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Comity: Younger v. Harris, 401 U.S. 37 (1971)

from a defendant who was unwilling to admit his guilt.[39]

Alford also extends the restriction upon *Jackson* begun by the Court in *Parker v. North Carolina*.[40] By ruling that a statute which forces a defendant to choose between his constitutional rights, his belief in his innocence, and the possibility of a harsher penalty is not unduly coercive or "chilling," the Court totally emasculated the *Jackson* decision. The fact that a statute may "encourage" the waiver of constitutional rights is no longer relevant to a determination of whether a plea of guilty was involuntary or coerced. If a plea is reasonable in regard to the facts surrounding the defendant's case, and competent counsel advised the accused regarding his plea, the plea is valid and relatively immune from collateral attack.[41] Furthermore, petitioners asserting the procedural incompetence of either counsel or judge, or other coercive factors during the proceedings will face a complete record of their plea.[42] It will, therefore, be relatively easy for a reviewing court to dismiss such petitioners without a hearing.

Thus, the fact that the Court once held that a federal statute similar to the one challenged in *Alford* had a "chilling" effect on constitutional rights, and that a conviction based on a coerced plea of guilty is a violation of a defendant's right to due process, has been negated in favor of increased administrative efficiency for the system of criminal justice.[43] But the constitutional rights waived in a guilty plea are too important to be sacrificed for a "rational decision despite coercive factors." In no event should such rights be waived and a petitioner denied the right to habeas corpus review simply because at an earlier time coercive factors made a plea of guilty seem more "rational."

[39] 400 U.S. at 40 (Brennan, J., dissenting).

[40] Although the Court in *Brady* did not actually overrule *Jackson*, the effect of the decision was to say that the *Jackson* result, coercion by fear of a harsher penalty, was no longer to be considered a factor in determining the validity of a guilty plea. By expressly rejecting the constitutional challenge to the statute in *Alford*, the Court removed the last hope of any petitioner who viewed *Jackson* as grounds for habeas corpus review of the voluntariness of his plea.

[41] FED. R. CRIM. P. 11. Since under Rule 11 the trial court cannot accept a guilty plea without first determining that it is voluntary, it is very unlikely that a petitioner could prevail on the assertion that he was coerced at the time of pleading.

[42] 18 U.S.C. § 2255 provides:

> Unless the motion and the files and records of the case conclusively show that the petitioner is entitled to no [habeas corpus] relief, the court shall... grant a hearing....

Faced with a complete record of the voluntariness and the intelligence of the petitioner's plea, it will be extremely easy for the reviewing courts to dismiss petitions without granting a hearing.

[43] In Bruton v. United States, 391 U.S. 123, 135 (1968), the Court, quoting from People v. Fisher, 249 N.Y. 419, 432, 164 N.E. 336, 341 (1928), stated:

> We secure greater speed, economy, and convenience in the administration of the law at the price of fundamental principles of constitutional liberty. That price is too high.

See also Miranda v. Arizona, 384 U.S. 436, 479–81 (1966); Fay v. Noia, 372 U.S. 391, 424 (1963).

COMITY

Younger v. Harris, 401 U.S. 37 (1971)

Recent years have witnessed an ever increasing trend toward intervention by federal courts into state affairs for the purpose of securing the civil rights of various petitioners.[1] This trend toward federal interventionism can be seen as an outgrowth of the black struggle for civil rights begun during the Civil War[2] and renewed following the landmark decision of *Brown v. Board of Education*,[3] when several state governments flagrantly violated the constitutional mandate announced by the Court in that case.[4]

[1] Much of this litigation is due to the wide range of subjects that have been held by courts to come within the scope of 42 U.S.C. § 1983 (1964):

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

[2] Zwickler v. Koota, 389 U.S. 241 (1967). Mr. Justice Brennan, speaking for the Court, discussed duties imposed upon the federal judiciary in protecting rights secured by the Constitution and the Congressional expansion of federal judicial power in the wave of nationalism that dominated political thought following the Civil War, *Id.* at 245–48.

[3] 347 U.S. 483 (1954).

[4] *See* Mr. Justice Harlan's dissent in Dombrowski v. Pfister, 380 U.S. 479, 499 (1965):

> Underlying the Court's major premise that crim-

By 1965 the Supreme Court in *Dombrowski v. Pfister*[5] seemed ready to authorize federal intervention in the previously sacrosanct area of state criminal proceedings.[6] The petitioners in *Dombrowski*, officers of a Negro civil rights organization, sought injunctive and declaratory relief alleging that Louisiana's Subversive Activities and Communist Control Law[7] and Communist Propaganda Control Law[8] were facially void for overbreadth and that threats of enforcement of those statutes made by various state officers were made without hope of securing valid convictions, but rather as part of a plan to harass the petitioners under color of state law.[9]

The district court in *Dombrowski* abstained so as to allow the state courts the opportunity to narrowly construe statutes which involved the state's basic right of self preservation. The district court felt that federal interference with the statute "would be a massive emasculation of the last vestige of dignity of sovereignty." [10] The Supreme Court, in the broadest of language, reversed, holding that:

> Because of the sensitive nature of constitutionally protected expression, we have not required that all of those subject to overbroad regulations risk prosecution to test their rights. For free expression —of transcendent value to all society, and not merely to those exercising their rights—might be the loser.[11]

The Court noted that the "very fact of prosecution" itself could have an inhibiting effect on first amendment rights and cause plaintiffs irreparable injury.[12] Since a grand jury had not been convened and no indictments obtained until after the filing of the federal action by petitioners, the Court held that the federal "anti-injunction" statute, 28 U.S.C. § 2283[13] was no bar to federal intervention.[14]

Two and one-half years after *Dombrowski* the Supreme Court restated their position with even greater sweep in *Zwickler v. Koota*.[15] The Court ruled that it was the duty of federal courts to guard, enforce, and protect every right granted or secured by the Constitution of the United States.

> Plainly, escape from that duty is not permissible merely because state courts also have the solemn responsibility, equally with the federal courts . . .[16]

Echoing *Dombrowski*, the Court held that where a statute is attacked as facially repugnant to the first amendment, an impermissible chilling effect on those rights might result from the delay of awaiting disposition in state courts.[17]

Neither *Dombrowski* nor the Court's other decisions in the area prior to the 1970 term defined the outer limits of federal court intervention into state criminal affairs.[18] Until the question of the applicability of the *Dombrowski* and *Zwickler* doctrines to pending criminal prosecutions was decided, the true scope of the doctrines was impossible of ascertainment.[19] The Supreme Court, in

inal enforcement of an overly broad statute affecting rights of speech and association is in itself a deterrent to the free exercise thereof seems to be the unarticulated assumption that state courts will not be as prone as federal courts to vindicate constitutional rights promptly and effectively.

[5] 380 U.S. 479 (1965).

[6] Douglas v. City of Jeanette, 319 U.S. 157 (1943); Fenner v. Boykin, 271 U.S. 240 (1926).

[7] La. Rev. Stat. §§ 14:358–14:374, (Cum. Supp. 1962).

[8] La. Rev. Stat. §§ 14:390–14:390.8, (Cum. Supp. 1962).

[9] *See* note 1 *supra* for text of statute under which relief was sought.

[10] 380 U.S. at 483.

[11] *Id.* at 486.

[12] *Id.* at 487.

[13] 28 U.S.C. § 2283 (1964):

> A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

[14] 380 U.S. at 484 n. 2.

[15] 389 U.S. 241 (1967). In *Zwickler*, the plaintiff was an individual with a propensity towards distributing anonymous handbills in violation of a New York penal law forbidding the printing, distribution, etc. of unsigned handbills. Zwickler's conviction was reversed by the New York courts on non-constitutional grounds. Zwickler thereupon sought federal relief in the form of a declaratory judgment that the statute was void for overbreadth and an injunction against future prosecution. The district court dismissed the complaint.

[16] 389 U.S. at 248.

[17] The Court thus ruled that the district court erred in not passing on the complaint for declaratory relief. *Id.* at 252. In regard to plaintiff's claim to injunctive relief, which had also been denied by the lower court, the Court stated,

> *Dombrowski* teaches that the questions of abstention and of injunctive relief are not the same. . . . We squarely held that "the abstention doctrine is inappropriate for cases such as the present one where . . . statutes are justifiably attacked on their face as abridging free expression . . . .

Id. at 254. The Court then held that where a statute is attacked for overbreadth in a proceeding for declaratory relief abstention is not a relevant question and that if the declaratory relief is granted a court need only determine whether injunctive relief is either "necessary or appropriate." The merits of the declaratory request were to be decided irrespective of the propriety of injunctive relief. *Id.* at 254–55.

[18] *See generally*, Maraist, *Federal Injunctive Relief Against State Court Proceedings: The Significance of Dombrowski*, 48 Texas L. Rev. 535 (1970).

[19] *Id.* at 591–605.

a series of cases,[20] has now answered that question, and in a manner designed to limit the holdings of *Dombrowski* and *Zwickler* to their facts.

In *Younger v. Harris*,[21] plaintiff Harris was indicted under a California statute known as the California Criminal Syndicalism Act[22] for distributing leaflets advocating a change in industrial ownership through political action.[23] Harris sought to have the federal district court enjoin prosecution of the criminal charges on the grounds that the statute and the prosecution inhibited him from exercising his first amendment rights. Harris was joined in his request for injunctive relief by three intervenors: two members of the Progressive Labor Party who alleged that they were inhibited in propagating their political beliefs and a history professor who feared he might be unable to teach the doctrines of Karl Marx. All the plaintiffs alleged that immediate injury would result from a failure to enjoin the prosecution of Harris. A three-judge federal district court held the California Act facially void for vagueness and overbreadth and enjoined the pending prosecution against Harris.[24] The Supreme Court on appeal reversed, Mr. Justice Douglas dissenting.[25]

The majority opinion, delivered by Mr. Justice Black,[26] quickly disposed of the intervenors for lack of a controversy. The Court noted that none of the intervenors had been indicted, arrested or threatened with prosecution under the challenged acts. The fact that the intervenors might feel "inhibited" by the prosecution pending against Harris was held insufficient to warrant so serious a matter as federal injunction of a pending state prosecution.[27]

As to Harris' claim for relief, the Court reversed the district court, holding that federal courts should not interfere in state criminal proceedings where petitioner has an adequate remedy in the state courts to protect his constitutional rights. The majority opinion discussed the traditions of "comity" between the federal government and the states as a concept occupying "a highly important place in our Nation's history and its future."[28] Under this tradition of "Our Federalism" the national government, anxious as it is to protect and vindicate federal rights and federal interests, must find ways to do so without unduly interfering with the legitimate activities of state governments.[29] Only when a failure to act will cause irreparable injury that is both great and immediate should a federal court exercise its equitable jurisdiction and enjoin a pending state proceeding. The Court did not define "irreparable injury" but did say that it must be more than the cost, anxiety, and inconvenience of defending a single criminal prosecution.

> Instead, the threat to the plaintiff's federally protected rights must be one that cannot be eliminated by his defense against a single criminal prosecution.[30]

The Court distinguished *Dombrowski* on the grounds that allegations of "bad faith" prosecution[31] in that case established the traditional type of "irreparable injury" sufficient to bring federal equitable powers into play. While the Court recognized that some language in *Dombrowski* could support an argument that that case authorized a federal court to grant equitable relief whenever a "facially" overbroad statute threatened the free exercise of first amendment rights, it declared this language to have been unnecessary to the decision of that case.

> It is undoubtedly true, as the Court stated in *Dombrowski*, that '[a] criminal prosecution under a statute regulating expression usually involves imponderables and contingencies that themselves may inhibit the full exercise of First Amendment freedoms.' 380 U.S. at 486. But this sort of 'chilling effect,' as the Court called it, should not by itself justify federal intervention.[32]

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[20] Younger v. Harris, 401 U.S. 37 (1971); Samuels v. Mackell, 401 U.S. 66 (1971); Boyle v. Landry, 401 U.S. 77 (1971); Perez v. Ledesma, 401 U.S. 82 (1971); Dyson v. Stein, 401 U.S. 200 (1971); Byrne v. Karalexis, 401 U.S. 216 (1971).

[21] 401 U.S. 37 (1971).

[22] CAL. PENAL CODE §§ 11400, 11401 (1970):
'Criminal syndicalism' as used in this article means any doctrine or precept advocating, teaching or aiding and abetting the commission of crime, sabotage (which word is hereby defined as meaning wilful and malicious physical damage or injury to physical property), or unlawful acts of force and violence or unlawful methods of terrorism as a means of accomplishing a change in industrial ownership or control, or effecting any political change.

[23] 401 U.S. at 60, dissenting opinion of Justice Douglas.

[24] Harris v. Younger, 281 F. Supp. 507 (C.D. Cal. 1968).

[25] 401 U.S. at 58.

[26] Mr. Justice Black took no part in the consideration or decision of *Dombrowski*. 380 U.S. at 498.

[27] 401 U.S. at 41–42.

[28] *Id.* at 45.

[29] *Id.* at 44.

[30] *Id.* at 46.

[31] "Bad faith" here can be defined as harassment or repeated prosecutions by law enforcement officials without any real hope of securing valid convictions. *See* Maraist, *supra* note 18, at 585–91.

[32] 401 U.S. at 50.

The Court further noted that the procedures for testing the constitutionality of a statute on its face in the manner contemplated by *Dombrowski* are at odds with the powers and duties of the federal courts which are derived from its responsibility for resolving concrete disputes.[33]

The majority limited its teachings in *Younger* in two ways: (1) it specifically stated that it was expressing no views about the circumstances necessary for federal action when no prosecution is pending in a state court;[34] and (2) because the Court based its decision on equitable principles it declined to decide whether the "anti-injunction" statute[35] would in and of itself control the case.[36]

In five companion cases disposed of with *Younger*, the Court both reiterated and enlarged upon the *Younger* holding. In *Samuels v. Mackell*[37] the Court ruled, in seeming contradiction to its prior decision in *Zwickler v. Koota*,[38] that the same equitable principles are to attach for declaratory relief as for injunctive relief.[39] The Court based its ruling on the fact that ordinarily either injunctive or declaratory relief would have the same result on pending prosecutions and that therefore the same principle barring injunctive relief should also bar declaratory relief.[40]

In *Boyle v. Landry*,[41] the Court disposed of plaintiffs' request for injunctive relief on the grounds that none of the plaintiffs "had ever been prosecuted, charged, or even arrested . . ." [42] under the statute that the district court had found unconstitutional. The Court felt that the petitioners were merely "speculating" [43] with respect to statutes that might be used to harrass or intimidate them.

In *Perez v. Ledesma*,[44] *Dyson v. Stein*,[45] and *Byrne v. Karalexis*[46] plaintiffs had successfully challenged the validity of their arrest and the seizure of their property under state obscenity statutes. Once again the Court reversed the decisions of the lower courts, holding that any constitutional questions raised with regard to the various obscenity statutes were to be adjudicated during the course of the state criminal proceedings.

Mr. Justice Douglas dissented from the majority's view of the impropriety of federal intervention in state criminal proceedings in most situations.[47] Justice Douglas praised the *Dombrowski* decision as recognizing that we are in a period where enormous extrajudicial sanctions are imposed on dissenters.

> [I]n times of repression, when interests with powerful spokesmen generate symbolic pogroms against nonconformists, the federal judiciary, charged by Congress with special vigilance for protection of civil rights has special responsibilities to prevent an erosion of the individual's constitutional rights.[48]

In the opinion of Justice Douglas the plaintiffs in *Younger*, *Boyle*, and *Dyson*[49] were entitled to the

[33] *Id.* at 52–53.
[34] *Id.* at 41.
[35] *See* note 13 *supra*.
[36] 401 U.S. at 54.
[37] 401 U.S. 66 (1971).
[38] *See* Maraist, *supra* note 18, at 603–05. Zwickler v. Koota, 389 U.S. 241 (1967), held that district courts were to consider requests for declaratory relief independently of any request for injunctive relief and render its decision on the merits irrespective of the appropriateness of injunctive relief, *Id.* at 254. Professor Maraist discussed the *Zwickler* case as capable of establishing a theory that could circumvent any bars to federal injunctions of pending prosecutions:

> The Declaratory Judgments Act provides that a federal court, after granting a declaratory judgment, may give 'further necessary or proper relief' to the litigant who prevails, and the Anti-Injunction Act excepts from its coverage stays of pending (28 U.S.C. § 2202 (1964) state proceedings when stays are necessary to "effectuate" a judgment of the court (28 U.S.C. § 2283 (1964)).

Mariast, *supra* note 18, at 603 (footnotes interlineated). Professor Maraist cited Landry v. Daley, 288 F.Supp. 189 (M.D.Ill. 1968) as an example of the theory in practice. *Landry*, of course, is one of the cases reversed *sub nom.* Boyle v. Landry, 401 U.S. 77 (1971), in conjunction with *Younger* and *Samuels*. It is interesting to note that Mr. Justice Black's majority opinion in *Samuels* discusses the same possibility of circumventing bars to injunctive relief in pending prosecutions as does Professor Maraist, 400 U.S. at 72, but Mr. Justice Black did not even mention *Zwickler*, a decision in which he joined. *See also* note 17 *supra*.
[39] 401 U.S. at 73.
[40] The Court quoted at length from Great Lakes Co. v. Huffman, 319 U.S. 293 (1943), a case where the Court refused to grant declaratory relief from an allegedly unconstitutional state tax on the grounds that since injunctive relief would not be proper due to the adequacy of state remedies neither would declaratory relief be proper. The Court further stated that although it was unable to find any case of its own dealing with the application of the doctrine to cases in which the relief sought affected state criminal prosecutions rather than state tax collections, it could perceive no relevant difference between the two situations with respect to the limited question of whether, in cases where the criminal proceeding was begun prior to the federal civil suit, the propriety of declaratory and injunctive relief should be judged by essentially the same standards. 401 U.S. at 71–2.
[41] 401 U.S. 77 (1971).
[42] *Id.* at 80.
[43] *Id.* at 81.
[44] 401 U.S. 82 (1971).
[45] 401 U.S. 200 (1971).
[46] 401 U.S. 216 (1971).
[47] 401 U.S. at 58.
[48] *Id.* (Douglas, J., dissenting).
[49] Justice Douglas concurred in *Samuels*, 401 U.S. at

relief they requested under the doctrines announced in *Dombrowski* and *Zwickler*. Mr. Justice Douglas also held that 42 U.S.C. § 1983 is an expressly authorized exception to the "anti-injunction" statute, 28 U.S.C. § 2283,[50] and thus no bar to those who would seek to enjoin state proceedings on the grounds of a deprivation of civil rights under color of law.

The response to *Younger* in the lower courts was immediate. Less than two weeks after the *Younger* decision a district court in New Jersey dismissed a class action by "longhaired travellers" alleging harassment by state police.[51] The court ruled, on the authority of *Younger*, that those members of the class who where the subject of pending prosecutions had an adequate forum to press their claims and that those who were not subject to prosecution had no valid claim to federal relief to "calm their inhibitions." Similarly, a district court in California refused to interfere in obscenity cases pending in the state courts on the grounds that they were good faith prosecutions brought in the hope of valid convictions.[52] The lower court, in discussing *Younger* and other recent Supreme Court decisions, exemplifies the spirit of numerous lower federal courts which have relied on *Younger* to deny plaintiffs federal intervention:[53]

> The Supreme Court has obviously called a halt to the faddish trend of irritating interventions in State action that for a while threatened to become an avalanche of constitutional fetishism.[54]

Despite the sweeping language of *Younger* and its companions, a number of federal courts have exhibited a reluctance to interpret the *Younger* holding too broadly. In *Wheeler v. Goodman*[55] a three-judge court reaffirmed their prior holding[56] of a North Carolina vagrancy statute as unconstitutional. The Supreme Court had vacated the original order and remanded in the light of *Younger*.[57] On remand the three-judge court pointed out that at the time suit was brought there were no prosecutions pending in state courts and that the plaintiffs,

74, dissented in part in *Perez*, 401 U.S. at 90, and took no part in *Byrne*, 401 U.S. at 220.

[50] *See* note 13 *supra*.

[51] Lewis v. Kugler, 324 F. Supp. 1220 (D.N.J. 1971). The longhaired travellers were actually a sub-class of "persons of highly individualized appearance," who, because of their appearance, they alleged, were subjected to frequent and unreasonable stops and searches along the highways of New Jersey by state police. Plaintiffs further alleged such activity resulted in several drug offense charges being brought against their number, and that prosecution for those offenses should be enjoined. In Lewis v. Kugler, 9 BNA CRIM. L. REPTR. 2409 (3rd Cir. Aug. 4, 1971), the Third Circuit reversed the trial court's dismissal of plaintiffs' complaint for future injunctive relief from the state police but still instructed the trial court on remand to enter no declaratory judgment with respect to the constitutionality of the searches and seizures forming the bases of pending prosecutions.

[52] Veen v. Davis, 326 F. Supp. 116 (C.D. Cal. 1971).

[53] Other cases where courts have refused to intervene in state proceedings on the strength of *Younger* are Livingston v. Garmire, 9 BNA CRIM. L. REPTR. 2166 (5th Cir. May 10, 1971) (Withdrawal of earlier opinion, 437 F.2d 1050 (5th Cir. 1971), affirming district court declaration that Miami disorderly conduct ordinance was unconstitutional. The Court of Appeals remanded to the district court for reconsideration in light of *Younger*); Rialto Theatre Co. v. City of Wilmington, 440 F.2d 1326 (3rd Cir. 1971) (District court order, requiring state officials to return motion picture film seized in raid to plaintiffs, remanded to district court to return parties to status quo before federal interference); Thevis v. Moore, 440 F.2d 1350 (5th Cir. 1971) (Refusal to enjoin enforcement of two Birmingham ordinances); People v. Birmingham, 440 F.2d 1352 (5th Cir. 1971) (Reversal of lower court injunction against enforcement of Birmingham obscenity ordinance); Eve Productions v. Shannon, 439 F.2d 1073 (8th Cir. 1971) (Refusal to enjoin Missouri obscenity prosecutions); Gornto v. Thomas, 439 F.2d 1406 (5th Cir. 1971) (Denial of injunctive and declaratory relief from Georgia obscenity statute); Fuller v. Scott, 9 BNA CRIM. L. REPTR. 2288 (M.D.N.C. June 22, 1971) (Order declaring North Carolina riot statute unconstitutional vacated because plaintiffs failed to show bad faith or harassment); Gregory v. Gaffney, 9 BNA CRIM. L. REPTR. 2287 (M.D. N.C. June 14, 1971) (Declaratory judgment that state obscenity statute was facially vague vacated because neither bad faith nor harassment had been shown by plaintiffs); Pederson v. Klinker, 9 BNA CRIM. L. REPTR. 2227 (E.D. Wis. May 25, 1971) (Temporary restraining order against prosecution of topless dancers for disorderly conduct vacated); Alga v. Crossland, 327 F. Supp. 1264 (M.D. Ala. 1971) (Injunction against prosecution of exhibitors of "adult movies" under state obscenity statute denied); Marseo v. Cannon, 326 F. Supp. 1315 (E.D. Wis. 1971) (Refusal to convene three-judge court to protect topless dancers from prosecution); Consejo General De Estudiantes De La Universidad De Puerto Rico v. University of Puerto Rico, 325 F. Supp. 453 (D. Puerto Rico 1971) (Refusal to enjoin or grant declaratory relief against enforcement of university regulations); Ascheim v. Quinlan, 324 F. Supp. 789 (W.D. Pa. 1971) (Suit brought to enjoin state court prosecution of various persons arrested in courtroom melee); Lawrence v. Lordi, 324 F. Supp 1092 (D.N.J. 1971) (Injunctive and declaratory relief denied upon complaint against New Jersey statute making it a crime to advocate or incite certain crimes); Moyer v. Nelson, 324 F. Supp. 1224 (S.D. Iowa 1971) (Refusal to enjoin good faith prosecution of traffic tickets); Hendricks v. Hogan, 324 F. Supp. 1277 (S.D.N.Y. 1971) (Refusal to convene three-judge court to hear complaint against New York flag desecration statute where prosecutions were pending).

[54] 326 F. Supp. 116, 119 n. 7.

[55] 9 BNA CRIM. L. REPTR. 2312 (W.D.N.C. July 1, 1971).

[56] Wheeler v. Goodman, 306 F. Supp. (W.D.N.C. 1970).

[57] 401 U.S. 987 (1971).

"hippies" in the Charlotte, N.C. area, had proved a case of "clear harassment" by the police.[58]

> The agreed upon facts show irreparable injury, both great and immediate, to the plaintiffs by reason of the series of unlawful raids and entries into their place of residence without arrest warrants and without the slightest probable cause.[59]

The facts in *Wheeler* are much closer to those in *Dombrowski* than to *Younger*. There were no prosecutions pending in the state courts and there was a showing of "bad faith" on the part of law enforcement officials. Thus the court in *Wheeler* held that federal relief was warranted to prevent irreparable injury to the plaintiffs. Nevertheless, although the *Wheeler* decision comes within the letter of *Younger*, an argument could be made that it departs from the spirit of that case. Much emphasis was placed by the *Younger* majority on the necessity to exhaust state remedies prior to requesting federal relief. In *Wheeler*, plaintiffs could have sought injunctive relief within the state courts, but the *Wheeler* court was careful not to extend the federal exhaustion requirement this far. The necessity of exhaustion before writ of habeas corpus is sought in the federal courts is analogous.[60]

Similarly in *Clutchette v. Procunier*,[61] a California district court refused to apply the *Younger* exhaustion requirement to quasi-criminal proceedings. In *Clutchette*, the court enjoined all prison disciplinary proceedings pending implementation of procedures by the state that will afford prisoners the basics of due process of law. The court held *Younger* to be inapplicable by labeling the action civil:

> Nothing in those decisions would lead this court to conclude that federal courts must abstain from deciding civil cases equally cognizable in state courts although not yet instituted. Such an interpretation would reintroduce the exhaustion doctrine into civil rights actions, a procedure certainly not intended by the Supreme Court in the *Younger* decisions.[62]

Notwithstanding the district court's simple assertion that the action was civil, it is difficult to imagine a more disruptive influence on federal-state relations than an injunction against a state's prison disciplinary proceedings. If ever there was a case where the interests of "comity" were at stake and where a civil action involved criminal proceedings this was it. Yet the *Clutchette* court chose not to trust the adjudication of prisoners' constitutional rights to the state courts.

Where prosecution of plaintiff was begun in good faith but there was no possibility of immediate relief in the state courts, another district court also found *Younger* to be inapplicable. In *Sweeten v. Sneddon*[63] the plaintiff was facing prosecution in the state courts for a misdemeanor. Because the pending charge was a misdemeanor, the state court refused to appoint an attorney for Sweeten even though he was indigent. Sweeten, however, was on parole from a prior felony conviction, and if convicted for the misdemeanor faced imprisonment not only for the misdemeanor but a revocation of his parole. The district court enjoined the state court from prosecuting Sweeten without an attorney. The court, in light of *Younger*, found that Sweeten was in great and immediate danger of irreparable injury—namely trial without benefit of counsel. The district court held that Sweeten was entitled to counsel at trial, especially in view of the situation of his parole, and that:

> the threat to plaintiff's constitutionally protected rights is one that cannot be eliminated by his defense to the misdemeanor action, since the city court has already denied the right he claims.[64]

The court also took into consideration the fact that decisions of the Supreme Court of Utah were contrary to plaintiff's claim to an attorney and for that reason he stood little hope of relief in the state courts.[65]

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[58] *See also* Hull v. Petrillo, 439 F.2d 1184 (2d Cir. 1971), where the court of appeals reversed the district court's dismissal of complaint alleging bad faith harrassment under city ordinance requiring license to sell newspapers on street.

[59] 9 BNA CRIM. L. REPTR. at 2312.

[60] *Ex Parte* Royall, 117 U.S. 241 (1886).

[61] 9 BNA CRIM. L. REPTR. 2291 (N.D. Cal. June 21, 1971).

[62] *Id. See also* McCue v. Racine, 9 BNA CRIM. L. REPTR. 2451 (E.D. Wis. July 28, 1971), where a district court held that *Younger* did not bar an injunction against prosecution of nude and semi-nude "go-go" dancers under city ordinances, which prosecutions are civil actions under the laws of Wisconsin.

[63] 324 F. Supp. 1094 (D. Utah 1971).

[64] *Id.* at 1104.

[65] *Id.* at 1099. One further distinction between *Younger* and *Sweeten* is that in the latter case the court was not actually seeking to enjoin prosecution of the plaintiff but only to prevent prosecution while he had no attorney.

Sweeten, while giving regard to the unavailability of relief in the state courts, which it seems the court in *Wheeler* neglected to do, raises the question of whether the standards for enjoining a prosecution because of procedural failures should be less strict than the standards required to enjoin on grounds of substance. *Perez*

Yet another interesting question is presented by *Taylor v. City of Selma.*[66] In that case a district court in Alabama enjoined a pending prosecution on the grounds that the prosecutions brought against plaintiffs were brought in bad faith in order to harass and prevent plaintiffs from participating in a local political campaign. On the grounds of plaintiffs' danger of irreparable injury, the court enjoined their prosecution in the state courts. The difficulty with the facts of this case is that the election which plaintiffs missed because of state court prosecution was held in 1966, and the prosecution enjoined is actually a trial de novo from an appeal from a prior trial and conviction. Thus, the question presented by this case is the time sequence of irreparable injury that must exist in order for a federal court to intervene. While plaintiffs may have had a valid claim for injunctive relief in 1966 (so that they would not miss the election) when the election passed so did the danger of irreparable injury, and once again the prosecution became one that could run its course in the state courts without further danger of irreparable injury. The district court, however, took a different, if not completely explained, view of the situation.

> While the election has long since been held, the prosecution of House and Carmichael remains unchanged and accordingly the defendants will be enjoined from prosecuting plaintiffs. . . .[67]

The district court in *Taylor* seems to have accepted the view that if at any point in a criminal proceeding a defendant stands in danger of great and immediate irreparable injury, and therefore has a valid claim to federal relief, those defendants may claim their relief even after the injury has occurred or disappeared. A better reasoned view, in the light of the respect due to state proceedings under *Younger*, would be that since federal courts may interfere only to prevent irreparable injury, they should not interfere when they cannot prevent said injury.[68]

Conclusion

There can be little doubt that the Supreme Court in *Younger* and its companion cases sought to severely limit the authority of the federal courts to intervene in state criminal proceedings. While this limitation is, no doubt, in part due to the backlog of cases now docketed on federal court calendars,[69] it is largely founded on a desire by the Court to re-establish state courts, as well as the federal courts, as protectors of the United States Constitution. Only in those situations where a plaintiff can show that great and immediate injury will result from a refusal by the federal court to intervene may a federal court exercise its equitable powers. The Court in *Younger* specifically avoided basing its decision on the anti-injunction statute, 28 U.S.C. § 2283.[70] Whatever the Court's motive in doing so, the result is to allow the lower federal

would seem to militate against such a reduction in standards except where, as the court in *Sweeten* found, there exists little or no chance of plaintiff's vindication in the state courts and as a result plaintiff will suffer great and immediate irreparable injury.

[66] 327 F. Supp. 1191 (S.D. Ala. 1971).

[67] *Id.* at 1193.

[68] Another example of federal intervention into a state civil matter is to be found in Board of Education v. Shelton, 9 BNA Crim. L. Reptr. 2191 (N.D. Miss. May 17, 1971). In that case a federal district court enjoined enforcement of a state court's injunction which would unconstitutionally limit demonstrations in and around a local school. The Court held that the suit brought in the federal court was in actuality an attack on a civil proceeding, the state court's injunction. This fact, and the great and immediate irreparable injury to constitutional rights resulting from the state court's order, justified the federal intervention requested in the eyes of the court. There was, in that case, the additional fact that the federal courts had previously entered orders on the very subject of restraints on protest around that very school and, therefore, the state court's injunction was actually an interference with the federal court's jurisdiction of the matter *Id.* at 2192. The court discussed the state court's interference with the federal court's order as an exception under 28 U.S.C. § 2283, the anti-injunction statute (*see* note 13 *supra* for text of statute).

Another case, while not directly on point, that raises some interesting questions in federal-state court relations in criminal matters, is Bastida v. Braniff, 9 BNA Crim. L. Reptr. 2279 (5th Cir. June 7, 1971). That case was a proceeding for a writ of habeas corpus rather than an action for injunction. The court of appeals found that threats by the state court judge and prosecutor to double petitioner's sentence should he be successful in the federal courts and reconvicted in the state courts justified the district court, that had granted the writ, in retaining jurisdiction of the case until any new trial and sentencing has been completed. The ill feelings that can result from federal intervention in state proceedings can be vividly seen in this case. An additional reason for the court of appeals' order that the district court retain jurisdiction of the new trial was that,

> . . . Judge Braniff and District Attorney Wimberly have both expressed extreme hostility toward this court for granting relief to petitioner. . . .

Id. It was exactly this sort of unseemly friction between state and federal courts that the Supreme Court's decision in *Younger* seeks to avoid; yet, in situations where a state court has acted in disregard of a defendant's civil rights, as in the *Bastida* case, it would be even more unseemly for an individual's rights to be sacrificed in order to maintain a superficial appearance of agreement between state and federal courts.

[69] *See* Burger, *State of the Federal Judiciary* (Aug. 10, 1970), 90 S. Ct. 2381 (1970).

[70] 401 U.S. at 54, *See* note 13 *supra* for text of statute.