Exhaustion Requirements in *Younger*-Type Actions: More Mud in Already Clouded Waters

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The Supreme Court's 1971 decision in *Younger v. Harris*[1] heralded a new era of Court-imposed restrictions on the access of civil rights litigants to the federal courts. The *Younger* Court held that absent extraordinary circumstances a state court defendant could not obtain a federal injunction against his pending state criminal prosecution.[2] Although the opinion set forth a relatively simple rule to be applied by the lower courts, the implications of that simple rule have turned out to be complex. Since 1971, the Court has devoted a great deal of time to the *Younger* doctrine, and in so doing has created a hopeless quagmire which has confused the lower courts and outraged the commentators. One development has been the Court's application of the exhaustion doctrine, generally associated with administrative law, to some *Younger*-type actions. This Article will examine the development of the *Younger* doctrine, focusing on the exhaustion requirement and its effects upon federal civil rights litigants.[3]

I. THE *YOUNGER* DOCTRINE

The *Younger* doctrine was set forth in *Younger v. Harris* and five companion cases.[4] Although the *Younger* Court argued that its decision rested on precedent and recognized federal policy, the opinion in fact represented a radical departure from the Court's earlier practice.[5]

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

[2]*Id.* at 41.

[3]For a general discussion of the *Younger* doctrine, see C. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS § 52A (3d ed. 1976).

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

[5]In the words of one commentator, "to the extent the Court based *Younger* on prior law, it relied upon sheer mythology, a total misconception of pre-*Dombrowski* history and precedent." Wechsler, *Federal Courts, State Criminal Law and the First Amendment*, 49 N.Y.U. L. REV. 740, 875 (1974). For general criticism of the Court's use of precedent in *Younger*, see Soifer & Macgill, *The* Younger *Doctrine: Reconstructing*

Harris had been indicted in a California state court for allegedly violating the California Criminal Syndicalism Act.[6] Harris then filed an action in federal court asking the court to enjoin Younger, the state district attorney, from prosecuting him under the Act, alleging that the Act infringed upon his first and fourteenth amendment rights. The Supreme Court held that the federal court should abstain from enjoining the state court proceeding.[7] The Court was concerned that a federal court injunction against Harris' prosecution would interfere with state court process in a way which was repugnant to principles of comity and "Our Federalism." The Court described "Our Federalism" as

> a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States.[8]

Furthermore, the Court noted the general equitable principle that, unless the moving party will suffer irreparable injury, an equity court should not enjoin an ongoing criminal prosecution because there is an adequate remedy at law, that is, the defense of the state court prosecution.[9]

Nevertheless, the Court indicated that there might be certain "extraordinary" circumstances in which defense to the state prosecution would not be an adequate remedy and, therefore, *Younger* would not preclude federal injunctive relief. These *Younger* exceptions would include prosecution brought in bad faith or for purposes of harassment,[10] prosecution under a statute which is "flagrantly and patently violative of express constitutional prohibitions in every clause, sentence and paragraph,"[11] and "[o]ther unusual situations calling for federal intervention . . . ."[12] Because Harris did not establish that his prosecution fell under any of these exceptions, the Court indicated that equity, comity, and federalism required the federal court to deny injunctive relief.[13]

Reconstruction, 55 TEX. L. REV. 1141, 1144-67 (1977); Weinberg, *The New Judicial Federalism*, 29 STAN. L. REV. 1191, 1206-09 (1977).

[6]CAL. PENAL CODE §§ 11400-11401 (West 1970).

[7]401 U.S. at 41.

[8]*Id.* at 44.

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

[10]*Id.* at 47-49 (construing Dombrowski v. Pfister, 380 U.S. 479 (1965)).

[11]401 U.S. at 53 (quoting Watson v. Buck, 313 U.S. 387, 402 (1941)).

[12]401 U.S. at 54.

[13]*Id.* at 43-54.

In *Samuels v. Mackell*,[14] a companion case to *Younger*, the Court denied a state court defendant's request for a federal judgment declaring unconstitutional the state law under which he was being prosecuted.[15] The Court's decision that the availability of federal declaratory relief must be tested by *Younger* principles was based on its conclusion that although injunctive and declaratory relief are distinct legal remedies, "the practical effect of the two forms of relief will be virtually identical, and the basic policy against federal interference with pending state criminal prosecutions will be frustrated as much by a declaratory judgment as it would be by an injunction."[16]

Thus, *Younger* and *Samuels* taken together preclude a state court defendant from obtaining equitable relief in federal court unless a *Younger* exception applies. If the federal plaintiff is subject to a pending state court prosecution and no extraordinary circumstances are present, then neither declaratory nor injunctive relief may be granted.

In *Samuels*, the Court had expressly left open the question of the propriety of federal declaratory relief in the absence of a pending state proceeding.[17] This question reached the Court in *Steffel v. Thompson*.[18] Becker and Steffel had been threatened with arrest while distributing handbills at a local shopping center. Steffel ceased handbilling at the threat of arrest,[19] but Becker continued to distribute handbills and was arrested. Steffel and Becker brought an action in federal court challenging the validity of the statute under which Becker had been arrested. The lower federal courts held that *Younger* precluded both Steffel and Becker from obtaining injunctive or declaratory relief in federal court.[20] Steffel appealed to the Supreme Court from the denial of declaratory relief. The Court held that Steffel could obtain a declaratory judgment in federal court because he was not being prosecuted in state court and because he had shown "a genuine threat of enforcement of a disputed state criminal statute . . . ."[21] The Court reasoned that when the federal

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[14]401 U.S. 66 (1971).

[15]*Id.* at 73.

[16]*Id.*

[17]*Id.* at 73-74.

[18]415 U.S. 452 (1974).

[19]The parties stipulated that Steffel might have been arrested had he continued handbilling. *Id.* at 456.

[20]*See* Becker v. Thompson, 334 F. Supp. 1386 (N.D. Ga. 1971), *aff'd*, 459 F.2d 919 (5th Cir. 1972).

[21]415 U.S. at 475. In Doran v. Salem Inn, Inc., 422 U.S. 922 (1975), a *Steffel*-type case decided one year after *Steffel*, the Court held under the facts that the federal plaintiffs were entitled to a preliminary injunction without meeting the *Younger* test pending disposition of their request for declaratory relief. *Id.* at 930-31.

plaintiff is not the subject of a pending state proceeding, principles of equity, comity, and federalism do not preclude federal intervention in the form of a declaratory judgment, which Congress intended "as an alternative to the strong medicine of the injunction . . . ."[22]

The *Steffel* decision is the cornerstone of the *Younger* paradox, for it provides the basis upon which the courts must decide which litigants can proceed in federal court despite possible effects on the state court. Although *Steffel* appears sensible on its face, a close analysis reveals that the case rests on a formalistic distinction. The *Younger* doctrine is designed to protect state courts from undue federal interference. The *Steffel* Court, however, defined undue federal interference with a state court solely in terms of the identity of the federal plaintiff; instead of looking to potential impact or interference in the state court, the Court asked only whether the federal plaintiff was the subject of a pending state proceeding. This identity-based distinction, although apparently easy to apply,[23] is not necessarily meaningful.

To best illustrate the "*Younger* paradox," it is useful to look at a hypothetical case. *A* distributes handbills at a local shopping center and is arrested for violating a state statute which is suspect. Because *A* cannot establish that her prosecution falls under any *Younger* exception, *Younger* and *Samuels* preclude her from challenging the statute in federal court. Nevertheless, *A*'s friend *B*, who also distributed handbills but left before the arrests took place, can now obtain federal declaratory relief which will effectively prevent enforcement of the statute.[24] Assuming that the federal court grants relief before *A*'s trial in state court, there can be little doubt that as a practical matter, *A*'s prosecution will be terminated as surely as if *A* had obtained the relief independent of *B*'s action.

Clearly, there is a formal distinction between the relief obtained by *A* and that obtained by *B*. If *A* has already been prosecuted and convicted when *B* obtains federal relief, *A* will probably be unable to

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[22]415 U.S. at 466.

[23]Essentially, *Steffel* states that if the federal plaintiff is currently being prosecuted in state court, relief would impermissibly interfere with the state court. In later cases such as Hicks v. Miranda, 422 U.S. 332 (1975), the Court obscures the definition of who is currently being prosecuted. *Hicks* is discussed in notes 31-39 *infra* and accompanying text.

[24]To the extent that *Steffel* does not mandate this result, later cases clearly command it. Because Becker did not appeal the lower court's decision, the Supreme Court in *Steffel* did not consider the outcome of a case in which there are two closely related federal plaintiffs, one who is subject to state prosecution and one who is not. This fact situation was presented in Doran v. Salem Inn, Inc., 422 U.S. 922 (1975), in which the Court determined that *Younger* would permit the party not being prosecuted to bring a federal action. *Id.* at 930.

collaterally attack her conviction.[25] If *A* has not yet been prosecuted it is conceivable, but unlikely, that the prosecution against her will proceed after a federal court has declared the statute unconstitutional. Under certain circumstances, *B*'s federal judgment may actually be binding upon *A*'s prosecutor or the court in which she is tried.[26] Even without considering the res judicata effect of a federal declaratory judgment, however, it is clear that as a practical matter a prosecutor would be reluctant to proceed under these circumstances. In fact, proceeding after the statute had been declared unconstitutional might be considered bad faith prosecution, permitting *A* to seek federal relief under the bad faith prosecution exception outlined in *Younger*.[27]

Thus, there is a technical distinction between a judgment obtained by *A* and a judgment obtained by *B*. Simply stated, a judgment granted to *A* will definitely halt her prosecution, but a judgment granted to *B* will only probably halt *A*'s prosecution. Is this the stuff of which comity is made? Is not the interference with the state system just as profound in the second instance as it is in the first? Arguably it may be less offensive to inform a state court that the statute under which it is prosecuting *A* is unconstitutional than to direct the state court not to prosecute *A*, but the practical impact—the interference with the state court process—is virtually the same.[28]

Although it may provide cold comfort to civil rights advocates, *Steffel*, as decided, leaves the door partially ajar for civil rights litigants. If the outcome of *Steffel* had been different, the Court indeed would have "place[d] the hapless plaintiff between the Scylla of

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[25]*See* Wooley v. Maynard, 430 U.S. 705 (1977), *discussed in* notes 85-91 *infra* and accompanying text.

[26]The binding effect of *B*'s federal judgment would depend on who were parties to the federal action and the wording of any federal court order. If *A*'s prosecutor were a party to the federal action and the order prohibited prosecution under the statute, *A*'s prosecutor would probably be bound by the federal judgment. The res judicata effect of a federal declaratory judgment, however, remains unresolved. *See* Steffel v. Thompson, 415 U.S. at 469-71 (quoting Perez v. Ledesma, 401 U.S. 82, 124-26 (1971) (Brennan, J., concurring in part and dissenting in part)).

[27]Justice Rehnquist, however, argues to the contrary in his concurring opinion in *Steffel*:

> [A]ttempts to circumvent *Younger* by claiming that enforcement of a statute declared unconstitutional by a federal court is *per se* evidence of bad faith should not find support in the Court's decision in this case. . . . [C]ontinued belief in the constitutionality of the statute by state prosecutorial officials would not commonly be indicative of bad faith . . . .

415 U.S. at 483 (Rehnquist, J., concurring).

[28]It is interesting to note that in Samuels v. Mackell, 401 U.S. 66 (1971), *discussed in* notes 14-17 *supra* and accompanying text, the Court looked to the practical impact as opposed to the legal distinctions.

intentionally flouting state law and the Charybdis of foregoing what he believes to be constitutionally protected activity in order to avoid becoming enmeshed in a criminal proceeding."[29] A decision prohibiting potential state court defendants from litigating in federal court would have been a logical extension of *Younger*, but would have radically restricted access to the federal courts by civil rights litigants—so radically, in fact, that it might have caused the Justices to reconsider the wisdom of *Younger*. Such a decision would have all but shut the door on challenges to state statutes in federal court. A federal plaintiff who was the subject of a pending state court prosecution would have been precluded by *Younger* and *Samuels* from obtaining relief in federal court, and a federal plaintiff who, although not the subject of a pending prosecution, could show a real threat of state court prosecution, would not have had standing to maintain a federal action.[30] Of course, the Court did not decide *Steffel* in the manner suggested, but instead held that *Younger* does not preclude federal declaratory relief when a prosecution is merely threatened rather than in progress.

The Court continued to refine, and in so doing, to complicate, the *Younger* doctrine in *Hicks v. Miranda*.[31] In *Hicks*, the Court held that a federal plaintiff who was not himself the subject of state proceedings would be bound by *Younger* principles if his interests "intertwined" with those of someone who was being prosecuted[32] or if the state prosecutor filed an action against the federal plaintiff after the federal action had been filed "but before any proceedings of substance on the merits [had] taken place in the federal court . . . ."[33] In *Hicks*, the prosecutor filed criminal misdemeanor charges against employees of a theatre for violating a state nuisance statute; as a result, the theatre was closed. The owners of the theatre filed an action in federal court challenging the statute under which the employees had been prosecuted.

The Supreme Court held that abstention under *Younger* was required under either of two theories. First, the Court found that the theatre owners "had a substantial stake in the state proceedings, so much so that they sought federal relief, demanding that the state statute be declared void and their films be returned to them. Obvious-

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[29]415 U.S at 462.

[30]This "Catch 22" approach was actually the outcome of Juidice v. Vail, 430 U.S. 327 (1977). In that case, the Court held, under a limited fact situation, that those plaintiffs who were not being prosecuted in state court and were therefore not subject to *Younger* had no standing, but those persons who were being prosecuted in state court, and therefore had standing, were subject to *Younger*. *Id.* at 331-33.

[31]422 U.S. 332 (1975).

[32]*Id.* at 348-49.

[33]*Id.* at 349.

ly, their interests and those of their employees were intertwined . . . ."[34] Thus, the federal plaintiffs would be regarded for purposes of the federal action as defendants to the state prosecution. The Court did little else to define "intertwining," leaving the lower courts to fend for themselves.[35]

The Court gave a second ground to support the result in *Hicks*. After the federal action had been filed, the state prosecutor amended the criminal action to name the theatre owners as defendants. The Supreme Court held that this state prosecution, commenced after the federal action, constituted a "pending proceeding" for *Younger* purposes:

> Neither *Steffel v. Thompson* . . . nor any other case in this Court has held that for *Younger v. Harris* to apply, the state criminal proceedings must be pending on the day the federal case is filed. . . . [W]e 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.[36]

The holding in *Hicks* is disturbing for both practical and pedagogical reasons. On the practical level, the Court created still another technical complexity for federal courts trying to determine the applicability of *Younger* principles. The *Younger* test no longer involved the simple question whether the federal plaintiff was subject to a pending state court criminal prosecution. Now the test was more complicated: (1) Was the federal plaintiff subject to a pending state court criminal prosecution at the time the federal complaint was filed? (2) Was a state court proceeding filed against the federal plaintiff before proceedings of substance on the merits had transpired in the federal action? (3) Is the federal plaintiff, not himself the subject of state proceedings when the federal action was filed, nonetheless "intertwined" with a party who was then subject to an ongoing state court prosecution? A "yes" answer to any of these questions would invoke *Younger* abstention.

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[34] *Id.* at 348-49.

[35] *Hicks* is the only case in which the Supreme Court has mentioned the "intertwining" standard. In Doran v. Salem Inn, Inc., 422 U.S. 922 (1975), the Court characterized as "Procrustean" the position taken by the lower court that three corporate entities challenging the same statute, represented by the same counsel, and possessing apparently identical interests should be subject to the same *Younger* considerations. *Id.* at 928-29.

[36] 422 U.S. at 349 (emphasis added).

Pedagogically, *Hicks* represents a radical abdication of jurisdiction by federal courts. If *Younger* stands for the proposition that a federal court cannot interfere with ongoing state proceedings, then *Hicks* stands for the proposition that state prosecutors can interfere with ongoing federal proceedings.[37] After *Hicks*, a state prosecutor can terminate a federal action filed against him by instituting proceedings against the federal plaintiff under the challenged ordinance before "proceedings of substance on the merits" have transpired in the federal action.[38] Surely this result would seem to "turn federalism on its head."[39]

II. ABSTENTION AND EXHAUSTION

In this climate of confusing and sometimes contradictory abstention mandates, the Court decided *Huffman v. Pursue, Ltd.*[40] The application of abstention in the *Huffman* context was so novel that the Supreme Court found no indication that the district court had even considered *Younger* principles.[41] *Huffman* is significant for two reasons. First, it was the earliest case in which the Court, which had previously applied *Younger* only in the criminal context, held the *Younger* doctrine applicable to those civil cases which, because they involve important state interests, are "akin" to state prosecutions.[42] Second, it was the first case in which the Court applied the *Younger* doctrine when no proceeding was in progress at the state court level. According to the Court, abstention was appropriate because the federal plaintiff had failed to exhaust his state court remedies.[43]

In *Huffman*, the federal plaintiff, Pursue, Ltd., attempted to challenge the validity of an Ohio statute which provided that a place

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[37]*See id.* at 353-57 (Stewart, J., dissenting).

[38]422 U.S. at 349. The assumption—which is in no way unreasonable—is that the prosecutor can validly prosecute the federal plaintiff: to have established standing to bring the federal action, the federal plaintiff must have shown he was subject to a real and immediate threat of prosecution. Steffel v. Thompson, 415 U.S. at 459.

Of course, if a state prosecutor were to prosecute without sufficient grounds merely to remove the case from federal court, this might well constitute bad faith. If so, abstention would not be required under *Younger*.

[39]Steffel v. Thompson, 415 U.S. at 472.

[40]420 U.S. 592 (1975).

[41]*Id.* at 599.

[42]*Id.* at 604. Soon to follow were Trainor v. Hernandez, 431 U.S. 434 (1977), and Juidice v. Vail, 430 U.S. 327 (1977), in which the Court went even further than it had gone in *Huffman*, extending *Younger* to civil cases in which the state has a significant interest. *See also* Moore v. Sims, 99 S. Ct. 2371 (1979).

The application of *Younger* to civil cases may have been a logical extension of the doctrine, but it was not a happy one. No other single *Younger* development has provoked such critical fire. *See, e.g.*, Shaman & Turkington, Huffman v. Pursue, Ltd.: *The Federal Courthouse Door Closes Further*, 56 B.U.L. REV. 907 (1976).

[43]420 U.S. at 608.

which exhibits obscene films is a nuisance. Prior to the federal action, the state prosecutor had instituted a civil nuisance proceeding in the Ohio courts against the plaintiff's predecessor in interest. After Pursue, Ltd. had succeeded to the leasehold interest of the state court defendant, the Ohio court issued a final judgment ordering closure of the theatre for a year and seizure and sale of personal property used in the operation of the theatre.

In the federal action, Pursue, Ltd. argued, *inter alia*, that *Younger* was inapplicable because no state court action was pending. In *Steffel*, the Court had held that *Younger* would not preclude federal declaratory relief when there was a genuine threat of future prosecution, but no pending prosecution. Because the Ohio court had entered a final judgment and, arguably, the proceeding was terminated, the federal plaintiff claimed that there was no pending prosecution.

The Supreme Court did not consider the question whether the Ohio court's judgment was final, but instead held *Younger* applicable because the federal plaintiff had failed to take appeal from his state court judgment to the state appellate system:

> [R]egardless of when the Court of Common Pleas' judgment became final, we believe that a necessary concomitant of *Younger* is that a party in appellee's posture must exhaust his state appellate remedies before seeking relief in the District Court, unless he can bring himself within one of the exceptions specified in *Younger*.[44]

According to the Court, federal intervention in the state process before exhaustion of state appellate remedies would be duplicative and disruptive. Furthermore, the Court recognized that "[f]ederal post-trial intervention, *in a fashion designed to annul the results of a state trial*, also deprives the States of a function which quite legitimately is left to them, that of overseeing trial court dispositions of constitutional issues which arise in civil litigation over which they have jurisdiction."[45]

Thus, *Huffman* further complicates the tests set forth in earlier cases. Now, federal courts had to resolve the following questions: (1) Was the federal plaintiff subject to a pending state court criminal prosecution *or a state civil action involving important state interests* when the federal complaint was filed? (2) Was a state proceeding filed against the federal plaintiff before proceedings of substance on the merits had transpired in the federal action? (3) Is the federal plaintiff, not himself the subject of state proceedings

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[44] *Id.*

[45] *Id.* at 609 (emphasis added).

when the federal action was filed, nevertheless "intertwined" with a party who was then subject to an ongoing state court proceeding? (4) *Is the federal relief designed to annul the results of a state proceeding*?

The imposition of an exhaustion requirement in a section 1983[46] action inspired grave doubts about the continued validity of *Monroe v. Pape*.[47] In *Monroe*, the Court held that a federal plaintiff need not exhaust state court remedies before bringing a section 1983 action in federal court: "It is no answer that the State has a law which if enforced would give relief. The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked."[48]

Justice Brennan in his dissenting opinion in *Huffman* stated that "[t]he extension . . . of *Younger v. Harris* to require exhaustion in an action under [section] 1983 drastically undercuts *Monroe v. Pape* and its numerous progeny . . . ."[49] Nevertheless, Justice Rehnquist for the majority asserted that the exhaustion requirement did not undermine *Monroe v. Pape*.[50] Rehnquist maintained that in *Monroe*, the Court held "that one seeking redress under . . . [section] 1983 for a deprivation of federal rights need not first initiate state proceedings based on related state causes of action."[51] He distinguished *Monroe* on the ground that it "had nothing to do with the problem [before the Court in *Huffman*] of the deference to be accorded state proceedings which have already been initiated and which afford a competent tribunal for the resolution of federal issues."[52]

Thus, the majority in *Huffman* indicated that as long as the federal plaintiff had not initiated any action in state court, and no state action had been initiated against him, the federal forum would remain open and exhaustion of state remedies would not be required. As Justice Brennan indicated in his dissenting opinion, however, there was some fear that the *Huffman* exhaustion require-

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[46]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.
42 U.S.C. § 1983 (1970).

[47]365 U.S. 167 (1961), *overruled on other grounds*, Monell v. Department of Social Servs., 436 U.S. 658 (1978).

[48]365 U.S. at 183.

[49]420 U.S. at 617 (Brennan, J., dissenting).

[50]420 U.S. at 609 n.21.

[51]*Id.*

[52]*Id.* at 609-10 n.21.

ment would be extended to create a serious stumbling block to obtaining federal relief under section 1983.[53]

Despite the fears voiced by the *Huffman* dissenters and commentators, the Court has recently indicated that the exhaustion requirement will not be interpreted broadly. In *Redhail v. Zablocki*,[54] the federal plaintiffs challenged, under section 1983, a Wisconsin statute which required certain residents to obtain a court order before they could marry. The district court considered whether *Younger* and *Huffman* would require the federal plaintiff to challenge the Wisconsin statute in state court and determined that *Younger* need not be invoked because there was no pending proceeding in the state court.[55] Furthermore, the court discussed the *Huffman* exhaustion requirement and concluded, citing *Monroe v. Pape*, that a federal plaintiff proceeding under section 1983 need not first apply to the state courts for relief.[56]

The Supreme Court affirmed the lower court's decision, but summarily disposed of the abstention issue in a footnote: "[T]he District Court was correct in finding *Huffman* and *Younger* inapplicable, since there was no pending state-court proceeding in which appellee could have challenged the statute."[57] The mere fact that there was no pending prosecution should not have been a sufficient reason to dismiss the abstention issue.[58] In *Huffman*, the Court had held that the exhaustion requirement did not depend upon whether there was a *pending* action. In fact, there was no pending action in *Huffman*, but abstention was required because the federal plaintiff had failed to make a timely appeal of the judgment against it. Actually, the appropriate test to be applied in *Redhail*, which the Court set forth in *Huffman*, would have been whether the federal relief was designed to annul the results of a state trial. Despite the fact that the *Redhail* Court applied the wrong test, the Court was obviously correct in its conclusion that *Huffman* did not require abstention because in *Redhail* there had been no state trial. *Redhail* thus indicates, at least by inference, that the Court does not intend to require abstention for failure to exhaust state remedies unless

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[53]*See, e.g.*, Bartels, *Avoiding a Comity of Errors: A Model for Adjudicating Federal Civil Rights Suits that "Interfere" with State Civil Proceedings*, 29 STAN. L. REV. 27, 30 n.8 (1976); Soifer & Macgill, *supra* note 5, at 1182.

[54]418 F. Supp. 1061 (E.D. Wis. 1976), *aff'd*, 434 U.S. 374 (1978).

[55]418 F. Supp. at 1065.

[56]*Id.* (citing Monroe v. Pape, 365 U.S. 167 (1961)).

[57]434 U.S. at 380 n.5.

[58]The Court may have meant that there was no proceeding, pending or otherwise, in the state court and that it was therefore unnecessary to apply the *Huffman* test, that is, to ask whether the federal relief would annul the results of a state trial. Nevertheless, the Court specifically referred to a *pending* proceeding.

there has been a state proceeding which would be interfered with in some way if relief were to be granted.

A. Huffman *and the Civil Rights Litigant*

The assurance that *Huffman* will not be extended to overrule *Monroe v. Pape* provides little comfort to the prospective federal plaintiff who, like the plaintiff in *Huffman*, does not choose the state forum but has it chosen for him by the state prosecutor. As in *Hicks*, the Supreme Court in *Huffman* gave the state prosecutor the opportunity to choose the preferred forum, and a state prosecutor will inevitably choose the state court. Absent extraordinary circumstances, once the prosecutor has initiated an action in state court, the state court defendant must pursue his state appellate remedies before commencing a federal action. As recognized by the dissenters in *Huffman*, "the mere filing of a complaint against a potential [section] 1983 litigant forces him to exhaust state remedies."[59]

The prospective federal plaintiff's plight is further aggravated by the *Hicks* definition of a pending prosecution which would invoke *Younger* principles as one filed before "proceedings of substance on the merits" have begun in the federal action.[60] Although the prospective federal plaintiff may win the race to the federal courthouse, he would still lose if the state prosecutor files in state court before proceedings of substance have taken place in the federal court.

The Court apparently saw no inequity in relegating the plaintiff in *Huffman* to the state courts—at least no inequity which outweighed the competing interests of federalism. In fact, the *Huffman* Court concluded that the federal plaintiff should not be permitted the "luxury" of litigating in federal court when that "luxury" is so "costly" to federalism.[61] The Court's willingness to relegate the federal plaintiff to the state courts rests on two basic assumptions. The first assumption, often repeated in *Younger* cases, is that state courts have a constitutionally imposed responsibility to enforce the Constitution and that the Court will not assume that the state courts are either unable or unwilling to enforce constitutional mandates.[62] The second assumption is that the aggrieved defendant has the option of appealing an adverse state decision to the United States Supreme Court and may in fact be able to appeal as a matter of right.[63] These safeguards, argues the Court, provide an adequate federal remedy.

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[59]420 U.S. at 617 (Brennan, J., dissenting).
[60]422 U.S. at 349.
[61]420 U.S. at 605-06.
[62]*Id.* at 611. *See also* Moore v. Sims, 99 S. Ct. 2371 (1979).
[63]420 U.S. at 605.

Neither of these assertions is particularly convincing. The Court's assumption that state courts are at least as capable of determining constitutional issues as federal courts is directly contrary to the express purpose and mandate of Congress in enacting section 1983. It is only logical to assume that federal courts will be more familiar with federal issues than state courts. Federal decisions made by the federal judiciary will also tend to be more uniform than those made by state court judges, because the federal judiciary is a more cohesive group than the state judiciary.[64]

Furthermore, federal constitutional decisions may be controversial and unpopular. Federal judges appointed for life are not subject to reelection or reappointment. The singular ability of the federal judiciary to protect the constitutional rights of citizens is best illuminated by asking one question: Where would the civil rights movement be today if it had depended upon the state courts to enforce constitutional guarantees of equal protection?

Fortunately, this question need never be answered because Congress has provided a remedy which enables civil rights advocates to challenge deprivations of civil rights under color of state law in federal court. This remedy is section 1983, which allows persons aggrieved by state authorities to bypass the state courts and sue in federal court. To the extent that *Younger* and cases like *Huffman* have limited the availability of the federal forum, the Court has undermined the congressional grant of jurisdiction. As the Supreme Court itself recognized in *Mitchum v. Foster*,[65] "[t]he very purpose of [section] 1983 was to interpose the federal courts between the States and the people, as guardians of the people's federal rights—to protect the people from unconstitutional action under color of state law, 'whether that action be executive, legislative, or judicial.' "[66]

The Court's assumption that appeal to the Supreme Court provides an adequate remedy is also subject to criticism. Fewer than ten percent of all petitions for review are granted.[67] And although a final decision of a state court which sustains the validity of a state statute on federal constitutional grounds is appealable to the Supreme Court as a matter of right,[68] the Court summarily disposes of most such cases.[69] A ten percent chance of consideration by the

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[64]*See* Soifer & Macgill, *supra* note 5, at 1185; Wells, *Preliminary Injunctions and Abstention: Some Problems in Federalism*, 63 CORNELL L. REV. 65, 74-75 (1977).

[65]407 U.S. 225 (1972).

[66]*Id.* at 242 (quoting *Ex parte* Virginia, 100 U.S. 339, 346 (1879)).

[67]Casper & Posner, *A Study of the Supreme Court's Caseload*, 3 J. LEGAL STUD. 339, 361, 367 (1974).

[68]28 U.S.C. § 1257(2) (1970).

[69]Erwin N. Griswold, former Solicitor General of the United States (1968-1973) has stated that "[w]ith few exceptions, appeals are treated as discretionary, and are

Supreme Court cannot be as effective an alternative as full review of the merits by a lower federal factfinder.

The *Younger* line of cases has rejected the idea that a litigant might have a legitimate interest in litigating in federal, as opposed to state, court. This closing of the federal courthouse doors may be the result, not of principle and precedent, but of a desire to limit the ever increasing caseload of the federal courts.

B. *Applications of* Huffman *in the Lower Courts*

The *Huffman* exhaustion rule has continued to generate confusion in the lower courts. In *Kahn v. Shainswit*,[70] the plaintiff, Kahn, requested a federal court order restraining a New York state judge from enforcing a state statute which foreclosed Kahn from counterclaiming in a state court divorce action in which he was a defendant. The district court recognized that *Huffman* had expanded *Younger* to the civil context and found that it was applicable to the case. The court observed that because Kahn was not foreclosed from appeal in the state courts and had failed to exhaust his state court remedies, abstention was required.[71]

Actually, the court in *Kahn* did not have to consider the exhaustion issue. Because the state court judge had not issued a final order[72] there was still a pending state court action to which the federal plaintiff was subject. Technically, the exhaustion issue should only be raised after a determination that there is no pending prosecution.[73]

One disturbing application of the *Younger* exhaustion doctrine has been the use of *Huffman* by some federal courts as a basis for denying pretrial habeas corpus relief. In *Ex parte Royall*,[74] the Supreme Court held that a federal court could use its discretion in determining whether to grant habeas relief to a state court defend-

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routinely dismissed 'for want of a substantial federal question.' " Griswold, *Rationing Justice—The Supreme Court's Caseload and What the Court Does Not Do*, 60 CORNELL L. REV. 335, 345 (1975).

[70]414 F. Supp. 1064 (S.D.N.Y. 1976).

[71]*Id.* at 1068.

[72]*Id.* at 1065.

[73]This may be overstating the case. In *Huffman*, the Court did not determine whether the state court's order became final before or after the federal filing. The Court considered such an inquiry unnecessary because it found that exhaustion was required in any event. 420 U.S. at 608. In *Kahn*, however, it was clear that no final order had been entered in the state action when the federal action was decided. *See* 414 F. Supp. at 1065. Therefore, it was unnecessary to reach the exhaustion issue.

[74]117 U.S. 241 (1886).

ant who had not been tried, but who had exhausted all state *pretrial* remedies. Nevertheless, in *Schlesinger v. Councilman*,[75] the Court noted in dicta that the "considerations of comity" inherent in *Younger* "underlie the requirement that petitioners seeking habeas relief . . . must first exhaust available state remedies . . . ."[76] In *United States v. New York*,[77] the Second Circuit denied a pretrial petition for habeas corpus, even though the state court defendant had exhausted all of her pretrial remedies, on the ground that *Younger* and *Huffman* required the state court defendant to exhaust all state court options. According to the court, the defendant had two choices: she could raise her constitutional defenses at trial in the state court, or she could plead guilty and raise them on appeal in the state appellate system. In *Drury v. Cox*,[78] the Ninth Circuit reached a similar conclusion:

> Our reading of *Younger v. Harris* . . . convinces us that only in the most unusual circumstances is a defendant entitled to have federal interposition by way of injunction or habeas corpus until after the jury comes in, judgment has been appealed from and the case concluded in the state courts. Apparent finality of one issue is not enough.[79]

Although other courts have agreed with the Second and Ninth Circuits,[80] at least one court has disagreed. In *Rivers v. Lucas*,[81] the Sixth Circuit rejected the *Drury* holding: "[W]e have found no Supreme Court decision which holds that pretrial habeas corpus relief is the equivalent of an injunction to stay proceedings in a state court."[82]

The application of *Huffman* in the habeas corpus context is particularly disturbing. The *Huffman* Court held that when federal relief is designed to annul the results of a state trial, exhaustion of state remedies is required. Thus, *Huffman*'s application to federal habeas corpus proceedings could mandate abstention in all habeas actions involving state incarcerations because the remedy of habeas corpus by its very nature is almost always designed to annul the results of a state trial.

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[75]420 U.S. 738 (1975).

[76]*Id.* at 756.

[77]532 F.2d 292 (2d Cir. 1976).

[78]457 F.2d 764 (9th Cir. 1972).

[79]*Id.* at 764-65.

[80]*See, e.g.*, Dolack v. Allenbrand, 548 F.2d 891 (10th Cir. 1977); Powell v. Keve, 409 F. Supp. 228 (D. Del. 1976).

[81]477 F.2d 199 (6th Cir.), *vacated and remanded*, 414 U.S. 896 (1973).

[82]477 F.2d at 203.

III. *WOOLEY V. MAYNARD* AND THE EXHAUSTION REQUIREMENT

It is unfortunate that the first mention of the exhaustion requirement, in *Huffman*, was largely overshadowed by *Huffman*'s extension of *Younger* to certain civil cases.[83] The application of exhaustion in the civil context obscured the direction in which the Court was pointing. In *Huffman*, the Court was concerned with the same sort of problem which had been raised by the peculiar facts of *Hicks v. Miranda*. In both *Hicks* and *Huffman*, the state courts had ordered closure of the federal plaintiffs' theatres. In *Huffman*, the court had ordered the seizure and sale of the plaintiff's property as well. Neither case was concerned as much with stopping an ongoing prosecution as with recovering property seized by the state court. In each case, the federal plaintiff attempted to undo the state court's actions without directly challenging its decision by attacking, in federal court, the statute under which the state court had proceeded. The practical result of having prevailed in such a challenge would not have been much different than having successfully defended or appealed in the state court. Thus, in both *Hicks* and *Huffman* the federal plaintiff had an interest which could be protected only by attacking a state court proceeding in a way which the Court had determined was antithetical to *Younger* principles. The Court was stating in *Hicks* that the federal plaintiffs, although technically not subject to a pending state court action, were seeking relief which would disrupt the state court in the same manner as if the federal plaintiffs were before the state court in a pending action. The relevant factor was the impact which the relief sought would have upon the state court rather than any particular individual's status as a party to a pending proceeding. This aspect of the case, however, was obscured by the Court's continued focus on the identity of the federal plaintiff. Thus, in cases in which the relief sought amounts to a collateral attack on a state court decision, or in the Court's words, when the relief sought is "designed to annul the results of a state trial," *Huffman* requires exhaustion.[84]

In this context the exhaustion requirement does not pose a serious threat to *Monroe v. Pape* or to actions brought under section 1983 generally. *Huffman* was not really intended to overrule *Monroe* or to seriously limit its viability. *Huffman* merely creates a limited exception to the "no exhaustion" rule of *Monroe*. In situations in which the section 1983 action amounts to a collateral attack on a state court judgment, the federal plaintiff will be forced back into the state system to appeal the state court's decision. Although

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[83]*See* note 42 *supra* and accompanying text.

[84]420 U.S. at 609.

this result will not find favor with those who believe that civil rights are more important than states' rights, it in no way approaches the spectre of an exhaustion requirement in all section 1983 cases.

Applying *Huffman* in the criminal context makes the exhaustion requirement easier to understand. If Pursue, Ltd. had been prosecuted, convicted, and fined in state court for violating a criminal nuisance statute and had then come into federal court challenging the nuisance statute and demanding the return of its fine, the Court would have required the federal plaintiff to go back to the state courts to appeal its state court judgment. This is the way most of the lower federal courts have applied the exhaustion requirement.[85] What would happen if Pursue, Ltd. were prosecuted, convicted, and fined in state court and then went to federal court to challenge prospectively the application of the statute? In other words, what would be the result if the federal plaintiff did not request relief which would have a direct impact on the state court judgment?

These were the facts in *Wooley v. Maynard*.[86] George Maynard had been prosecuted repeatedly in the New Hampshire courts for obscuring the state motto "Live Free or Die" on his license plates. He had been fined and had served a fifteen-day sentence for violating an ordinance requiring display of the motto. When no proceeding was pending against Maynard,[87] he and his wife brought an action in federal court challenging the ordinance on first amendment grounds. The state argued that *Younger* and *Huffman* precluded federal intervention because Maynard had not sought review of his state court convictions and thus had failed to exhaust his state court remedies.

The Court held that exhaustion was not required because Maynard, rather than attempting to attack his state court convictions, was seeking purely prospective relief: "[Maynard] does not seek to have his record expunged, or to annul any collateral effects those convictions may have, *e.g.*, upon his driving privileges. The Maynards seek only to be free from prosecutions for future violations of the same statutes. *Younger* does not bar federal jurisdiction."[88] Thus, *Wooley* limits the exhaustion requirement to those

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[85]*See, e.g.*, Foster v. Zeeko, 540 F.2d 1310 (7th Cir. 1976); Dones-Arroyo v. Trias-Monge, 430 F. Supp. 315 (D.P.R. 1976).

[86]430 U.S. 705 (1977).

[87]Actually, Maynard's third prosecution for violation of the statute had been continued for sentencing. *Id.* at 708. Nevertheless, the district court found that "continued for sentencing" amounted to a final order in this setting, because no collateral consequences would result unless Maynard were prosecuted in the future. *Id.* at 711 n.8 (quoting Maynard v. Wooley, 406 F. Supp. 1381, 1384 (D.N.H. 1976)).

[88]430 U.S. at 711.

cases in which the federal action is, in effect, a collateral attack upon a state court proceeding. *Huffman* clearly involved such a collateral attack, for the relief requested would have dissolved the state court's order.

Is this a workable standard? And if it is, is it a reasonable one? To a certain extent, any federal judgment regarding a state statute will have some impact on the courts of that state. That, we recognize, is one of the costs of the federal system. *Younger* indicates that some types of impact are prohibited. For example, a state court defendant cannot seek a federal injunction against his ongoing state prosecution. *Steffel* indicates that some types of impact are not prohibited. Thus, a friend of a state court defendant, who is subject to a threat of prosecution but who is not being prosecuted, can go into federal court and have the statute under which the state defendant is being prosecuted declared unconstitutional. As discussed earlier,[89] this declaratory action is not barred by principles of federalism, even though it will terminate the state court prosecution as surely as if the relief had been granted to the state court defendant.

The distinctions drawn by the Court do not clearly indicate what kind of impact the requested relief must have on the state court before it will amount to relief "designed to annul the results of a state trial . . . ."[90] In *Wooley*, the Court noted that the plaintiff had not sought to have his previous record expunged and that the requested relief was purely prospective, but was it purely prospective? After the Supreme Court had issued an injunction against Maynard's future prosecution under the statute, could the state have initiated proceedings to revoke Maynard's license based on his convictions under the statute? Legally, there may be some doubt whether a state could successfully bring such an action. As a practical matter, however, it is doubtful that a state would do so. Thus, Maynard's purely prospective relief effectively expunged his record.

In short, the distinction between actions designed to annul the results of a state trial and actions requesting purely prospective relief may be one of form rather than substance. If, for example, the plaintiff in *Huffman* had not attempted to attack the state court determination, but instead had challenged the constitutionality of the statute prospectively, would that plaintiff have been barred from proceeding by *Younger*? *Wooley* suggests that he would not.[91] Does *Wooley* create an exception to *Younger* that destroys the rule?

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[89]*See* text accompanying notes 24-28 *supra*.

[90]Huffman v. Pursue, Ltd., 420 U.S. at 609.

[91]The result would depend upon whether there was a final order in the state court. If not, *Younger* would apply.

When the Court prospectively strikes down a state statute, what impact will that have on past state actions? Which types of impact on state court proceedings will be inimical to federalism and which will not? Questions such as these raise doubts not only about the soundness of the *Huffman* decision, but also about the soundness of *Younger* itself.

IV. Conclusion

The exhaustion requirement for *Younger*-type cases set forth in *Huffman* exemplifies the increasing complexity of the *Younger* doctrine. In its narrowest application, the *Huffman* exhaustion requirement prevents state court defendants from collaterally attacking state court judgments in federal court. At its broadest, *Huffman* could overrule *Monroe v. Pape*, precluding the federal plaintiff from challenging any state statute in federal court without first applying to the state courts for relief. *Redhail* and *Wooley*, however, indicate clearly that the Court in *Huffman* did not intend the latter result. Therefore, the *Huffman* exhaustion requirement poses an annoying, but not insurmountable, obstacle to the federal civil rights litigant.

The exhaustion requirement is troublesome because it further complicates and obscures an already complex procedural doctrine. Although "Our Federalism" is an important concept in the federal constitutional system, individual civil rights are at least as important. These civil rights are being threatened by technical complexities which make it increasingly difficult to reach the federal forum. Moreover, the rules governing *Younger* extension are at least paradoxical, and at most inconsistent. In any event, they are unpredictable. With the *Younger* decision, the Court took a broad sweep with the paint brush. With each succeeding decision, it comes closer and closer to painting itself into a corner.