 (1941); Spielman Motor Sales Co. v. Dodge, 295 U.S. 89, 96 (1935).

[118] *Compare* United States v. Laub, 385 U.S. 475, 485–87 (1967); Raley v. Ohio, 360 U.S. 423, 437–42 (1959); *with* State v. Smith, 12 Wash. App. 514, 520 (1975); Giant of Md., Inc. v. State's Atty., 274 Md. 158, 179 (1975); Hopkins v. State, 193 Md. 489, 498 (1950), *appeal dismissed*, 339 U.S. 940 (1950). *Compare* State v. Rollins, 359 A.2d 315, 317–18 (R.I. 1976); *with* State v. Davis, 188 So.2d 24 (Fla. Ct. App. 1966); see also Santobello v. New York, 404 U.S. 257 (1971); Doyle v. State, 59 Tex. Cr. 39, 41 (1910).

[119] *Compare* Federal Crop Ins. Corp. v. Merrill, 332 U.S. 380 (1947); *with* Moser v. United States, 341 U.S. 41 (1951); Berger, *Estoppel against the Government*, 21 U. CHI. L. REV. 680 (1954); Rapp, *Squaring Corners: A Proposal for Legislative Application of Equitable Estoppel against the Government*, 64 ILL. B. J. 688 (1976); *with* Comment, 46 U. COLO. L. REV. 433 (1975); see also cases cited in note 118 *supra*.

[120] But see text *supra*, at note 110.

is not sufficient to hold out the possibility of subsequent action if the representation is dishonored, unless it is clear that there will be power to grant effective relief in that event.

The enforcement problem could be solved in either of two ways. The prosecutor could consent to an injunction. Alternatively, the Supreme Court could hold that a stipulation not to prosecute in these circumstances is enforceable by the federal court, which should retain jurisdiction for the purpose. Either a consent decree or an enforceable stipulation would be nearly the equivalent of a contested interlocutory injunction, but neither would include a judicial prediction concerning the merits. To avoid the additional deterrent effect created by that defect, the consent decree or stipulation should permanently preclude prosecution for additional violations committed before final resolution of the test case.

Such procedures could preserve both interlocutory rights and the primacy of the state criminal forum. There would be a cost to the state. Violations would be permitted in cases where the court would deny interlocutory relief. The state may be willing to pay that cost to keep out of federal court, and as long as we assume the fairness of the state forum, the would-be federal plaintiff should not be allowed to complain. But neither should the federal court plaintiff be required to rely on vague or unenforceable prosecutorial statements. In the absence of a consent decree or a clearly enforceable stipulation, an interlocutory injunction against any new prosecutions should be available where the normal requirements are met.

As noted, the post-*Younger* Court acknowledged the need for prospective relief in *Steffel* and temporary relief in *Doran*. The Court took another important step last term in *Wooley v. Maynard*. *Wooley* acknowledged the need for prospective relief where the federal plaintiff had been thrice convicted without appealing.[121] The defendant state officials argued that under *Huffman*[122] plaintiff was barred from federal court by his earlier failure to exhaust state appellate remedies. The Court quickly rejected this contention on the ground that "the relief sought is wholly prospective."[123] Plaintiff sought "only to be free from prosecutions for future violations" and did not seek to "annul" his earlier convictions or "any

[121] 97 S. Ct. at 1432–33.

[122] See text *supra*, at note 14.

[123] 97 S. Ct. at 1433.

collateral effects those convictions may have."[124] *Huffman* was distinguished because there the state court had closed the plaintiff's theater on account of past violations, and the relief sought had been to prevent enforcement of the state court judgment. In short, the Court accepted, at least in the context of unexhausted appeals, the distinction between past and future violations rejected in *Roe v. Wade*.[125] *Wooley*'s theoretical foundation can only be the inability of the criminal court to give prospective relief.

The intended scope of *Wooley* is unclear. The narrowest possible reading is that *Wooley* simply limits the application of *Huffman*'s requirement that appeals be exhausted and that *Wooley* does not apply where there is actually a pending prosecution. But that reading is untenable.[126] The requirement that appellate remedies be exhausted is not a supplemental requirement of less importance than the requirement that no prosecution be pending. Rather, it is an integral part of the *Younger* doctrine's basic rule that, once a state proceeding begins, the constitutional claims must be resolved there. Indeed, the Court quite plausibly suggested in *Huffman* that federal intervention is worse after the state trial than before.[127] This makes it impossible to limit *Wooley* to the appellate-exhaustion requirement.

Rather, *Wooley* is distinguishable from *Huffman* and from *Younger* itself only by the federal plaintiff's prayer for relief.[128] The plaintiff in *Wooley* sought only relief that could not have been obtained in the unexhausted appeals. If he had appealed, he would still have been subject to new prosecutions and to the dilemma of whether to comply pending the appeals. This would have been equally true if the time for appeal had not yet expired when the federal complaint was filed, if appeals had been taken and were still pending, if a fourth prosecution had been initiated, or even if the original prosecutions were still pending in the trial court. The result in *Wooley* should not have been different in any of these situations. In each, plaintiff should have been entitled to prospective

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[124] *Ibid.*

[125] 410 U.S. at 126; see text *supra*, at notes 88–91.

[126] See Fiss, note 5 *supra*, at 1141–42.

[127] 420 U.S. at 608–09; see also Amsterdam, note 75 *supra*, at 835–36.

[128] *Cf.* Note, note 5 *supra*, at 1317–22 (other ways in which nature of plaintiff's claim affects applicability of *Younger*).

relief even if the pending prosecutions themselves could only be fought in state court.

Once this is recognized, there is no reason to make the pleading rule a trap for the unwary. If plaintiffs seeking only prospective relief are entitled to it, then plaintiffs seeking some prospective relief and some retrospective relief should be entitled to the prospective portion. It is not suggested that the Court intended all this in *Wooley*, but it is suggested that no rational line will be found between *Wooley* and a substantial retrenchment of the *Younger* doctrine.

B. PERMANENT PROSPECTIVE RELIEF

No order of the criminal court can have the effect of an interlocutory injunction. But its judgment may have predictable effects on future litigation, and some of these effects may be nearly as useful to litigants as a prospective final judgment. These effects are both formal and informal; they derive from res judicata, stare decisis, and the persuasive effect of court opinions.

Res judicata is a general term; it includes bar and merger, the rule that the same cause of action may not be relitigated, and collateral estoppel, the rule that issues determined adversely to a party in one litigation may not be relitigated by him in another cause of action.[129] If a final judgment of dismissal or acquittal is unambiguously based on the unconstitutionality of the statute and if that constitutional determination is given full collateral estoppel effect in subsequent prosecutions against the same defendant, then the defendant may rely on the criminal judgment to nearly the same extent that he would rely on a prospective judgment.

Whether or not collateral estoppel applies, the decision may be given stare decisis effect. In most states, this will occur only if the constitutional decision is made by an appellate court in a published opinion.[130] Stare decisis gives some prospective benefit to all potential defendants, although that effect is not as strong as collateral estoppel.

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[129] See Sea-Land Services, Inc. v. Gaudet, 414 U.S. 573, 593 (1974); Ashe v. Swenson, 397 U.S. 436, 443 (1970); Larsen v. Northland Transp. Co., 292 U.S. 20, 25 (1934); LOUISELL & HAZARD, CASES AND MATERIALS ON PLEADING AND PROCEDURE: STATE AND FEDERAL 618–19 (3d ed. 1973).

[130] See cases collected in 21 C.J.S. *Courts* § 200 (1940); *id.* (1977 Supp.); 20 AM. JUR.2d *Courts* §§ 189, 201 (1965); *id.* (1977 Supp.)

Whether there is collateral estoppel in this context depends on each state's resolution of two subsidiary issues which have caused a good deal of confusion and disagreement. Does collateral estoppel apply to criminal judgments, and does it apply to issues of law? The federal rule that collateral estoppel does apply to criminal judgments has been made applicable to the states through the Double Jeopardy Clause.[131] But where the indictment is dismissed on motion before jeopardy attaches, the state remains free to apply its own law. The *Restatement* does not address the issue,[132] and at least some states have denied collateral estoppel effect to criminal judgments.[133]

As to issues of law, there is no governing federal rule. Instead, there are two competing lines of authority. Some cases suggest that estoppel applies to facts and to mixed law and fact, but not to pure law.[134] Others apply estoppel to all issues actually and necessarily determined without distinction between factual and legal issues.[135] One recent Supreme Court opinion denying estoppel effect to a legal conclusion gave no indication whether it was applying a general rule or a recognized exception which happened to fit the facts.[136] Elsewhere, there is a noticeable trend toward giving estoppel effect to legal determinations, subject to specified exceptions.[137]

Thus a criminal court may provide relief which is prospective in effect, if not in theory, in states which give collateral estoppel effect to issues of law decided in criminal cases, after defendant's

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[131] Turner v. Arkansas, 407 U.S. 366 (1972); Harris v. Washington, 404 U.S. 55 (1971); Ashe v. Swenson, 397 U.S. 436, 443–45 (1970).

[132] A.L.I., RESTATEMENT OF JUDGMENTS, Scope Note, at 2 (1942).

[133] State v. Ashe, 350 S.W.2d 768, 770–71 (Mo. 1961).

[134] See Ashe v. Swenson, 397 U.S. 436, 443 (1970); FPC v. Amerada Pet. Corp., 379 U.S. 687, 690 (1965); Yates v. United States, 354 U.S. 298, 336 (1957); Partmar Corp. v. Paramount Pictures Theatres Corp., 347 U.S. 89, 103 n.9 (1954); Commissioner v. Sunnen, 333 U.S. 591, 601–02 (1948); United States v. Moser, 266 U.S. 236, 242 (1924).

[135] See Emich Motors Corp. v. General Motors Corp., 340 U.S. 558, 569 (1951); State Farm Mut. Auto Ins. Co. v. Duel, 324 U.S. 154, 162 (1945); United States v. Stone & Downer Co., 274 U.S. 225, 230 (1927); Collins v. Loisel, 262 U.S. 426, 430 (1923); United States v. Oppenheimer, 242 U.S. 85 (1916); Frank v. Mangum, 237 U.S. 309, 334 (1915); Nalle v. Oyster, 230 U.S. 165, 181 (1913).

[136] Whitcomb v. Chavis, 403 U.S. 124, 162–63 (1971) (plurality opinion).

[137] *Compare* A.L.I., RESTATEMENT OF JUDGMENTS § 70 (1942); *with* A.L.I., RESTATEMENT (SECOND) OF JUDGMENTS §§ 68, 68.1(b), and Comment on Clause (b) at 29–35 (Tent. Draft No. 4, 1977); *compare* JAMES, CIVIL PROCEDURE § 11.22 (1965); *with* JAMES & HAZARD, CIVIL PROCEDURE § 11.20 (2d ed. 1977).

constitutional claims are vindicated by the trial court and, in all states, after such claims are upheld on appeal.

The judgment has no prospective effect on the constitutional issue if that issue is not reached, and the state court may be obliged to avoid reaching it if possible.[138] Avoidance may be fairly easy in some cases, especially where the challenge is to the statute as applied. If the citizen wins in the trial court, the prosecutor may not be allowed to appeal.[139] Certainly he cannot be forced to appeal. The trial court judgment generally has no stare decisis effect, and its collateral estoppel effect may depend on quite unsettled state law or be denied by the state altogether. The *Restatement* suggests that the loser of the first case should not be bound by collateral estoppel if he could not appeal.[140] This rule cannot be applied where the Double Jeopardy Clause controls. But until the Supreme Court definitively decides that legal issues must be given collateral estoppel effect, the Double Jeopardy Clause does not control the situation under analysis. The limited prospective effect of trial court judgments is especially important, because the stronger the defendant's federal claim, the more likely he is to win in the trial court.

The prospective benefit of stare decisis is subject to the risk that the decision will be overruled. Similarly, the *Restatement* provision suggesting collateral estoppel effect for issues of law includes an exception for cases where "a new determination is warranted in order to take account of an intervening change in the applicable legal context or otherwise to avoid inequitable administration of the laws."[141] In either of these situations, prosecution for intervening violations should be precluded,[142] but that issue is also unsettled.[143]

In contrast, the injunction directly prevents future prosecution.

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[138] *Cf.* Ashwander v. TVA, 297 U.S. 288, 346–48 (1936) (Brandeis, J., concurring) (federal courts).

[139] *Compare* United States v. Jenkins, 420 U.S. 358 (1975); *with* United States v. Wilson, 420 U.S. 332 (1975); and both with Tex. Code Crim. Proc. Ann. art. 44.01 (Vernon 1977) (no appeal by state under any circumstances).

[140] A.L.I., RESTATEMENT (SECOND) OF JUDGMENTS § 68.1(a) (Tent. Draft No. 4, 1977).

[141] *Id.* at § 68.1(b)(ii).

[142] Bouie v. City of Columbia, 378 U.S. 347 (1964); State v. O'Neil, 147 Iowa 513 (1910).

[143] See State v. Hoover, 59 Ala. 57, 60 (1877); *cf.* Dobbert v. Florida, 97 S. Ct. 2290, 2300 (1977) (new death penalty statute applied to crime committed when former unconstitutional death penalty statute was in effect).

And whatever the general resolution of the question whether estoppel applies to issues of law, a federal declaratory judgment that a statute is unconstitutional must be given estoppel effect. Although the Court has treated the issue as open,[144] such judgments cannot fulfill the purpose for which the statute was enacted unless they are binding. The legislative history makes clear that Congress intended that declaratory judgments be available to test the constitutionality of state laws without risk of prosecution.[145] That purpose simply cannot be achieved if the resulting declaration of unconstitutionality is not binding. Moreover, if not binding, it would be only an unconstitutional advisory opinion.[146] Thus, the statutory provision that declaratory judgments "shall have the force and effect of a final judgment or decree,"[147] binding on the states under the Supremacy Clause, must be read as referring to res judicata.[148]

Of course even prospective judgments are not forever unchangeable. Injunctions may be modified,[149] and the collateral estoppel effect of a declaratory judgment may come to an end if there is a substantial change in controlling law. But this is better than a judgment with no collateral estoppel effect at all. In addition, the risk of prosecution for intervening violations is smaller. Allowing such prosecutions is inconsistent with the congressional purpose to create a risk-free remedy in the Declaratory Judgment Act. The burden of showing that an injunction should be modified is on the party seeking the modification,[150] and to modify a permanent injunction

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[144] *Steffel*, 415 U.S. at 470–71 (opinion of the Court), quoting with approval from *Perez*, 401 U.S. at 125 (Brennan, J., concurring in part); 415 U.S. at 480–84 (Rehnquist, J., concurring).

[145] H.R. REP. No. 1264, 73d Cong., 2d Sess. (1934); S. REP. No. 1005, 73d Cong., 2d Sess. (1934). The history of this act is reviewed in *Steffel*, 415 U.S. at 465–68; *Perez*, 401 U.S. at 111–15, 125 n.16 (Brennan, J., concurring in part).

[146] Imperial Irrigation Dist. v. Nevada-Cal. Elec. Corp., 111 F.2d 319, 320–21 (9th Cir. 1940); but see Note, 46 U.S.C. L. REV. 803, 832–41 (1973).

[147] 28 U.S.C. § 2201 (1970).

[148] *Steffel*, 415 U.S. at 477 (White, J., concurring); A.L.I., RESTATEMENT OF JUDGMENTS § 77 (1942); A.L.I., RESTATEMENT (SECOND) OF JUDGMENTS § 76, and Reporter's Notes, Comment b at 29–31 (Tent. Draft No. 3, 1976); Note, note 146 *supra*, at 803.

[149] Pasadena City Bd. of Educ. v. Spangler, 427 U.S. 424, 437–38 (1976); Dombrowski v. Pfister, 380 U.S. 479, 492 (1965); System Federation v. Wright, 364 U.S. 642 (1961); Glenn v. Field Packing Co., 290 U.S. 177 (1933).

[150] United States v. United Shoe Machinery Corp., 391 U.S. 244, 248–49 (1968); United States v. Swift & Co., 286 U.S. 106 (1932).

in a way which would penalize past acts done in reliance on it would be seriously inconsistent with equitable doctrine.[151] Consideration of reliance on an injunction fits much more easily into equity doctrine than consideration of reliance on precedent fits into criminal law and its constitutional limitations.

The foregoing analysis of the legal effects of a favorable criminal judgment shows that they fall far short of assuring uninterrupted future exercise of the claimed federal right. But the prosecutor will not always take advantage of those defects. In some cases, he will give up after one acquittal or dismissal. Those cases are surely not negligible in number, but even more surely, they are nowhere near all. Nor is it possible to know in advance what the prosecutor will do. Thus, at the time the *Younger* doctrine requires dismissal of the federal case, it is often impossible to know whether the state remedy will be adequate even in effect.

In a case where interlocutory relief is denied or not sought, a federal court committed to maintaining the state criminal court as the primary forum might stay proceedings in its own case and await events or even dismiss without prejudice. If the state court reaches the federal issue and rules in favor of the federal plaintiff and the state accepts that decision, permanent prospective relief is unnecessary. But at the first clear sign that a second round of litigation will be required, all assumptions of adequacy must be rejected. At that point, the federal court must take as its premise that the state cannot permanently vindicate the federal right and proceed accordingly. Certainly it should not defer to a second pending proceeding in the same way it deferred to the first. And the delay caused by the initial stay should be taken into account if the plaintiff seeks interlocutory relief when the federal case resumes.

Given the limited prospective effects of a criminal judgment, the second prosecution may have some hope of success and thus be in good faith under present law.[152] Repeated prosecutions ending in repeated trial court invalidation of the statute might ultimately support a showing of bad-faith harassment. But that does not make the first criminal defense an adequate remedy. Nor are a series of such defenses followed by a federal lawsuit an adequate remedy;

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[151] DOBBS, HANDBOOK ON THE LAW OF REMEDIES § 2.4, at 52 (1973).

[152] See text *supra*, at notes 36–37.

remedies that require multiple litigation have always been held inadequate.[153]

The Supreme Court has not spoken to these considerations, even implicitly. They were not involved in *Wooley*,[154] because the state court rejected the constitutional claims. Had plaintiff pursued appeals, the state case would still have been pending, and plaintiff would have needed interlocutory relief. That is sufficient to explain not penalizing his failure to exhaust those appeals.

C. CLASS RELIEF

Even giving collateral estoppel effect to the legal conclusions underlying the state criminal judgment is inadequate if the federal case is properly brought as a class action. Theoretically, the criminal court's inability to give class relief may be overcome by abandoning the mutuality of estoppel rule[155] and holding the state bound as against any subsequent defendant who invokes the judgment. Although the majority view no longer requires mutuality of estoppel,[156] it is unlikely that any court will hold the state bound as against the world by one trial court judgment holding a statute unconstitutional, especially if the state could not appeal. The current draft of the *Second Restatement* suggests two exceptions which fit the situation nicely. The first is that a court may require mutuality of estoppel where "the issue is one of law and treating it as conclusively determined would inappropriately foreclose opportunity for obtaining reconsideration . . ."[157] The second is that relitigation is not precluded where the loser of the first case could not appeal.[158]

Whatever the reasoning, one can safely predict that other members of the federal plaintiff's class will not get collateral estoppel

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[153] Graves v. Texas Co., 298 U.S. 393, 403 (1936); Lee v. Bickell, 292 U.S. 415, 421 (1934); DOBBS, note 151 *supra*, § 2.5 at 57; DOBBYN, INJUNCTIONS IN A NUTSHELL 45–46 (1974); *cf.* Toucey v. New York Life Ins. Co., 314 U.S. 118, 129 (1941) (no injunction to save litigant trouble of pleading res judicata in second suit); 28 U.S.C. § 2283 and Reviser's Note (1970) (statute amended to overrule *Toucey*).

[154] 97 S. Ct. 1428; see text *supra*, at notes 121–28.

[155] Blonder-Tongue v. University Foundation, 402 U.S. 313, 320–27 (1971).

[156] A.L.I., RESTATEMENT (SECOND) OF JUDGMENTS § 88, and cases collected in Reporter's Note, at 170–74 (Tent. Draft No. 3, 1976).

[157] *Id.* at § 88(7).

[158] *Id.* at § 68.1(a) (Tent. Draft No. 4, 1977).

benefits from the first state judgment. If it is appealed, they would get stare decisis benefit, but, as noted, appeal cannot be assured. The prosecutor will sometimes acquiesce, but he will probably refrain from prosecuting others because of nonbinding adverse decisions less often than he will refrain from reprosecuting the original defendant for a subsequent violation.

The class action can remedy this defect. The class action court can enjoin enforcement of the statute against any member of the class. Or it can declare the statute unconstitutional, and the collateral estoppel effect will extend to the whole class.[159]

The Court, however, appears to have held that a named plaintiff with an adequate remedy in a pending state proceeding may not represent a class which includes persons not yet sued or prosecuted.[160] This result is totally unexplained and may be based on nothing more than a desire to minimize the number of occasions on which federal relief will be available. It is not sufficient to say that such a named plaintiff is not a member of the class, for he may define the class to include both prosecuted and unprosecuted members. The issue is whether a class so defined and so represented meets the requirements of Rule 23. A respectable argument could be made in that situation that a named plaintiff's claim is atypical,[161] though that result is certainly not compelled by the weight of authority.[162]

Even if the Court's apparent restriction is accepted, however, once a named plaintiff is properly in federal court because his individual state remedy is inadequate, he should also be able to assert the inadequacy of the state remedy as to the class. Thus, if the named plaintiff seeks interlocutory or permanent prospective relief unavailable in the criminal case and the requirements of Rule 23 are met, he should be able to seek class relief.

More importantly, there are situations in First Amendment cases in which the named plaintiff's remedy is not adequate even for him-

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[159] Fed. R. Civ. P. Rule 23(c)(3); Supreme Tribe of Ben-Hur v. Cauble, 255 U.S. 356, 366-67 (1921); A.L.I., RESTATEMENT (SECOND) OF JUDGMENTS §§ 85(1)(e), 85(2) and Reporter's Note, Comments e, f at 68–70 (Tent. Draft No. 2, 1975).

[160] *Trainor*, 97 S. Ct. at 1920 (semble); *cf. Allee*, 416 U.S. at 828–29 (Burger, C.J., dissenting in part) (plaintiff not threatened with prosecution cannot acquire standing by representing those who are); *O'Shea*, 414 U.S. at 494 (same).

[161] Fed. R. Civ. P. Rule 23(a)(3); Blankner v. City of Chicago, 504 F.2d 1037, 1043 (7th Cir. 1974); Koos v. First Nat'l Bank, 496 F.2d 1162, 1164–65 (7th Cir. 1974).

[162] 3B MOORE'S FEDERAL PRACTICE ¶ 23.06-2 (2d ed. 1948; 1976–77 Supp.)

self unless it extends to a class. In cases where groups are campaigning for a common goal, like *Allee* and *Cameron*,[163] the individual speaker is much more likely to be successful if his class is free to speak with him.[164] For similar reasons, it has been held that candidates suffer legally cognizable injury when their supporters are coerced into working for opponents.[165] The right at issue may be conceived of as the plaintiff's right to associate with others for the advancement of his ideas[166] or as a right to "effective advocacy"[167]—a right to speak free of improper or unequal state-created obstacles to persuasion. Whatever the legal theory, an injunction against prosecution for political speech is not adequate unless it protects the named plaintiff's associates, and he should have standing so to assert.

There are also situations where special substantive considerations suggest a need for class relief. Speakers are allowed to raise claims of overbreadth and vagueness on the theory that, otherwise, nonparties would be deterred from speaking.[168] It would be anomalous, though not technically inconsistent, if the named plaintiff in these cases could raise the substantive rights of absent class members but not the procedural rights. Thus, in overbreadth and vagueness cases, the plaintiff should also be able to rely on the lack of class relief in the criminal case to show the inadequacy of the criminal defense.

The criminal court's inability to give class relief is partly alleviated by the possibility that, even if one suit is dismissed because a prosecution is pending against the named plaintiff, others may bring a federal suit[169] and may bring it as a class action. But the possibility that someone else may sue later is no reason to deny a needed remedy now to a litigant before the court. Nor does such reasoning prove the criminal defense to be an adequate remedy; rather, it

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[163] See text *supra*, at note 92.

[164] NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 460 (1958).

[165] Shakman v. Democratic Organization, 435 F.2d 267, 269 (7th Cir. 1970).

[166] See Williams v. Rhodes, 393 U.S. 23, 30–32 (1968) (opinion of the Court); *id.* at 38–39 (Douglas, J., concurring); *id.* at 41–42 (Harlan, J., concurring); NAACP v. Button, 371 U.S. 415, 428–38 (1963); Bates v. City of Little Rock, 361 U.S. 516, 522–24 (1960); NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 460–63 (1958).

[167] See NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 460 (1958); *cf.* Williams v. Rhodes, 393 U.S. 23, 30 (1968) ("right . . . to cast . . . votes effectively").

[168] Gooding v. Wilson, 405 U.S. 518, 521 (1972).

[169] *Doran*, 422 U.S. at 928–29; *Steffel*, 415 U.S. 452; *Roe*, 410 U.S. at 120–29; Fiss, note 5 *supra*, at 1130–33.

admits the inadequacy of the criminal defense and offers to cure it in another class action instead of in the one filed.

Moreover, there is no assurance under present law that the second suit can or will be brought. If the class is loosely knit and disorganized, no second named plaintiff may step forward, especially if the prosecutor is careful quickly to indict and thus disqualify potential leaders. Many may be willing to engage in legal protest but unwilling to violate the law or commence litigation. On the other hand, if the class is well organized and can easily arrange for another plaintiff, there are indications that the second plaintiff may be barred because his "interest" is "intertwined" with the defendant in the pending criminal prosecution,[170] and he may be able to "see to it" that his federal claims are presented there.[171] *Steffel*, *Allee*, and *Doran* suggest some limits to that astounding holding, but they are not well defined. Certainly the present jurisprudence of the Court does not assure that class relief will be available when needed.

D. THE IMMINENCE ARGUMENT

One other possible objection to prospective relief is that there is no sufficiently imminent threat of a subsequent prosecution to support a claim for relief which has as its justification the prevention of subsequent prosecutions. In part of the *Younger* opinion dealing with unprosecuted coplaintiffs, the Court imposed an apparently stringent requirement that prosecution be imminently threatened before federal relief is granted.[172] This requirement was based partly on case or controversy considerations and partly on traditional conditions for equitable relief. In practice, the Court's treatment of the imminence requirement has been quite varied. Most opinions again seem willing to assume that states will enforce their statutes unless there are reasons for believing otherwise.[173] Yet opinions in

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[170] *Hicks*, 422 U.S. at 348 (alternative holding); *Allee*, 416 U.S. at 826–33 (Burger. C.J., dissenting in part).

[171] *Hicks*, 422 U.S. at 349 (alternative holding).

[172] *Younger*, 401 U.S. at 41–42; *Steffel*, 415 U.S. at 476 (Stewart, J., concurring).

[173] *Ellis*, 421 U.S. at 434 (opinion of the Court); *id.* at 447 (Powell, J., dissenting); Doe v. Bolton, 410 U.S. 179, 188–89 (1973); *Lake Carriers' Ass'n*, 406 U.S. at 506–09; see also Hunt v. Washington State Apple Advertising Comm'n, 97 S. Ct. 2434 (1977); Douglas v. Seacoast Products, Inc., 97 S. Ct. 1740 (1977); Dixon v. Love, 97 S. Ct. 1723 (1977); Linmark Assoc., Inc. v. Township of Willingboro, 97 S. Ct. 1614 (1977); *cf.* Carey v. Population Services Int'l, 97 S. Ct. 2010, 2015–16 n.3 (1977) (standard unclear); *Steffel*, 415 U.S. at 459–60 (same).

slightly different contexts treat the imminence requirement stringently.[174]

In the prototype *Younger* situation, a case filed while the first prosecution is pending, the imminence argument is entitled to little weight. Indeed, it is really the adequacy argument in disguise. There is clearly a case or controversy between the parties as to whether the federal plaintiff is entitled to continue his course of conduct; the pending prosecution proves that. The prayers for a declaratory judgment of unconstitutionality and for an interlocutory injunction against enforcement are as ripe as they will ever be. If there is an acquittal in the pending case and if the prosecutor acquiesces, then there may no longer be a continuing controversy.[175] But that possibility is precisely the possibility that the prosecution may furnish a practically adequate remedy; it does not negate the existence of a ripe controversy prior to judgment.

Similarly, under the pressure of a threatened interlocutory injunction, the prosecutor may promise to bring only one test case. But such promises are not likely to be made without such pressure, and federal plaintiffs should not be expected to rely on them in any event. Prosecuting one violation implies a threat to prosecute others. The deterrent effect of the criminal law is based on that implied threat,[176] and the deterrent effect of a pending prosecution on the defendant is real, immediate, and entitled to judicial attention under any reasonable construction of the imminence requirement.[177]

Nor is there any imminence problem with respect to potential class members—persons not yet prosecuted who also are violating or desire to violate the statute. As the Court has recognized, prosecuting one violator implies a threat to prosecute others and thus supports a finding that there is a ripe controversy as to those others.[178]

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[174] *Juidice*, 97 S. Ct. at 1216 n.9; *Rizzo*, 423 U.S. at 370–73; *O'Shea*, 414 U.S. at 493–98.

[175] *Cf. Steffel*, 415 U.S. at 459–60 (no continuing controversy if federal plaintiff abandons desire to continue course of conduct).

[176] ZIMRING & HAWKINS, DETERRENCE 163 (1973).

[177] A Quantity of Copies of Books v. Kansas (Harlan, J., dissenting), quoted note 97 *supra*; *cf.* cases cited in note 178 *infra*; see also ZIMRING & HAWKINS, note 176 *supra*, at 217–24, 246.

[178] Carey v. Population Services Int'l, 97 S. Ct. 2010, 2015–16 n.3 (1977) (prosecution twelve years before); *Steffel*, 415 U.S. at 459 (ongoing prosecution).

IV. Implications of the Need for Prospective Relief

A. Equity, Comity, and Federalism

The *Younger* doctrine is based on "relevant principles of equity, comity, and federalism."[179] If the phrase is only a slogan for unreasoned deference to claims of states' rights in an ever growing number of contexts, as some have charged,[180] then careful analysis is futile. But if the Court has accurately stated the interests which the *Younger* doctrine serves, then careful study of its opinions is essential to any effort to accommodate those interests with the need for prospective relief.

Although comity and federalism are distinguishable,[181] *Younger* used them as two names for the same idea,[182] and the Court has never attempted to separate them in *Younger* cases involving state courts. Moreover, all of *Younger's* teeth came from its view of federalism. Equity's contribution was limited to the basic idea that an injunction should issue only if the plaintiff has no adequate remedy at law, *i.e.*, if he will suffer irreparable injury without the injunction. "Irreparable injury" and "no adequate remedy at law" are two formulations of the same requirement; injury is reparable if, and only if, there is an adequate legal remedy.[183] There is no support for the Court's unexplained treatment of these two formulations as separate requirements in *Trainor*.[184] Fortunately, nothing was made to turn on it.

The normal equity rule had been implicitly modified when the Court first considered whether defense of a state prosecution might be an adequate remedy. In other contexts, it is settled that only a federal legal remedy will cause a federal court to withhold an injunction.[185]

In the name of federalism, *Younger* and *Samuels* extended the old equity rule in much more dramatic fashion. A legal remedy is not adequate unless it is "as complete, practical and efficient as that

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[179] *Huffman*, 420 U.S. at 602–03; *Steffel*, 415 U.S. at 462.

[180] Francis v. Henderson, 425 U.S. 536, 551 (Brennan, J., dissenting) (1976).

[181] *Schlesinger*, 420 U.S. at 753–61 (deference to court martial).

[182] 401 U.S. at 44.

[183] See Fiss, note 105 *supra*, at 9; Dobbs, note 151 *supra*, § 2.10, at 108.

[184] 97 S. Ct. at 1917.

[185] *Ibid.*; AFL v. Watson, 327 U.S. 582, 594 n.9 (1946); City Bank Farmers Trust Co. v. Schnader, 291 U.S. 24, 29 (1934).

which equity could afford."[186] But the Court made no effort to evaluate the remedy it posited in *Younger*. Moreover, it said that plaintiff's injury must be not only irreparable but "great and immediate."[187] These last two adjectives have never been given any content, except that we have been repeatedly told that the "cost, anxiety, and inconvenience of having to defend against a single criminal prosecution" is not great, immediate, and irreparable injury.[188] Second, the Court deferred to a pending prosecution even when the equity case was filed first.[189] The settled equity rule had been that legal remedies which first became available after the equity suit was filed were irrelevant.[190] Finally, the Court extended the equity rule to declaratory judgments,[191] despite the explicit provision of Rule 57 that the "existence of another adequate remedy does not preclude" a declaratory judgment[192] and the statutory provision that a declaratory judgment is available "whether or not further relief is or could be sought."[193]

These extensions of the equity rule must draw their support from the Court's view of federalism. The initial statement of that view in *Younger* was broad and vague,[194] and there are echoes of that initial sweep in applications of the doctrine outside the context of challenges to the constitutionality of statutes.[195] But in that context, the Court's view of federalism was given content in *Steffel*, and the content turned out to be rather narrow. The Court's view of federalism would not overturn the Supremacy Clause or *Cohens v. Virginia*.[196] The federal courts are still to be the final arbiters of the constitutionality of state statutes. Additional deference to state judiciaries and executives is required, but not to state legislatures.[197]

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[186] Terrace v. Thompson, 263 U.S. 197, 214 (1923); accord, other authorities cited in note 114 *supra*.

[187] 401 U.S. at 46.

[188] *Huffman*, 420 U.S. at 601–02; *Younger*, 401 U.S. at 46.

[189] *Hicks*, 422 U.S. at 349 (alternative holding).

[190] American Life Ins. Co. v. Stewart, 300 U.S. 203, 215 (1937); Dawson v. Kentucky Distilleries Co., 255 U.S. 288, 296 (1921).

[191] *Samuels*, 401 U.S. 66.

[192] Fed. R. Civ. P. Rule 57.

[193] 28 U.S.C. § 2201 (1970).

[194] 401 U.S. at 44–45.

[195] Francis v. Henderson, 425 U.S. 536, 541–42 (1976); *Rizzo*, 423 U.S. at 380.

[196] 6 Wheat. 264 (1821).

[197] See Fiss, note 5 *supra*, at 1107.

Younger federalism defers only to the state's interests in completing its own proceeding once begun. The Court identified three such interests in *Steffel:*[198]

> 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.

It is reasonably clear what the Court meant by duplicative proceedings and negative reflection on state courts. "Disruption of the state criminal justice system" is more ambiguous. In *Steffel*, the phrase could only mean disruption of a pending prosecution filed before the federal suit was filed. So construed, it is not clear how any of these three interests support the "reverse removal power"[199] conferred on state prosecutors in *Hicks v. Miranda*,[200] and the opinion makes no effort to tell us. Where the federal case is filed first, under normal usage it is the state case that results in duplication. Similarly, it does not reflect negatively on state courts for a federal court to finish a case already commenced. And there is no disruption of the state criminal justice system as that phrase was used in *Steffel*. *Hicks* must rest on a broader view of what it means to disrupt the state criminal justice system and possibly on the view that the federal court causes duplication and negative reflection when it insists on retaining without strong cause a case barely begun. *Hicks* implicitly expands the meaning of "disruption of the state criminal justice system" to include interruption of any pending case, without regard to when it was filed. But, still implicitly, *Hicks* suggests that there comes a time in the progress of the first-filed federal case when the interest in avoiding such disruption is no longer strong enough to require dismissal.[201]

A fourth interest was suggested by the Court in *Trainor v. Hernandez:* giving the state court an opportunity "to construe the

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[198] *Steffel*, 415 U.S. at 462, quoted in *Huffman*, 420 U.S. at 603; see also Note, note 5 *supra*, at 1282–90.

[199] See Fiss, note 5 *supra*, at 1134–36.

[200] 422 U.S. at 349–50 (alternative holding); accord, *Doran*, 422 U.S. 922; see text *supra*, at note 13.

[201] For a somewhat different analysis, see Note, note 5 *supra*, at 1303–04.

challenged statute in the face of the actual federal constitutional challenges."[202] But that interest carries equal weight whether or not a state case is pending and, in any event, is fully served by *Pullman* abstention.[203]

No one of the three interests taken alone is sufficient to support the Court's results. All but the interest in avoiding duplicative litigation can be served by letting the state and federal cases proceed simultaneously. Duplicative litigation can be avoided by enjoining the state proceeding as well as by dismissing the federal proceeding. One of the other interests must be invoked to choose between those two options. The desire to avoid disrupting the state system does not necessarily determine that choice, because *Younger* abstention disrupts the federal judicial system in ways parallel to the proscribed disruption of the state system. Federal cases are dismissed, or never filed, because of the state proceedings.

This suggestion focuses attention on another implicit component of the Court's views. The state's interest in maintaining its own judicial proceeding is proportionate to the strength of the state's substantive interests at issue in the litigation. Put less neutrally, the Court gives important weight to the state's interest in being the judge of its own case. This appears most clearly in the Court's extension of *Younger* to civil cases to which the state is a party in its sovereign capacity.[204] Similarly, in extending *Younger* to civil contempt proceedings, the Court ignored the normal distinction between civil contempt as benefiting litigants and criminal contempt as vindicating the court's authority.[205] It relied on the state's interest in vindicating "the regular operation of its judicial system."[206]

Thus, the phrase "disruption of state judicial proceedings in which the state seeks to vindicate its own interests" should probably be substituted for *Steffel's* "disruption of the state criminal justice system." In the Court's view, disruption of such a proceeding is apparently more objectionable than disruption of federal judicial proceedings to which the United States is not a party and in which federal substantive policies would be vindicated only for the benefit

[202] 97 S. Ct. at 1919.

[203] Railroad Comm'n v. Pullman Co., 312 U.S. 496 (1941); see note 7 *supra*.

[204] *Trainor*, 97 S. Ct. at 1917–19; *Huffman*, 420 U.S. at 603–05.

[205] United States v. United Mine Workers, 330 U.S. 258, 302–04 (1947).

[206] *Juidice*, 97 S. Ct. at 1217.

of private litigants. But if the Court extends *Younger* to all civil proceedings, then disruption of the federal case will become equal in importance to disruption of the state case. At that point, only fears of negative reflection on state courts would be available to support the Court's preference for dismissing the federal case rather than interfering with the state case.

B. THE IMPACT OF PROSPECTIVE RELIEF

Equitable intervention in the situations heretofore identified does not reflect negatively on state courts. The inability of criminal courts to give interlocutory, permanent prospective, or class relief is general in Anglo-American jurisprudence. Federal criminal courts could do no better. And there are strong reasons for maintaining the clear distinctions between civil and criminal procedure. Similarly, recognition of the limited effect of a state's res judicata rules is not stigmatizing. These limitations are independent of any views on the ability of state judges to decide constitutional claims fairly and intelligently. The need for different forms of relief justifies the partial duplication caused by equitable intervention in these situations.

Analysis becomes more difficult when one considers disruption of the pending state proceeding. As long as we assume the good faith and competence of the state courts, the state remedy is not inadequate because the state court is harming the federal court plaintiff, but only because it cannot do enough to help. That problem is solved by making additional relief available in the federal court. It is not necessary to prevent the state court from acting. This suggests the result in *Cline v. Frink Dairy Co.*,[207] where, for purely formal reasons and without analysis, the Court affirmed injunctions of future prosecutions but vacated injunctions of pending prosecutions against the same plaintiffs. But that does not completely solve the problem. If the federal judgment is given collateral estoppel effect in the state court, then the state proceeding would still be disrupted. Instead of deciding the constitutional issue, the state court would decide the res judicata issue.

It is important to specify the degree of disruption that possibility entails. The *Cline* solution would permit no interlocutory injunction against the pending prosecutions; that prosecution could proceed

[207] 274 U.S. 445, 452–53, 466 (1927); Transcript of Record, at 10; Beatrice Creamery Co. v. Cline, 9 F.2d 176, 177 (D. Colo. 1925).

in normal course at least until the federal judgment. If the federal court upholds the challenged statute, the pending prosecution need not be disrupted at all. Conviction could come as soon as if there had been no federal litigation. Moreover, even if collateral estoppel may be invoked against a criminal defendant, the state can waive the benefits of the doctrine if it wants its own courts to decide the constitutional issue.

Second, there would be no disruption where the state case is decided before the federal case. This would not be unusual and would be routine if the federal courts stay proceedings when interlocutory and class relief are either denied or not sought.

Third, where the statute is challenged as applied, the state court would decide whether the prosecuted conduct is distinguishable from the contemplated conduct adjudicated in the federal action. If so, collateral estoppel would not apply, and the state case would proceed undisrupted except for the injection of one additional issue. If pending prosecutions are enjoined, this issue would be determined in federal court.

Thus, the disruptive effects of granting prospective relief are not nearly so severe as the disruptive effects of enjoining a pending prosecution. This degree of disruption, though far from trivial, should be accepted in order to meet the need for prospective relief.

If the Court is not willing to permit even this degree of indirect disruption of state proceedings, then it should create an exception to the collateral estoppel doctrine, permitting the state court to ignore the federal judgment in this narrow situation. It may be anomalous to envision a litigant protected from future prosecution by a federal injunction suffering punishment for a past violation of the same statute, but that is better for the litigant than being punished and without future protection. Moreover, since the Court assumes that state courts are as capable of deciding constitutional issues as federal courts, it must also assume that such anomalies would be infrequent. Presumably, the state and federal court would normally agree. Where they disagree, both judgments would not necessarily be carried out. The Supreme Court could resolve the conflict on appeal or writ of certiorari. And where custodial punishment is imposed, habeas corpus would lie,[208] generally to the

[208] Wainwright v. Sykes, 97 S. Ct. 2497, 2502 (1977); Ex parte Siebold, 100 U.S. 371, 376-77 (1879).

same federal court which granted prospective relief,[209] a result not forbidden by the *Younger* doctrine.[210]

There is no insuperable legislative bar to such an exception to collateral estoppel doctrine. The Full Faith and Credit Clause and its implementing statute[211] do not refer to federal judgments. As long as the federal judgment is binding as to future violations, it is not reduced to a mere advisory opinion, and it fulfills the congressional intention to create a risk-free remedy in the Declaratory Judgment Act. The last sentence of § 2201[212] presents a problem, but the federal plaintiff could be required partially to waive its benefits as a condition of prospective relief, and the waiver could be made binding by inclusion in the judgment.

It still remains briefly to apply this analysis to the three forms of prospective relief. The federal plaintiff's claim is strongest if he shows a right to interlocutory relief, whether for himself alone or for a class. There will be a need for such relief in a large percentage of cases;[213] the right to it will turn on the probability of success and the balance of hardships.[214] If an interlocutory injunction is issued, the federal court should proceed expeditiously to final judgment, to minimize the injury to the parties if the injunction is ultimately held erroneous.

The federal plaintiff's claim is weakest when he is entitled only to permanent individual relief. If the court decides that plaintiff is not entitled to interlocutory relief and not entitled to represent a class, then it might consider retaining jurisdiction but staying further proceedings pending resolution of the state prosecution. Such a stay is inappropriate unless the state law clearly accords collateral estoppel effect to legal issues decided in criminal cases, the pending state case fairly presents the constitutional issue, and there is no substantial chance of an acquittal on nonconstitutional grounds. Federal plaintiffs should not be denied permanent prospective relief because of speculation that state prosecutors will voluntarily honor a judgment without collateral estoppel effect.

Where the federal plaintiff seeks permanent class relief, his claim is stronger. There is much less possibility that the state judgment

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[209] *Compare* 28 U.S.C. § 1391(b) (1970); *with* 28 U.S.C. § 2241(a) (1970).

[210] *Huffman*, 420 U.S. at 605–07.

[211] 28 U.S.C. § 1738 (1970).

[212] See text *supra*, at note 147.

[213] See text *supra*, at notes 98–103.

[214] See authorities cited in note 105 *supra*.

will give prospective benefits. There is no possibility of collateral estoppel. The only hope is that there will be an appeal and stare decisis effect or voluntary prosecutorial compliance. The arguments for a stay of the federal case are parallel to but substantially weaker than the arguments for a stay in an individual case. In no event should there be a dismissal with prejudice until the criminal case is completed and is seen at least to have informal prospective and class effects.

These suggested results may not take full account of the Court's view that ordinary irreparable injury is not enough to justify federal intervention.[215] But that view is hard to analyze because, as noted,[216] it has never been given any content. It seems more responsive to a general disposition against federal intervention than to the specific state interests identified by the Court. Rigid insistence that only great and immediate injury to the federal plaintiff offsets the state's interests ignores the extent to which the inadequacy of the state remedy directly eliminates some of the state's interests from the balance. The desire to avoid negative reflection on the state courts simply drops out of the equation when the federal intervention is to grant relief unavailable there. If the Court insists, however, on an especially great showing of irreparable injury, then it might conclude that uncertainy over the permanent prospective effect of a state judgment is insufficient. In that event, stays or dismissals without prejudice might be routinely granted, subject to the conditions suggested earlier.[217]

C. RES JUDICATA AND CONGRESSIONAL INTENT

Permitting two actions to proceed simultaneously raises the question whether the first judgment becomes res judicata in the other case. This gives increased prominence to an issue that has been lurking unresolved in federal jurisprudence for some time: Should a state constitutional judgment be given collateral estoppel effect in a federal action under § 1983?[218] Because the issue can arise in many

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[215] *Younger*, 401 U.S. at 46.

[216] See text *supra*, at notes 187–88.

[217] See text *infra*, at note 218.

[218] Theis, *Res Judicata in Civil Rights Act Cases: An Introduction to the Problem*, 70 Nw. L. Rev. 859 (1976); Note, note 5 *supra*, at 1330–54; see *Ellis*, 421 U.S. at 435 (opinion of the Court); *id.* at 439–43 (Powell, J., dissenting); *Huffman*, 420 U.S. at

contexts,[219] full examination of it is beyond the scope of this paper. But some tentative exploration is necessary to assess the workability and likely effect of the foregoing conclusions concerning federal equity power. The only court to face the issue squarely in this context was divided but held the state conviction binding.[220]

By statute, a state court judgment has the same effect in federal court as in courts of the rendering state.[221] The issue is whether § 1983, like the Habeas Corpus Act,[222] creates an exception to that rule. There are substantial parallels between the two statutes. Both date from Reconstruction, and both provide for relief against public officials. Both acts provide a broad range of protection for all rights secured by the Constitution and federal laws.

Most importantly, the legislative history of both reflects a profound mistrust of state courts and a desire to provide a federal remedy for their abuses.[223] Reconstruction legislation was premised on Congress's belief that state governments, including state courts, could not or would not enforce federal rights and would in some cases work affirmatively to deny them.[224] The legislative history

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607–08 n.19; Preiser v. Rodriguez, 411 U.S. 475, 497 (1973) (opinion of the Court); *id.* at 509 n.14 (Brennan, J., dissenting); Florida State Bd. of Dentistry v. Mack, 401 U.S. 960, 960–62 (1971) (White, J., dissenting from denial of certiorari); *cf. Wooley*, 97 S. Ct. 1428 (issue not raised).

[219] See cases and commentaries collected at Theis, note 218 *supra*, at 865–66 n.35.

[220] Thistlethwaite v. City of New York, 497 F.2d 339 (2d Cir. 1974).

[221] 28 U.S.C. § 1738 (1970); but see Parker v. McKeithen, 488 F.2d 553, 558 n.7 (5th Cir. 1974); American Mannex Corp. v. Rozands, 462 F.2d 688, 689–90 (5th Cir. 1972); Vestal, *Res Judicata/Preclusion by Judgment: The Law Applied in Federal Courts*, 66 MICH. L. REV. 1723, 1734, 1736–39, 1746 (1968); Note, note 5 *supra*, at 1334.

[222] 28 U.S.C. § 2241 (1970).

[223] As to § 1983, see notes 224–27, 232 *infra*. As to habeas corpus, see CONG. GLOBE 4229 39th Cong., 1st Sess. (1866) (Sen. Trumbull); see generally *id.* at 4228–30, 4150–51; *id.* at 729, 730, 790, 903, 945 39th Cong., 2d Sess. (1867); see also debates on related bills considered earlier and at greater length, *id.* at 1983 39th Cong., 1st Sess. (1866) (Sen. Clark, Sen. Trumbull); *id.* at 2021 (Sen. Clark); *id.* at 2023 (Sen. Howard); *id.* at 2054 (Sen. Clark, Sen. Wilson); *id.* at 2055 (Sen. Trumbull); *id.* at 2058 (Sen. Cowan); *id.* at 2061–62 (Sen. Johnson); *id.* at 2063 (Sen. Clark, Sen. Stewart); *id.* at 2065 (Sen. Sherman); *id.* at 4096 (Rep. Wilson).

[224] CONG. GLOBE 374 42d Cong., 1st Sess. (1871) (Rep. Lowe); *id.* at 653 (Sen. Osborn); *id.* at 807 (Rep. Garfield); *id.* at App. 216–17 (Sen. Thurman) (1871); see generally *id.* at 43–44, 113, 116–18, 123–31, 134–35, 144–45, 152–67, 172–76, 179–82, 189–92, 194–211, 219–27, 231–33, 236–40, 244–49, 317–22, 329–41, 343–58, 361–401, 408–63, 475–93, 498–506, 508–24, 534–38, 566–82, 599–610, 645–66, 686–709, 754–66, 769–79, 787–95, 798–801, 804–08, 819–31, 833, App. 14–39, App. 46–50, App. 67–316. Much of this legislative history is reprinted in 1 SCHWARTZ, STATUTORY HISTORY OF THE UNITED STATES: CIVIL RIGHTS 591–653 (1970). Much of that which relates to mis-

contains repeated statements that state courts would not enforce the rights of blacks and Republicans.[225] Representative Perry said that one of the "most dangerous things an injured party can do is to appeal to justice."[226] The congressional remedy for the failings of state courts included § 1983[227] and four important grants of federal jurisdiction: general federal question jurisdiction,[228] original civil rights jurisdiction,[229] civil rights removal jurisdiction,[230] and modern habeas corpus jurisdiction.[231]

The Reconstruction Congresses believed that federal courts were more independent than state courts and more likely to rise above or resist local "influence . . . , sympathies . . . , prejudices . . . , passions or terror."[232] No subsequent Congress has taken away any substantial portion of the jurisdiction they granted. Modern commentators have argued persuasively that federal judges are still more receptive to federal claims than their state counterparts.[233] There are important institutional factors suggesting that this should be so,[234] even assuming complete good faith and integrity on the

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trust of state courts is excerpted and summarized in Mitchum v. Foster, 407 U.S. 225, 238–42 (1972); Pierson v. Ray, 386 U.S. 547, 559–62 (1967) (Douglas, J., dissenting); Monroe v. Pape, 365 U.S. 167, 172–83 (1961).

[225] CONG. GLOBE 334–35 42d Cong., 1st Sess. (1871) (Rep. Hoar); *id.* at 345 (Sen. Sherman); *id.* at 505 (Sen. Pratt); *id.* at App. 166–67 (Rep. W. Williams); *id.* at App. 277 (Rep. Porter).

[226] *Id.* at App. 78.

[227] Act of April 20, 1871, Chap. XXII, § 1, 17 Stat. 13, now 42 U.S.C. § 1983 (1970).

[228] Act of March 3, 1875, Chap. 137, § 1, 18 Stat. 470, now 28 U.S.C. § 1331 (1970).

[229] Act of April 20, 1871, Chap. XXII, § 2, 17 Stat. 13, now 28 U.S.C. § 1343 (1970).

[230] Act of April 9, 1866, Chap. XXXI, § 3, 14 Stat. 27, now 28 U.S.C. § 1443 (1970).

[231] Act of Feb. 5, 1867, Chap. XXVIII, § 1, 14 Stat. 385, now 28 U.S.C. § 2241(c)(3) (1970).

[232] Remarks of Rep. Coburn, CONG. GLOBE 460 42d Cong., 1st Sess. (1871).

[233] Dombrowski v. Pfister, 227 F. Supp. 556, 571 (E.D. La. 1964) (Wisdom, J., dissenting); Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105, 1106, 1115–31 (1977); Kanowitz, *Deciding Federal Law Issues in Civil Proceedings: State versus Federal Trial Courts*, 3 HAST. CONST. L. Q. 141, 158 (1976); Schneider, *State Court Evasion of United States Supreme Court Mandates: A Reconsideration of the Evidence*, 7 VAL. U. L. REV. 191 (1973); Beatty, *State Court Evasion of United States Supreme Court Mandates during the Last Decade of the Warren Court*, 6 VAL. U. L. REV. 260 (1972); Gilbert, note 5 *supra*, at 19–21; Manwaring, *The Impact of Mapp v. Ohio*, in EVERSON, ED., THE SUPREME COURT AS POLICY MAKER: THREE STUDIES ON THE IMPACT OF JUDICIAL DECISIONS 1 (1968); Vines, *Southern State Supreme Courts and Race Relations*, 18 WEST. POL. Q. 5, 8–18 (1965); Amsterdam, note 75 *supra*, at 793–802; Lusky, note 63 *supra*, at 1163; Note, 21 U. FLA. L. REV. 346 (1969).

[234] FEDERALIST No. 10 (Madison).

part of state judges.[235] The large volume of *Younger* litigation gives rise to its own inferences: with so many prosecutors fighting to stay in state court and so many defense lawyers fighting to get into federal court, one must wonder if they are all wrong about where their clients' interests lie. But it is not necessary to resolve this as an empirical question; the congressional determination should be conclusive.

The Court's treatment of this legislative history has been quite inconsistent. The *Younger* cases have ignored it. In them, the Court has insisted that state courts are as able as federal courts and has refused to grant relief which might suggest otherwise. But the Court has also repeatedly recognized that the purpose and effect of the Reconstruction legislation was to make the federal courts "the *primary* and powerful reliances for vindicating every right given by the Constitution, the laws and treaties of the United States."[236] Outside the *Younger* context, the Court has held that federal review of state judgments is an inadequate substitute for plaintiffs' right to federal fact finding.[237] More recently, in *Mitchum v. Foster*,[238] the Court relied heavily on the congressional view that state courts were hostile to federal rights and concluded that the Reconstruction legislation was part of "a vast transformation" from earlier concepts of federalism.[239]

One can only guess whether the Court will consider the res judicata issue another appropriate occasion to ignore the congressional assessment of the reliability of state courts. But that assessment should be relevant. It would be strange if the prospective relief authorized by § 1983 could be defeated by a prior state determination of the federal issue in a different cause of action, when the original reason for granting federal jurisdiction was mistrust of the state courts.

The issue requires further study. The failure to enact removal jurisdiction over all cases in which federal defenses are raised, together with the omission from § 1983 of any express reference to

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[235] Neuborne, note 233 *supra*, at 1118–28; Amsterdam, note 75 *supra*, at 800–02.

[236] *Steffel*, 415 U.S. at 464; Zwickler v. Koota, 389 U.S. 241, 247 (1967); both quoting FRANKFURTER & LANDIS, THE BUSINESS OF THE SUPREME COURT: A STUDY IN THE FEDERAL JUDICIAL SYSTEM 65 (1927); accord, McNeese v. Board of Educ., 373 U.S. 668, 672 (1963).

[237] England v. Louisiana Bd. of Medical Exam'rs, 375 U.S. 411, 416–17 (1964).

[238] 407 U.S. 225 (1972).

[239] *Id.* at 242.

state judgments,[240] supports an argument that Congress intended state judgments to have at least bar and merger effect except on habeas corpus. But those considerations carry little weight with respect to collateral estoppel and prospective relief, since enforcement of the first judgment would not be prevented. Additionally, a collateral estoppel exception is much more important to the effectuation of § 1983 than a bar and merger exception.

Even if § 1983 does not create an exception to collateral estoppel doctrine, suits for prospective relief of the type here proposed would not be made unworkable or superfluous. Interlocutory relief is needed before the state judgment. Permanent prospective relief is most needed in those states that deny collateral estoppel effect to legal determinations in criminal judgments. But in those states, the legal determination should also be denied collateral estoppel effect in federal court.[241]

D. STATE CIVIL REMEDIES

It is now possible to return to the question why the state criminal defendant who needs prospective relief should not be required to go to state civil courts. As noted earlier, *Younger* and its progeny require only that, once a citizen becomes a defendant in certain kinds of state proceedings, he must pursue the remedies which defense of those proceedings offers. But the Court has not wavered from the rule that, when the citizen is free to become a civil rights plaintiff, he has a right to file in federal court.[242] Just last Term, the Court unanimously rejected a contention that constitutional claims first be presented to state courts, reaffirming that "it is the 'solemn responsibility' of 'all levels of the federal judiciary to give due respect to a suitor's choice of a federal forum for the hearing and decision of his federal constitutional claims.' "[243]

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[240] *Cf.* 28 U.S.C. § 2254(a) (1970) ("in custody pursuant to the judgment of a State court"); Act of Feb. 5, 1867, Chap. XXVIII, § 1, 14 Stat. 385, 386 ("pending such proceeding . . . and after . . . discharge . . . any proceeding . . . in any State court . . . shall be deemed null and void"); but *cf.* Mitchum v. Foster, 407 U.S. 225, 236–38, 242–43 (1972) (§ 1983 expressly authorizes injunctions against pending state proceedings because to construe it otherwise would deprive it of its intended scope).

[241] 28 U.S.C. § 1738 (1970); but see note 221 *supra.*

[242] Douglas v. Seacoast Products, Inc., 97 S. Ct. 1740, 1744–45 n.4 (1977); *Doran,* 422 U.S. at 930; *Steffel,* 415 U.S. at 472–73; *Lake Carriers' Ass'n,* 406 U.S. at 510.

[243] Douglas v. Seacoast Products, Inc., 97 S. Ct. 1740, 1744–45 n.4 (1977), quoting with approval from Zwickler v. Koota, 389 U.S. 241, 248 (1967).

This rule follows directly from the cause of action created by § 1983 and the implementing grant of jurisdiction in 28 U.S.C. § 1343. To require § 1983 plaintiffs to initiate state litigation would be totally inconsistent with the congressional intention to create a federal remedy, independent of any remedies in the state courts that Congress so mistrusted and available at the plaintiff's choice.[244] To require a litigant to file a state suit is a much more direct denial of his choice of forum than to require him to defend a pending case. Requiring him to defend may be reconcilable with the statutory scheme as a way of preserving the choice not to enact removal for federal defenses, though the Court has not made this argument.

Moreover, requiring state criminal defendants entitled to equitable relief to initiate state litigation would not serve *Younger's* policies. Any argument in support of such a special rule would have to start from the premise that the civil and criminal cases were related and that related cases within the same system are somehow more desirable than related cases in different systems. The problem of related cases is not new. There are a variety of devices for bringing such cases together—joinder, counterclaim, consolidation, res judicata. Modern procedural rules neither permit nor require counterclaims in criminal cases. They do not provide for joinder or consolidation of civil and criminal cases. They provide different rules for civil and criminal cases.[245] The long-term judgment of our jurisprudence is that civil and criminal cases do not mix; a contrary judgment would be inconsistent with the special protections given criminal defendants. The pendency of a criminal case is irrelevant to choice of forum in a civil case, because the two cases cannot be brought together even if they are in the same system.

Thus the effect of a separate civil proceeding on the state criminal process does not depend on where the civil case is filed. Having a federal judge take jurisdiction over a related dispute raising the same constitutional issue is no more duplicative, disruptive, or insulting to the criminal judge than having a second state judge with different powers do so. The considerations of equity and comity are identical. As to federalism, if the plaintiff's choice of forum

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[244] Zwickler v. Koota, 389 U.S. 241, 248 (1967); McNeese v. Board of Educ., 373 U.S. 668, 671–74 (1963); Monroe v. Pape, 365 U.S. 167, 183 (1961).

[245] Fed. R. Civ. Proc. and Fed. R. Crim. Proc.; see generally Helvering v. Mitchell, 303 U.S. 391, 402 (1938); CATALDO, KEMPIN, STOCKTON, & WEBER, INTRODUCTION TO LAW AND THE LEGAL PROCESS 115–16 (2d ed. 1973).

makes any invidious comparison, it is not between the federal court and the criminal court where the first case is pending but between the federal court and the state civil court where the new case would be filed. That is precisely the comparison that the plaintiff's choice of forum always makes and which is required by § 1983 and the jurisdictional statutes.

V. Conclusion

This article has considered not only the criminal remedy and the normal forms of prospective relief but also potential substitutes such as enforceable stipulations, consent decrees, voluntary stays, and dismissals without prejudice. Such possibilities are not unimportant, but they should not obscure the basic reality. Criminal courts do not have sufficient powers to assure prospective relief. A citizen undertaking a forbidden but constitutionally protected course of conduct needs one resolution of his constitutional claim which will be binding in the future, both for himself and his class. He needs a preliminary resolution of the issue and immediate interlocutory protection. Not every citizen claiming such relief is entitled to it, but he is entitled to have his claim examined free of the erroneous assumption that a criminal court can furnish the relief he seeks.

Adjusting the *Younger* doctrine to incorporate the need for prospective relief will require careful assessment and balancing of competing interests in particular cases. In striking such balances, the Court should give weight to the fact that important First Amendment interests are at stake in many *Younger* cases. And it must give weight to the fact that Congress provided for prospective federal relief. Congress gave the civil rights litigant his own cause of action, at law or in equity, not merely a right to defend at law. And not trusting the state courts, it gave him the right to file that cause of action in the forum of his choice.

There are three paths now open to the Supreme Court. It can narrowly construe *Wooley*, substantially ignore the defects in the criminal remedy, and continue to send litigants away without the prospective relief they need. Alternatively, it can vigorously develop a system of stipulations, stays, and other devices to encourage or coerce informal solutions and "voluntary" acquiescence. In this way, it may manage to provide near substitutes for the various forms

of prospective relief while usually leaving the primary adjudication of the constitutional issue to the state criminal court. This is the minimum required of the Court under its own articulated premises. But there is no reason for it to work so hard to keep federal claims out of federal court.

The third alternative is freely to entertain claims for prospective relief and to decide the issues raised by such claims. Even though they refuse to enjoin the first prosecution, federal courts should not deny relief with respect to contemplated future violations. Certainly they should not do so in defiance of congressional intent. At most, *Younger*'s deference to state courts should be limited to cases in which the state court has power to grant full relief. *Younger*'s premises require no more.

Stare decisis should not bar this course. *Younger* is a recent innovation, resting shakily on a view of prior law which, at least with respect to prospective relief, is seriously misleading. Not until *Wooley v. Maynard* did the Court begin to think about a need for prospective relief unmet by state prosecutions. *Wooley* should point the way to a reassessment of all the cases that expound on *Younger* without considering that need.