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Federal Court Intervention in Pending State Criminal Prosecutions- The Significance of Younger v. Harris

COMMENTS

FEDERAL COURT INTERVENTION IN PENDING STATE CRIMINAL PROSECUTIONS—THE SIGNIFICANCE OF *YOUNGER v. HARRIS*

The recent United States Supreme Court decision of *Younger v. Harris*[1] along with its companion cases[2] represent the most significant development in the area of federal-state court relations since the Court decided *Dombrowski v. Pfister*[3] in 1965. *Dombrowski* created grave doubts over the continued validity of the long established public policy against federal court interference with state court proceedings. Civil libertarians were quick to seize upon the broad assertions in that case as support for their efforts toward expanding the concept of federal court intervention in state criminal prosecutions. Though the Court was given the opportunity to reconcile the conflicting interpretations over the significance of *Dombrowski*, it failed to do so and basic doubts as to the true dimensions of that decision remained unanswered until the Court decided *Younger v. Harris* and its companion cases in February, 1971. Because *Younger* was expressly limited in its application to pending state criminal prosecutions,[4] this Comment in attempt-

1 401 U.S. 37 (1971).

2 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).

3 380 U.S. 479 (1965).

4 Justice Black, speaking for the Court, carefully limited *Younger:*

> . . . We express no view about the circumstances under which federal courts may act when there is no prosecution pending in state courts at the time the federal proceeding is begun. 401 U.S. at 41.

Black failed to indicate what stages of the proceeding were to be considered a part of a "prosecution pending." The actual facts of *Younger* are in doubt and so are of little help in making this determination. The three-judge district court indicated that Harris had only been indicted and was awaiting trial at the time the federal suit was filed. *See* Harris v. Younger, 281 F. Supp. 507, 509 (C.D. Cal. 1968). Justice Black, on the other hand, stated that Harris had been indicted and "was actually being prosecuted" at the time of the federal suit. 401 U.S. at 41. Justice Stewart's remarks in his concurring opinion failed to resolve this question. He added only that *Younger* would not be controlling "when a federal court is asked to give injunctive or declaratory relief from *future* state criminal prosecutions." 401 U.S. at 55 (Stewart, J., concurring). Stewart went on to indicate that *Younger v. Harris* would have no application where state civil proceedings were involved. *Id.*

Black also concluded in *Younger* that 28 U.S.C. § 2283 (1970), the federal anti-injunction statute, would not be affected by this decision. Black noted that since this ruling was based on the lack of equitable principles needed to invoke federal relief, there

ing to assess the importance of that decision will be confined solely to the developments in that area of the law.

I. The Abstention Doctrine

Basically, the abstention doctrine provides that the federal courts will refrain from interfering with state court proceedings until the state courts have had an opportunity to fully adjudicate matters before them.[5] The doctrine is founded on considerations of federalism and is by its origin equitable in nature.[6] The abstention doctrine is essentially a compromise in an attempt by Congress and the federal courts to minimize the conflict and maximize the efficiency between state and federal courts.[7]

While there is disagreement among constitutional scholars as to the origins of abstention as a concept,[8] few will dispute the fact that its judicial development into a recognized doctrine did not begin until early in the twentieth

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was no opportunity to determine whether section 2283 would control. 401 U.S. at 41. Section 2283 is applicable only where the actual prosecution has begun. *See* note 12 *infra.*

[5] Younger v. Harris, 401 U.S. 37, 43 (1971).

Generally, four principles are given as the basis for the abstention doctrine: (1) A desire to permit the state an opportunity to decide issues on the basis of state law, thus avoiding the constitutional issue wherever possible; (2) To prevent unnecessary interference with the states in their efforts to administer their own laws; (3) To permit the states the opportunity to resolve unanswered questions concerning state law; (4) To provide over-burdened federal courts with some relief. *See* C. Wright, Federal Courts 196 (2d ed. 1970).

[6] Since it is essentially equitable in nature, the abstention doctrine, in the area of criminal prosecutions, has strong support from the principle that courts of equity will not act to restrain a criminal prosecution. *See* Younger v. Harris, 401 U.S. 37, 43 (1971).

The abstention doctrine is founded on considerations of comity—that federal courts should give consideration to the sovereign status of the individual state. Comity, though frequently referred to as a doctrine, is more properly a long-standing public policy. *See* C. Wright, Federal Courts 169-72 (1963).

[7] *See* Railroad Comm'n v. Pullman Co., 312 U.S. 496 (1941); C. Wright, *supra* note 5.

[8] The dispute apparently dates back to the early nineteenth century. A number of writers, relying upon Chief Justice Marshall's pronouncements in Cohens v. Virginia, 19 U.S. (6 Wheat.) 264 (1821), maintain that the concept of abstention was totally foreign to our early constitutional jurists. *See* Maraist, *Federal Injunctive Relief Against State Court Proceedings: The Significance of Dombrowski,* 48 Texas L. Rev. 535, 537 (1970). Our present Court, on the other hand, speaking through the late Justice Black has noted that "[s]ince the beginning of this country's history Congress has, subject to few exceptions, manifested a desire to permit state courts to try state cases free from interference by federal courts." Younger v. Harris, 401 U.S. 37, 43 (1971).

century.[9] It was not until 1941 in *Railroad Comm'n v. Pullman Co.*[10] that the doctrine was interpreted to its fullest extent. In that case the Court noted:

> . . . [A] doctrine of abstention is appropriate to our federal system whereby the federal courts "exercising a wise discretion," restrain their authority because of "scrupulous regard for the rightful dependence of the state governments" and for the smooth working of the federal judiciary.[11]

A. *The "Extraordinary Circumstances" Exception*

Both Congress and the Court, though persistent in the belief that traditional policy considerations warranted noninterference in state proceedings, have through necessity fashioned several exceptions to the abstention doctrine.[12]

With respect to state criminal prosecutions, the area directly affected by *Younger v. Harris*, an exception to what then existed of the abstention doctrine was created by the Court in 1908 in *Ex parte Young*.[13] In that decision the Court indicated that under "extraordinary circumstances" a federal court may properly enjoin a pending state criminal prosecution.[14] As to the factors necessary to constitute these exceptional circumstances, the Court indicated only that such circumstances would exist where the petitioner was

[9] It has been said that the abstention doctrine began its initial development in a 1929 Supreme Court case, Gilchrist v. Interborough Rapid Transit Co., 279 U.S. 159 (1929). *See* Maraist, *supra* note 8, at 538.

[10] 312 U.S. 496 (1941).

[11] *Id.* at 501.

[12] Congress has expressly provided for only three exceptions where federal courts may grant injunctive relief against state court proceedings. Injunctive relief may be granted where (1) expressly authorized by act of Congress; or (2) where necessary to aid a federal court in its jurisdiction; or (3) to protect or effectuate the judgments of a federal court. *See* 28 U.S.C. § 2283 (1970).

A second major judicial exception, developed from the principles established in Ex parte Young, 209 U.S. 123 (1908), has been commonly referred to as the "civil rights" exception. In practical application this exception has frequently been difficult to distinguish from the "extraordinary circumstances" exception. This is particularly true where the danger to the exercise of civil rights results from a state criminal prosecution. For a discussion of the former exception, *see* Maraist, *supra* note 8, at 548.

[13] 209 U.S. 123 (1908). At issue was the constitutionality of a state railroad rate statute. The Court held that the provisions of this statute concerning enforcement of rates, ". . . by imposing such enormous fines and possible imprisonment as a result of an unsuccessful effort to test the validity of the laws themselves, are unconstitutional on their face. . . ." *Id.* at 148.

[14] The Court in *Ex parte Young* did not purport to establish any new rule, but rather indicated that its conclusions were supported by long-standing case authority. The Court quoted with approval from Pennoyer v. McConnaughy, 140 U.S. 1, 12 (1890):

> . . . [T]he general doctrine . . . that the circuit courts of the United States will restrain a state officer from executing an unconstitutional statute of the State, when to execute it would violate rights and privileges of the complainant which had been guaranteed by the Constitution, and would work irreparable damage and injury to him, has never been departed from. 209 U.S. at 152.

threatened with "great and irreparable injury" from an act that violates the federal constitution.[15]

Ex parte Young proved to be an unpopular decision,[16] and Congress reacted quickly by enacting legislation to restrict its effectiveness.[17] The Court in later decisions, while not rejecting the power it had granted itself in *Ex parte Young*, merely refused to exercise that power by its persistent reluctance to find that the facts presented created a danger of irreparable injury.[18]

Obviously the Court's attitude toward *Ex parte Young* severely limited the development of guidelines whereby the existence of extraordinary circumstances warranting federal intervention might be determined. Nevertheless, one factor—harassment and bad faith prosecution on the part of state officials—has consistently been considered by the Court to be an exceptional circumstance justifying federal court intervention.[19] In no decision has this been more evident than in *Hague v. CIO*,[20] decided in 1939. Here the Court, refusing to abstain, granted declaratory and injunctive relief against the mayor, police chief and other city officials of Jersey City, New Jersey where the respondents were being harassed with prosecutions, unlawful searches and arrests because of their labor union activities. The Court enjoined the actions of the city officials and held that the ordinance under which they purported to act was facially defective in forbidding public assembly and distribution of literature in contravention of the respondent's right of free speech and peaceful assembly.[21]

While *Hague v. CIO* was not the first instance in which the Court was faced with an overly broad or vague statute endangering the exercise of first

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15 Ex parte Young, 209 U.S. 123, 167 (1908).

16 *See* C. WRIGHT *supra*, note 8, at 186.

17 *Ex parte Young* had a considerable influence on the passage in 1910 of an act which forbade the issuance of a federal injunction against state proceedings or statutes, except by a three-judge district court. The basic three-judge statute, which has been subject to amendment since its adoption, is now codified at 28 U.S.C. § 2281 (1970). *See* Currie, *The Three-Judge District Court In Constitutional Litigation*, 32 U. CHI. L. REV. 1 (1964). The three-judge court act was one of the less drastic measures proposed to Congress following *Ex parte Young*. Some of the proposals sought to take away the jurisdiction of federal courts to hear suits with regard to state laws. *See* C. WRIGHT, *supra* note 8, at 188.

18 *See, e.g.*, Douglas v. City of Jeannette, 319 U.S. 157, 164 (1943); Watson v. Buck, 313 U.S. 387, 401 (1941); Beal v. Missouri Pac. R.R., 312 U.S. 45, 50 (1941); Spielman Motor Sales Co. v. Dodge, 295 U.S. 89, 95 (1935); Fenner v. Boykin, 271 U.S. 240 (1926). *But see* Hague v. CIO, 307 U.S. 496 (1939).

19 Though denying injunctive relief against a state criminal prosecution, the Court in Beal v. Missouri Pac. R.R., 312 U.S. 45, 50 (1941), indicated that multiple prosecutions might constitute irreparable injury warranting intervention. *See also* Watson v. Buck, 313 U.S. 387 (1941).

20 307 U.S. 496 (1939).

21 *Id.* at 516-18.

amendment freedoms,[22] it is unlikely that the Court could have forseen the significant role this factor would play in future decisions with regard to federal court intervention in state court proceedings.[23] By far the most important development in this area prior to *Dombrowski v. Pfister* did not occur until some twenty-five years after *Hague* when the Court decided *Baggett v. Bullitt*.[24] In *Baggett* a class action was brought by members of the faculty, staff and student body of the University of Washington seeking declaratory and injunctive relief against a Washington state loyalty oath.[25] The Court reversed a three-judge district court ruling and granted the prayed for relief. Justice White, speaking for the Court, indicated that because of the vagueness of the statute it would require "extensive adjudication under a variety of situations [to] bring the oath within the bounds of permissible constitutional certainty." [26] The Court found that the vagueness of the statute might inhibit the exercise of first amendment freedoms.[27] Justice White went on to note that "abstention operates to require piecemeal adjudication in many courts . . . thereby delaying ultimate adjudication on the merits for an undue length of time. . . ." [28]

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22 *See, e.g.*, Schneider v. State, 308 U.S. 147 (1939); Herndon v. Lowry, 301 U.S. 242 (1937); Stromberg v. California, 283 U.S. 359 (1931).

23 *See, e.g.*, Keyishian v. Board of Regents, 385 U.S. 589 (1967); Dombrowski v. Pfister, 380 U.S. 479 (1965); Baggett v. Bullitt, 377 U.S. 360 (1964); Louisiana *ex rel.* Gremillion v. NAACP, 366 U.S. 293 (1961). *See also* Comment, *Protecting Civil Liberties Through Federal Court Intervention in State Criminal Matters*, 59 CALIF. L. REV. 1549, 1559 (1971); Note, *The Chilling Effect in Constitutional Law*, 69 COLUM. L. REV. 808 (1969).

24 377 U.S. 360 (1964).

25 One of the Washington laws applied only to teachers, who before being accepted for employment were required to swear that they would ". . . by precept and example promote respect for the flag and the institutions of the United States of America and the State of Washington, reverence for law and order and undivided allegiance to the government of the United States." WASH. LAWS 1931, ch. 377.

The second oath attacked, WASH. REV. CODE § 9.81.010 (1951), applied to any state employment and required that any person applying for such a position disclaim being a "subversive person" within WASH. REV. CODE § 9.81.010(5) (1951). A "subversive person" within this code section was any person

> . . . who commits, attempts to commit, or aids in the commission, or advocates, abets, advises or teaches by any means any person to commit, attempt to commit, or aid in the commission of any act intended to overthrow, destroy or alter, or to assist in the overthrow, destruction or alteration of, the constitutional form of government of the United States . . . by revolution, force, or violence. . . .

26 Baggett v. Bullitt, 377 U.S. 360, 378 (1964).

27 *Id.* at 379.

28 *Id.* at 378-9. This statement by the Court was in response to the state's argument that Railroad Comm'n v. Pullman Co., 312 U.S. 496 (1941) required that the states be given an opportunity to first resolve unsettled questions of state law. The state noted that these statutes had never been construed. The Court indicated that this oath "is

Although *Baggett* did not involve a pending criminal prosecution, that fact did not preclude it from having a significant effect in that area;[29] for as the Court in *Dombrowski v. Pfister* would later point out, where "protected freedoms of expression and association are similarly involved" there is "no controlling distinction in the fact that the definition is used to provide a standard of criminality rather than the contents of a test oath." [30]

Prior to *Dombrowski v. Pfister*, *Baggett* and *Hague v. CIO* provided the best indication of the factors necessary to obtain the relief sanctioned in *Ex parte Young*. Briefly then, when *Dombrowski* came before the Court for decision, any one of several factors might constitute exceptional circumstances warranting federal intervention in a pending state criminal prosecution. The petitioner might be deemed to have shown a threat of irreparable injury that was both great and immediate if he alleged that he was threatened with harassment under the guise of a facially defective statute;[31] or that he was threatened with prosecution under a vague or overly broad statute endangering the exercise of his first amendment rights;[32] or finally, that he was threatened with multiple prosecutions under an unconstitutionally vague statute.[33]

B. *The Dombrowski Doctrine*

The Court's growing concern over the protection of first amendment freedoms with regard to abstention was clearly evident in *Dombrowski v. Pfister*.[34] Dombrowski and his colleagues were arrested and their records seized under two Louisiana communist control laws.[35] The warrant was sub-

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not open to one or a few interpretations, but to an indefinite number." 377 U.S. at 378.

29 The Court in *Baggett* noted that under WASH. REV. CODE § 9.72.030 (1951) the threat of criminal prosecution for perjury was always present where one made a false oath. *Id.* at 374.

30 Dombrowski v. Pfister, 380 U.S. 479, 494 (1965).

31 Hague v. CIO, 307 U.S. 496 (1939).

32 Baggett v. Bullitt, 377 U.S. 360 (1964).

33 *Id.*

34 380 U.S. 479 (1965).

35 The Subversive Activities and Communist Control Law, LA. REV. STAT. §§ 14:358-74 (Supp. 1962). The Communist Propaganda Control Law, LA. REV. STAT. §§ 14:390-390.8 (Supp. 1962).

The appellants were charged with violation of the subversive activities act for failing to register as members and officers of a communist front organization. 380 U.S. 479, 492-3 (1965). Dombrowski and one other colleague were charged with violating the propaganda control law for failing to register as officers of a "subversive organization." *Id.* at 493. The Court found that since the definition of "subversive organization" in the Louisiana act was almost identical to that in *Baggett v. Bullitt*, it was invalid for the same reasons. The Court further found that registration requirements

sequently quashed and the seized evidence suppressed. State officials, however, continued to threaten the appellants with prosecution and a state indictment soon followed. Dombrowski alleged that because the statute under which he was being prosecuted was facially vague and overbroad, it was susceptible to unlawful application abridging his right to freedom of expression; that the state officials were proceeding with no hope of securing a conviction; that the sole purpose of the state action was to harass him and his colleagues in their civil rights activities; and finally, that the state action had frightened away potential members and contributors to his organization and paralyzed its operations.[36] Mr. Justice Brennan, speaking for the Court, reaffirmed the principles justifying federal nonintervention in state court proceedings,[37] but noted that

> . . . the allegations in this complaint depict a situation in which defense of the State's criminal prosecution will not assure adequate vendication of constitutional rights. They suggest that a substantial loss or impairment of freedoms of expression will occur if appellants must await the state court's disposition and ultimate review in this Court of any adverse determination. These allegations, if true, clearly show irreparable injury.[38]

No doubt the Court was justified in finding that the facts alleged warranted intervention. Unfortunately, however, Justice Brennan did not confine his remarks to the particular facts present. He went on to intimate that intervention would be justified where the exercise of first amendment rights were in danger of being "chilled" by a facially vague or overbroad statute or by multiple prosecutions.[39] Essentially from Justice Brennan's remarks it could be inferred that in the future extraordinary circumstances warranting intervention might be found in any state proceeding resulting in a "chilling effect" upon the exercise of first amendment freedoms.[40]

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of the subversive activities act were invalid because it did not provide for the procedural safeguards required in Joint Anti-Fascist Comm. v. McGrath, 341 U.S. 123 (1951).

[36] The appellants were members and officers of the Southern Conference Educational Fund, an organization that actively participated in the Negro civil rights movement. 380 U.S. at 482.

[37] 380 U.S. at 483-85.

[38] *Id.* at 485-86.

[39] Clearly the facts present in *Dombrowski* constituted more than a mere "chilling effect" upon the exercise of first amendment freedoms. Not only were the statutes under which the appellants were being prosecuted facially unconstitutional, *see* note 34 *supra*, but the appellants were subjected to constant damaging harassment by state officials. Justice Brennan's remarks that the very fact of prosecution may have a "chilling effect" upon the exercise of first amendment rights assumes facts far less damaging than those actually present. 380 U.S. at 487.

[40] *Id.* at 487.

Dombrowski's broad pronouncements were soon hailed by civil libertarians and constitutional scholars alike as an indication that this decision marked a substantial departure from traditional abstention considerations.[41] Supreme Court decisions that followed served only to support this view by their failure to positively respond to the apparent speculation over *Dombrowski.*[42] Many lower federal courts, for lack of clear authority to the contrary, felt that *Dombrowski* had severely restricted the abstention doctrine in the area of first amendment freedoms.[43] Briefly, these courts interpreted *Dombrowski* and subsequent decisions as indicating that under the extraordinary circum-

[41] *See generally* Sedler, *The Dombrowski-Type Suit as an Effective Weapon for Social Change: Reflections From Without and Within,* 18 KAN. L. REV. 237 (1970); Stickgold, *Variations on The Theme of Dombrowski v. Pfister: Federal Intervention in State Criminal Proceedings Affecting First Amendment Rights,* 1968 WIS. L. REV. 369 (1968).

[42] In Cameron v. Johnson, 381 U.S. 741 (1965), the Court in a per curiam opinion indicated that it regarded *Dombrowski* as having significance beyond its own facts. The Court vacated a three-judge district court ruling, rendered prior to *Dombrowski,* refusing to grant injunctive relief against the enforcement of a Mississippi anti-picketing statute. The Court remanded the case to the district court so that it might be considered in light of *Dombrowski v. Pfister.* Justice Black, who was later to write the opinions of the Court in *Younger* and its companion cases, wrote a lengthy dissent to the dismissal. Black noted: "Apparently the Court means to indicate that this recent decision [*Dombrowski v. Pfister*] created a new rule authorizing federal courts to enjoin state officers from enforcing state laws. . . ." *Id.* at 747.

In Zwickler v. Koota, 389 U.S. 241 (1967), the appellant sought declaratory relief from a New York statute regulating the distribution of handbills. The Court in holding the statute void for overbreadth noted that it might produce a "chilling effect" on the appellant's first amendment rights. *Id.* at 252.

But when *Cameron* returned for the second time the Court retreated from the position taken in *Dombrowski* and *Zwickler. See* Cameron v. Johnson, 390 U.S. 611 (1968). On remand the three-judge court had again refused to grant relief against the anti-picketing statute. The Court, in affirming, indicated that a "chilling effect" on first amendment freedoms was permissible so long as state officials were proceeding in good faith to enforce a valid statute. *Id.* at 619. This position on the part of the Court has been criticized as permitting "state officials to harass the exercise of protected expression so long as they have an expectation of obtaining conviction." *See* Stickgold, *supra* note 41, at 412.

[43] *See, e.g.,* Sheridan v. Garrison, 415 F.2d 699 (5th Cir.), *cert. denied,* 396 U.S. 1040 (1969); Parker v. Morgan, 322 F. Supp. 585 (W.D.N.C. 1971); Babbitz v. McCann, 320 F. Supp. 219 (E.D. Wis. 1970), *vacated and remanded,* 402 U.S. 903 (1971); *cf.* Livingston v. Garmire, 437 F.2d 1050 (5th Cir.), *vacated and remanded,* 442 F.2d 1322 (5th Cir. 1971); Soglin v. Kauffman, 418 F.2d 163 (7th Cir. 1969); Tyrone, Inc. v. Wilkinson, 410 F.2d 639 (4th Cir.), *cert. denied,* 396 U.S. 985 (1969); Baxter v. Ellington, 318 F. Supp. 1079 (E.D. Tenn. 1970). *Contra,* King v. Adams, 410 F.2d 455 (5th Cir. 1969); Tyler v. Russel, 410 F.2d 490 (10th Cir. 1969); Townsend v. State of Ohio, 366 F.2d 33 (6th Cir. 1966); Ivy v. Katzenbach, 351 F.2d 32 (7th Cir.), *cert. denied,* 382 U.S. 958 (1965); Grove Press, Inc. v. Bailey, 318 F. Supp. 244 (N.D. Ala. 1970).

stances exception irreparable injury that was both great and immediate would exist where the complainant could prove either (1) bad faith prosecution,[44] (2) the existence of a facially vague or overbroad statute resulting in a "chilling effect" upon the exercise of first amendment rights,[45] or (3) a "chilling effect" upon first amendment freedoms that would not be remedied by state court adjudication.[46]

Those who sought to apply *Dombrowski* to areas unrelated to freedom of expression met with little success absent proof of bad faith prosecution or harassment.[47] With respect to first amendment rights, however, the criteria established by *Dombrowski* was obviously capable of very broad application. This was clearly evident in many lower federal cases as the mere mention of a "chilling effect" or freedom of expression frequently prompted federal intervention.[48] Speculation over the ultimate extremes to which *Dombrowski* might be carried, at least with respect to pending state criminal prosecutions, was to come to an unexpected halt in February, 1971 when the Court decided *Younger v. Harris* and its companion cases.[49]

II. Younger and Its Companion Cases

In *Younger v. Harris*[50] a three-judge federal court, relying on *Dombrowski*, had held California's Criminal Syndicalism Act[51] void for vagueness and

[44] *See, e.g.*, Astro Cinema Corp., Inc. v. Mackell, 422 F.2d 293 (2d Cir. 1970); Grove Press, Inc. v. Bailey, 318 F. Supp. 244 (N.D. Ala. 1970); Washington v. Garmire, 317 F. Supp. 1384, (S.D. Fla. 1970) *vacated and remanded*, 442 F.2d 1322 (5th Cir. 1971); Gordon v. Christenson, 317 F. Supp. 146 (D. Utah 1970).

[45] *See, e.g.*, LeFlore v. Robinson, 434 F.2d 933 (5th Cir. 1970), *vacated*, 446 F.2d 715 (5th Cir. 1971); Strasser v. Doorley, 432 F.2d 567 (1st Cir. 1970); Moreno v. Henckel, 431 F.2d 1299 (5th Cir. 1970); Stamler v. Willis, 415 F.2d 1365 (7th Cir. 1969), *cert. denied*, 399 U.S. 929 (1970); Baxter v. Ellington, 318 F. Supp. 1079 (E.D. Tenn. 1970).

[46] *See, e.g.*, Time, Inc. v. McLaney, 406 F.2d 565 (5th Cir.), *cert. denied*, 395 U.S. 922 (1969); Gordon v. Christenson, 317 F. Supp. 146 (D. Utah 1970).

[47] *See, e.g.*, Hall v. New York, 359 F.2d 26 (2d Cir. 1966) (defendant prosecuted for sodomy); Nichols v. Vance, 293 F. Supp. 680 (S.D. Tex. 1968) (prosecution for murder); Burhoe v. Byrne, 285 F. Supp. 382 (D. Mass. 1968) (receiving stolen liquor).

[48] *See, e.g.*, Schnell v. City of Chicago, 407 F.2d 1084 (7th Cir. 1969); Babbitz v. McCann, 320 F. Supp. 219 (E.D. Wis. 1970), *vacated and remanded*, 402 U.S. 903 (1971); Washington v. Garmire, 317 F. Supp. 1384 (S.D. Fla. 1970), *vacated and remanded*, 442 F.2d 1322 (5th Cir. 1971). *Cf.* Soglin v. Kauffman, 418 F.2d 163 (7th Cir. 1969); Tyrone, Inc. v. Wilkerson, 410 F.2d 639 (4th Cir.), *cert. denied*, 396 U.S. 985 (1969).

[49] *See* cases cited note 2 *supra*.

[50] 401 U.S. 37 (1971).

[51] Cal. Penal Code §§ 11400-01 (West 1967). The full text of this act may be found at 401 U.S. 37, 38-39. Briefly, however, it provides that any person who teaches or aids or publicizes or justifies or commits any act of criminal syndicalism is guilty of a felony. "Criminal syndicalism" is defined as ". . . any doctrine or precept . . . teaching or aiding and abetting the commission of crime . . . or unlawful acts of force and

overbreadth in violation of the first and fourteenth amendments and had enjoined further prosecution under the act.[52] In reversing the district court, the late Justice Black, speaking for the Court, wasted little time in establishing that *Dombrowski* should not be regarded as ". . . having upset the settled doctrines that have always confined very narrowly the availability of injunctive relief against state criminal prosecutions." [53] Justice Black pointed out that the mere showing that a state statute was facially vague or overbroad in violation of first amendment freedoms, or that it might produce a "chilling effect" on those freedoms, absent proof of bad faith or harassment is insufficient to justify intervention.[54] The presence of a "chilling effect," said Black, ". . . even in the area of first amendment rights, has never been considered a sufficient basis, in and of itself, for prohibiting state action." [55]

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violence or . . . terrorism as a means of accomplishing a change in industrial ownership or control, or effecting any political change." *See* Harris v. Younger, 281 F. Supp. 507, 508 (C.D. Cal. 1968).

[52] Harris had been indicted for distributing leaflets in violation of the act. Several other plaintiffs intervened in the suit alleging that they were members of the Progressive Labor Party, an organization supporting change in industrial ownership and political change. These plaintiffs contended that the prosecution of Harris and the presence of the statute inhibited them in their advocacy. *See* Harris v. Younger, 281 F. Supp. 507, 509 (C.D. Cal. 1968).

The three-judge court, citing Douglas v. City of Jeannette, 319 U.S. 157 (1943), noted that ordinarily a federal court may not properly intervene in state criminal prosecutions, for if constitutional issues are involved they may be considered by the United States Supreme Court after all state remedies have been exhausted. In reference to *Dombrowski v. Pfister*, the district court went on to say, however, that ". . . in recent years, exceptions to this rule have been applied when the criminal statute inherently has a limiting effect upon free expression and when, as here, it is susceptible to unduly broad application." 281 F. Supp. at 510.

The district court pointed out that its ruling did not pass on the right of those not facing prosecution to attack the validity of the statute. *Id.* at 516. Justice Black, however, stated that those plaintiffs other than Harris had no standing to question the validity of the statute. He noted that ". . . persons having no fears of state prosecution except those that are imaginary or speculative, are not to be accepted as appropriate plaintiffs in such cases [*i.e.* federal lawsuits to enjoin a prosecution in a state court]." Younger v. Harris, 401 U.S. 37, 42 (1971).

[53] 401 U.S. 37, 53 (1971).

[54] *Id.* at 50, 53. Justice Black noted that federal injunctive relief does not always eliminate the "chilling effect" that may result from state prosecution; that as *Dombrowski* pointed out, such injunctions should be removed as soon as the objectionable clauses were given an acceptable interpretation by the state courts. The result, said Black, is that the uncertainty remains for those who fear criminal prosecution under the statute. *Id.* at 50-51.

[55] *Id.* at 51. The Court stated that

> [w]here a statute does not directly abridge free speech, but—while regulating a subject within the State's power—tends to have the incidental effect of inhibiting First Amendment rights, it is well settled that the statute can be upheld if the

Despite its critical attitude, the Court by no means intended to overrule *Dombrowski;* rather Black indicated that intervention was clearly warranted on the facts present in that case.[56] The Court, when confronted with *Dombrowski's* broad assertions, noted simply that they were unnecessary to that decision.[57]

In *Younger* the Court did not rule out the possibility that there could exist extraordinary circumstances in the absence of bad faith and harassment that would justify intervention.[58] Little doubt was left, however, that in the future the circumstances alleged would indeed have to be very special. Black noted that such circumstances might exist where the statute was "flagrantly and patently violative of express constitutional prohibitions in every clause, sentence and paragraph. . . ." [59] Justice Stewart in a concurring opinion indicated that state officials would have to use bad faith and harassment in enforcement or that the statute would have to be "patently and flagrantly unconstitutional on its face" to warrant intervention.[60]

Samuels v. Mackell[61] was the second in the series of five cases decided with *Younger. Samuels* involved a factual situation similar to that of *Younger.* The appellants sought an injunction, or in the alternative, declaratory relief against enforcement of a New York state criminal anarchy statute. The Court stated that the appellants had failed to show that they would suffer irreparable injury from the prosecution, accordingly under the criteria established in *Younger* injunctive relief was denied.[62] Justice Black, turning to the alternative prayer for declaratory relief, remarked that abstention was proper here as well, since

> . . . ordinarily a declaratory judgment will result in precisely the same interference with and disruption of state proceedings that the long-standing policy limiting injunctive relief was designed to avoid.[63]

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effect on speech is minor in relation to the need for control of the conduct and the lack of alternative means for doing so. *Id.*

56 *Id.* at 48-49.

57 The statements were unnecessary, said the Court, because "the plaintiffs had alleged a basis for equitable relief under the long-established standards." *Id.* at 50.

58 *Id.* at 53.

59 *Id.*

60 401 U.S. 37, 56 (Stewart, J., concurring).

61 401 U.S. 66 (1971).

62 *Id.* at 68.

63 *Id.* at 72. Black indicated, however, that just because it was determined that the injunctive relief was improper in a particular case, it should not be assumed that declaratory relief is automatically precluded. Without giving any specific examples, Black noted:

> There may be unusual circumstances in which an injunction might be withheld because, despite a plaintiff's strong claim for relief under the established standards, the injunctive remedy seemed particularly intrusive or offensive; in such a

In *Perez v. Ledesma*,[64] a third companion case decided with *Younger*, a three-judge federal district court suppressed the use of allegedly obscene materials seized by state officers. The Court, in setting aside the suppression order, held that *Younger* prohibited interference with any phase of a pending state criminal prosecution, including evidence obtained by state officers' in the absence of extraordinary circumstances.[65]

In the few months since *Younger* and its companion cases were decided their impact on lower federal court decisions with respect to pending state criminal prosecutions has been profound. In most of these decisions requests for injunctive and declaratory relief have been summarily dismissed.[66] It is important to observe that the courts are apparently confining *Younger* strictly to criminal prosecutions.[67] Overburdened district courts, who had

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situation, a declaratory judgment might be appropriate and might not be contrary to the basic equitable doctrines governing the availability of relief. *Id.* at 73.

[64] 401 U.S. 82 (1971).

[65] Of the lower court's suppression order, the Court noted that ". . . [i]t is difficult to imagine a more disruptive interference with the operation of the state criminal process short of an injunction against all state proceedings." *Id.* at 84. The Court observed that it appeared the state officials were merely acting in good faith to enforce the state's criminal laws. *Id.* at 85.

In addition to the cases discussed in this Comment, the Court decided two other cases closely associated with *Younger*. *See* Dyson v. Stein, 401 U.S. 200 (1971); Byrne v. Karalexis, 401 U.S. 216 (1971). In both per curiam decisions relief was denied on the basis of *Younger* and *Samuels*. Though these decisions contribute little to the principles established in the rulings discussed, they do serve to support the significance of *Younger* and *Samuels*.

[66] In the areas affected, the issuance of federal injunctions and declaratory relief since *Younger* has been almost nonexistent. *Younger v. Harris* has virtually replaced *Dombrowski* as authority in this area. *See, e.g.*, Livingston v. Garmire, 442 F.2d 1322 (5th Cir. 1971); Coleman v. Yokum, 442 F.2d 351 (5th Cir. 1971); Locks v. Laird, 441 F.2d 479 (9th Cir. 1971); Rialto Theatre Co. v. City of Wilmington, 440 F.2d 1326 (3d Cir. 1971); Eve Prod., Inc. v. Shannon, 439 F.2d 1073 (8th Cir. 1971); Woodruff v. West Virginia Bd. of Regents, 382 F. Supp. 1023 (S.D. W. Va. 1971); Conover v. Montemuro, 328 F. Supp. 994 (E.D. Pa. 1971); Shaw v. Garrison, 328 F. Supp. 390 (E.D. La. 1971); Pederson v. Breier, 327 F. Supp. 1382 (E.D. Wis. 1971); Planned Parenthood Ass'n v. Nelson, 327 F. Supp. 1290 (D. Ariz. 1971); Alga, Inc. v. Crosland, 327 F. Supp. 1264 (M.D. Ala. 1971); Kirk v. McMeen, 327 F. Supp. 125 (N.D. Iowa 1971); Hearn v. Short, 327 F. Supp. 33 (S.D. Tex. 1971); Veen v. Davis, 326 F. Supp. 116 (C.D. Cal. 1971); Hendricks v. Hogan, 324 F. Supp. 1277 (S.D.N.Y. 1971); Lewis v. Kugler, 324 F. Supp. 1220 (D.N.J. 1971); Lawrence v. Lordi, 324 F. Supp. 1092 (D.N.J. 1971).

[67] *See, e.g.*, Hull v. Petrillo, 439 F.2d 1184 (2d Cir. 1971) (criminal prosecution not pending); Kennan v. Warren, 328 F. Supp. 525 (W.D. Wis. 1971) (state administrative proceeding); Anderson v. Vaughn, 327 F. Supp. 101 (D. Conn. 1971) (criminal prosecution not pending); Kennan v. Nichol, 326 F. Supp. 613 (W.D. Wis. 1971) (prosecution not yet commenced); C'est Bon, Inc. v. North Carolina State Bd. of Alcoholic Control, 325 F. Supp. 404 (W.D.N.C. 1971) (liquor license suspension).

for six years struggled with the intricacies and inconsistences of *Dombrowski* obviously welcomed *Younger*, and rightly so, for though the latter decision failed to provide them with well defined guidelines to follow, it did offer substantial relief from a mounting case load caused in part by *Dombrowski*. The language of the *Younger* Court was sufficient to indicate that in the future truly exceptional circumstances would have to be alleged to warrant intervention.[68] The significance of *Younger*, then, is that very few plaintiffs threatened with state criminal prosecution will be able to allege facts sufficient to justify federal intervention.[69] Indeed, those who have succeeded since *Younger* have done so only by proving bad faith prosecution and harassment on the part of state officials.[70]

III. Conclusion

With respect to pending state criminal prosecutions, *Younger v. Harris* and its companion cases have reaffirmed the doctrine of comity—that federal courts, in the exercise of their jurisdiction, should give consideration to the sovereign status of the individual state.[71] Though *Younger* does not provide all the answers, its effect on the *Dombrowski* doctrine is such that only the issue of whether such a valid doctrine continues to exist in areas not affected by *Younger* remains in doubt. Concern over the continued validity of *Dombrowski*, however, in those areas not affected by *Younger* may be purely academic, for certainly if *Dombrowski* is to be confined to its particular facts the Court will, as the opportunities arise, hold as it did in *Younger*.

No doubt *Younger* will prove to be a wise decision. *Dombrowski* served only to increase the discord between the federal and state judiciary. The assumption that the state courts are adequately equipped to expeditiously vindicate the rights of the accused is a sound one. The principles enunciated in *Dombrowski v. Pfister*, carried to their logical extreme, could eventually place such a burden on the federal courts that the evil sought to be avoided in one judicial system would exist in another, from which there would be no recourse.

D. E. E.

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68 *See* notes 57-59 *supra* and accompanying text.

69 *See, e.g.*, Duncan v. Perez, 445 F.2d 557 (5th Cir. 1971); Hull v. Petrillo, 439 F.2d 1184 (2d Cir. 1971); Montgomery County Bd. of Educ. v. Shelton, 327 F. Supp. 811 (N.D. Miss. 1971).

70 *See* note 66 *supra*.

71 *See* Younger v. Harris, 401 U.S. 37, 44 (1971). *See also* Comment, *Protecting Civil Liberties Through Federal Court Intervention in State Criminal Matters*, 59 Calif. L. Rev. 1549, 1550 (1971).