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Federal Courts, Injunctions, Declaratory Judgments, and State Law: The Supreme Court Has Finally Fashioned a Workable Abstention Doctrine

Clair E. Dickinson

NOTES

FEDERAL COURTS, INJUNCTIONS, DECLARATORY JUDGMENTS, AND STATE LAW: THE SUPREME COURT HAS FINALLY FASHIONED A WORKABLE "ABSTENTION DOCTRINE"

THE AMERICAN JUDICIAL SYSTEM is founded on several policies which act as guideposts for the courts. Among these is the policy that states should be as free from federal control as possible.[1] At the opposite end of the spectrum is the view that federal courts have a duty to protect individuals from violations of their constitutional rights.[2] These policies meet, and seemingly clash, when a plaintiff enters a federal court either to request a declaratory judgment that a state statute is unconstitutional or to seek an injunction against the enforcement of the statute.[3]

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[1] This policy is reflected in The Anti-Injunction Act, 28 U.S.C. § 2283 (1970), and The Three-Judge Court Act, 28 U.S.C. § 2281 (1970). The Anti-Injunction Act provides:

> 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.

The Three-Judge Court Act provides:

> An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title.

A three-judge court is required to hear requests for injunctions against the operation of state laws because if such operation is to be enjoined, it should require the agreement of at least two judges, rather than the decision of just a single judge. 28 U.S.C. § 1253 (1970) provides for direct appeal to the Supreme Court from decisions of a three-judge court as an added safeguard for the states:

> Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges.

[2] This position is evidenced by The Civil Rights Act, 42 U.S.C. 1983 (1970) and The Declaratory Judgment Act, 28 U.S.C. § 2201 (1970). The Civil Rights Act provides:

> 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.

The Declaratory Judgment Act provides:

> In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

[3] The plaintiff who enters a federal court to seek a declaratory judgment or an injunc-

The balancing of these competing interests has caused the courts a great amount of difficulty over the past ten years.[4] In struggling to harmonize the conflict, the courts have sometimes appeared to lean too far towards states' rights; in other instances they have seemingly favored the rights of individuals. During the 1974 Term the Supreme Court decided six cases[5] which in some way concerned either injunctions against the enforcement of unconstitutional state laws or declaratory judgments of their unconstitutionality. This note will show that a workable doctrine has finally developed in this area as a result of the guidance provided by these cases.

I. PULLMAN AND THE PRE-SEXTET CASES

A. *Pullman Abstention*

This note is not primarily concerned with the doctrine which originated in the 1941 case of *Railroad Commission v. Pullman Co.*,[6] known as "*Pullman* abstention." It is, however, concerned with the doctrine expressed in *Younger v. Harris*,[7] usually referred to as "*Younger* abstention," but more accurately termed "*Younger* nonintervention."[8] It is nonetheless necessary to discuss "*Pullman* abstention" in order to avoid some of the confusion which has plagued the courts, including the

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tion against the enforcement of a state law will fall into one of two categories; either he will have a prosecution pending against him under the challenged statute or he will not. As will be seen, the category into which he falls will largely affect whether he receives the requested relief.

[4] Actually the problem has a history much longer than ten years, *see* text accompanying notes 13-14 *infra*, but, for purposes of this discussion it is necessary to go back only as far as Dombrowski v. Pfister, 380 U.S. 479 (1965).

[5] 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); MTM, Inc. v. Baxley, 420 U.S. 799 (1975); Huffman v. Pursue, 420 U.S. 592 (1975). This note will discuss at length each of these opinions except *Kugler*.

[6] 312 U.S. 496 (1941).

[7] 401 U.S. 37 (1971).

[8] It is important to realize that "*Younger* nonintervention," "*Pullman* abstention," and "*Burford* abstention" are distinct doctrines. "*Younger*" and "*Pullman*" are the two most often used "abstention" doctrines, but it is also important to be aware of the "*Burford* abstention" doctrine, which grew out of the case of Burford v. Sun Oil Co., 319 U.S. 315 (1943). Simply stated, *Burford* held that when a federal court is asked to entertain a case dealing with an area in which the state has provided a specific form of review, thereby allowing the state forum to obtain a particular expertise in the area, the federal court should abstain. When a court invokes the "*Younger* doctrine," it does so to avoid intervening in an ongoing state court proceeding. In "*Pullman* abstention" or "*Burford* abstention" on the other hand, the issue is not whether the federal court should intervene in an ongoing state action, but whether the federal court should decide a case about which it lacks sufficient knowledge. In "*Pullman* abstention" the court lacks knowledge about the proper construction of the state law, *see* text accompanying notes 9-12 *infra*; in "*Burford* abstention" it lacks the expertise which a special state body may have. For this reason, and because of the confusion resulting from the indiscriminate use of the term "abstention" to refer to distinct policies, "nonintervention" better describes the doctrine of *Younger*. For a much more exhaustive discussion of *Pullman* and *Burford* abstention, and some of the confusion involved in differentiating between them and *Younger* nonintervention, see Field, *Abstention in Constitutional Cases: The Scope of the Pullman Abstention Doctrine*, 122 U. PA. L. REV. 1071, 1153-87 (1974).

United States Supreme Court, when they have dealt with "*Younger* nonintervention."

In sections of Texas where there was little passenger traffic, trains carried only one sleeping car. Such trains, unlike those with more than one sleeping car, were operated without a Pullman conductor, the sleeper being in the charge of a porter. At that time all Pullman porters were black and all Pullman conductors white. The Texas Railroad Commission issued an order that all sleeping cars had to be in the continuous charge of a Pullman conductor. The Pullman Company and the railroads affected brought an action in federal court to enjoin the Commission's order on two grounds. Pullman claimed first that the Commission was not authorized by Texas law to issue such an order and second, that the order violated the equal protection, due process, and commerce clauses of the United States Constitution. A three-judge district court enjoined enforcement of the order[9] and its decision was appealed directly to the Supreme Court.

The Supreme Court reversed and remanded with instructions for the district court not to dismiss, but to retain jurisdiction over the federal issues while plaintiffs brought an action in state court on the state question.[10] The Court's rationale for this action was twofold: It wished to avoid reaching a federal constitutional issue if the case could be decided on an independent state question and it wanted to refrain from deciding the state question. The Court pointed out that "the reign of law" would not be furthered if a federal court provided an answer to a state question, which answer would not have binding effect on the state's courts.[11]

Pullman abstention, then, arises when a federal court is asked to decide a state question and a federal constitutional question, the state question presents an independent state ground for decision, and the state law is unclear. When a situation dictates *Pullman* abstention, the district court does not dismiss the federal complaint but abstains from deciding the federal issue, retains jurisdiction, and enables the plaintiff to initiate an action in state court on the state question. If the state court rules in favor of the plaintiff on his state question, the case is at an end; if he loses on his state ground, the federal court then decides his federal question.[12]

Nonintervention, on the other hand, arises when a federal plaintiff requests an injunction to restrain a pending state prosecution or requests a declaratory judgment that a statute under which he is being prosecuted is unconstitutional. Under the nonintervention doctrine, the federal court dismisses the complaint and the plaintiff is forced to raise both his federal and state issues in the pending state prosecution.

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[9] Pullman Co. v. Railroad Comm'n, 33 F. Supp. 675 (W.D. Tex. 1940).

[10] Railroad Comm'n v. Pullman Co., 312 U.S. 496, 501-02 (1941).

[11] *Id.* at 500.

[12] This is true at least in theory. The unfortunate reality is that *Pullman* abstention causes litigation to drag on for great lengths of time, sometimes never reaching a final disposition. *See* Field, *supra* note 8, at 1085-86.

B. *Dombrowski and the Rebirth of Nonintervention*

The doctrine of nonintervention did not appear for the first time in *Dombrowski v. Pfister*;[13] rather, it has had a long and confusing history.[14] In *Dombrowski*, the Court was aware of the doctrine of nonintervention and to prevent its application found it necessary to overcome what was viewed as its underlying policy:

> [C]onsiderations of federalism have tempered the exercise of equitable power, for the Court has recognized that federal interference with a State's good-faith administration of its criminal laws is peculiarly inconsistent with our federal framework.[15]

Plaintiffs in *Dombrowski* were the Southern Conference Educational Fund, Inc. (SCEF) and James Dombrowski, the Executive Director of SCEF. The defendants were a host of state legislative, prosecutorial, and law enforcement officials including James Pfister, a Louisiana State Representative and Chairman of the Joint Legislative Committee on Un-American Activities of the Louisiana Legislature. After the suit was filed in district court, the Treasurer of SCEF and an attorney for SCEF filed a petition of intervention which was granted.

The facts in *Dombrowski* are essential to a proper understanding of nonintervention. The SCEF was a civil rights organization which operated in Louisiana and other southern states for the purpose of fostering civil rights for black Americans. In October of 1963, Dombrowski and the intervenors were arrested by Louisiana state and local police and charged with violations of the Louisiana Subversive Activities and Communist Control Law[16] and the Communist Propaganda Control Law.[17] In conjunction with these arrests their homes and offices were raided and their files and records seized. These arrest warrants were quashed by a state judge and the charges against Dombrowski and the intervenors were dismissed. In subsequent proceedings, the state court suppressed the evidence because the raid was illegal. After the dismissal, Louisiana officials continued to threaten reinstitution of criminal prosecutions. It was at this point, when no proceedings were pending against plaintiffs, that they filed their action in district court alleging that the statutes the state was attempting to enforce against them were unconstitutional and that the threats to further enforce the statutes were made with no expectation of securing convictions, but rather to discourage them from carrying out constitutionally protected activities. Their complaint requested a declaratory judgment and a permanent injunction to prevent

[13] 380 U.S. 479 (1965).

[14] The doctrine's American roots can be traced to the 19th century case of *In re* Sawyer, 124 U.S. 200 (1888). It is not necessary for the purposes of this note to examine the doctrine's history. For an article which discusses this history at length, see B. Wechsler, *Federal Courts, State Criminal Law and the First Amendment*, 49 N.Y.U.L. REV. 740 (1974).

[15] 380 U.S. at 484 (citation omitted).

[16] LA. REV. STAT. ANN. §§ 14:358 to :374 (Cum. Supp. 1962), *as amended*, LA. REV. STAT. ANN. §§ 14:358 to :373 (1974).

[17] LA. REV. STAT. ANN. §§ 14:390 to :390.8 (1974).

defendants from enforcing the statutes in question against plaintiffs, and to further prevent defendants from interfering with plaintiffs' exercise of their constitutional rights.[18]

Since plaintiffs' complaint requested an injunction against the enforcement of a statute with statewide applicability, it fell within the Three-Judge Court Act.[19] After the convening of the three-judge court, prosecution officials summoned a grand jury in anticipation of indicting plaintiffs. Plaintiffs then applied to one of the three federal judges for a temporary restraining order which was issued. Following the hearing, however, the full three-judge district court dissolved the temporary restraining order and dismissed the complaint. After the dismissal of plaintiffs' complaint, the state grand jury returned indictments against the individual plaintiffs.[20]

The dismissal was appealed directly to the Supreme Court. As noted above, Justice Brennan found that "considerations of federalism have tempered the exercise of equitable power . . . ."[21] To support this statement, Mr. Justice Brennan cited the Anti-Injunction Act[22] which the Court pointed out did not apply in *Dombrowski* because the grand jury had not been convened until after the filing of the complaint in federal district court. As a result no state "proceedings" within the meaning of section 2283 were pending.[23]

Having established that section 2283 was not a bar to the requested relief the Court proceeded to examine the net effect of the "considerations" that section 2283 typified. Citing *Douglas v. City of Jeannette*,[24] the Court made it clear that nonintervention had been applied when plaintiffs would not suffer more harm by being forced to defend a state criminal action than that "incidental to every criminal proceeding brought lawfully and in good faith."[25] Further, a federal court of equity could not furnish greater protection for a plaintiff's constitutional rights than would be afforded by pursuit of the state's appellate processes, and if necessary, eventual appeal to the Supreme Court.[26] In such a case, the Court found that a federal court should allow the state criminal action to proceed undisturbed. The Court determined, however, that *Dombrowski* was not such a case.

In making this determination the Court first looked to the statutes involved and noted that state criminal prosecutions under statutes regu-

[18] Dombrowski v. Pfister, 227 F. Supp. 556, 558 (E.D. La. 1964) (three-judge court).

[19] For text of the Act, see note 1 *supra*.

[20] 380 U.S. at 488.

[21] *Id.* at 484. See text accompanying note 15 *supra*.

[22] For text of the Act, see note 1 *supra*.

[23] 380 U.S. at 484 n.2.

[24] 319 U.S. 157 (1943). In *Douglas* a group of Jehovah's Witnesses convicted under an ordinance of Jeannette, Pennsylvania of selling religious literature without paying a city license tax sought injunctive relief from future prosecutions. *Douglas* is considered the leading pre-*Dombrowski* case on nonintervention. The Court refused the requested injunction, but at least partially on the ground that the ordinance had that same day been declared unconstitutional in Murdock v. Pennsylvania, 319 U.S. 105 (1943).

[25] 380 U.S. at 485, *quoting* Douglas v. City of Jeannette, 319 U.S. at 164 (1943).

[26] 380 U.S. at 485.

lating expression, particularly when the statutes are allegedly overbroad, can have a critical inhibiting effect on the exercise of first amendment rights.[27] The Court then proceeded to look at the facts of the case: the reinstitution of criminal proceedings after they were once quashed, repeated announcements that the SCEF was a subversive or Communist-front organization, and threats to enforce statutory provisions other than those under which indictments had already been brought. On the basis of these observations, the Court concluded that the district court was incorrect in finding a lack of sufficient irreparable injury to justify the federal court's intervention.[28]

Thus, the Court considered two factors in deciding that the district court should not have dismissed the case: the allegation that the statutes violated the first amendment and the harassment surrounding the attempted enforcement. The combination of these two elements furnished the irreparable injury which overcame the "considerations of federalism" normally counselling a federal court to dismiss.

Having found that the district court should not have dismissed because of these "considerations," the Court was faced with a state statute and no state court ruling that this statute applied to the SCEF. It was a classic *Pullman* situation:

> The District Court also erred in holding that it should abstain pending authoritative interpretation of the statute in the state courts, which might hold that they did not apply to SCEF, or that they were unconstitutional as applied to SCEF. We hold the abstention doctrine is inappropriate for cases such as the present one where, unlike *Douglas v. City of Jeannette*, statutes are justifiably attacked on their face as abridging free expression, or as applied for the purpose of discouraging protected activities.[29]

The last sentence of this paragraph probably has been quoted more than any other in the opinion. It is quoted, however, to support something for which it does not stand. It is quoted to show that a district court should not dismiss, despite the policy considerations of nonintervention, when a statute is justifiably attacked on its face *or* when there has been harassment on the part of the prosecutorial authority.[30] Yet this statement in *Dombrowski* actually stood for the proposition that *Pullman* abstention rather than nonintervention should not be applied in either of these situations. This misconception regarding *Dombrowski* is not entirely the fault of the commentators; Mr. Justice Brennan caused much of the confusion by citing *Douglas* which was not a

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[27] *Id.* at 486.

[28] *Id.* at 489.

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

[30] *See, e.g.*, Harris v. Younger, 281 F. Supp. 507, 511 (C.D. Cal. 1968), *rev'd*, 401 U.S. 37 (1971), *discussed in* text accompanying notes 69-70 *infra*. *See also* Wechsler, *supra* note 14, at 837; *The Supreme Court, 1964 Term*, 79 HARV. L. REV. 56, 173 (1965). *But see* Spears, *The Supreme Court February Sextet: Younger v. Harris Revisited*, 26 BAYLOR L. REV. 1, 40-41 (1974).

Pullman abstention case, but a nonintervention case. It is unclear why Mr. Justice Brennan chose to cite *Douglas*. It is possible that he had not clearly distinguished the two doctrines, though he did recognize that they were different questions and that the test for overcoming *Pullman* abstention was less than that for overcoming nonintervention.

This was the status of nonintervention after *Dombrowski*. The Court had declared that in the absence of sufficient irreparable harm a federal court should not interfere with state criminal processes. Sufficient irreparable harm was found to be present when there was a combination of a justifiable first amendment attack on a statute *and* harassment. A number of commentators saw sufficient irreparable injury present when there was either a justifiable first amendment attack on a statute *or* harassment. If *Dombrowski* had established the rule declared by the commentators, it would have been a serious erosion of states' rights. The actual rule of *Dombrowski* demonstrated a respect for states' rights but afforded relief to an individual plaintiff whose rights had been abused by state officials.

C. *Zwickler v. Koota: Pullman Confused Again*

The plaintiff in *Zwickler v. Koota*[31] was arrested under Section 781-b of the New York Penal Laws which made it a crime to distribute handbills containing statements about candidates for elected office, unless the name and address of the printer and the person for whom the handbills were being distributed were printed on them.[32] He was convicted, but on appeal his conviction was reversed on state law grounds.[33] Thereafter, plaintiff filed a complaint in federal district court seeking both a declaratory judgment that the statute was unconstitutional on its face and an injunction against future prosecutions under the statute. As will become apparent, this was not a case requiring the application of nonintervention because the plaintiff did not attempt to enjoin a pending state prosecution. The district court, however, failed to realize this distinction and because of the requested injunction treated *Zwickler* as a nonintervention case. Referring solely to the requested injunction, and failing to find "special circumstances" which would overcome the considerations of federalism counselling nonintervention, the district court dismissed the complaint. In its decision, the court so confused nonintervention with *Pullman* abstention that it is impossible to distinguish the two doctrines in the court's opinion. The court finally dismissed the complaint stating that the plaintiff could bring an action in state court for a declaratory judgment and thereby avoid waiting for a criminal prosecution to test the constitutionality of the statute.[34]

The district court's decision was appealed directly to the Supreme

[31] 389 U.S. 241 (1967).

[32] *Id.* at 242.

[33] People v. Zwickler, (N.Y. App. T., April 23, 1965), *cited at* 389 U.S. at 243 n.2.

[34] Zwickler v. Koota, 261 F. Supp. 985, 993 (E.D.N.Y.) (three-judge court), *rev'd*, 389 U.S. 241 (1967). The district court had dismissed as in nonintervention but suggested that plaintiff bring suit in state court as in *Pullman* abstention.

Court. Mr. Justice Brennan, writing for the majority, viewed the case as presenting dual issues:

> We shall consider *first* whether abstention from the declaratory judgment sought by appellant would have been appropriate in the absence of his request for injunctive relief, and *second*, if not, whether abstention was nevertheless justified because appellant also sought an injunction against future criminal prosecutions. . . .[35]

In addressing the initial problem, Mr. Justice Brennan found that absent the request for an injunction, it would have been error to abstain from deciding the request for a declaratory judgment. Abstention was not appropriate because the statute was attacked on the ground of "overbreadth." It is important to note that the Court was here speaking about *Pullman* abstention. Mr. Justice Brennan stated that because the statute was not vague, it would be futile to send the plaintiff to state court where it would be impossible to render a decision which would avoid the federal constitutional question. There was no doubt that this statute applied to the plaintiff's proposed activities.[36]

Mr. Justice Brennan next addressed the second question, "whether abstention was nevertheless justified because appellant also sought an injunction against future criminal prosecutions."[37] This is when the problem arose. When Mr. Justice Brennan here used the word "abstention" he was no longer speaking of *Pullman* abstention, but rather of nonintervention. The question posited was whether the joining of a request for an injunction with that for a declaratory judgment brought the request for declaratory judgment within the area where "considerations of federalism have tempered the exercise of equitable power."[38] The answer was a resounding no:

> We hold that a federal district court has the duty to decide the appropriateness and the merits of the declaratory request irrespective of its conclusion as to the propriety of the issuance of the injunction.[39]

In considering *Zwickler v. Koota*, what the courts did address is as significant as what they failed to address. The district court did not address the request for a declaratory judgment; the Supreme Court did not address the request for an injunction or raise the nonintervention issue in connection with the request for a declaratory judgment. Stating that the appropriateness of the declaratory judgment and the injunction were different questions, the Court did not indicate whether the district court was correct in deciding not to enjoin the prosecution.[40]

[35] 389 U.S. at 245 (emphasis in original).

[36] *Id.* at 249-50.

[37] *Id.* at 245.

[38] Dombrowski v. Pfister, 380 U.S. 479, 484 (1965). *See* text accompanying note 15 *supra*.

[39] 389 U.S. at 254.

[40] If the Supreme Court had affirmed the district court's refusal to grant an injunction,

D. *Cameron v. Johnson: Sloppiness Compounded*

The Supreme Court next dealt with the distinction between abstention and nonintervention in *Cameron v. Johnson*.[41] Actually, *Cameron* had been before the Court earlier and it was at that point that its problems began.[42]

Cameron, like *Dombrowski*, grew out of the civil rights movement of the 1960's. On January 22, 1964, civil rights organizations held a large demonstration at the Forrest County courthouse in Hattiesburg, Mississippi. Every day afterwards, with the exception of Sundays, they picketed the courthouse. On April 8, 1964, the Mississippi Legislature enacted, and the Governor signed, the Mississippi Anti-Picketing Law. On April 9, the Forrest County sheriff read the new law to the pickets and directed them to disperse, which they did. The next day, however, picketers reappeared and were arrested; more arrests followed as the picketing continued. On April 13, a class action was filed in federal district court asking that the Anti-Picketing Law be declared unconstitutional and that the state prosecutions be enjoined.[43] The district court dismissed the complaint, refusing to pass on the constitutionality of the statute, but finding no violation of plaintiffs' constitutional rights as a result of their arrests or prosecutions.[44]

The district court's opinion was appealed directly to the Supreme Court. In the interim, *Dombrowski* had been decided and thus the Court in a per curiam decision vacated and remanded, instructing the district court to first review the Anti-Injunction Act, and if found not to bar the district court's deciding the case, then to consider the request in light of *Dombrowski*.[45] The dissent, however, found no reason to reverse the district court's opinion, and contended that although *Dombrowski* had approved injunctions against state proceedings to enforce a statute facially violative of the first and fourteenth amendments, the decision turned on the allegation that the prosecutions had not been brought in good faith.[46] Mr. Justice Black, writing for the dissent, further stated that *Dombrowski* indicated that even when prosecuting officials were acting under a statute not facially unconstitutional, they could be enjoined if the prosecutions were brought for the purpose of depriving plaintiffs of their constitutional rights.[47] He concluded, however, that *Cameron* involved no allegation of bad faith enforcement of the

it would have been answering the question of whether nonintervention applies to a requested injunction against future prosecutions, a question which is still open. *See* Doran v. Salem Inn, Inc. 422 U.S. 922, 930 (1975), and text accompanying note 194 *infra*.

[41] 390 U.S. 611 (1968).

[42] 381 U.S. 741 (1965) (per curiam).

[43] Cameron v. Johnson, 244 F. Supp. 846 (S.D. Miss. 1964) (three-judge court).

[44] *Id.* at 849.

[45] 381 U.S. at 741-42. Mr. Justice Brennan who had written for the majority in *Dombrowski* and would do so again in Zwickler v. Koota, 389 U.S. 241 (1967), and the second *Cameron* decision, Cameron v. Johnson, 390 U.S. 611 (1968), joined in the per curiam decision, but Mr. Justice Black who would write the decision in Younger v. Harris, 401 U.S. 37 (1971), was among the four dissenters.

[46] 381 U.S. at 748-49 (Black, J., dissenting).

[47] *Id.* at 749.

statute in question and thus there was no reason to intervene in the state court proceeding.[48]

On remand the district court again dismissed finding that the Anti-Injunction Act prohibited the issuance of an injunction despite the argument that the Civil Rights Act was an exception to section 2283, and declared the challenged statute to be constitutional.[49] When *Cameron* again reached the Supreme Court it was affirmed. In spite of the previous instruction to the district court to consider the Anti-Injunction Act, the Court chose to avoid it. Mr. Justice Brennan stated that although the district court had found that the Civil Rights Act was not an exception to section 2283's total bar to injunctions, and had on this ground refused the requested injunctions of the prosecutions begun prior to the filing of the federal suit, it was unnecessary for the Supreme Court to consider the question.[50]

The Court proceeded to find that the statute was neither vague nor overbroad, and thus not unconstitutional on its face. Although the Court considered this question first and apart from the question of harassment, it did not state that a holding that the statute was unconstitutional would allow an injunction to issue. The Court then looked for an "impermissible chilling effect" resulting from the manner in which the statute had been enforced, and noted that "[w]e have not hesitated on direct review to strike down applications of constitutional statutes which we have found to be unconstitutionally applied to suppress protected freedoms."[51] The Court did not find that the statute in question had been unconstitutionally applied and accordingly affirmed the district court's decision.

The dissent pointed very clearly to the problem caused by the double use of the term "abstention" in *Dombrowski*:

> I agree that the statute in question is not "unconstitutional on its face." But that conclusion is not the end of the matter. *Dombrowski* stands for the proposition that "the abstention doctrine is inappropriate for cases . . . where . . . statutes are justifiably attacked on their face as abridging free expression, *or as applied for the purpose of discouraging protected activities.*"[52]

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[48] *Id.*

[49] 262 F. Supp. 873 (S.D. Miss. 1966) (three-judge court).

[50] 390 U.S. at 613-14 n.3.

[51] *Id.* at 620. Mr. Justice Brennan merely reiterated what Mr. Justice Black had stated in his dissent to the remand of *Cameron*:

> [T]here might be cases in which state or federal officers, acting under color of a law which is valid, could be enjoined from engaging in lawful conduct which deprives persons of their federally guaranteed statutory or constitutional rights.

381 U.S. at 749 (Black, J., dissenting). Mr. Justice Black read *Dombrowski* as allowing an injunction in the absence of an unconstitutional statute but in the presence of harassment. Mr. Justice Brennan argued by analogy based on what the Court would do on direct review.

[52] 390 U.S. at 622 (Fortas, J., dissenting), *quoting* Dombrowski v. Pfister, 380 U.S. 479, 489-90 (emphasis added by Mr. Justice Fortas).

The proposition for which the dissenters quoted *Dombrowski* is not untrue. In fact the majority, after having decided that the statute was constitutional, looked for harassment in the enforcement of the statute with an eye toward enjoining the prosecution.[53] The problem is that when this passage, which actually referred to *Pullman* abstention,[54] is cited for the proposition that harassment alone will overcome the "considerations of federalism" against issuing an injunction, it leads to the untrue conclusion that a facially unconstitutional statute alone will do the same.

E. *Golden v. Zwickler: Anonymous Campaign Literature Revisited*

The Supreme Court had one more opportunity to shape this area of the law before nonintervention acquired its given name in *Younger v. Harris*.[55] In *Zwickler v. Koota*,[56] the Supreme Court had instructed the district court on remand to consider the request for declaratory judgment separately from the request for an injunction. As previously discussed, plaintiff in *Zwickler* had been prosecuted once under section 781-b of the Penal Law of New York State, but his conviction had been reversed by a state appellate court on state grounds. Thereafter he went into district court seeking a declaratory judgment and an injunction, but the court dismissed his complaint.[57] On remand the district court had to first determine if plaintiff presented a justiciable controversy as required by the Declaratory Judgment Act.[58] It found unconvincing defendant's argument that the case was moot because it was unlikely that the Congressman attacked by the handbills would again run for Congress. There had been an active controversy at the time the federal case had begun and there was no reason to doubt plaintiff's allegation that the challenged statute currently was deterring him from the full exercise of his first amendment rights.[59]

The district court went on to declare the statute unconstitutional. In its first opinion the district court had dwelt on the impropriety of the requested injunction without mentioning the requested declaratory judgment. In its second opinion the court gave primary consideration to the requested declaratory judgment, referring to the requested injunction only to implement its declaratory judgment of the statute's unconstitutionality and without considering the nonintervention issue.[60]

The Supreme Court again reversed the opinion of the district court, and in so doing revealed the essential problem facing a plaintiff, against

[53] 390 U.S. at 618-20.

[54] *See* text accompanying notes 29-30 *supra*.

[55] 401 U.S. 37 (1971).

[56] 389 U.S. 241 (1967).

[57] *See* text accompanying notes 33-34 *supra*.

[58] See note 2 *supra* for text of the Act. Actually, the requirement is imposed on the courts by the Constitution and the Act merely codifies the requirement.

[59] Zwickler v. Koota, 290 F. Supp. 244, 249 (E.D.N.Y. 1968) (three-judge court).

[60] 290 F. Supp. at 258. This is an excellent example of the two-step process of avoiding the nonintervention doctrine which the Court would seek to guard against in Samuels v. Mackell, 401 U.S. 66 (1971). *See* text accompanying note 87 *infra*.

whom no prosecution is pending, who challenges the constitutionality of a state statute:

> We think that under all the circumstances of the case the fact that it was most unlikely that the Congressman would again be a candidate for Congress precluded a finding that there was "sufficient immediacy and reality" here. . . . His assertion in his brief that the former Congressman can be "a candidate for Congress again" is hardly a substitute for evidence that this is a prospect of "immediacy and reality."[61]

The Supreme Court, by reversing on the issue of justiciability, never reached the question of the correctness of the issuance of an injunction and thus avoided determining the applicability of nonintervention when plaintiff was not being prosecuted under the attacked statute. This was the condition of the law prior to the February Sextet.[62]

II. The February Sextet

A. *The "Landmark Case" of Younger v. Harris*

Younger v. Harris[63] has been assessed in these terms:

> In a disastrous defeat for the first amendment, a two-pronged *Dombrowski* became one-pronged if state criminal proceedings were pending at the time of the filing of the federal court suit.[64]

This statement is incorrect. Besides being incorrect in its implication that *Dombrowski* had set up a "two-pronged test," the satisfaction of either prong requiring the issuance of an injunction, it contains a negative pregnant that *Dombrowski's* "two-pronged test" still stood when no state criminal proceedings were pending at the time of the filing of the federal court suit. *Dombrowski* never constructed such a test.

There were four plaintiffs in *Younger v. Harris* and their situations illuminate both aspects of the constitutional challenge to state statutes here under consideration: those when the plaintiff is currently being prosecuted and those when he is not. After being indicted for distributing certain leaflets in violation of California's Criminal Syndicalism Act,[65] plaintiff Harris sought dismissal of the indictment in California Superior Court based on the Act's alleged unconstitutionality. When this request was denied, he petitioned for writs of prohibition in the California Court of Appeal and the California Supreme Court. These

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[61] Golden v. Zwickler, 394 U.S. 103, 109 (1969). By this time Koota, the named defendant when the action began, was no longer district attorney, having been replaced by the present named defendant, Golden.

[62] The February Sextet is the name commonly given to *Younger v. Harris* and its companion cases: 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); Samuels v. Mackell, 401 U.S. 66 (1971); Younger v. Harris, 401 U.S. 37 (1971).

[63] 401 U.S. 37 (1971).

[64] Wechsler, *supra* note 14, at 867.

[65] Cal. Penal Code §§ 11400-02 (West 1972).

petitions also denied, he next turned to the federal district court to seek an injunction. The other three plaintiffs, on the other hand, had not been indicted. Plaintiffs Dan and Hirsch, members of the Progressive Labor Party, alleged that the presence of the Act "on the books" and the prosecution pending against Harris inhibited them in the advocation of the program of their political party. Plaintiff Broslawsky, a history professor, alleged uncertainty as to whether his practice of teaching about the doctrines of Marx and the Communist Manifesto might subject him to prosecution under the Act.[66]

The district court began by indicating that it would have been better if the state court had first considered the constitutionality of the state statute.[67] The court stated that under normal circumstances the unconstitutionality of the Act would be raised only as a defense in the criminal case but, citing *Dombrowski*, that, "in recent years, exceptions to this rule have been applied."[68] The district court then quoted extensively from *Dombrowski*, closing with:

> The opinion [in *Dombrowski*] then went on to state the rule that "We hold the abstention doctrine is inappropriate for cases such as the present one where . . . statutes are justifiably attacked on their face as abridging free expression, or as applied for the purpose of discouraging protected activities."[69]

The district court said that based on *Dombrowski*, if the challenged statute was an unconstitutional restriction on free expression, as they believed it was, the state prosecution should be enjoined.[70] The court had fallen into Mr. Justice Brennan's trap for the unwary. It went on to find that Dan, Hirsch, and Broslawsky also presented a justiciable controversy not because prosecutions were dangerously near or there was any likelihood that California courts would entertain such prosecutions but because "[w]ell-intentioned prosecutors and judicial safeguards do not neutralize the vice of a vague law."[71] Accordingly, the Act was declared unconstitutional and its enforcement enjoined.

Mr. Justice Black had been waiting for an opportunity to clarify *Dombrowski* since his dissent to the remand of *Cameron v. Johnson*.[72] The opportunity presented itself in *Younger* and he seized it; unfortunately, his clarification was not thorough. Mr. Justice Black first addressed the three unindicted plaintiffs saying that they did not present a genuine controversy. They had not alleged, and the district court did not find, that they would be prosecuted under the challenged statute. Instead they had alleged only that they felt inhibited. Mr. Justice Black

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[66] Harris v. Younger, 281 F. Supp. 507, 509 (C.D. Cal. 1968) (three-judge court).

[67] *Id.* at 510.

[68] *Id.*

[69] *Id.* at 511, *quoting* Dombrowski v. Pfister, 380 U.S. 479, 489-90 (1965) (citation omitted).

[70] 281 F. Supp. at 511.

[71] *Id.* at 516-17, *quoting* Baggett v. Bullitt, 377 U.S. 360, 373 (1964).

[72] 381 U.S. 741 (1965) (per curiam). *See* text accompanying notes 47-50 *supra*.

made it clear that such an allegation, even if true, was not sufficient to allow the federal court to issue the requested injunction.[73] The clear implication of this statement was that these three plaintiffs also could not challenge the statute by way of an action for declaratory judgment.

Having disposed of plaintiffs Dan, Hirsch, and Broslawsky, Mr. Justice Black proceeded to the larger task at hand, the clarification of *Dombrowski*. He began with the history of the doctrine of nonintervention and concluded:

> In all these cases the Court stressed the importance of showing irreparable injury, the traditional prerequisite to obtaining an injunction. In addition, however, the Court also made clear that in view of the fundamental policy against federal interference with state criminal prosecutions, even irreparable injury is insufficient unless it is "both great and immediate."[74]

According to Mr. Justice Black, the rationale for the additional requirement that the irreparable harm be both great and immediate was twofold: the tradition that a court of equity should not interfere with a criminal prosecution, and more importantly, "comity," a term used to express the concept of having a proper respect for the functions of the states. Prior to *Dombrowski*, federal courts were for these reasons very reluctant to enjoin the state criminal prosecutions.[75]

Mr. Justice Black next acknowledged the district court's belief that *Dombrowski* had eased the requirements for obtaining an injunction against state criminal prosecutions:

> We recognize that there are some statements in the *Dombrowski* opinion that would seem to support this argument. But, as we have already seen, such statements were unnecessary for the decision of that case, because the Court found that the plaintiffs had alleged a basis for equitable relief under the long-established standards.[76]

The basis to which Mr. Justice Black referred was the combination of a facially void statute and the harassment by state officials in bringing a prosecution without hope of success, and thereby presenting great and immediate irreparable harm. But what of the language which was un-

[73] The Court stated:

> If these three had alleged that they would be prosecuted for the conduct they planned to engage in, and if the District Court had found this allegation to be true — either on the admission of the State's district attorney or on any other evidence — then a genuine controversy might be said to exist. But here appellees Dan, Hirsch, and Broslawsky do not claim that they have ever been threatened with prosecution, that a prosecution is likely, or even that a prosecution is remotely possible. They claim the right to bring this suit solely because, in the language of their complaint, they "feel inhibited." We do not think this allegation, even if true, is sufficient to bring the equitable jurisdiction of the federal courts into play to enjoin a pending state prosecution.

401 U.S. at 42.

[74] *Id.* at 46.

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

[76] *Id.* at 50.

necessary to the decision in *Dombrowski*? Although Mr. Justice Black avoided quoting the language, it is clear that he was referring to Mr. Justice Brennan's oft-quoted trap that abstention was inappropriate where a statute is attacked for violating the first amendment on its face *or* as applied.[77]

Mr. Justice Black was correct in his belief that this language was unnecessary for the Court's decision on the nonintervention issue, but he was incorrect in his statement that this language was unnecessary for the decision in *Dombrowski*.[78] If the Court had not used this language to dispose of the issue of *Pullman* abstention, it could not have instructed the district court to issue the requested injunction. Rather, it would have been forced to instruct the district court to "abstain" while plaintiffs went into state court to obtain a declaratory judgment regarding the applicability of the challenged statutes to their activities.[79]

Although this might seem like a distinction without a difference, it is essential to realize that *Dombrowski* set up a test which required a showing of great and immediate irreparable harm consisting of both the presence of a facially void statute and harassment on the part of state officials, and that this test did not develop as a result of *Younger* working a change on *Dombrowski*.[80] Another important point set forth in Mr. Justice Stewart's concurring opinion in *Younger*, is that all six nonintervention cases decided that day dealt only with criminal prosecutions pending in state court when the request for an injunction was made. The Court left undecided the issue of how a requested injunction or declaratory judgment should be treated when such requests looked only to future state prosecutions.[81] These statements by Mr.

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[77] *See* text accompanying notes 29-30 *supra*.

[78] Mr. Justice Black apparently felt this language was dictum; it was not.

[79] *See* text accompanying notes 6-12 *supra*.

[80] Although *Dombrowski's* test was satisfied by the presence of both a facially void statute and harassment, it is clear that harassment alone would have supplied the immediate irreparable harm required for a federal court to intervene. This was the import of Mr. Justice Brennan's statement:

> We have not hesitated on direct review to strike down applications of constitutional statutes which we have found to be unconstitutionally applied to suppress protected freedoms.

Cameron v. Johnson, 390 U.S. 611, 620 (1968). *See* text accompanying note 47 *supra*. It is important to recall that a facially void statute alone is not enough to satisfy the *Dombrowski* test. Mr. Justice Black did, however, slightly open the door to this possibility in *Younger*:

> There may, of course, be extra-ordinary circumstances in which the necessary irreparable injury can be shown even in the absence of the usual prerequisites of bad faith and harassment. . . . "It is of course conceivable that a statute might be 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."

401 U.S. at 53-54, *quoting* Watson v. Buck, 313 U.S. 387, 402 (1941). It must be remembered that this statement opened the door to a possibility not addressed in *Dombrowski*, and did not close it to one which was addressed as some commentators believe. *See* text accompanying note 64 *supra*. In fact, it can be questioned whether this opened the door at all. If the hypothetical "flagrantly and patently" unconstitutional statute were ever to exist, it seems very probable that any attempt to enforce it would necessarily involve "bad faith and harassment."

[81] 401 U.S. at 54-55 (Stewart, J., concurring).

Justice Stewart are of utmost interest when it is recalled that in *Dombrowski* the Court specifically pointed out that there was no criminal prosecution pending at the time the federal complaint was filed, at least for purposes of the Anti-Injunction Act. If *Dombrowski* was a case in which there was no pending state prosecution, and if, as the majority of the *Younger* Court stated, *Dombrowski* required both great and immediate irreparable harm for the issuance of an injunction, it follows logically that the question Mr. Justice Stewart considered still open had in fact been answered by *Dombrowski*. In the absence of a pending criminal prosecution, great and immediate irreparable harm would be required for the issuance of an injunction. Such harm would be present if a statute, whether or not constitutional on its face, were applied in a manner that denied plaintiff his constitutionally guaranteed rights.[82]

B. *Samuels v. Mackell: Declaratory Judgments, Pending Prosecutions, and Nonintervention*

The facts in *Samuels v. Mackell*[83] bear a striking similarity to those of its fellow Sextet member, *Younger*. Plaintiffs in *Samuels* were under indictment for violation of four sections of the New York Penal Law[84] when they filed their complaint in federal district court seeking both declaratory and injunctive relief. The district court dismissed on the ground that the attacked statutes were constitutional.[85] The Supreme Court affirmed the dismissal, but not on the same ground.

Mr. Justice Black, based on his decision in *Younger*, first said that it was error for the district court to consider the request for an injunction in the absence of great and immediate irreparable injury. He then considered the request for a declaratory judgment and held that the same principles, with one clarification, applied whether a state criminal defendant requested a declaratory judgment or an injunction. This result was necessary for at least two reasons. First, the Declaratory Judgment Act specifically states that after a federal court has issued a declaratory judgment, it may enforce that declaration by granting additional necessary relief.[86] As a result, a declaratory judgment granted while a state prosecution is pending might later be used by a federal plaintiff to obtain an injunction to enforce the declaratory relief. This would have the unpleasant effect of allowing a plaintiff, using a two-step method, to accomplish what nonintervention sought to prevent. Second, even if a plaintiff did not use the declaratory judgment to obtain an injunction, it would be highly unlikely that in the face of a federal

[82] Although, as the Court pointed out, there was no prosecution pending for purposes of § 2283, it is possible that there was a prosecution pending for nonintervention purposes. 380 U.S. at 484 n.2. *See* text accompanying notes 174-80 *infra*. This would explain Mr. Justice Stewart's quoted statement, even though, he does not seem to realize it in the most recent cases. *See* text accompanying note 174 *infra*.

[83] 401 U.S. 66 (1971).

[84] N.Y. PENAL LAW §§ 160, 161, 163, 580(i) (McKinney 1967). *See* 401 U.S. at 67.

[85] Samuels v. Mackell, 288 F. Supp. 348 (S.D.N.Y. 1968) (three-judge court).

[86] 401 U.S. at 72.

court's declaration of unconstitutionality the state would continue its prosecution.[87]

The one clarification made by Mr. Justice Black was that when the required great and immediate irreparable harm was found, the court might simply find it more appropriate to grant the declaratory judgment and deny the injunction because declaratory relief is less intrusive than injunctive relief.[88] Mr. Justice Black's observation on this aspect of the declaratory remedy would later be applied to the parallel situation of a constitutional challenge to a state statute absent a pending prosecution.[89]

C. *Perez v. Ledesma: Mr. Justice Brennan and the Sextet*

Plaintiffs in *Perez v. Ledesma*[90] operated a newsstand in the Parish of St. Bernard, Louisiana, which sold allegedly obscene materials. As a result, informations were filed against plaintiffs in a state court under a Louisiana statute[91] and a St. Bernard Parish ordinance.[92] After the filing of the informations, plaintiffs entered federal court seeking a declaratory judgment that the statute and ordinance were unconstitutional and an injunction against the pending prosecutions. Though the statute was found constitutional, the court held that, lacking a prior adversary hearing, the seizure, and consequently the arrests, were invalid.[93] The court further expressed the view that the challenged parish ordinance was unconstitutional, but because it was not a law of statewide application, they were without power under the Three-Judge Court Act to declare it unconstitutional.[94] On appeal, the Supreme Court held that the district court erred in declaring the arrests and seizure of materials invalid, and in issuing a suppression order that effectively hindered the good faith criminal prosecution. Based on *Younger*, the Court found the district court's interference with the state prosecution improper.[95]

The majority of the Court found that they were unable to review the district court's statement on the invalidity of the parish ordinance because it was not the final judgment of a three-judge court, reviewable directly by the Supreme Court.[96] Mr. Justice Brennan, on the other hand, found the three-judge court's mere expression of opinion on the parish ordinance to be a reviewable judgment and proceeded to do so in a separate opinion.[97]

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[87] *Id.*

[88] *Id.* at 73.

[89] *See* text accompanying note 129 *infra*.

[90] 401 U.S. 82 (1971).

[91] LA. REV. STAT. ANN. § 14:106 (Supp. 1970).

[92] 401 U.S. at 83.

[93] Delta Book Distributors, Inc. v. Cronvich, 304 F. Supp. 662, 667-69 (E.D. La. 1969) (three-judge court).

[94] *Id.* at 670.

[95] 401 U.S. at 83-85.

[96] *Id.* at 86.

[97] *Id.* at 98-99 (Brennan, J., concurring and dissenting).

Mr. Justice Brennan's review of the parish ordinance opinion enabled him to explore issues which the rest of the Court did not reach. At the time of the filing of the federal complaint, prosecutions were pending under the challenged ordinance, but before the three-judge court convened to hear the case, the prosecution had entered a *nolle prosequi* in the state court. Mr. Justice Brennan found that the district court was, therefore, correct in not considering nonintervention as far as the ordinance was concerned. He found that the availability of the requested relief depended upon the situation at the time of the hearing in district court, not at the time the complaint was filed.[98]

Having established that he was dealing with a situation in which no prosecution was pending, Mr. Justice Brennan turned to his earlier decision in *Dombrowski*, stating that, where no prosecution is pending, it recognized two situations when nonintervention should not be applied. He listed these as harassment and "where a criminal statute prohibits or seems to prohibit constitutionally protected conduct, and to that extent is unconstitutionally vague or overbroad. . . ."[99]

It seems strange that Mr. Justice Brennan made this statement in *Perez*. In his concurring opinion to *Younger* he had not stated that *Dombrowski* set forth two situations when nonintervention should not apply. The majority in *Younger* had determined that *Dombrowski* did not set forth two situations calling for intervention. Even stranger is what followed shortly after this statement in Mr. Justice Brennan's opinion in *Perez*:

> However, where federal intervention is sought after a state prosecution has commenced and while it is pending, the interests protected by federal intervention must be weighed against the broad countervailing principles of federalism. . . . For these reasons, federal courts should not ordinarily intervene by way of either declaratory or injunctive relief in cases where a state court prosecution exists that began before the federal suit was filed, and the federal court plaintiff alleges only that a state statute being applied to him is unconstitutional.[100]

This weighing is exactly what Mr. Justice Brennan had done in *Dombrowski*. Mr. Justice Brennan seems to be saying that *Dombrowski* stood for two propositions: on the one hand, that great and immediate irreparable harm was found in *Dombrowski* because of the combination of a facially void statute and harassment; on the other, that *Dombrowski* would allow the issuance of an injunction, in the absence of a state prosecution, upon either a facially void statute or harassment. In view of the Court's *Younger* decision, and the above discussion of *Dombrowski*,[101] the only conclusion that can be reached is that Mr. Justice

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[98] *Id.* at 103-04.

[99] *Id.* at 117-18.

[100] *Id.* at 120-21.

[101] *See* text accompanying notes 27-30 *supra*.

Brennan was wrong in his statement that *Dombrowski* had recognized two situations calling for a federal court's intervention.

There is yet another aspect of Justice Brennan's opinion worth noting. In *Golden v. Zwickler*,[102] the Court found that plaintiff, who was not being prosecuted, had not presented a justiciable controversy concerning the alleged unconstitutionality of the challenged statute. Mr. Justice Brennan found no such problem in *Perez*. Plaintiffs had alleged that they wished to continue selling the items which had led to their arrests and because the state had once begun prosecutions under the challenged ordinance it was highly likely that it would do so again. So here, unlike *Golden*, the challenge to the ordinance was presented in the form of a real controversy between parties having adverse interests.[103]

III. Amplification of the Sextet

A. *Mitchum v. Foster: "A Decision of the First Magnitude,"*[104] *Without Any Meaning*

It will be recalled that in *Dombrowski* the Court referred to the Anti-Injunction Act to evidence the concerns for federalism which form the basis for nonintervention. The Court, however, stated that the Act did not apply to that particular case because, at the time the federal complaint was filed, "no state 'proceedings' were pending within the intendment of § 2283."[105] In *Cameron v. Johnson*,[106] section 2283 was likewise avoided by the Court because the considerations typified by the section rendered an injunction improper regardless of whether the Act itself was a bar.[107] Again in the Sextet, the Court relied solely on the equitable principles which counsel nonintervention to deny the relief requested, and thus avoided the issue of whether an injunction must be denied because of section 2283 even when immediate irreparable harm is present.[108] Finally, in *Mitchum v. Foster*,[109] the Court addressed the question of whether, in a case filed under the Civil Rights Act, section 2283 would be a bar to the relief requested.

Plaintiff in *Mitchum* operated a bookstore in Bay County against which a proceeding to close as a public nuisance had been brought by

[102] 394 U.S. 103 (1969).

[103] Mr. Justice Brennan stated:

> Appellees' complaint expressly alleges, and there was no evidence or finding to the contrary, that appellees "desire to continue to keep for sale and to sell" the publications and playing cards in question. Thus, unlike the situation in Golden, the question of the constitutionality of the ordinance is "presented in the context of a specific live grievance". . . . Indeed, in light of the appellants' aggressive prosecution of appellees, the inference is permissible that any attempts by appellees to continue to display the questioned publications for sale might well again be met with prosecutions under both the statute and ordinance.

401 U.S. at 102 (Brennan, J., concurring and dissenting).

[104] Wechsler, *supra* note 14, at 877-78.

[105] 380 U.S. 479, 484 n.2 (1965). *See* text accompanying note 23 *supra*.

[106] 390 U.S. 611 (1968).

[107] *Id.* at 613 n.3.

[108] Younger v. Harris, 401 U.S. 37, 54 (1971).

[109] 407 U.S. 225 (1972).

the county prosecutor. While the proceedings were pending in state court plaintiff filed a civil rights action in federal district court seeking injunctive and declaratory relief from the pending state court action. The facts seem to be much like those in *Younger*, but with one exception. In *Younger* and its companion cases, the federal plaintiff was being prosecuted in a state *criminal* action. Plaintiff in *Mitchum* was not involved in a criminal action; rather, the pending state court case was of a type which the Supreme Court later referred to as "akin to a criminal prosecution."[110] It was a civil action under state law in aid of the state's criminal law.

The three-judge court refused to enjoin the state action based on the Anti-Injunction Act, stating that the Civil Rights Act was not an exception to section 2283's total bar to injunctions.[111] An appeal was taken directly to the Supreme Court where Mr. Justice Stewart wrote the opinion for a unanimous Court.

The Court was faced with a dilemma. It had previously avoided the question of whether the Civil Rights Act was an exception to the Anti-Injunction Act by relying solely on nonintervention principles. It could have done so again because plaintiff in *Mitchum* had failed to allege the requisite harassment to overcome the nonintervention doctrine. This, however, would have meant deciding that nonintervention applied to "quasi-criminal" as well as criminal cases. Unwilling to take such a step, the Court finally reached the question of whether the Civil Rights Act was an exception to the Anti-Injunction Act. The answer was affirmative.

In arriving at this decision Mr. Justice Stewart reviewed the history of both Acts and determined that Congress clearly intended the Civil Rights Act to be an exception to section 2283's total bar to injunctions. This determination was based on the concern of Congress that individuals be free from unconstitutional state action even when that action was on the part of a state court. Mr. Justice Stewart, however, pointed out that the Court had avoided the question of nonintervention and that the Court's decision was not to be viewed as questioning the principles upon which nonintervention is based.[112] Mr. Chief Justice Burger, in a concurring opinion, stressed that the question of the applicability of nonintervention in civil cases was still open.[113]

What, then, is the meaning of *Mitchum*? The Anti-Injunction Act is not a bar to the issuance of an injunction under the Civil Rights Act against a pending state court action; if, however, that state court action is a criminal action there must be present great and immediate irreparable harm. Thus *Mitchum*'s real vitality is only in the civil area. As will be seen, this vitality has recently been considerably restricted.[114]

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[110] Huffman v. Pursue, Ltd., 420 U.S. 592, 604 (1975). *See* text accompanying notes 131-44 *infra*.

[111] Mitchum v. Foster, 315 F. Supp. 1387 (N.D. Fla. 1970).

[112] 407 U.S. at 243.

[113] *Id.* at 244 (Burger, C. J., concurring).

[114] *See* text accompanying notes 131-44 *infra*.

B. *Steffel v. Thompson: Nonintervention in the Absence of a Pending State Action*

In *Steffel v. Thompson*[115] the Supreme Court reached one of the questions left open by the Sextet: In the absence of a pending state court action, what are the standards for granting a declaratory judgment on the constitutionality of a state criminal statute?

Plaintiff in *Steffel* participated in protests against the United States' involvement in Vietnam, a part of which included the distribution of handbills at a shopping center in Georgia. Employees of the shopping center requested that plaintiff and his companions stop their activities, but they refused. The employees summoned police officers who told plaintiff and his companions to leave or be arrested; they left but returned two days later. Police were again summoned and plaintiff again stopped handbilling, but one of his companions refused and was arrested. Plaintiff thereupon filed an action in federal district court seeking a declaratory judgment that the handbilling statute[116] was unconstitutional as applied to him and an injunction against its enforcement. The district court dismissed on the ground that "no meaningful contention can be made that the state has or will in the future act in bad faith."[117] The plaintiff appealed from the district court's opinion, but only on the question of the declaratory judgment. The Court of Appeals for the Fifth Circuit affirmed the district court's judgment refusing declaratory relief.[118] The plaintiff appealed to the Supreme Court.

Mr. Justice Brennan, writing for the majority, first had to confront the problem which had doomed three of the four plaintiffs in *Younger*: Was there a justiciable controversy? He held that, based on the warnings of the police and the arrest of plaintiff's companion, Steffel had presented a "case or controversy" within the meaning of the Declaratory Judgment Act at the time his federal complaint had been filed. That, however, did not end the problem. In *Golden v. Zwickler,*[119] the Court had found that plaintiff did not present a justiciable controversy because the Congressman his anonymous handbills attacked was unlikely to run again for Congress. Steffel encountered the same type of problem. By the time the Supreme Court heard his case the United States' involvement in Vietnam had changed. Mr. Justice Brennan pointed out that it was possible that the plaintiff was no longer so strenuously opposed to the country's involvement in Vietnam, and as a result no longer wished to distribute handbills at the shopping center in question.[120] The Court

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[115] 415 U.S. 452 (1974).

[116] GA. CODE ANN. § 26-1503 (1972).

[117] Becker v. Thompson, 334 F. Supp. 1386, 1389 (N.D. Ga. 1971).

[118] Becker v. Thompson, 459 F.2d 919 (5th Cir. 1972).

[119] 394 U.S. 103 (1969). *See* text accompanying note 61 *supra.*

[120] The Court seemed to demand a great amount of specificity concerning the exact nature of the controversy:

> Since we cannot ignore the recent developments reducing the Nation's involvement in that part of the world, it will be for the District Court on remand to determine if subsequent events have so altered petitioner's desire to engage in handbilling at the shopping center that it can no longer be said that this case presents "a substan-

said that it was for the district court to decide on remand whether a justiciable controversy still existed.[121]

Despite the possible lack of justiciability, Mr. Justice Brennan addressed the question of the appropriate action for a district court asked to declare a statute unconstitutional in the absence of a state prosecution. Quoting from his separate opinion in *Perez*[122] he concluded:

> [W]hen no state prosecution is pending and the only question is whether declaratory relief is appropriate[,] . . . the Congressional scheme that makes the federal courts the primary guardians of constitutional rights, and the express congressional authorization of declaratory relief, afforded because it is a less harsh and abrasive remedy than the injunction, become the factors of primary significance.[123]

The Court's opinion made it clear that in the absence of a state prosecution, if a plaintiff presents a justiciable controversy, a declaratory judgment should be issued. This is true whether the statute is attacked on its face or, as in *Steffel*, as applied. In the absence of an actual pending prosecution the balance is struck differently than in the presence of one. When the plaintiff has not actually disobeyed the statute and wishes a declaration of his rights and liabilities before doing so, the policy of the Declaratory Judgment Act that a person should not have to "eat the suspect to find out whether it is a mushroom or a toadstool"[124] controls.

The Court was careful to point out that it was not deciding what course should be followed in the absence of a pending state action if the requested relief were an injunction, the other question left open by *Younger*.[125] Mr. Justice Stewart, in a concurring opinion, stated with regard to justiciability that although the present plaintiff had been successful in presenting a genuine controversy, at least at the inception of the federal action, it was unlikely that many plaintiffs would be able to do so.[126] As Mr. Justice Stewart noted, the chief problem facing a federal

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> tial controversy between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment."

415 U.S. at 460. From the Court's discussion of the possible lack of a controversy in *Steffel*, it appears that to have presented a justiciable controversy the plaintiff would not only have had to allege a continuing desire to distribute handbills, but a continuing desire to distribute the same handbills at the same shopping center.

[121] *Id.*

[122] Perez v. Ledesma, 401 U.S. 82, 104 (1971) (Brennan, J., separate opinion). *See* text accompanying notes 90-103 *supra*.

[123] 415 U.S. at 463.

[124] Borchard, *Challenging "Penal" Statutes by Declaratory Action*, 52 YALE L.J. 445, 469 (1943).

[125] 415 U.S. at 475.

[126] 415 U.S. at 476 (Stewart, J., concurring), wherein he stated:

> The petitioner in this case has succeeded in objectively showing that the threat of imminent arrest, corroborated by the actual arrest of his companion, has created an actual concrete controversy between himself and the agents of the State. He has, therefore, demonstrated "a genuine threat of enforcement of a disputed state criminal statute. . . ." Cases where such a "genuine threat" can be demonstrated will, I think, be exceedingly rare.

plaintiff in the absence of a state prosecution is not nonintervention, but the lack of justiciability. *Steffel* demonstrated one way to establish justiciability — an oral threat of enforcement. Before proceeding to the 1974 Term cases, it will be helpful to look at two cases decided before *Steffel* on the question of justiciability of a claim for declaratory relief.

C. *Roe v. Wade and Doe v. Bolton: Abortions and Nonintervention*

Roe v. Wade[127] and its companion case *Doe v. Bolton*[128] are the landmark Supreme Court cases on abortion. They are pertinent here not for their final holdings, but for their holdings on justiciable controversies.

In *Roe v. Wade* there were three plaintiffs: Roe, a single woman, pregnant at the time the suit began; Hallford, a physician with two state prosecutions pending against him for performing abortions; and the Does, a childless married couple who feared a future unwanted pregnancy which might impair the mother's health. The district court dismissed the Does, finding a lack of justiciability. It granted declaratory relief to Roe and Hallford, but refused injunctive relief. Plaintiffs appealed the denial of injunctive relief directly to the Supreme Court and defendants cross-appealed the grant of declaratory relief.

In an opinion by Mr. Justice Blackmun, the Court held that the district court was correct in finding that Roe presented a justiciable controversy even though she was no longer pregnant at the time the Court heard the case. It is of greater significance, however, that the Court found standing on the part of Roe to challenge a state criminal statute under which she could not be prosecuted. Her constitutional rights were not infringed by the possibility that the statute could be used in a prosecution against her, but rather by the fact that she was refused an abortion because of her physician's fear of prosecution. This aspect of *Roe* enlarges *Steffel* to allow a declaratory judgment to issue to a plaintiff whose denial of constitutional rights is not a result of the statute directly working against the plaintiff, but of the statute working against another to deny plaintiff's constitutional rights.

The Supreme Court reversed the district court's decision as to Hallford on *Younger* principles, and affirmed as to the Does because their fear of a future pregnancy was far too speculative to establish a present "case or controversy." In affirming the declaratory judgment of unconstitutionality, the Court did not decide the issue of the requested injunction but stated that since the prosecutors would probably not attempt to enforce the statutes after they had been declared unconstitutional, an injunction was not required.[129]

Doe v. Bolton was similar to *Roe* except that in *Doe* the Supreme Court

[127] 410 U.S. 113 (1973).

[128] 410 U.S. 179 (1973).

[129] 410 U.S. at 166. The Court there stated:

> We find it unnecessary to decide whether the District Court erred in withholding injunctive relief, for we assume the Texas prosecutorial authorities will give full credence to this decision that the present criminal abortion statutes of that State are unconstitutional.

also found that nine unindicted physicians presented a justiciable controversy. Plaintiffs, besides Doe, were nurses, clergymen, social workers, corporations, and physicians. The Court stated that since Doe was recognized for the purpose of challenging the Georgia abortion statutes, whether the other plaintiffs would be recognized as presenting a justiciable controversy was not a question of great import. The Court did state, however, that the nine physicians would be recognized as plaintiffs, even though they had never been prosecuted or threatened with prosecution under the challenged statutes.[130]

Roe v. Wade and *Doe v. Bolton* then, although decided before *Steffel*, amplified its holding. In the absence of a pending state criminal prosecution, a federal court should grant declaratory relief when a prosecution is actually threatened against the plaintiff under the challenged statute, when it is fairly certain that if the plaintiff engages in the proscribed activities he will be prosecuted, or when the statute works against another individual in a way that denies the plaintiff constitutionally guaranteed rights.

This was the state of the law on the eve of the Supreme Court's 1974 Term. In *Younger*, the Court had reaffirmed the *Dombrowski* rule that when a state prosecution is pending, a proper respect for states' rights will be maintained, but the individual will also be protected from "great and immediate irreparable harm." When no state criminal prosecution is pending the balance is struck differently: a state's right to be free from federal interference is considered secondary to the federal courts' duty to protect individuals from unconstitutional laws. But even in that instance, the balance is not struck totally in favor of the individual — the rights of states are protected by the constitutional prohibition against issuance of advisory opinions. Left undecided was how the balance should be struck when the state action was civil as opposed to criminal. Also unanswered was the question of when a state court action is pending for nonintervention purposes. The following discussion will examine what the Court did during its 1974 Term and thus reveal the answers to these questions.

IV. The 1974 Term

A. *Huffman v. Pursue: Nonintervention and the Quasi-Criminal Case*

In *Mitchum v. Foster*,[131] the Court successfully avoided deciding the issue of the applicability of *Younger* nonintervention to noncriminal

[130] 410 U.S. at 188. The Court stated:

> Inasmuch as Doe and her class are recognized, the question whether the other appellants — physicians, nurses, clergymen, social workers, and corporations — present a justiciable controversy and have standing is perhaps a matter of no great consequence. We conclude, however, that the physician-appellants, who are Georgia-licensed doctors consulted by pregnant women, also present a justiciable controversy and do have standing despite the fact that the record does not disclose that any one of them has been prosecuted, or threatened with prosecution, for violation of the State's abortion statutes. . . . The physician-appellants, therefore, assert a a sufficiently direct threat of personal detriment. They should not be required to await and undergo a criminal prosecution as the sole means of seeking relief.

[131] 407 U.S. 225 (1972).

cases.[132] In its first encounter with the nonintervention doctrine during the 1974 Term, the Court was forced to face this issue head-on.

Plaintiff in *Huffman v. Pursue, Ltd.*[133] was the lessee of the Cinema I Theatre in Lima, Ohio. Plaintiff's predecessor, William Dakota, had specialized in showing allegedly pornographic films. Defendants in *Huffman*, the sheriff and prosecuting attorney of Allen County, Ohio, had enforced Ohio's public nuisance statute[134] against the Cinema I Theatre while it was under the management of Dakota. The Court of Common Pleas of Allen County reviewed a number of films which had been shown at the theater and ruled that Dakota had engaged in displaying obscene movies. Pursuant to the nuisance statute the theater was closed for a year, unless released sooner by order of the court.[135] Prior to the judgment, Huffman, the current plaintiff, succeeded to Dakota's leasehold, but rather than appeal the state court's judgment, he filed a complaint in federal court seeking injunctive and declaratory relief that the state statute was unconstitutional. The district court did not consider the applicability of *Younger* nonintervention and instead declared the statute unconstitutional insofar as it prevented the showing of films not judged obscene and enjoined that portion of the state court judgment closing the theater. Defendants appealed directly to the Supreme Court.

The majority of the Court began by considering the applicability of *Younger* nonintervention to "quasi-criminal" cases. They pointed out that the Court in *Younger* had justified nonintervention on two grounds: first, the doctrine that a court of equity should not proceed when a plaintiff has an adequate remedy at law, particularly when asked to intervene in a criminal prosecution, and second, the "more vital consideration" of comity or a "proper respect for state functions."[136] Based mainly on this second "more vital" consideration, the Court found *Younger* nonintervention fully applicable to the present case. It also found the first consideration applicable because the state proceeding was "akin to a criminal prosecution," but their main reliance was clearly placed on the concept of comity.[137]

The Court in *Huffman* diluted the vitality of *Mitchum v. Foster* in

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[132] *See* text accompanying notes 111-12 *supra*.

[133] 420 U.S. 592 (1975).

[134] OHIO REV. CODE ANN. § 3767.01 (Page 1971).

[135] 420 U.S. at 598. The statute provided that upon satisfaction of certain conditions including a showing that the nuisance would not be reestablished, a release from the closure order could be obtained. OHIO REV. CODE ANN. § 3767.04 (Page 1971).

[136] 420 U.S. at 601, *quoting* Younger v. Harris, 401 U.S. 37, 43 (1971).

[137] 420 U.S. at 599-601. The Court stated:

> The component of *Younger* which rests upon the threat to our federal system is thus applicable to a civil proceeding such as this quite as much as it is to a criminal proceeding. *Younger*, however, also rests upon the traditional reluctance of courts of equity, even within a unitary system, to interfere with a criminal prosecution. Strictly speaking, this element of *Younger* is not available to mandate federal restraint in civil cases. But whatever may be the weight attached to this factor in civil litigation involving private parties, we deal here with a state proceeding which in important respects is more akin to a criminal prosecution than are most civil cases.

Id. at 604.

which the requested injunction operated against a "quasi-criminal" state proceeding. Although the Anti-Injunction Act would not preclude an injunction, at least in the absence of great and immediate irreparable harm, *Younger* would.[138] In light of the Court's main reliance on comity, rather than the traditional reluctance of a court of equity to restrain criminal proceedings, it is difficult to perceive why this argument would not apply full force against intervention in purely civil cases.[139] The three Justices who dissented in *Huffman*,[140] and at least one member of the majority,[141] saw the Court's opinion as the first step toward applying *Younger* nonintervention to all state court proceedings. When this is accomplished, the "landmark case" of *Mitchum v. Foster* will have eroded to nothing in the absence of great and immediate irreparable harm.[142]

Having found *Younger* fully applicable to "quasi-criminal" cases, the Court turned to plaintiff's contention that since the trial court had reached a final judgment which was not appealed, there was no pending state proceeding. This argument was rejected. The prospect of a federal court

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[138] *See* text accompanying note 114 *supra*. As the Supreme Court recently stated:

> So strongly has Congress weighted this factor of federalism in the case of a state criminal proceeding that it has enacted 28 U.S.C. § 2283 to actually deny to the District Courts the authority to issue injunctions against such proceedings unless the proceedings come with narrowly specified exceptions. Even though an action brought under § 1983, as this was, is within those exceptions, *Mitchum v. Foster*, . . . the under-lying notions of federalism which Congress has recognized in dealing with the relationships between federal and state courts still have weight. Where an injunction against a criminal proceeding is sought under § 1983, "the principles of equity, comity, and federalism" must nonetheless restrain a federal court.

Rizzo v. Goode, 96 S. Ct. 598, 608 (1976) (citations omitted).

[139] The Court's recent decision in Rizzo v. Goode, 96 S. Ct. 598 (1976), applying the concept of "comity" to forbid a federal court's interference in the operations of a city police force, further indicates that *Younger* will apply full force to purely civil cases. The Court in *Rizzo* stated:

> But even where the prayer for injunctive relief does not seek to enjoin the state criminal proceedings themselves, we have held that the principles of equity nonetheless militate heavily against the grant of an injunction except in the most extraordinary circumstances. In *O'Shea v. Littleton*, . . . we held that "a major continuing intrusion of the equitable power of the federal courts into the daily conduct of state criminal proceedings is in sharp conflict with the principles of equitable restraint which this Court has recognized in the decisions previously noted." And the same principles of federalism may prevent the injunction by a federal court of a state civil proceeding once begun. . . .
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> . . . Thus the principles of federalism which play such an important part in governing the relationship between federal courts and state governments, though initially expounded and perhaps entitled to their greatest weight in cases where it was sought to enjoin a criminal prosecution in progress, have not been limited either to that situation or indeed to a criminal proceeding itself. We think these principles likewise have applicability where injunctive relief is sought not against the judicial branch of the state government, but against those in charge of an executive branch of an agency of state or local governments such as respondents here.

Id. at 608 (citations omitted).

[140] 420 U.S. at 613 (Brennan, J., dissenting, joined by Douglas and Marshall, JJ.).

[141] *See* Hicks v. Miranda, 422 U.S. 332, 357 (1975) (Stewart, J., dissenting).

[142] *See* text accompanying notes 104-14 *supra*. As pointed out by Mr. Justice Rehnquist, even prior to the *Huffman* decision, some lower federal courts were applying *Younger* nonintervention to purely civil state proceedings. 420 U.S. at 607. *See* Duke v. Texas, 477 F.2d 244 (5th Cir. 1973); Lynch v. Snepp, 472 F.2d 769 (4th Cir. 1973); Cousins v. Wigoda, 463 F.2d 603 (7th Cir. 1972).

overturning the final judgment of a state court was held to be an even greater insult to the abilities of state judges to carry out their sworn duty to uphold the Constitution.[143]

The significance of *Huffman* lies in its holding that state remedies must necessarily be exhausted when *Younger* applies,[144] that *Younger* is fully applicable to "quasi-criminal" cases, and in its suggestion of applicability to purely civil cases.

B. *MTM Inc. v. Baxley: Nonintervention and the Three-Judge District Court*

The next opinion of the 1974 Term, *MTM Inc. v. Baxley*,[145] did not rest squarely on *Younger* grounds but did greatly affect this area. The facts in *MTM* were almost identical to those in *Huffman*. A theater owner whose establishment was closed under a state nuisance statute requested a federal district court to enjoin the state court proceeding. In this case, though, the district court refused to issue the injunction and dismissed on *Younger* grounds.[146] Because this was a decision of a three-judge district court,[147] plaintiffs appealed directly to the Supreme Court. The Court noted probable jurisdiction and set the case for argument.[148] When the case was heard, the Court vacated the lower court judgment and remanded in a per curiam decision.

Plaintiff in *MTM* argued that because of the requested injunction the case was one required to be heard by a three-judge court and was, under section 1253, directly appealable to the Supreme Court.[149] The Court rejected plaintiff's argument holding that the dismissal on *Younger* principles was not a resolution of the merits of the constitutional claim and that direct appeal would lie only after such a resolution.[150] The case was remanded with instructions to appeal to the court of appeals.

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[143] 420 U.S. at 608-09. This point raises an interesting situation. The Court considered it a great insult to a state judge for a federal court to intervene and overturn his decision prior to appeal. It would appear to be an even greater insult to allow a case to go through the entire appellate process of the state only to have the United States Supreme Court reverse. Of course, the assumption is that the state appellate courts will correct any errors which the state trial court made. In those situations where the appellate courts fail to do so, however, the Supreme Court not only insults the abilities of the trial judge, but also those of the appellate judges. In the meantime the federal plaintiff has been denied his constitutional rights.

[144] A recent commentator addressed this aspect of the *Huffman* decision, Comment, *Federal Equitable Restraint: A Younger Analysis in New Settings*, 35 MD. L. REV. 483, 497-511 (1976). It is important to realize that *Huffman's* requirement of exhaustion of state remedies only applies in cases in which the federal plaintiff is *directly* attacking the past prosecution, and not to cases like Ellis v. Dyson, 421 U.S. 426 (1975), in which the past prosecution was used only in an effort to enjoin future prosecutions. *See* text accompanying notes 153-64 *infra*.

[145] 420 U.S. 799 (1975) (per curiam).

[146] General Corp. v. Sweeton, 365 F. Supp. 1182 (N.D. Ala. 1973) (three-judge court).

[147] Of the major cases under discussion, those that were not appealed from decisions of three-judge district courts were: Doran v. Salem Inn, Inc., 422 U.S. 922 (1975); Ellis v. Dyson, 421 U.S. 426 (1975); Steffel v. Thompson, 415 U.S. 452 (1974).

[148] 415 U.S. 975 (1974).

[149] *See* note 1 *supra*, for the text of § 1253.

[150] 420 U.S. at 804.

This decision has an unpleasant effect on a plaintiff in a federal case to which *Younger* nonintervention applies, if, as thought by at least one Justice,[151] a three-judge district court must make the decision to apply *Younger*. The plaintiff must first present his case to a three-judge district court. If the three-judge court applies *Younger* and dismisses, he then must appeal to the court of appeals. If the three-judge district court finds *Younger* inapplicable or satisfied, the defendant may appeal directly to the Supreme Court. It is unclear what will happen if either the Supreme Court in the latter situation, or the appeals court in the former, finds that the three-judge district court erred in its decision of the *Younger* issue.[152]

C. *Ellis v. Dyson: Nonintervention and Loitering in Dallas*

The Supreme Court was next confronted with nonintervention in *Ellis v. Dyson*.[153] Plaintiffs in *Ellis*, like plaintiff in *Golden v. Zwickler*,[154] had been prosecuted under the law being challenged. Plaintiffs were arrested at two a.m. on January 18, 1972 in Dallas, Texas and charged with violating the city's loitering ordinance.[155] At their trial in Dallas Municipal Court, plaintiffs moved to have the case dismissed on the ground that the ordinance was unconstitutionally vague and overbroad. Upon denial of this motion, they entered pleas of *nolo contendere*[156] and were fined ten dollars plus costs. They chose to forego filing the requisite fifty dollar bond and obtaining a trial *de novo* in county court. If they had pursued the trial *de novo* the amount of the fine, upon a judgment of guilty, might have been increased to a maximum of two hun-

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[151] Steffel v. Thompson, 415 U.S. 452, 457 n.7 (1974). There, Mr. Justice Brennan writing for the majority stated:

> Since the complaint had originally sought to enjoin enforcement of the state statute on grounds of unconstitutionality, a three-judge district court should have been convened. . . . A three-judge court is required even if the constitutional attack — as here — is upon the statute as applied . . . and is normally required even if the decision is to dismiss under *Younger-Samuels* principles, since an exercise of discretion will usually be necessary. . . .

[152] Mr. Justice Douglas suggested an answer to this predicament in his dissent:

> Perhaps the three-judge court system, along with direct review here, should be eliminated or altered in a major way. . . .

420 U.S. at 809. Perhaps serious consideration should be given to A.L.I. Proposal § 1374 which would greatly modify the three-judge court. Regardless of the ultimate solution, the present requirement that this type of case be heard by a three-judge court, and if relief is denied, then appealed to a three-judge appeals court, is a thorn in the side of a *Younger* plaintiff and an unnecessary waste of judicial time.

[153] 421 U.S. 426 (1975). Actually, there was a case in the interim, Kugler v. Helfant, 421 U.S. 117 (1975). In *Kugler*, a pure *Younger* situation, the Court refused to enjoin a state prosecution, even though the plaintiff alleged and sought to prove great and immediate irreparable harm, thus demonstrating the difficulty involved in overcoming *Younger*.

[154] 394 U.S. 103 (1969). *See* text accompanying notes 55-62 *supra*.

[155] 421 U.S. at 427-28.

[156] A plea of nolo contendere. The legal effect of such a plea shall be the same as that of a plea of guilty, but the plea may not be used against the defendant as an admission in any civil suit based upon or growing out of the act upon which the criminal prosecution is based.

TEX. CODE CRIM. PRO. ANN. art. 27.02 (1966), *as amended*, TEX. CODE CRIM. PRO. ANN. art. 27.02(5) (1975), *quoted at* 421 U.S. at 428-29 n.3.

dred dollars. They then filed suit in federal district court seeking a declaratory judgment that the ordinance was unconstitutional because it proscribed "conduct that may not be limited," and impermissibly chilled "the right of free speech, association, assembly, and movement."[157] They also sought expungement of their arrest records, but did not seek to enjoin enforcement of the ordinance. The district court dismissed based on its analysis that *Younger* principles applied when prosecution was threatened as well as when it was actually pending.[158] The court of appeals affirmed and the Supreme Court granted certiorari.[159]

The Supreme Court began by pointing out that the case had proceeded through the lower courts before the decision in *Steffel*[160] which held that *Younger* did not apply to a requested declaratory judgment by a plaintiff presenting a justiciable controversy in the absence of a pending state prosecution. The Court treated this as such a case rather than an attempted collaterial attack on a state prosecution. It did find it necessary, however, to caution the lower court on how to proceed on remand, expressing reservations about the existence of a case or controversy because plaintiffs' attorneys had not been in contact with their clients for approximately one year and thus were not sure that plaintiffs still were in Dallas. If plaintiffs were in fact no longer in Dallas, it would be impossible to find a threat of future prosecution under the challenged ordinance.[161]

In a dissenting opinion, Mr. Justice Powell made clear his view that even if the plaintiffs were still found to be in Dallas, the likelihood of further prosecution under the challenged statute was so remote that the case conclusively lacked justiciability. He did emphasize, however, that

> [p]etitioners' previous arrests and convictions are relevant to the justiciability of their prayer for prospective relief only if they evidence a realistic likelihood that *petitioners* may be arrested again.[162]

Mr. Justice White, in a separate opinion,[163] concurred in the reversal of the court of appeals' decision, but dissented from the failure to rule on

[157] 421 U.S. at 431.

[158] Ellis v. Dyson, 358 F. Supp. 262 (N.D. Tex. 1973).

[159] Ellis v. Dyson, 475 F.2d 1402 (5th Cir. 1973), *cert. granted*, 416 U.S. 954 (1974).

[160] Ellis v. Dyson, 421 U.S. 426, 431 (1975).

[161] 421 U.S. at 434. The Court there stated:

> It is appropriate to observe in passing, however, that we possess greater reservations here than we did in *Steffel* as to whether a case or controversy exists today. First, at oral argument counsel for petitioners acknowledged that they had not been in touch with their clients for approximately a year and were unaware of their clients' whereabouts. . . . Unless petitioners have been found by the time the District Court considers this case on remand, it is highly doubtful that a case or controversy could be held to exist. . . . Further, if petitioners no longer frequent Dallas, it is most unlikely that a genuine threat of prosecution for possible future violations of the Dallas ordinance could be established.

[162] 421 U.S. at 445 (Powell, J., dissenting).

[163] 421 U.S. at 437 (White, J., concurring).

the issue of expungement of the records. He considered this portion of plaintiffs' prayer as setting forth a case or controversy, and would have dismissed under *Younger* because to do otherwise would, in his opinion, have been a violation of *Huffman*'s rule which required the exhaustion of state remedies before a federal court could intervene. What Mr. Justice White failed to realize, however, was that plaintiff's requested expungement was preconditioned on the Court favorably ruling on the declaratory judgment and for this reason the Court was correct in not ruling on the second request until the first was disposed of on the merits.

This case rounds out the holding in *Golden v. Zwickler*. Not only may a person prosecuted under an allegedly unconstitutional statute and found not guilty challenge said statute, but a plaintiff found guilty may also challenge it. This conclusion is, of course, based on the premise that the challenge looks only to future enforcement of the statute and that the plaintiff, unlike *Zwickler* and probably those in *Ellis*, is able to present a justiciable controversy based on the likelihood of future enforcement of the statute.[164]

D. *Hicks v. Miranda: Destruction of the "Primary Reliances"*[165]

The Court's five-to-four decision in *Hicks v. Miranda*[166] is perhaps its most interesting decision dealing with this area of the law. It evoked an impassioned dissent by Mr. Justice Stewart, who had previously joined with the majority on *Younger* issues. More importantly, it established the arrival of adolescence for *Younger* nonintervention and afforded the opportunity to finally realize the full meaning of *Dombrowski v. Pfister*.[167]

Hicks presents one of the most complicated fact patterns of those cases under discussion. Plaintiffs owned and operated the Pussycat Theatre in Buena Park, California. On four different occasions police seized four copies of the film "Deep Throat" from the theater. Subsequently, a criminal misdemeanor charge based on the seized films was filed in

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[164] It is unclear, in light of *Ellis*, why Dr. Hallford was dismissed as a plaintiff in *Roe v. Wade*, 410 U.S. 113, 126 (1973). *See* text accompanying note 129 *supra*. Dr. Hallford tried to distinguish his standing as a present defendant and a future possible defendant, but the Court found no merit in such a distinction. Possibly the difference between Dr. Hallford's situation and the instant one is that his case had not yet proceeded to a final judgment, whereas the present case had because of plaintiffs' failure to appeal their pleas of *nolo contendere*.

[165] Mr. Justice Stewart, dissenting in Hicks v. Miranda, 422 U.S. 332 (1975), stated:

> The Court today, however, goes much further than simply recognizing the right of the State to proceed with the orderly administration of its criminal law; it ousts the federal courts from their historic role as the "primary reliances" for vindicating constitutional freedoms.

Id. at 356, *quoting* F. FRANKFURTER & J. LANDIS, THE BUSINESS OF THE SUPREME COURT 65 (1972), where it was stated:

> In the Act of March 3, 1875, Congress gave the federal courts the vast range of power which had lain dormant in the Constitution since 1789. These courts ceased to be restricted tribunals of fair dealing between citizens of different states and became the primary and powerful reliances for vindicating every right given by the Constitution, the laws, and treaties of the United States.

[166] 422 U.S. 332 (1975).

[167] 380 U.S. 479 (1965).

Orange County Municipal Court against two employees of the theater, but no charges were lodged against plaintiffs. On the same day, however, the Superior Court of Orange County ordered plaintiffs, in an action in which they were named defendants, to show cause why the films should not be declared obscene. Plaintiffs appeared, objected to the court's jurisdiction on state law grounds, and said they were reserving all federal questions.[168] The superior court subsequently viewed the film, declared it obscene, and ordered all copies at the theater seized. This order was not appealed.

Plaintiffs then filed an action in federal district court seeking a declaratory judgment that the California obscenity statute[169] was unconstitutional, an injunction against enforcement of the statute, and an injunction ordering the return of the seized films. The district judge refused a requested temporary restraining order because of a lack of irreparable injury and an insufficient likelihood of prevailing on the merits. He further requested the convening of a three-judge court to consider the constitutionality of the statute. Service of the complaint in the three-judge district court was completed on January 14, 1974. On January 15, 1974, the criminal complaint in Municipal Court was amended, naming the federal plaintiffs as defendants. On June 4, 1974, the three-judge district court declared the obscenity statute unconstitutional and ordered all copies of "Deep Throat" returned to plaintiffs.[170] The Supreme Court, after deciding the appeal was correctly before them[171] turned to the issue of *Younger* nonintervention and held that the district court should have dismissed under *Younger*.

In reversing the lower court decision, the Supreme Court did not rely on either the superior court proceedings, where the federal plaintiffs had been named defendants, or the fact that plaintiffs' interests were "intertwined" with those of their employees' who had been named defendants in the separate state criminal action.[172] The Court, instead, emphasized that the plaintiffs had been named defendants in the municipal court action the day after their filing of the federal complaint. It was noted that no previous case had drawn the line at the day the federal complaint was filed:

> Indeed, the issue has been left open; and we now hold that where state criminal proceedings are begun against the federal plaintiffs after the federal complaint is filed but before any proceedings of substance on the merits have taken place in the federal court, the principles of *Younger v. Harris* should apply in full force.[173]

[168] 422 U.S. at 335. Plaintiffs' action in attempting to "reserve" their federal questions apparently stemmed from the old problem of confusing nonintervention with *Pullman* abstention. When a federal plaintiff is sent to state court to litigate his state question under *Pullman*, he reserves his federal questions for presentation to the federal court after completion of the state litigation.

[169] CAL. PENAL CODE § 311 (West 1970).

[170] Miranda v. Hicks, 388 F. Supp. 350 (C.D. Cal. 1974) (three-judge court).

[171] 422 U.S. at 344-48.

[172] *Id.* at 348.

[173] *Id.* at 349 (footnote omitted).

The Court went on to find an absence of the requisite great and immediate irreparable harm and reversed.

Mr. Justice Stewart, writing for the four dissenters, accused the majority of distorting the *Younger* doctrine's accommodation of competing interests. He argued that the Court's rule, allowing a state prosecutor to frustrate the plaintiff's federal case by beginning a state prosecution after the filing of the federal complaint, ousted "the federal courts from their historic role as the 'primary reliances' for vindicating constitutional freedoms."[174] But Mr. Justice Stewart was wrong in his accusations that the Court in *Hicks* accomplished any such ouster. If the federal courts were ever ousted from their historic role, that ouster took place ten years prior to the *Hicks* decision in *Dombrowski v. Pfister.*

Reexamining the facts of *Dombrowski*[175] one will discover that at the time the complaint was filed in federal court there were no proceedings pending in state court. This was pointed out by Mr. Justice Brennan to show that the Anti-Injunction Act was inapplicable. After the federal complaint was filed a grand jury was impaneled in anticipation of indictments of the federal court plaintiffs. The Supreme Court found that enforcement of the statute could be enjoined, not because of the absence of a state prosecution,[176] but because of the presence of great and immediate irreparable harm based on the finding of harassment on the part of state officials.[177] In fact, Mr. Justice Stewart concurring in *Younger* pointed out that the course to be followed in the absence of a state prosecution was an open question.[178] How could this have been an open question if it had been settled in *Dombrowski*? When, in *Steffel v. Thompson*,[179] the Court finally decided what course to pursue absent a state prosecution, it found no need to overcome *Dombrowski.* If *Dombrowski* had been a case without a pending state prosecution, the plaintiff in *Steffel* would have had to show great and immediate irreparable harm to receive a declaratory judgment, a showing which was not required by the Court.[180] *Hicks*, then, did not enlarge the *Dombrowski* holding in the least. In fact, it did not go to the extreme allowed by *Dombrowski.* In *Hicks* the federal plaintiffs had nonintervention applied to them because they were named defendants in state court; in *Dombrow-*

[174] *Id.* at 356 (Stewart, J., dissenting).

[175] *See* text accompanying notes 17-23 *supra.*

[176] The Court did note the absence of a state prosecution for purposes of § 2283, *see* text accompanying note 23 *supra.* But their very treatment of the nonintervention issue implied the presence of a prosecution for nonintervention purposes. It may be suggested that this reading of the case is incorrect and that it actually answered the question, still considered open, of how a court should handle a request for an injunction in the absence of a prosecution. *See* text accompanying note 194 *infra.* This cannot be a correct analysis, however, because the plaintiffs in *Dombrowski* requested a delcaratory judgment as well as an injunction. *Zwickler v. Koota* established that when such a request for both forms of relief is made, the declaratory judgment issue must be decided independently from the injunction issue. *See* text accompanying note 39 *supra.* The only time the two issues are the same is when a state prosecution is pending. *See* text accompanying notes 83-89 *supra.*

[177] *See* text accompanying note 28 *supra.*

[178] 401 U.S. at 54-55 (Stewart, J., concurring). *See* text accompanying note 81 *supra.*

[179] 415 U.S. 452 (1974).

[180] *See* text accompanying note 124 *supra.*

ski, the only action which had taken place on the state level was the impaneling of a grand jury.[181]

Mr. Justice Stewart did make one valid criticism of the Court's opinion:

> There is the additional difficulty that the precise meaning of the rule the Court adopts is a good deal less than apparent. What are "proceedings of substance on the merits?" Presumably, the proceedings must be both "on the merits" and "of substance."[182]

Although the Court was unclear about when it became too late for a state to commence a state court action, it is possible to gain some insight from a prior opinion of one of Mr. Justice Stewart's fellow dissenters. In his separate opinion in *Perez v. Ledesma*,[183] Mr. Justice Brennan found that *Younger* principles should not apply to a requested declaratory judgment when state court proceedings, pending at the time the federal complaint was filed, were no longer pending when the case came up for hearing before the three-judge district court. He there stated: "The availability of declaratory relief was correctly regarded to depend upon the situation at the time of the hearing and not upon the situation when the federal suit was initiated."[184] The majority of the Court did not reach this issue in *Perez*, but Mr. Justice Brennan's logic seems convincing. Part of the justification for nonintervention has been that a federal plaintiff can raise his constitutional objection in defense of his state court action. The opportunity to raise that issue is not diminished by the fact that the state action began after the federal complaint was filed. If, as Mr. Justice Stewart feared,[185] the state prosecutor were to initiate a state action for the sole purpose of keeping a plaintiff out of federal court and with no hope of gaining a conviction, it would appear that the plaintiff would be able to overcome the applicability of *Younger* because the state suit would have been brought for purposes other than securing a conviction.[186] As Mr. Justice Stewart suggested, taken alone, *Hicks* does appear to "trivalize" *Steffel* or, at least to restrict it.[187] But *Hicks* was not destined to be the Court's last encounter with this area of the law during the 1974 Term.

E. *Doran v. Salem Inn, Inc.: Declaratory Relief and Preliminary Injunctions*

In the Supreme Court's last 1974 Term encounter with *Younger* nonintervention, it did much to counteract the feared opportunity given

[181] *See* text accompanying note 20 *supra*.

[182] 422 U.S. at 353 n.1 (Stewart, J., dissenting).

[183] 401 U.S. 82 (1971).

[184] *Id.* at 103 (Brennan, J., concurring and dissenting).

[185] 422 U.S. at 357.

[186] Such a prosecution could hardly be called a good-faith prosecution, and the injury to the federal plaintiff would not be that "incidental to every criminal proceeding brought lawfully and in good faith. . . ." Dombrowski v. Pfister, 380 U.S. 479, 485 (1965), *quoting* Douglas v. City of Jeanette, 319 U.S. 157, 164 (1943).

[187] 422 U.S. at 353.

state prosecutors by *Hicks*. The facts in *Doran v. Salem Inn, Inc.*[188] follow a familiar pattern. Plaintiffs in *Doran* were the operators of three bars which featured topless dancers. On July 17, 1973, the town of North Hampstead, where the bars were located, passed an ordinance prohibiting topless dancing.[189] Plaintiffs complied with the ordinance, but on August 9, 1973, filed an action in federal court seeking a temporary restraining order, a preliminary injunction, and a declaratory judgment that the ordinance was unconstitutional. The requested temporary restraining order was denied. The next day one of the three plaintiffs, M & L Restaurant, Inc., again started providing topless dancers. M & L, as a result, was served with criminal summonses based on the challenged ordinance. The other two plaintiffs did not resume presenting topless dancers until after the district court issued a preliminary injunction.

The district court refused to dismiss under *Younger* principles because the prosecution pending against one plaintiff did not affect the other two, and because it would have been "anomalous"[190] not to extend federal relief to M & L as well. The district court entered an opinion and order granting a preliminary injunction "pending the final determination of this action."[191] In support of the injunction the district court found that the ordinance was unconstitutional. The court of appeals affirmed[192] and appeal was taken to the Supreme Court.

After overcoming an initial jurisdictional issue,[193] the Court, in an opinion by Mr. Justice Rehnquist, determined that it was error for the district court not to dismiss M & L as plaintiff because of the state proceeding pending against it. This showed the vitality of the *Hicks* rule for otherwise a federal plaintiff, after the filing of his federal complaint, could flaunt the state law with no fear of prosecution.

The Court next turned to the preliminary injunctions issued in favor of the other two plaintiffs.

> Whether injunctions of future criminal prosecution are governed by *Younger* standards is a question which we reserved in both *Steffel* . . . and *Younger*. . . . We now hold that on the facts of this case the issuance of a preliminary injunction is not subject to the restrictions of *Younger*.[194]

This holding, when considered along with *Hicks*, achieved the balance between competing interests which the Court had long struggled to obtain. *Hicks* established that a state can proceed against an individual even after the filing of a federal complaint. If this rule were not followed, the federal plaintiff could disobey the challenged state law without fear of it being enforced against him after the filing of his federal complaint.

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[188] 422 U.S. 922 (1975).

[189] *Id.* at 924.

[190] Salem Inn, Inc. v. Frank, 364 F. Supp. 478, 481-82 (E.D.N.Y. 1973).

[191] 364 F. Supp. at 483.

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

[193] 422 U.S. at 927.

[194] *Id.* at 930.

On the other hand, *Doran* provided protection for the federal plaintiff by permitting the issuance of a preliminary injunction upon satisfying the traditional equity requirements of immediate irreparable harm and a likelihood of succeeding on the merits.[195] Because of the requirement of a likelihood of success on the merits, the *Doran* rule prevents the federal plaintiff from receiving a preliminary injunction to avoid prosecution under a law which is in fact constitutional, but allows him to avoid a prosecution under an unconstitutional law without having to refrain from protected activities.

Conclusion

After the long journey from *Dombrowski* in 1965, the doctrine of *Younger* nonintervention has finally reached adulthood. The Court has provided a solid rule to be followed in the varied situations which arise in this area. The proper balance has now been struck, allowing a plaintiff to challenge an allegedly unconstitutional state statute without undergoing the unpleasant risk of a criminal prosecution, but also protecting the rights of states to be free from federal interference with the good-faith administration of their laws. A plaintiff who wishes to challenge a state statute, whether criminal or civil, will fall into one of two categories: Either he will be involved in a state court proceeding under the challenged state statute or he will not. This proceeding can exist at a very early stage, such as the impaneling of a grand jury. The time to determine the existence of such a proceeding is not when the federal complaint is filed, but rather when it comes up for hearing.

If the plaintiff falls into the second category he should attempt to obtain a temporary restraining order and a preliminary injunction when he files his complaint to avoid being forced into the first category. He should also carefully allege a current threat of enforcement that will continue throughout the controversy. By so doing he presents a justiciable controversy and thus avoids the fate suffered in the past by most federal plaintiffs who were not being prosecuted. The allegations can be based on oral threats of prosecution, or simply the sheer likelihood that certain activity will result in prosecution. The likelihood of the plaintiff's being prosecuted will be increased by the presence of a past but final prosecution.

If the plaintiff falls into the first category, that is, if he is involved in a state prosecution, he must allege and prove that without the assistance of the federal court he will suffer great and immediate irreparable harm. This harm must be shown by the presence of harassment on the part of the prosecuting authorities. But the plaintiff who falls into the first category should keep in mind that, in the ten years since the formulation of the test in *Dombrowski*, only one set of plaintiffs, those in *Dombrowski*, have satisfied its test.

Clair E. Dickinson

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[195] *See* W. De Funiak, Handbook of Modern Equity 16-17 (1956).