

## ABSTENTION IN THE TIME OF FERGUSON

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*Of the roughly 450,000 Americans who are in local jails awaiting trial, many are there because they are poor. When people with economic resources are arrested, they can sometimes pay bail or fines, and go on with their lives. Those who cannot afford to pay meet a different fate. Some remain in jail for days or weeks while waiting to see a judge. Some remain there for months because courts did not take their indigence into account when setting or reviewing bail. If they plead guilty in order to leave jail, this often triggers a new set of fines and fees that they cannot afford to pay. Failure to pay results in a new arrest. The cycle starts anew.*

*This Article is about federal lawsuits challenging various state and local regimes that criminalize poverty, and a threshold barrier that has blocked some such federal suits. Under *Younger v. Harris*—and the doctrine of *Younger* abstention—federal courts may not disrupt a state criminal proceeding by means of an injunction or declaratory judgment. Federal courts’ reluctance to resolve such cases is predicated on federalism interests. Traditionally, however, federal courts have nonetheless entertained suits to stop or prevent irreparable harm, especially where an underlying State process provides an inadequate means to raise federal constitutional claims. When a State is engaging in a structural or procedural constitutional violation, federalism interests diminish and the risk of irreparable harm is grave.*

*This Article argues for an exception to *Younger* abstention when litigants challenge structural or systemic constitutional violations. “Structural” means a flaw that infects a judicial process’s basic framework in incalculable ways, such as denial of counsel at a critical stage or a judge’s financial interest in the outcome. “Systemic” means a flaw that routinely impacts litigants by way of a policy, pattern or practice, or other class-wide common set of violations. Because the United States Supreme Court has already made clear that “inadequate” state proceedings should not stand in the way of federal intervention, this exception can be adopted and implemented without major changes to existing Supreme Court precedent. No one should be in jail or punished because she is poor. Federal courts should ensure that this substantive right has practical effect.*

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## Introduction

*Anyone who has ever struggled with poverty knows how extremely expensive it is to be poor; and if one is a member of a captive population, economically speaking, one's feet have simply been placed on the treadmill forever. One is victimized, economically, in a thousand ways.*

-James Baldwin, *The Price of the Ticket*<sup>1</sup>

In America, one's economic status often dictates when she experiences freedom from the government's custody, control, and constant surveillance. Illegal practices that reinforce this reality have recently met a formidable foe: Federal lawsuits. Over the past few years, in jurisdictions across the nation, impoverished Americans have filed federal class actions challenging systemic and structural federal constitutional violations in state and local governments' administration of criminal justice.<sup>2</sup> In some suits, poor Americans have alleged that local actors centrally connected to the administration of criminal justice—including judges, private probation officers, and public defenders—have an improper financial interest in whether the residents are fined or jailed.<sup>3</sup> In other cases, litigants have challenged various money bail systems, especially where bail is imposed without regard to a criminal defendant's ability to pay.<sup>4</sup> In yet another set of cases, residents allege that infractions, such as traffic tickets, set into motion a vicious cycle of incarceration, probation, and debt.<sup>5</sup> That is, the residents' inability to pay fines induces incarceration or probation; their incarceration or probation results in additional debt; and their inability to pay results in more incarceration. These circular schemes have no discernable end when they ensnare an indigent person. When these practices are challenged in federal court, the initial briefing often has little to do with whether the

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<sup>1</sup> James Baldwin, *Fifth Avenue, Uptown*, THE PRICE OF THE TICKET (1985) 209. The essay was originally published in the July 1960 edition of *Esquire Magazine*.

<sup>2</sup> See, e.g., *Carter v. City of Ferguson*, No. 4:15-cv-00253 (E.D. Mo.); *Cain v. City of New Orleans*, No. 2:15-cv-04479 (E.D. La); *Rodriguez v. Providence Corrections Corp.*, No. 3:15-cv-01048 (M.D. Tenn); *Pierce v. The City of Velda City*, Case No. 4:15-cv-570-HEA (E.D. Mo.); *Thompson v. Moss Point, Mississippi*, No. 1:15-cv-182LG-RHW (S.D. Mo.); *Jones v. The City of Clanton*, Case No. 2:15-cv-34-MHT (M.D. Ala); *Walker v. City of Calhoun*, Case No.: 4:15-CV-0170-HLM (N.D. Ga); *Buffin v. The City and County of San Francisco and The State of California*, Case 4:15-cv-04959-YGR (N.D. CA); *Burks v. Scott County*, No. 3:14-cv-00745-HTW-LRA (S.D. Mo.); *Bice v. Louisiana Public Defender Bd.*, Case 2:11-cv-00477-JCZ-DEK (E.D. La).

<sup>3</sup> See, e.g., *Bice v. Louisiana Public Defender Bd.*, Case 2:11-cv-00477-JCZ-DEK (E.D. La); *Rodriguez v. Providence Corrections Corp.*, No. 3:15-cv-01048 (M.D. Tenn); *Cain v. City of New Orleans*, No. 2:15-cv-04479 (E.D. La).

<sup>4</sup> See e.g., *Walker v. City of Calhoun*, Case No.: 4:15-CV-0170-HLM (N.D. Ga); *Buffin v. The City and County of San Francisco and The State of California*, Case 4:15-cv-04959-YGR (N.D. CA); *Burks v. Scott County*, No. 3:14-cv-00745-HTW-LRA (S.D. Mo.).

<sup>5</sup> *Carter v. City of Ferguson*, No. 4:15-cv-00253 (E.D. Mo.); *Cain v. City of New Orleans*, No. 2:15-cv-04479 (E.D. La); *Rodriguez v. Providence Corrections Corp.*, No. 3:15-cv-01048 (M.D. Tenn).

plaintiffs have alleged a plausible constitutional violation. Instead, judge-made procedural and jurisdictional matters like abstention sometimes take the front stage.

The small town of Ferguson, Missouri, is likely the most notorious place where residents and federal officials have reported the existence of unjust fees and collection schemes. That town catapulted into the nation's consciousness when its residents began protesting a police officer's killing of an unarmed teenager on a late summer-day in 2014.<sup>6</sup> Roughly eight months after the killing, the Department of Justice issued The Ferguson Report, detailing and criticizing the town's criminal justice policies, including onerous fees, fines and collection practices.<sup>7</sup> Still, while the Ferguson example is the most infamous, the town is far from unique with respect to allegations that cash-strapped residents are being used as ATM machines for cash-strapped towns.<sup>8</sup> Indigent residents have filed suit in a range of American places in and beyond Ferguson, including New Orleans, Louisiana; Rutherford County, Tennessee; and Montgomery, Alabama.<sup>9</sup> They have also filed suit challenging rigid bail schedules in major American cities such as Houston and San Francisco.<sup>10</sup> Civil rights organizations have criticized similar practices in the strategic center of the Civil Rights Movement and Capital of the Progressive South: Atlanta. Federalism doctrines like abstention are an integral aspect of the briefing and legal decisionmaking in all of the suits that have been filed in this sphere.

The list of threshold jurisdictional and procedural issues that accumulate in these suits is almost diverse enough to form the basis of an entire class in Federal Courts. These issues include: standing, mootness, absolute immunity, sovereign immunity, qualified immunity, class action commonality requirements, limits on municipal liability, whether state-law forums must be exhausted before a federal court can hear the underlying claim, the *Rooker-Feldman* rule against federal district court review of state judgments, habeas, and abstention. The focus of this Article is limited to the role that the doctrine of *Younger* abstention plays in this set of lawsuits.

In the 1971 case of *Younger v. Harris*, the Supreme Court ruled that federal courts must generally abstain from enjoining state criminal proceedings, even where the plaintiff

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<sup>6</sup> Kyle J. Jacob, *From Garner to Graham and Beyond: Police Liability for Use of Deadly Force - Ferguson Case Study*, 91 CHL-KENT L. REV. 325 (2016); S. David Mitchell, *Ferguson: Footnote or Transformative Event?*, 80 MO. L. REV. 943, 950 (2015); Samuel P. Jordan, *Federalism, Democracy, and the Challenge of Ferguson*, 59 ST. LOUIS U. L.J. 1103 (2015).

<sup>7</sup> Dept. of Justice, Civil Rights Div., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 47, 55 (2015) (Ferguson Report), online at <https://www.justice.gov/sites/default/files/opa/press>. See also Dorothy A. Brown, *Ferguson's Perfect Storm of Racism*, CNN.com, (Mar. 5, 2015), available at <http://www.cnn.com/2015/03/05/opinions/brown-ferguson-report/> ("If you were the member of a minority group and tried to create a system to control and oppress the majority, you could not have done a better job than the ... leaders of Ferguson, Missouri.")

<sup>8</sup> *Developments in the Law: Policing*, 128 HARV. L. REV. 1723, 1729 (2015); *State Bans on Debtors' Prisons and Criminal Justice Debt*, 129 HARV. L. REV. 1024, 1030 (2016). For context as to the financial distress municipal governments sometimes experience, and the ways this leads to reduced governance see Michelle Wilde Anderson, *The New Minimal Cities*, 123 YALE L.J. 1118, 1122 (2014) ("Years, if not decades, of budget cuts and asset sales have left little beyond a stripped-down version of core service functions like irregular police and fire protection, rudimentary sanitation, and water supply.")

<sup>9</sup> See *supra* note \_\_\_\_.

<sup>10</sup> *Odonnell v. Harris Cty., Texas*, No. CV 4:16-1414 (S.D. Texas) (Houston); *Buffin v. The City and County of San Francisco and The State of California*, Case 4:15-cv-04959-YGR (N.D. CA) (San Francisco).

alleges that the state criminal charges are unconstitutional.<sup>11</sup> The Court later clarified that this rule also applies to civil proceedings that are “akin” to criminal proceedings.<sup>12</sup> Further, the Court has made clear that federal courts should also refuse to grant *declaratory* relief that interrupts an ongoing state criminal proceeding, even if injunctive relief is not sought.<sup>13</sup> Perhaps predictably, then, when a plaintiff files suit alleging that a local or state government’s fines, fees, bail, or collection methods violate the federal constitution, some governmental defendants lean on *Younger* abstention as a means of ending the litigation without a judicial ruling on the underlying merits of the plaintiffs’ claim.<sup>14</sup>

When the government invokes *Younger* in these suits, the results are mixed. Arguments based on *Younger* have resulted in the termination of victims’ claims in cases against places that include Sherwood, Arkansas; Scott County, Mississippi; the State of Louisiana; and Broward County, Florida.<sup>15</sup> By contrast, federal courts have rejected *Younger*-based arguments in suits against places that include Harris County, Texas; New Orleans, Louisiana; Rutherford County, Tennessee; San Francisco, CA; and Calhoun, Georgia.<sup>16</sup> The latter suits are a part of a broader set of successful cases that have led to significant remedies in locales across the nation—remedies that have decreased the population of people jailed or punished for being poor. When plaintiffs are able to navigate the threshold jurisdictional barriers, they generally experience success on the merits, resulting in robust remedies.

This Article has descriptive, normative, and prescriptive ambitions. Descriptively, this Article is the first extensive account of cases challenging the criminalization of poverty—one of the most pressing and prominent civil rights issues in the American legal system. Relatedly, this Article documents the ways this civil rights issue has the capacity to shape federal abstention doctrine by means of an emergent exception to *Younger* abstention for systemic, structural constitutional violations. This descriptive work is itself important. Local governments and private probation companies rely on fees, fines, and severe collection practices. Indeed, scholars, activists, non-profits jurists and journalists have all either studied or critiqued local governments’ and private probation companies’ roles in bulking up the carceral state on the backs the poor.<sup>17</sup> But the jurisdictional barriers to ending these practices are less commonly studied—especially *Younger* abstention. This Article begins to fill this gap.

Normatively, this Article assesses the important role courts have played in protecting against irreparable harm in the absence of other adequate remedies, and contends that for *Younger* abstention to meet its best aspirations, it must not impede that core function of our federal judiciary. Courts should therefore not apply *Younger* abstention when the underlying state criminal forum is structurally or systemically ill-equipped to consider a constitutional objection. Abstaining under those circumstances serves neither the important function federal courts have played in abating irreparable

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<sup>11</sup> *Younger v. Harris*, 401 U.S. 37, 44 (1971).

<sup>12</sup> *Sprint Commc'ns, Inc. v. Jacobs*, 134 S. Ct. 584, 588 (2013).

<sup>13</sup> *Steffel v. Thompson*, 415 U.S. 452 (1974).

<sup>14</sup> See Part II.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

harm since *Ex parte Young*,<sup>18</sup> nor legitimate federalism interests.<sup>19</sup> This Article also brings a contemporary civil rights issue into dialogue with the decades-long debate about whether abstention is legitimate. If the doctrine permits systemic and structural irreparable constitutional harm to persist without intervention, then, absent a well-supported justification, *Younger* abstention is complicit in these practices, and its legitimacy is in a period of decline.

Prescriptively, this Article outlines specific and concrete ways to render abstention doctrine better equipped to prevent irreparable harm. I argue that *Younger* abstention is not appropriate when the claimant is challenging a systemic or structural flaw with respect to a local or state judicial process. By structural, I mean flaws that infect a judicial process's basic framework in immeasurable ways, undermining confidence in the hearing's basic fairness.<sup>20</sup> By systemic, I generally mean a flaw that routinely impacts litigants by way of a policy, pattern or practice, or other class-wide common set of violations.

Part I provides the parameters *Younger* abstention and traces ways that federal courts have historically ensured that the doctrine has allowed courts to correct irreparable harm in States' administration of criminal justice. Part II examines State and local schemes that criminalize poverty; lawsuits challenging those practices; and the role *Younger* abstention sometimes plays in impeding these suits. Part III explores two central guiding principles of federal courts: guarding against irreparable harm and protecting federalism. These principles are served, rather than undermined, when federal courts correct systemic or structural constitutional violations in the state criminal process. Part IV articulates, as a practical matter, how a "structural or systemic" exception to *Younger* would or should operate and the role federal district courts can play in actualizing it. Part IV also argues that if *Younger* is understood to prevent access-to-federal courts when people challenge systemic or structural constitutional violations, this conception undermines the doctrine's legitimacy.

## I. Our Federalism From *Young* to *Younger*

This Part describes *Younger* abstention and how the Court has sought to ensure that the preservation of federal-state comity does not unduly come at the expense of access-to-justice. Courts and commentators alike have correctly observed that judicially recognized exceptions to *Younger* abstention help balance comity and equity.<sup>21</sup> This Part provides a more specific account of these exceptions' connective tissue. Under the

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<sup>18</sup> *Ex parte Young*, 209 U.S. 123 (1908).

<sup>19</sup> Part IV.

<sup>20</sup> 499 U.S. 279 (1991).

<sup>21</sup> Steven G. Calabresi and Gary Lawson, *Equity and Hierarchy: Reflections on the Harris Execution*, 102 *YALE L.J.* 255, 256 (1992) (arguing that *Younger* should attempt to strike a balance between equitable considerations and comity, and that current doctrine fails on that score). *See also* Spargo v. N.Y. State Comm'n on Judicial Conduct, 351 F.3d 65, 74 (2d Cir. 2003) ("*Younger* is not . . . based on Article III requirements, but instead a prudential limitation on the court's exercise of jurisdiction grounded in equitable considerations of comity."); Benavidez v. Eu, 34 F.3d 825, 829 (9th Cir. 1994) ("*Younger* abstention . . . reflects a court's prudential decision not to exercise jurisdiction which it in fact possesses . . ."); Gomez v. U.S. Dist. Court for N. Dist. of California, 503 U.S. 653, 654 (1992) ("Equity must take into consideration the State's strong interest in proceeding with its judgment and Harris' obvious attempt at manipulation.")

interpretative account offered here, one unifying feature of *Younger*'s exceptions is that they promote federal judicial remedies when a person will otherwise suffer harm that is irreparable, serious, and immediate because the underlying state process cannot be trusted to abate this harm. Given the centrality of criminal justice to state sovereignty and autonomy, this represents something of a compromise: Trust and rely on state criminal processes to adjudicate constitutional claims during an ongoing criminal proceeding, *unless* there is reason to believe that the state process will not or cannot adequately abate the harm. In providing this interpretive account, this Part places a spotlight on the role that inferior court judges had in shaping exceptions to *Younger* abstention, especially civil-rights oriented judges in the American South. The Part also documents a new relevant doctrinal development that is consistent with this interpretive account: an emerging exception to *Younger* for systemic violations of the federal constitution.

### A. *Our Reconstructed Federalism*

The 1908 case of *Ex parte Young* is recognized as a profoundly important case because it facilitates the enforcement of the American constitution when state actors act unlawfully.<sup>22</sup> Because a suit against a state official in her official capacity is technically a suit against a State,<sup>23</sup> and because States are generally inoculated from federal suits filed by private parties,<sup>24</sup> seeking to enjoin an unconstitutional state law technically creates a sovereign immunity problem. In *Ex parte Young*, the Court created an exception to sovereign immunity, permitting injunctions against state officials in order to vindicate federal constitutional rights.<sup>25</sup> This ruling has served as an indispensable pillar of constitutional litigation; it is how, for example, litigants in recent years were able to sue state officials for issues ranging from marriage equality and prison overcrowding without sovereign immunity obstacles.<sup>26</sup>

*Ex parte Young*'s importance to constitutional law is not limited to field of sovereign immunity, however, even if that is the area of law for which the case is now most well known. The case is an early piece of the puzzle as to when and how a federal court may enjoin an ongoing state prosecution.<sup>27</sup> After all, the case endorsed an injunction against a person who potentially faced a state criminal prosecution, and who

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<sup>22</sup> *Ex parte Young*, 209 U.S. 123 (1908). See Vicki C. Jackson, *Seminole Tribe, the Eleventh Amendment, and the Potential Evisceration of Ex Parte Young*, 72 N.Y.U. L. REV. 495 (1997) (“The availability of such equitable relief, under the so-called *Ex parte Young* doctrine, has long been accepted as a necessary counterbalance to the states’ Eleventh Amendment immunity from federal jurisdiction.”)

<sup>23</sup> *Kentucky v. Graham*, 473 U.S. 159, 169 (1985) (“[A]bsent waiver by the State or valid congressional override, the Eleventh Amendment bars a damages action against a State in federal court. This bar remains in effect when State officials are sued for damages in their official capacity.”) (internal citations omitted); *Hafer v. Melo*, 502 U.S. 21, 25 (1991) (“Suits against state officials in their official capacity therefore should be treated as suits against the State.”)

<sup>24</sup> *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996).

<sup>25</sup> *Ex parte Young*, 209 U.S. 123 (1908).

<sup>26</sup> *Obergefell v. Hodges*, 576 U.S. \_\_\_ (2015) (suit against state official challenging a ban on same-sex marriage); *Brown v. Plata*, 563 U.S. 493 (2011) (suit against state official challenging overcrowded prisons).

<sup>27</sup> John Harrison, *Ex Parte Young*, 60 STAN. L. REV. 989 (2008) (discussing the case’s implications for suits against State official and arguing that the emphasis on *Ex parte Young* as a sovereign-immunity case is misplaced).

wished to obtain federal judicial relief on the ground that the substantive law he was charged with violated the constitution. In the decades following *Ex parte Young*, the Court enjoined the enforcement of state laws in roughly three-dozen cases.<sup>28</sup>

A federal injunction against a state criminal prosecution raises federalism concerns such as comity and respect for the traditional role of the State on questions of criminal law.<sup>29</sup> As such, it is perhaps no surprise that when the Supreme Court reviewed federal injunctions against state prosecutions in the decades that followed *Ex parte Young*, the Court engaged a key question. How should federal courts balance the vindication of federal constitutional rights with respect for States' ability to correct their own constitutional violations?

Among the cases in which the Court confronted this tension expressly were *Douglas v. City of Jeannette*,<sup>30</sup> *Am. Fed'n of Labor v. Watson*,<sup>31</sup> and, eventually, *Dombrowski v. Pfister*.<sup>32</sup> These cases explained that state prosecutions should not be enjoined absent a showing of irreparable, grave, and immediate harm. They further made clear that harm is not irreparable if a litigant can raise the federal constitutional objection during an adequate, timely state proceeding. In *Douglas*, for example, the Court refused to enjoin a religious ordinance that was allegedly unconstitutional as applied to the plaintiff. The Court reasoned that the plaintiff could not demonstrate a likelihood of "irreparable injury" that was "both great and immediate" because the case against the plaintiff was "brought lawfully and in good faith," and he could secure relief in a "prompt trial and appeal pursued to [the Supreme Court]." <sup>33</sup>

By contrast, the Court issued injunctions in *Watson* and *Dombrowski* because the plaintiff's allegations could meet that standard. In *Watson*, the Court enjoined the enforcement of a state law that created a right for employers to hire non-unionized workers;<sup>34</sup> the State of Florida purportedly used the law as a basis to threaten unions with criminal and civil fines.<sup>35</sup> The United States Supreme Court endorsed an injunction

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<sup>28</sup> Douglas Laycock, *Federal Interference with State Prosecutions: The Cases Dombrowski Forgot*, 46 U. CHI. L. REV. 636 (1979).

<sup>29</sup> *Younger v. Harris*, 401 U.S. 37 (1971) ("This underlying reason for restraining courts of equity from interfering with criminal prosecutions is reinforced by an even more vital consideration, the notion of 'comity,' that is, a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways.")

<sup>30</sup> *Douglas v. City of Jeannette* (Pennsylvania), 319 U.S. 157, 163-64 (1943).

<sup>31</sup> 327 U.S. 582, 593 (1946) ("Where a federal court of equity is asked to interfere with the enforcement of state laws, it should do so only to prevent irreparable injury which is clear and imminent.") (internal citations omitted).

<sup>32</sup> *Dombrowski v. Pfister*, 380 U.S. 479, 485-86 (1965).

<sup>33</sup> *Douglas v. City of Jeannette* (Pennsylvania), 319 U.S. 157 (1943).

<sup>34</sup> *Am. Fed'n of Labor v. Watson*, 327 U.S. 582, 585 (1946) ("The right of persons to work shall not be denied or abridged on account of membership or non-membership in any labor union, or labor organization; provided, that this clause shall not be construed to deny or abridge the right of employees by and through a labor organization or labor union to bargain collectively with their employer.")

<sup>35</sup> *Id.*, at 588 ("The bill further alleges that appellee Watson has threatened appellant unions and their officers and agents and the individual appellants with criminal prosecutions unless they give up the closed-shop agreements and refrain from renewing or entering into any such agreements.")

against these practices because it would prevent “grave”<sup>36</sup> and “immediate”<sup>37</sup> “irreparable injury which [was] clear and imminent.”<sup>38</sup> And in the 1965 case of *Dombrowski*, “the allegations in [the] complaint depict[ed] a situation in which defense of the State’s criminal prosecution [would] not assure adequate vindication of constitutional rights.”<sup>39</sup> Because the prosecutions in that case stemmed from harassment and bad faith, one could not assume that the state courts would serve as adequate arbiters. Instead, without federal judicial intervention, the plaintiffs would have to suffer “substantial loss or impairment of freedoms of expression” until the Supreme Court could reverse any improper state court determination. “These allegations, if true, clearly show irreparable injury.”<sup>40</sup>

*Dombrowski* received significant scholarly attention in the decade or so after it was decided. The dominant initial view was that the case boldly opened a new door for civil rights claims against unconstitutional state prosecutions.<sup>41</sup> However, the decision’s scholarly reception shifted as the Court later made clear in *Younger v. Harris* that, *Dombrowski* notwithstanding, federal challenges to state prosecutions are generally disallowed.<sup>42</sup> Most notably, Owen Fiss and Douglas Laylock both wrote that *Dombrowski* sowed the seeds of its own demise. In a profoundly personal and incisive essay, Fiss offered his perspective on what led his former boss, Justice William Brennan, to construct *Dombrowski* in the way that he did. Fiss contended that *Dombrowski* provided little in the way of controlling principles or rules that would make such injunctions available beyond a very small set of cases.<sup>43</sup> Laylock went further, persuasively arguing that in *Dombrowski*, the justices overlooked or forgot the dozens of cases after *Ex parte Young* and even after *Douglas* in which the Court *had* enjoined the enforcement of state laws. By treating such injunctions as something novel, the *Dombrowski* decision arguably undermined the foundation of precedent on which the

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<sup>36</sup> Watson, 327 U.S., at 606 (“[T]he law that has given rise to the grave threat to collective bargaining in Florida.”).

<sup>37</sup> *Id.*, at 595 (“[T]he threat of irreparable injury is real not fanciful, immediate not remote.”)

<sup>38</sup> *Id.*, at 593.

<sup>39</sup> *Ibid.*

<sup>40</sup> *Dombrowski*, 380 U.S., at 485-86.

<sup>41</sup> See Laylock, *supra* note \_\_ n. 27. The footnote identifies a range pieces characterizing *Dombrowski* this way, including: D’Army Bailey, *Enjoining State Criminal Prosecutions Which Abridge First Amendment Freedoms*, 3 HARV. C.R.-C.L. L. REV. 67, 69–91 (1967); Spencer H. Boyer, *Federal Injunctive Relief: A Counterpoise Against the Use of State Criminal Prosecutions Designed to Deter the Exercise of Preferred Constitutional Rights*, 13 HOW. L.J. 51, 83–85 (1967); Bradley R. Brewer, *Dombrowski v. Pfister: Federal Injunctions Against State Prosecutions in Civil Rights Cases—A New Trend in Federal-State Judicial Relations*, 34 FORDHAM L. REV. 71, 72–73, 83–86 (1965); Robert Allen Sedler, *The Dombrowski-Type Suit as an Effective Weapon for Social Change: Reflections from Without and Within*, 18 U. KAN. L. REV. 237, 244–45, 253–58 (1970); Marc Stickgold, *Variations on the Theme of Dombrowski v. Pfister: Federal Intervention in State Criminal Proceedings Affecting First Amendment Rights*, 1968 WIS. L. REV. 369, 380–85; *The Supreme Court, 1970 Term*, 85 HARV. L. REV. 38, 301–02 (1971); *The Supreme Court, 1964 Term*, 79 HARV. L. REV. 56, 170–74 (1965).

<sup>42</sup> See generally Part I(C) and I(D).

<sup>43</sup> Owen M. Fiss, *Dombrowski*, 86 YALE L.J. 1103, 1105 (1977) (writing that his former boss, Justice Brennan, wrote an opinion in *Dombrowski* that suffered from “indirection” and a borrowing of older conceptions of federalism).

opinion should have stood, leading to the presumption against such injunctions that we generally associate with *Younger v. Harris*.<sup>44</sup>

### *B. Our Reinvigorated Federalism*

The most famous discussion of limits on state prosecutions came six years after *Dombrowski* in *Younger v. Harris*.<sup>45</sup> The case purported to break little new ground. Citing “longstanding public policy,”<sup>46</sup> the case held (or perhaps reaffirmed) that federal courts should generally refrain from interfering with a state criminal proceeding unless that state proceeding provides an inadequate means of redress.<sup>47</sup> The decision also reaffirmed the corollary: Federal courts may interfere with a state criminal proceeding when “great and immediate harm” would otherwise follow, including when it is apparent that the state forum “would not afford adequate protection.”<sup>48</sup> After all, if there is no uncorrupted state *or* federal forum to raise a federal constitutional violation, there is substantial risk of irreparable or serious harm.

The politico-legal environment that followed *Younger* and its development in the decade that followed may help explain its special place in the Federal Courts canon. Or, perhaps, it was the opinion’s soaring federalist rhetoric. In either event, the case developed during a decade that reflected significant shifts in the Nation’s political and legal consciousness. Federal judicial intervention in the area of racial and criminal justice faced backlash and resistance in the form of a re-imagined and re-invigorated dualist conceptions of federalism.<sup>49</sup> What is more, the 1970’s ushered in resistance to Warren Era expansions of what Sean Farhang has called the “litigation state.”<sup>50</sup> The expansions came in the form of: changes in civil procedure that facilitated aggregate litigation;<sup>51</sup> the incorporation of key rights into the Fourteenth Amendment;<sup>52</sup> new civil rights statutes;<sup>53</sup>

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<sup>44</sup> *Younger v. Harris*, 401 U.S. 37 (1971).

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*, at 43.

<sup>47</sup> *Id.*, 45

<sup>48</sup> *Ibid.*

<sup>49</sup> David Mason, *Slogan or Substance? Understanding “Our Federalism” and Younger Abstention*, 73 CORNELL L. REV. 852 (1988); Owen M. Fiss, *Dombrowski*, 86 YALE L.J. 1103 (1977). BOB WOODWARD & SCOTT ARMSTRONG, *THE BROTHERS: INSIDE THE SUPREME COURT* (1979). What is more, Bertrall Ross recently observed that another change started its rise then as well in the way of a shift in judicial conception of politics; minorities were not so much politically powerless actors deserving of special judicial solitude as they were passionate self-interested rent-seekers who distort American politics. Bertrall L. Ross II, *Democracy and Renewed Distrust: Equal Protection and the Evolving Judicial Conception of Politics*, 101 CAL. L. REV. 1565 (2013).

<sup>50</sup> SEAN FARHANG, *THE LITIGATION STATE: PUBLIC REGULATION AND PRIVATE LAWSUITS IN THE U.S.* (2010).

<sup>51</sup> See Brandon L. Garrett, *Aggregation and Constitutional Rights*, 88 NOTRE DAME L. REV. 593, 599–600 (2012).

<sup>52</sup> See, e.g., *Mapp v. Ohio*, 367 U.S. 643 (1961) (incorporating the Fourth Amendment right against unreasonable searches and seizures); see also *Gideon v. Wainwright*, 372 U.S. 335 (1963) (incorporating the Sixth Amendment right to counsel for criminal defendants); see also *Klopfer v. North Carolina*, 386 U.S. 213 (1966) (incorporating the Sixth Amendment right to a speedy trial); see also *Benton v. Maryland*, 395 U.S. 784 (1969) (incorporating the double jeopardy clause of the Fifth Amendment).

<sup>53</sup> Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (1964); Voting Rights Act of 1965, 42 U.S.C. §§ 1973–1973aa-6 (1965).

and broader interpretations of Section 1983.<sup>54</sup> Contemporaneously, the liberal Chief Justice Earl Warren retired from the Court and, ultimately, newly elected President Richard Nixon replaced him with the more federalism-oriented Chief Justice Warren Burger.<sup>55</sup> Chief Justice Burger openly protested the expansion of the litigation state, most notably during his famous Pound Lecture in 1976.<sup>56</sup>

In *Younger* itself, John Harris faced criminal prosecution under California's Criminal Syndicalism Act for handing out far-left political pamphlets. He filed suit in federal court, challenging the statute as facially unconstitutional under the First Amendment. A three-judge district court panel agreed, enjoining enforcement of the statute. The district court cited the Warren Era Supreme Court case of *Dombrowski v. Pfister*,<sup>57</sup> for the proposition that when a law "unconstitutionally abridge[s] free expression or tend[s] to discourage activities in which a person should be free to engage," then "it becomes the duty of this court to undertake to resolve these questions."<sup>58</sup>

The Supreme Court reversed in a 1971 opinion, reaffirming that enjoining an ongoing state criminal proceeding is presumptively impermissible. The Court distinguished *Dombrowski* on the grounds that in that case, there was substantial evidence of bad faith on the part of state officials that rendered the state forum inadequate. And accordingly, *Dombrowski* could not compete with what it perceived to be a broader tradition of judicial resistance to efforts to enjoin state judicial proceedings. The Court acknowledged that "[t]he precise reasons for this longstanding public policy against federal court interference with state court proceedings have never been specifically identified."<sup>59</sup> Still, the Court reasoned that, as an equitable remedy, an injunction against a criminal prosecution is improper where the plaintiff has "an adequate remedy at law and will not suffer irreparable injury if denied equitable relief," something the state judicial system must be presumed to afford. The Court further rested its decision on "the notion of 'comity,' that is, a proper respect for state function. The Court famously added: "'Our Federalism,' born in the early struggling days of our Union of States, occupies a highly important place in our Nation's history and its future."<sup>60</sup>

Over the course of the next decade, *Younger* abstention expanded so precipitously that by 1977, two scholars expressed concern that federalism principles would lead to the overturning of the venerable *Ex parte Young*.<sup>61</sup> In *Samuels v. Mackell*, a companion case to *Younger*, the Court barred lower courts from issuing declaratory relief that would disrupt an ongoing proceeding.<sup>62</sup> In the 1975 case of *Hicks v. Miranda*, the Court held that a federal claim should be dismissed even where criminal charges are brought *after* a case has been filed, so long as the charges are filed "before any proceedings of substance on the merits have taken place in the federal court."<sup>63</sup> That same year, in *Huffman v.*

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<sup>54</sup> *Monroe v. Pape*, 365 U.S. 167 (1961).

<sup>55</sup> EARL M. MALTZ, *THE CHIEF JUSTICESHIP OF WARREN BURGER, 1969–1986* (2000).

<sup>56</sup> Louise Weinberg, *The New Judicial Federalism*, 29 STAN. L. REV. 1191 (1977).

<sup>57</sup> 380 U.S. 479 (1965).

<sup>58</sup> *Harris v. Younger*, 281 F. Supp. 507, 510 (C.D. Cal. 1968), rev'd, 401 U.S. 37 (1971)

<sup>59</sup> *Younger v. Harris*, 401 U.S. 37, 43-45 (1971).

<sup>60</sup> *Id.*, at 44-45.

<sup>61</sup> See Aviam Soifer & H. C. Macgill, *The Younger Doctrine: Reconstructing Reconstruction*, 55 TEX. L. REV. 1141 (1977).

<sup>62</sup> *Samuels v. Mackell*, 401 U.S. 66, 72 (1971); see also *Steffel v. Thompson*, 415 U.S. 452 (1974).

<sup>63</sup> *Hicks v. Miranda*, 422 U.S. 332, 349 (1975).

*Pursue, Ltd.*,<sup>64</sup> the Court adopted an exhaustion requirement; when *Younger* abstention applies, a person must exhaust any state appeal that is a part of the same “unitary system.” And ultimately, the Court extended *Younger* to civil proceedings that are akin to criminal proceedings, and a handful of other settings that implicate states’ fundamental sovereign interests.<sup>65</sup>

### C. Our Repairable Federalism: *Younger*’s Safety-Valves

In the cases of *Younger*, *Samuels*, *Hicks*, and *Huffman*, the Court presumed a generally functioning state judicial system where an aggrieved person could raise federal constitutional objections. None of these cases involved claims that state criminal processes themselves were complicit in furthering, or inherently incapable of repairing, constitutional violations. By contrast, federal actions challenging these types of structural or systemic procedural defects fared better during the same period. *Younger* itself acknowledged that irreparable harm or “extraordinary circumstances” would sometimes require federal intervention into state criminal proceedings.<sup>66</sup> And throughout the 1970’s, the Court reaffirmed and refined these principles, holding that Courts should not block a suit when state officials are engaging in bad-faith or harassment; when state adjudicators have a real or reasonable perceived financial stake in the outcome; when state officials are attempting to wield a patently unconstitutional law; and when there is no timely forum to raise constitutional claims.

Federal lower court judges in the American South had an outsized role in shaping these exceptions, giving practical content to the Supreme Court’s broader guiding principle that federal courts should redress grievances when necessary to prevent irreparable harm. This was particularly true of the legendary civil-rights oriented judges who came to be known as the “Fifth Circuit Four” because of their role in expanding civil rights for black Americans.<sup>67</sup> These judges were John Minor Wisdom of Louisiana; Richard Rives of Alabama; John Robert Brown of Texas; and Elbert Tuttle of Georgia.<sup>68</sup> Another important judicial actor was then district court Judge Frank Johnson of Alabama, who like the Fifth Circuit Four, had earlier been a central figure dismantling Jim Crow in Alabama. The metes and bounds of *Younger*’s exceptions, animating principles, and rarely-told origins all merit deeper discussion.

#### 1. Bad Faith

In *Younger*, as the Court declined to award an injunction, it explained that the plaintiff in that case “failed to make any showing of bad faith, harassment, or any other unusual circumstance that would call for equitable relief.”<sup>69</sup> When there is bad faith, the likely harm is “irreparable,” and a person is entitled to “equitable relief under the long-

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<sup>64</sup> 420 U.S. 592 (1975)

<sup>65</sup> *Sprint Commc’ns, Inc. v. Jacobs*, 134 S. Ct. 584, 588 (2013).

<sup>66</sup> *Younger v. Harris*, 401 U.S. 37 (1971).

<sup>67</sup> See Deborah J. Barrow & Thomas G. Walker, *A COURT DIVIDED: THE FIFTH CIRCUIT COURT OF APPEALS AND THE POLITICS OF JUDICIAL REFORM* (1988); J.W. Peltason, *FIFTY-EIGHT LONELY MEN: SOUTHERN FEDERAL JUDGES AND SCHOOL DESEGREGATION* 104 (1961).

<sup>68</sup> *Id.*

<sup>69</sup> *Younger*, 401 U.S., at 54.

established standards.”<sup>70</sup> This irreparable harm standard has deep historical roots.<sup>71</sup> And the bad-faith exception provides a way to apply that standard to end illegal state prosecutions.

An early adopter of the bad faith exception was Judge John Minor Wisdom of the Fifth Circuit Court of Appeals. An Eisenhower-appointed for whom the New Orleans Fifth Circuit Courthouse is now named,<sup>72</sup> Judge Wisdom is known as one of four federal judges who became unlikely heroes by facilitating racial integration in Alabama, Florida, Louisiana, Georgia, Mississippi, and Texas.<sup>73</sup> While the Fifth Circuit four were appellate court judges, they often sat on three-judge district court panels with district judges such as Hon. Frank Johnson;<sup>74</sup> at that time, federal jurisdictional statutes often only permitted such three-judge panels to enjoin certain civil rights violations.<sup>75</sup> A party could immediately appeal the panel’s decisions to the United States Supreme Court.<sup>76</sup> Sitting on such a panel in 1964, Judge Wisdom and two district court judges confronted whether to enjoin a prosecution against civil rights advocates under Louisiana’s Communist Control Law.<sup>77</sup>

At issue was a state case against the Southern Conference Educational Fund, Inc., a civil rights organization dedicated to ending state-sanctioned racial injustice in Louisiana and Mississippi.<sup>78</sup> A minister named Dr. Rev. James Dombrowski ran the day-to-day operations, assisted by lawyers with a dedicated to civil rights practice.<sup>79</sup> On October 4, 1963, all three were arrested in New Orleans for hosting a racially-integrated conference for civil rights lawyers.<sup>80</sup> As Judge Wisdom later noted: “At gunpoint their homes and offices were raided and ransacked by police officers and trustees from the House of Detention acting under direct supervision of the staff director and the counsel for the State Un-American Activities Committee.”<sup>81</sup> The civil rights leaders sought relief in federal court, alleging a serious and imminent threat to their fundamental constitutional rights.<sup>82</sup> Accordingly, the leaders sought declaratory and injunctive relief under 42 U.S.C. § 1983.<sup>83</sup>

The three-judge panel denied the injunction, relying on federalism concerns. A federal injunction, the majority reasoned, would threaten a state’s autonomy and,

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<sup>70</sup> *Id.*, at 50.

<sup>71</sup> Douglas Laycock, *The Death of the Irreparable Injury Rule*, 103 HARV. L. REV. 687 (1990); John Lubsdorf, *The Standard for Preliminary Injunctions*, 91 Harv. L. Rev. 525 (1978).

<sup>72</sup> David J. Garrow, *Visionaries of the Law: John Minor Wisdom and Frank M. Johnson, Jr.*, 109 YALE L.J. 1219 (2000).

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> Note, *Reviewing the Grant of A Three-Judge Court*, 69 COLUM. L. REV. 146 (1969); Notes, *The Three-Judge District Court: Scope and Procedure Under Section 2281*, 77 HARV. L. REV. 299 (1963).

<sup>76</sup> *District Courts—Introduction—Three-Judge District Courts*, 17 Fed. Prac. & Proc. Juris. § 4040 (3d ed.); see also 28 U.S.C. § 1253.

<sup>77</sup> *Dombrowski v. Pfister*, 227 F. Supp. 556 (E.D. La. 1964), rev’d, 380 U.S. 479 (1965).

<sup>78</sup> *Id.*, at 558.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*, at 573 (Wisdom, J., dissenting).

<sup>82</sup> *Id.*, at 563.

<sup>83</sup> *Id.*, at 558.

therefore, our federalist constitutional order.<sup>84</sup> The panel explained: “Can we deny the State the basic right of self-preservation; the right to protect itself? If so, truly this would be a massive emasculation of the last vestige of the dignity of sovereignty.”<sup>85</sup> The Court also relied on cases wherein the Supreme Court had denied federal injunctions against state prosecutions.

But in an opinion that ultimately carried the day and gained the force of law, Judge Wisdom dissented. He disputed the view that the government’s legitimate federalism interests outpaced federal courts’ obligation to stop the irreparable harm that would befall the plaintiffs while they languished in jail facing felony charges for exercising fundamental constitutional rights. The plaintiffs had alleged, after all, that the State was “abusing its legislative power and criminal processes” by using “the pretext of protecting itself against subversion” to “harass[] and humiliate[] the plaintiffs.”<sup>86</sup> Abuse at the hands of a state government is not, without more, a constitutional value worth protecting.

Judge Wisdom’s reasoning was in part personal. He acknowledged that the words “States’ Rights” were “mystical, emotionladen words,” and that for him “as for most Southerners, the words evoke visions of the hearth and defense of the homeland and carry the sound of bugles and the beat of drums.” Still, he offered, “[T]he crowning glory of American federalism is not States’ Rights. It is the protection the United States Constitution gives to the private citizen against all wrongful governmental invasion of fundamental rights and freedoms.”<sup>87</sup> He later continued, “[E]very judge in this circuit knows... that in some cases, all too many cases, persons have been punished without any justifiable basis or punished cruelly beyond the bounds of just punishment for a minor offense, to serve as an object lesson to others.”<sup>88</sup>

Judge Wisdom’s reasoning was also based upon the way that precedent, up until that point, had preserved a role for federal courts in stopping significant harm that would befall the plaintiff if a federal court failed to act. He observed that when the Supreme Court had refused to enjoin state proceedings, it had explicitly held that it was because a plaintiff had failed to show “exceptional circumstances” or “great and immediate danger.”<sup>89</sup> It makes little sense for a federal court to intervene in a typical case where a state court is equipped to hear a challenge as to the constitutionality of a criminal statute. Such interventions, among other problems, would allow collateral piecemeal federal attacks of state rulings. But such reasoning collapses when the State proceeding is a component of the harm. As Judge Wisdom articulated: “Under any rational concept of federalism the federal district court has the primary responsibility and the duty to determine whether a state court proceeding is or is not a disguised effort to maintain the

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<sup>84</sup> *Dombrowski v. Pfister*, 227 F. Supp. 556, 560 (E.D. La. 1964), rev’d, 380 U.S. 479, 85 S. Ct. 1116, 14 L. Ed. 2d 22 (1965) (“This Court should jealously guard these plaintiffs in their constitutional rights to equal protection of the laws, yet in our zeal to protect we should not consciously or unconsciously undermine the whole fabric of state and federal relationship as it struggles to survive its inherent constitutional posture.”)

<sup>85</sup> *Id.*, at 559.

<sup>86</sup> *Id.*, at 569.

<sup>87</sup> *Id.*, at 570.

<sup>88</sup> *Dombrowski*, 227 F. Supp., at 570.

<sup>89</sup> *See, e.g., Watson v. Buck*, 313 U.S. 387 (1940) (holding that “exceptional circumstances” and “great and immediate” danger were not shown.)

State's unyielding policy of segregation at the expense of the individual citizen's federally guaranteed rights and freedoms."<sup>90</sup>

The Supreme Court agreed with Judge Wisdom, adopting an exception to abstention for bad-faith prosecutions. In doing so, the Court's reasoning confirmed that the exception is a subset of the broader question whether state judicial processes are adequate to prevent irreparable injury. A bad-faith prosecution necessarily means that a State's adversarial process is complicit in the deprivation of constitutionally protected interests. This renders that adversarial process an inadequate means to raise federal constitutional objections,<sup>91</sup> often creating a risk of irreparable harm that only federal courts can prevent. Given the harassing, bad-faith nature of the state adversarial system, the State's processes could not "assure adequate vindication of constitutional rights."<sup>92</sup> This would result in the "substantial loss or impairment of freedoms of expression," a "clear[]...irreparable injury."<sup>93</sup>

## 2. Bias

A second exception to *Younger* is that it does not apply when the underlying state forum is biased. This exception, too, was crafted in part by one of the Fifth Circuit Four. In this case, Judge Richard Rives, an Alabama appellate-court appointed by President Truman<sup>94</sup> served on the three-judge district court panel that crafted the bias-exception, along with Judge Frank Johnson and Judge Robert Varner, the author of the opinion.<sup>95</sup> Their reasoning, which was adopted by the United States Supreme Court, was that a biased forum provided an inadequate means to promptly stop or prevent imminent irreparable harm.

In *Gibson v. Berryhill*, Alabama Board of Optometry threatened to take away the licenses of a group of optometrists for "unprofessional conduct."<sup>96</sup> All of the members of the Board were members of the Alabama Optometrists Association.<sup>97</sup> Indeed, serving on the Board required membership in the Association. Further, becoming a member of the Association required owning one's own private practice.<sup>98</sup> The accused optometrists were all employed by the same large company, and therefore, because they did not own their own practice, could not be members of the Alabama Optometry Association. Revoking their licenses would open up a lot of new business of the Board members, but would cause significant harm to the aggrieved optometrists' livelihood and reputation.

Concerned about the Board's bias, the threatened optometrists filed federal suit, alleging that the Board's patent impartiality violated the Due Process Clause. The district court and Supreme Court both agreed, holding that *Younger* abstention did not require

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<sup>90</sup> Dombrowski, 227 F. Supp., at 583.

<sup>91</sup> Dombrowski v. Pfister, 380 U.S. 479, 485 (1965).

<sup>92</sup> *Id.*, at 485-86

<sup>93</sup> *Id.*, at 486.

<sup>94</sup> Derrick A. Bell, Jr., *Civil Rights Lawyers on the Bench Unlikely Heroes*. by Jack Bass. New York: Simon and Schuster, 1981. Pp. 352, 91 YALE L.J. 814, 826 (1982) (noting that Judge Rives was appointed by President Harry Truman).

<sup>95</sup> 411 U.S. 564 (1973) .

<sup>96</sup> *Id.*, at 567

<sup>97</sup> *Ibid.*

<sup>98</sup> *Ibid.*

dismissing the suit. After all, according to the allegations in the complaint, there were “deficiencies in the pending [state] proceedings;”<sup>99</sup> most notably, the plaintiffs sufficiently alleged that “the Board was biased and could not provide the plaintiffs with a fair and impartial hearing in conformity with due process of law.”<sup>100</sup> There was, then no clearly untainted forum to object to the license-revocation proceedings, and therefore prevent “irreparable damage.”<sup>101</sup>

### 3. Timeliness

Third, for *Younger* to apply, the state tribunal must provide a *timely* opportunity to avoid constitutional harm. For example, in *Gibson*, the fact that an eventual state appeal was available, one that would presumably be less infected with the same core deficiencies was of no moment. *Younger* abstention “naturally presupposes the opportunity to raise and have timely decided by a competent state tribunal the federal issues involved.”<sup>102</sup> *Younger* abstention is not “required simply because judicial review, de novo or otherwise, would be forthcoming at the conclusion of the administrative proceedings.”<sup>103</sup> The opportunity for an adequate, unbiased, hearing must be timely given the unjustified damage that can be done to a person while they wait to raise their claims in an uninfected forum.<sup>104</sup>

The immediacy requirement also facilitated the outcome in *Gerstein v. Pugh*, yet another case in which the Court adopted the reasoning of Fifth Circuit judges confronting systemic constitutional violations.<sup>105</sup> In that case, a Florida county was placing people in jail for long periods of time without any timely opportunity to see a judge by means of a preliminary hearing. The detained individuals filed a federal class action. Long periods in jail with no opportunity to see a judge, they argued, violated due process by creating an unacceptable risk that innocent people would lose their liberty and livelihood while languishing in jail. But before the federal courts could reach that question, it first had to decide whether prospective relief was permitted under abstention doctrine.

The Fifth Circuit, in an opinion by Judge Tuttle, held that *Younger* did not bar the claim.<sup>106</sup> The very nature of their claim was that they could not see a judge in a timely manner. And the mere fact that a future trial and appellate proceeding were available was insufficient, because by then, the irreparable damage would have already been done. The Fifth Circuit panel asked: “If these plaintiffs were barred by *Younger* from this forum, what relief might they obtain in their state court trials? Since their pre-trial incarceration would have ended as of the time of trial, no remedy would exist. Their claims to pre-trial preliminary hearings would be mooted by conviction or exoneration.”<sup>107</sup> The court cited

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<sup>99</sup> *Gibson v. Berryhill*, 411 U.S. 564, 570-71 (1973).

<sup>100</sup> *Gibson*, 411 U.S., at 570.

<sup>101</sup> *Berryhill v. Gibson*, 331 F. Supp. 122, 126 (M.D. Ala. 1971), vacated, 411 U.S. 564 (1973)

(“Revocation of the license of a professional man to practice his profession, together with the attendant publicity which would inevitably be associated therewith, would cause irreparable damage to the Plaintiffs. No method is provided under the state law to avoid this irreparable damage.”)

<sup>102</sup> *Gibson*, 411 U.S., at 576.

<sup>103</sup> *Ibid.*

<sup>104</sup> *Id.*, at 577.

<sup>105</sup> *Gerstein v. Pugh*, 420 U.S. 103, 111 (1975).

<sup>106</sup> *Pugh v. Rainwater*, 483 F.2d 778, 782 (5th Cir. 1973), *aff'd in part, rev'd in part sub nom.* *Gerstein v. Pugh*, 420 U.S. 103 (1975).

<sup>107</sup> *Id.*

an earlier Fifth Circuit, also authored by Judge Tuttle, standing for a similar proposition.<sup>108</sup>

The Supreme Court agreed, stating in a footnote that the lower court “correctly” resolved the issue.<sup>109</sup> The Court added that *Younger* was inapplicable because even if a federal court ordered timely preliminary hearings, such an order “could not prejudice the conduct of the trial on the merits.”<sup>110</sup> After all, the requested injunction “was not directed at the state prosecutions as such, but only at the legality of pretrial detention without a judicial hearing, an issue that could not be raised in defense of the criminal prosecution.”<sup>111</sup>

#### 4. Patent Unconstitutionality

A particularly enigmatic exception to *Younger* abstention is “patently unconstitutional” state law. That is, when a prosecution is based on a law that is unconstitutional in “every paragraph” and “every sentence,” federal courts are permitted to intervene.<sup>112</sup> The reason this exception creates a puzzle is that the Court has made clear time and again that the mere fact that a law is facially unconstitutional does not mean that this exception should apply.<sup>113</sup> And indeed, the Court has never actually found the exception applicable in any federal case.

Perhaps the best way to understand the exception, then, is to understand the principle that animates the other exceptions: avoiding the irreparable harm that attends a structurally corrupt proceeding in which one’s constitutional interests are at stake. If a statute is not only facially invalid, but so flagrantly and indisputably unconstitutional such that no reasonable person could possibly conclude otherwise, this raises the question: why is the State wielding such a law against its populace? In extreme circumstances, perhaps the mere application of a hypothetical law that is so out of bounds stands as evidence of a problem in the adversarial process. It bears repeating, however, that the parameters of this exception are not only tightly circumscribed,<sup>114</sup> but also unusually poorly defined.

#### *D. Our Emerging “Systemic” Exception?*

In recent years, some federal courts have found that *Younger* was inapplicable in class actions against certain systemic, widespread constitutional violations. Those courts have expressly reasoned that *Younger* is a bad fit for certain systemic harms that local

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<sup>108</sup> *Ibid.*, citing *Morgan v. Wofford*, 472 F.2d 822 (5th Cir. 1972) (Tuttle, J.)

<sup>109</sup> *Gerstein*, 420 U.S., at 108 (1975) n. 9.

<sup>110</sup> *Ibid.*

<sup>111</sup> *Ibid.*

<sup>112</sup> *Watson v. Buck*, 313 U.S. 387, 402 (1941) (“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.”).

<sup>113</sup> *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 602 (1975) (“[W]e unequivocally held that facial invalidity of a statute is not itself an exceptional circumstance justifying federal interference with state criminal proceedings.”); see also *Middlesex Cty. Ethics Comm. v. Garden State Bar Ass’n*, 457 U.S. 423, 437 (1982).

<sup>114</sup> Fiss, *supra* note \_\_ n. 36 & n. 48.

courts have been unwilling or unable to abate. For this proposition, the leading case is the federal district court case of *M.D. v. Perry*.<sup>115</sup> Children in that case challenged the inadequacy of foster care proceedings in the state of Texas, alleging widespread patterns of harms that included “repeated placements, over-medication, abuse, neglect, and deprivation of familial relationships with siblings).”<sup>116</sup> The State attempted to invoke *Younger*, but the district court disagreed. In an opinion by Judge Janis Graham Jack, the court reasoned that because “[the] lawsuit focuses on systemic problems and seeks systemic solutions, it would not ‘duplicate’ the individualized reviews that occur in the state courts.”<sup>117</sup> In later years, however, the Fifth Circuit limited the reach of this holding to (1) certified (rather than putative) class actions, and (2) foster care proceedings.<sup>118</sup>

The district court case has proven influential beyond the confines of the Fifth Circuit. In another case, involving a similar set of facts, an Arizona federal court rejected *Younger* in part “because the purpose of [federal] oversight is not to pinpoint individual cases of noncompliance for federal court intervention, but rather to implement system-wide remedial measures to help cure alleged chronic, widespread failures.”<sup>119</sup> That court further noted that the State had produced no “instances in which the juvenile courts have been involved with rooting out systemic causes of repeated agency failures.”<sup>120</sup>

The opinion has also gained influence in the academy. A recent amicus brief at the United States Supreme Court by leading federal courts scholars endorsed a similar proposition.<sup>121</sup> In addition, Dave Marcus has written an important article in *Georgetown Law Journal* giving the case favorable discussion in a footnote.<sup>122</sup> History may well show that *M.D. v. Perry* is in the august tradition of federal lower court judges adopting new exceptions to *Younger* that give life to a venerable principle: federal courts need not remain supine in the face of constitutional violations that cannot be repaired by the relevant state processes.

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Both before and after *Younger*, federal courts have chosen to correct instances of irreparable harm when the state proceeding presents an inadequate forum. Safety valves for bad faith, untimely proceedings, biased proceedings, and even patently unconstitutional laws are united by that long-standing conception of the federal judiciary’s equitable role. And federal lower courts led the way in crafting each of these safety valves, thereby ensuring that the Supreme Courts long-standing commands about correcting irreparable harm were heeded. Even during a time of re-invigorated

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<sup>115</sup> *M.D. v. Perry*, 799 F. Supp. 2d 712 (S.D. Tex. 2011).

<sup>116</sup> *Id.* at 714-15.

<sup>117</sup> *Id.*, at 720-21.

<sup>118</sup> *Bice v. Louisiana Pub. Def. Bd.*, 677 F.3d 712, 720 n.8 (5th Cir. 2012).

<sup>119</sup> *Tinsley v. McKay*, No. CV-15-00185-PHX-ROS, 2015 WL 9690914, at \*13 (D. Ariz. Sept. 29, 2015)

<sup>120</sup> *Id.*

<sup>121</sup> *Brief of Amici Curiae Erwin Chemerinsky Et Al. in Support of the Petition for Writ of Certiorari*, *E.T. v. Cantil-Sakauye*, No. 12-56 (U.S., Aug. 7, 2012.)

<sup>122</sup> David Marcus, *The Public Interest Class Action*, 104 *GEO. L.J.* 777, 833 n. 227(2016). He observed, “The state proceedings do not involve the same interests as the federal class action, with the former centered on the individual child’s concerns and the latter on the group’s.”

federalism – or even “Our Federalism”— the Court formally incorporated these safety valves into *Younger* doctrine.

The time is ripe to assess whether these exceptions are working as intended. Scholars in the field of federal jurisdiction are already raising critical questions about how to ensure that federal courthouse doors are not slammed on plaintiffs more than necessary to achieve norms like federalism and preventing over-deterrence. Recent scholarship during the Ferguson era has given renewed attention to that important goal. John Jefferies has challenged the notion of absolute immunity, noting that unreasonable violations of the constitution deserve a remedy.<sup>123</sup> James Pfander and Jessica Dwinell recently argued that federal courts should at least play a “declaratory” function when States violate the law, declaring that the plaintiffs’ rights have been violated even if there are limits on the plaintiffs’ ability to achieve a robust monetary award.<sup>124</sup> Joanna Schwartz and William Baude have written ground-breaking articles questioning the logical underpinnings of qualified immunity.<sup>125</sup> And I have argued that suits should be available against local governments under a theory of respondeat superior when no other remedy is available in light of individualized immunities.<sup>126</sup>

Collectively, then, academic literature in the field of federal jurisdiction is calling for a new round of remedial calibration with respect to immunities in constitutional litigation. But immunities are not the only barrier civil rights plaintiffs face. Abstention is another, especially given the documented rise of cases challenging systemic failures in the way the carceral state treats our Nation’s poor in economically depressed towns across the nation.

## II. Our Ferguson in the Time of Our Federalism

In our renewed, fraught national conversation about the role of race and poverty in the administration of America’s carceral apparatus, one wrong that has surfaced is the criminalization of poverty, notwithstanding a robust body of constitutional law banning such practices. After the killing of Michael Brown in Ferguson in the summer of 2014,<sup>127</sup> America learned about 16,000 of the town’s 21,000 residents had outstanding warrants,<sup>128</sup> many trapped in a cycle of debt and incarceration.<sup>129</sup> After the killing of Walter Scott in the spring of 2015 in South Carolina, the nation learned that the reason he

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<sup>123</sup> John C. Jeffries, Jr., *The Liability Rule for Constitutional Torts*, 99 VA. L. REV. 207 (2013).

<sup>124</sup> James E. Pfander & Jessica Dwinell, *A Declaratory Theory of State Accountability*, 102 VA. L. REV. 153 (2016).

<sup>125</sup> Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 YALE L.J. \_\_\_\_ (2017) (forthcoming).

<sup>126</sup> Fred O. Smith, Jr., *Local Sovereign Immunity*, 116 COLUM. L. REV. 409 (2016).

<sup>127</sup> U.S. Dep’t of Justice, DEPARTMENT OF JUSTICE REPORT REGARDING THE CRIMINAL INVESTIGATION INTO THE SHOOTING DEATH OF MICHAEL BROWN BY FERGUSON, MISSOURI POLICE OFFICER DARREN WILSON (2015).

<sup>128</sup> Dept. of Justice, CIVIL RIGHTS DIV., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 47, 55 (2015) (Ferguson Report), online at [https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson\\_police\\_department\\_report.pdf](https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf). See also *Utah v. Strieff*, 136 S. Ct. 2056, 2068, 195 L. Ed. 2d 400 (2016) (Sotomayor, J., dissenting).

<sup>129</sup> See Ruth Marcus, *Policing by Fleecing in Ferguson and Beyond*, WASH. POST (Mar. 6, 2015), available at [http://www.washingtonpost.com/opinions/in-ferguson-and-other-cities-jailed-for-being-poor/2015/03/06/e8cb5896-c42a-11e4-9271-610273846239\\_story.html](http://www.washingtonpost.com/opinions/in-ferguson-and-other-cities-jailed-for-being-poor/2015/03/06/e8cb5896-c42a-11e4-9271-610273846239_story.html).

was initially pulled over was because he owed a court judgment for unpaid child support.<sup>130</sup> After Sandra Bland died suddenly in a Texas jail cell in the summer of 2015 following a traffic stop, America learned that a judge had set her bail at \$5,000, an amount her family could not afford to pay.<sup>131</sup> After the killing of Philando Castile outside of St. Paul, Minnesota in the summer of 2016, we learned that, despite the absence of a criminal record, he had been pulled over 50 times in the years before the killing, often because of his inability to pay the price of the tickets; this in turn led to more tickets.<sup>132</sup> An otherwise law-abiding citizen, his life and death were nonetheless deeply enmeshed with the carceral state.<sup>133</sup>

For decades, it has been well established that the Constitution prohibits criminalizing poverty. In *Bearden v. Georgia*,<sup>134</sup> the Supreme Court held that “if the State determines a fine or restitution to be the appropriate and adequate penalty for [a] crime, it may not thereafter imprison a person solely because he lacked the resources to pay it.”<sup>135</sup> The Court reasoned that “to “deprive [a] probationer of his conditional freedom simply because, through no fault of his own he cannot pay ... would be contrary to the fundamental fairness required by the Fourteenth Amendment.”<sup>136</sup> As Judge Myron Thompson succinctly and eloquently explained in a recent opinion: “Criminal defendants, presumed innocent, must not be confined in jail merely because they are poor. Justice that is blind to poverty and indiscriminately forces defendants to pay for their physical liberty is no justice at all.”<sup>137</sup>

Nonetheless, in recent years, journalists,<sup>138</sup> scholars,<sup>139</sup> civil rights lawyers<sup>140</sup> and activists<sup>141</sup> have all documented the seemingly pervasive carceral regimes that appear

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<sup>130</sup> Naomi Cahn & June Carbone, *Walter Scott and The Child Support System*, CONCURRING OPINIONS (Apr. 24, 2015), <http://concurringopinions.com/archives/2015/04/walter-scott-and-the-child-support-system.html>.

<sup>131</sup> Debbie Nathan, *The Real Reason Sandra Bland Got Locked up*, THE NATION (Dec. 18, 2015), <https://www.thenation.com/article/the-real-reason-sandra-bland-got-locked-up>; Leon Neyfakh, *Why Was Sandra Bland Still in Jail?*, SLATE (Jul 23, 2015), [http://www.slate.com/articles/news\\_and\\_politics/crime/2015/07/sandra\\_bland\\_is\\_the\\_bail\\_system\\_that\\_kept\\_her\\_in\\_prison\\_unconstitutional.html](http://www.slate.com/articles/news_and_politics/crime/2015/07/sandra_bland_is_the_bail_system_that_kept_her_in_prison_unconstitutional.html)

<sup>132</sup> Brandon Stahl, *Philando Castile was caught up in a cycle of traffic stops, fines*, MINN. STAR TRIB. (Jul. 17, 2016).

<sup>133</sup> *Id.*

<sup>134</sup> 461 U.S. 660, 672-73 (1983).

<sup>135</sup> *Id.*, at 667.

<sup>136</sup> *Id.*, at 674.

<sup>137</sup> *Jones v. The City of Clanton*, No. 215CV34-MHT, 2015 WL 5387219, at \*3 (M.D. Ala. Sept. 14, 2015).

<sup>138</sup> Shaila Dewan, *Court by Court, Lawyers Fight Policies That Fall Heavily on the Poor*, N.Y. TIMES, Oct. 23, 2015; Campbell Robertson, *Suit Alleges “Scheme” in Criminal Costs Borne by New Orleans’s Poor*, N.Y. TIMES (Sept. 17, 2015), <http://www.nytimes.com/2015/09/18/us/suit-alleges-scheme-in-criminal-costs-borne-by-new-orleans-poor.html>; Joseph Shapiro, *Measures Aimed at Keeping People Out of Jail Punish the Poor*, NPR (May 24, 2014, 4:58 PM), <http://www.npr.org/2014/05/24/314866421/measures-aimed-at-keeping-people-out-of-jail-punish-the-poor>.

<sup>139</sup> Laura I. Appleman, *Nickel and Dimed into Incarceration: Cash-Register Justice in the Criminal System*, 57 B.C. L. REV. 1483 (2016); Eisha Jain, *Prosecuting Collateral Consequences*, 104 GEO. L.J. 1197, 1207 (2016) (“Minor arrests can trigger fees (both civil and criminal), and if the defendant cannot pay, she can expect to face additional punishment”); Neil L. Sobol, *Charging the Poor: Criminal Justice Debt & Modern-Day Debtors’ Prisons*, 75 MD. L. REV. 486, 540 (2016); Kathryn M. Young & Joan Petersilia, *Keeping Track: Surveillance, Control, and the Expansion of the Carceral State*, 129 HARV. L. REV. 1318 (2016); *Developments in the Law: Policing*, 128 HARV. L. REV. 1723, 1729 (2015) (describing how private

to flatly contradict these principles. This Part documents recent lawsuits in which the core claim is that governments are incarcerating Americans for being poor. The suits described herein are divided into three categories, claims against: (1) rigid bail schedules; (2) pecuniary-interest schemes and (3) post-judgment debtor's prisons. In the first set of suits, people allege that local or state courts impose rigid bail when the person is charged, without regard to the person's ability to pay. In the second set, the claim is that someone intimately connected to the criminal justice process—a judge, prosecutor, public defender, or probation officer—has an economic interest in criminal defendant's sentencing or incarceration. In the third set, the allegation is that persons are jailed for their inability to pay fees or fines associated with tickets of judgments.

Some of these suits have faced threshold barriers that cause federal courts not to reach the underlying merits, including *Younger* abstention.<sup>142</sup> As described below, a number of district courts have rejected governments' invocation of *Younger* in each of the three sets of cases that are the focus of this Article. In those cases, courts have gone on to issue injunctive relief, declaratory relief, and consent decrees.<sup>143</sup> That relief has resulted in significant decreases in the jail populations of New Orleans and Harris County, Texas. This relief has also resulted in a ban on a range of coercive practices in Rutherford County, Tennessee. Still, other courts have embraced the governments' *Younger* arguments. While the latter cases were almost certainly wrong under current doctrine, that these federal courts thought they lacked the power to stop systemic and structural irreparable harm—harm that could not be adequately addressed by state courts—speaks to the need for a more explicit abstention exception in cases challenging systemic or structural failures in the state juridical process.

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probation companies have become “debt collector[[s] backed by carceral power”); Jessica M. Eaglin, *Improving Economic Sanctions in the States*, 99 MINN. L. REV. 1837 (2015); Beth A. Colgan, *Reviving the Excessive Fines Clause*, 102 CALIF. L. REV. 277 (2014). See also Devon Carbado, *From Stopping Black People to Killing Black People: The Fourth Amendment Pathways to Police Violence*, 104 CALIF. L. REV. \_\_\_\_ (2017) (forthcoming).

<sup>140</sup> See Note, *State Bans on Debtors' Prisons and Criminal Justice Debt*, 129 HARV. L. REV. 1024, 1030 (2016) (“Equal Justice Under Law and the Southern Poverty Law Center have also sued a handful of other municipalities, and the ACLU has pursued an awareness campaign in a number of states, sending letters to judges and mayors in Ohio and Colorado.”); but see Alec Karakatsanis, *Policing, Mass Imprisonment, and the Failure of American Lawyers*, 128 HARV. L. REV. F. 253, 254 (2015) (“The failure of lawyers is a tragedy in two parts. First, there has been an intellectual failure of the profession to scrutinize the evidentiary and logical foundations of modern policing and mass incarceration. Second, the profession has failed in everyday practice to ensure that the contemporary criminal legal system functions consistently with our rights and values.”)

<sup>141</sup> See, e.g., Ram Subramanian et al., *Incarceration's Front Door: The Misuse of Jails in America*, The Vera Institute of Justice, Feb. 2015, at 6, <http://www.vera.org/sites/default/files/resources/downloads/incarcerations-front-door-report.pdf>.

<sup>142</sup> See *infra* Part II(A-C).

<sup>143</sup> See, e.g., *Rodriguez v. Providence Cmty. Corr., Inc.*, 155 F. Supp. 3d 758 (M.D. Tenn. 2015); *Jones v. The City of Clanton*, No. 2-15-CV34-MHT, 2015 WL 5387219, at \*1 (M.D. Ala. Sept. 14, 2015); *Mitchell v. City of Montgomery*, No. 3:15-cv-01048, Doc. 51-1 (M.D. Ala., Nov. 17, 2014) (“Agreement to Settle Injunctive and Declaratory Relief Claims.”) see also *Odonnell v. Harris Cty., Texas*, No. CV 4:16-1414, 2016 WL 7337549, at \*18 (S.D. Tex. Dec. 16, 2016) (“The plaintiffs have alleged sufficient facts to support plausible claims that their constitutional rights have been, are, and likely will be violated.”); *Reynolds et al. v. Judicial Corr. Servs., Inc.*, 2:15-cv-00161; <https://www.splcenter.org/seeking-justice/case-docket/roxanne-reynolds-et-al-v-judicial-correction-services-inc-et-al>; *Mitchell v. City of Montgomery*, No. 2:14CV186-MHT, 2014 WL 11099432 (M.D. Ala. Nov. 17, 2014).

### A. Rigid Post-Arrest Bail

In some jurisdictions, when a person is initially arrested, her bail has nothing to do with her individualized circumstances. Instead, documents and practices known as “bail schedules” outline precisely how much money people accused of specific crimes must pay in order to obtain freedom.<sup>144</sup> Each day, about 450,000 people who cannot afford bail are held in local jails while they await trial.<sup>145</sup> This often results in people pleading guilty while they await trial in order to obtain their freedom, even if they are innocent.<sup>146</sup> Poor arrestees have filed a number of class actions in recent years challenging these systems as another means of incarcerating Americans for their inability to pay the government. In *Walker v. Calhoun*, for example, residents challenged a law that kept indigent persons accused of misdemeanors in jail for up to 7 days while they awaited a hearing unless they could pay a one-size-fits all bail amount.<sup>147</sup> That case has attracted national attention.<sup>148</sup> There is another suit, currently pending appeal, against the much larger Harris, County, Texas, home of the sprawling, diverse metropolis that is Houston. In a remarkable moment in that suit, the Sheriff of Harris County recently testified for the plaintiffs, “When most of the people in my jail are there because they can’t afford to bond out, and when those people are disproportionately black and Hispanic, that’s not a rational system.”<sup>149</sup> Elected officials in a similar suit against San Francisco have also sided with the plaintiffs.<sup>150</sup>

Some of these suits have been stopped cold by *Younger* abstention arguments.<sup>151</sup> The bail-schedule case of *Burks v. Scott County* includes one of the most extensive – and most troubling— discussions of *Younger*.<sup>152</sup> The case illustrates that some federal courts wrongly defer to state judicial processes that are plausibly plagued by systemic or structural constitutional violations.

In 2015, detainees Octavious Burks and Joshua Bassett, who were accused of serious crimes in Scott County, Mississippi, filed federal suit on behalf of themselves and others similarly situated challenging the county’s approach to determining bail.<sup>153</sup> Included in their complaint was a copy of the county’s bail schedule, which has no

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<sup>144</sup> Lindsey Carlson, *Bail Schedules A Violation of Judicial Discretion?*, CRIM. JUST., Spring 2011, at 12, 16

<sup>145</sup> Lauryn P. Gouldin, *Disentangling Flight Risk from Dangerousness*, 2016 B.Y.U. L. REV. 837, 837 (2016).

<sup>146</sup> Paul Heaton, Sandra Mayson, and Megan Stevenson, *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 STAN. L. REV. \_\_\_\_ (forthcoming 2017).

<sup>147</sup> *Walker v. City of Calhoun*, Georgia, No. 4:15-CV-0170-HLM, 2016 WL 361612, at \*1 (N.D. Ga. Jan. 28, 2016).

<sup>148</sup> David Savage, *Obama administration challenges the money bail system: Can people be kept in jail just because they are poor?*, LA TIMES (Aug. 25, 2016).

<sup>149</sup> Michael Hardy, *In Fight Over Bail’s Fairness, a Sheriff Joins the Critics*, N.Y. TIMES, Mar. 9, 2017, available at [https://www.nytimes.com/2017/03/09/us/houston-bail-reform-sheriff-gonzalez.html?\\_r=0](https://www.nytimes.com/2017/03/09/us/houston-bail-reform-sheriff-gonzalez.html?_r=0)

<sup>150</sup> *Id.*

<sup>151</sup> In addition to *Burks v. Scott County*, *infra*, a federal court recently invoked *Younger* to dismiss a petition for habeas corpus from a person challenging San Francisco’s bail schedule. *Arevalo v. Hennesy*, 4:17-cv-06676-HSG, Doc. 16 (N.D. Cal., Dec. 22, 17).

<sup>152</sup> *Burks v. Scott County*, Mississippi, No. 3:14-cv-745-HTW-LRA, Doc. 86, (S.D. Miss. Sept. 20, 2015).

<sup>153</sup> *Burks v. Scott County*, Mississippi, No. 3:14-cv-745-HTW-LRA, Doc. 39, (S.D. Miss. Dec. 12, 2014).

express provision for indigence.<sup>154</sup> Further, the complaint alleged that during preliminary hearings, wherein a judge makes bail determinations, indigent criminal defendants do not receive an attorney.<sup>155</sup> This lack of consideration of inmates' ability to pay, combined with the absence of counsel at a critical phase of a criminal trial, warranted federal judicial intervention, the complaint alleged.<sup>156</sup> The preliminary hearing is the only moment in the state's trial proceedings in which a person can challenge bail determinations. The detainees sought injunctive and declaratory relief that would require counsel at preliminary hearings, as well as individualized bail determinations. The plaintiffs also sought money damages.<sup>157</sup>

The court dismissed the claims for prospective relief, and stayed the claims for damages.<sup>158</sup> The court acknowledged that under *Gerstein v. Pugh*,<sup>159</sup> the Supreme Court rejected *Younger* arguments where plaintiffs had no timely opportunity to challenge long pre-trial detentions. It distinguished this case, however, on the grounds that the pre-trial detainees in that case did not receive a timely hearing at all.<sup>160</sup> By contrast, these detainees who receive hearings, but merely contend that those hearings are constitutionally defective.<sup>161</sup> The court explained that pre-trial detainees can object to the absence of counsel during the course of preliminary hearing; in particular, the court noted, poor pre-trial detainees could cite binding precedent and tell state judges that "their right to counsel had attached, entitling them to representation at all critical stages."<sup>162</sup> Further, the pre-trial detainees could have requested new "individualized bail hearings and proceeded in pro se capacities."<sup>163</sup>

This opinion helps to illustrate how current doctrine can sometimes lead federal courts to adopt an untenably circumscribed understanding of what constitutes an adequate forum to bring constitutional grievances. The court implicitly acknowledged that the right to counsel at a preliminary hearing is constitutional right, noting that preliminary hearings are a critical stage.<sup>164</sup> And, according to the plaintiffs, represented by the American Civil Liberties Union, this constitutional right was being systematically denied in Scott County. A hearing plagued by systemic, significant constitutional error was nonetheless adequate for the purposes of *Younger* abstention.

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<sup>154</sup> *Id.*

<sup>155</sup> *Id.*, at 9-10.

<sup>156</sup> *Id.*, at 21-22.

<sup>157</sup> *Id.*, at 24.

<sup>158</sup> When a federal court stays a damages claim during a state criminal trial, it cannot be presumed that the court will determine the merits of the suit later. Under *Heck v. Humphrey*, 512 U.S. 477, 486-87 (1994), litigants may not rely on Section 1983 to file suits that would undermine their conviction; the fact of their confinement; or the duration of their confinement. This barrier would have almost certainly taken center stage in the briefing following the stay had the case not settled. *Burks v. Scott County, Mississippi*, No. 3:14-cv-745-HTW-LRA, Doc. 109, (S.D. Miss. July 27, 2017), 26.

<sup>159</sup> *Gerstein v. Pugh*, 420 U.S. 103, 111 (1975).

<sup>160</sup> *Burks v. Scott County, Mississippi*, No. 3:14-cv-745-HTW-LRA, Doc. 86, (S.D. Miss. Sept. 20, 2015), 26.

<sup>161</sup> *Ibid.* ("Plaintiffs, though, were not denied a preliminary hearing, only threatened that they would not receive appointed counsel during the preliminary hearing.")

<sup>162</sup> *Ibid.* (citing *Rothgery v. Gillespie Cnty., Tex.*, 554 U.S. 191, 202-03 (2008)).

<sup>163</sup> *Ibid.*

<sup>164</sup> *Ibid.*

To the extent that federal remedies under Section 1983 are aimed at ending or deterring federal constitutional conduct, this narrow understanding of “adequate” comes at a cost. This is not only so because this approach requires deferring to deeply defective hearings, but also because it is inattentive to the ways that federal civil rights actions are equipped to prevent and end systemic violations in a way that individual objections at criminal hearing simply are not. Even if the inmates in *Burks v. Scott County*, had successfully objected pro se to their lack of counsel and to the lack of individualized hearings, other inmates in the county it is unclear why this would stop other poor inmates from languishing in jail indefinitely, suffering from the same violation. *Younger* abstention’s failure to account for these concerns raises questions about whether some federal courts’ working definition of “adequate” is adequate.

When a federal judge *does* issue relief, by contrast, this can lead to injunctions or consent decrees that end systematically lawless, unconstitutional deprivation of poor Americans’ liberty.<sup>165</sup> This is not mere speculation. Federal district courts have rejected governments’ *Younger*-based arguments in class actions that have challenged the bail systems in San Francisco<sup>166</sup> and Harris County, Texas.<sup>167</sup> And while both suits are ongoing, a federal court in the Southern District of Texas issued a preliminary injunction against the bail system Harris County, the third-largest jail system in the United States.<sup>168</sup> Under the terms of that order, among other things, local officials in that county “are enjoined from detaining indigent misdemeanor defendants who are otherwise eligible for release but are unable because of their poverty to pay a secured money bail.”<sup>169</sup>

The Harris County injunction reverberated across the State of Texas, and across the nation. In the months following the suit, Dallas officials authorized a system of bail based exclusively on inmates’ risk rather than their wealth, and other locales across the State began exploring the same.<sup>170</sup> Beyond Texas, other major cities eyed or implemented reforms in the months following the Harris County injunction. Faced with a pending federal lawsuit and community pressure, the Cook County— home to Chicago— dramatically changed its jailing practices. In July 2017, three months after the injunction was issued in Harris County, Cook County’s Chief Judge issued a directive prohibiting local judges from setting bail at amounts that a defendant cannot afford to pay.<sup>171</sup> By late December 2017, the jail population in Cook County had reached a record low.<sup>172</sup> More recently, national and civil rights organizations have urged other cities, such as Atlanta,

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<sup>165</sup> See generally Owen Fiss, *THE CIVIL RIGHTS INJUNCTION* (1978).

<sup>166</sup> *Buffin v. The City and County of San Francisco and The State of California*, Case 4:15-cv-04959-YGR, Doc. 55, 3-8 (N.D. CA, Feb. 1, 2016) (“Order on Pending Motions”).

<sup>167</sup> *Odonnell v. Harris Cty., Texas*, No. CV 4:16-1414, Doc. 125 (S.D. Texas, Dec. 16, 2016).

<sup>168</sup> *O'Donnell v. Harris Cty., Texas*, 251 F. Supp. 3d 1052, 1161–62 (S.D. Tex. 2017).

<sup>169</sup> *Id.*

<sup>170</sup> Jolie McCullough, *How Harris County's federal bail lawsuit spreads beyond Houston*, TEXAS TRIBUNE, Oct. 2, 2017, available at <https://www.texastribune.org/2017/10/02/how-harris-countys-bail-lawsuit-spreads-beyond-houston/>

<sup>171</sup> Richard Oppel, *Defendants Can't Be Jailed Solely Because of Inability to Post Bail, Judge Says*, NEW YORK TIMES, July 17, 2017, available at <https://www.nytimes.com/2017/07/17/us/chicago-bail-reform.html>.

<sup>172</sup> Bernie Tafoya, *Cook County Jail Population Sees A Record Low*, CBS CHICAGO Dec, 22, 2017, <http://chicago.cbslocal.com/2017/12/22/cook-county-jail-population-record-low/>

to reform its bailing practices, even in the absence of a formal lawsuit.<sup>173</sup> A letter to Atlanta penned by Civil Rights Corps and the Southern Center for Human Rights to Atlanta explicitly noted that previous suits against other municipalities, like Harris County, had been successful.<sup>174</sup>

### *B. Incentivized Incarceration*

Among the other civil rights actions filed in recent years was a suit against government actors in State of Louisiana. In case of *Cain v. New Orleans*, for example, litigants are challenging the manner in which court fees imposed on convicted defendants incentivize findings of guilt because the fees are used to fund prosecutors, public defenders, and judges.<sup>175</sup> They note that in the past, fees have been used to fund judges' expanded health care plans.<sup>176</sup> The complaint alleges that “[t]he systemic financial conflicts of interest have not improved in the years since. The Court still uses the millions of dollars of revenues collected in this manner to fund its basic operations.”<sup>177</sup> The argument is predicated on *Ward v. Monroeville*,<sup>178</sup> in which the United States Supreme Court invalidated a conviction where a mayor, who also served as a judge, presided over cases in which convicted persons' fines funded the cities' operations. The Court cited the mayor's “possible temptation” in light of his “executive responsibilities for village finances.”<sup>179</sup>

In *Cain*, governmental defendants argued that *Younger* abstention should block the suit, a contention that the district court rejected.<sup>180</sup> And in December 2017, that court granted partial summary judgment to the plaintiffs, indicating that it would issue a declaratory judgment order that would make plain that the system used to fund judicial operations in New Orleans violated the Fourteenth Amendment's Due Process Clause. “It

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<sup>173</sup> A number of other state and local governments have also sought to soften the nexus between bail and inmates' economic status. In 1994, the District of Columbia changed its money-bail code such that it is now based on a person's potential dangerousness and “serious risk that the person will flee.” D.C. Code § 23-1321. Later, the New Mexico Supreme Court ruled that “[n]either the New Mexico Constitution nor our rules of criminal procedure permit a judge to set high bail for the purpose of preventing a defendant's pretrial release.” *State v. Brown*, 338 P.3d 1276, 1292 (N.M. 2014). Then in 2016, the State of New Jersey enacted bail reforms; under the New Jersey Constitution, “[p]retrial release may be denied to a person if the court finds that no amount of monetary bail, non-monetary conditions of pretrial release, or combination of monetary bail and non-monetary conditions would reasonably assure the person's appearance in court when required, or protect the safety of any other person or the community, or prevent the person from obstructing or attempting to obstruct the criminal justice process.” N.J. Const. art. 1, § 11. The State of Maryland adopted similar changes on February 17, 2017 in rules promulgated by the Maryland Court of Appeals. O'Donnell, 251 F. Supp. 3d, at 1080-81.

<sup>174</sup> *Letter to City of Atlanta*, Nov. 10, 2017 (on file with author) (noting that plaintiffs had “won federal class action relief in lawsuits against large jurisdictions like Harris County (Houston) and against municipal court money bail practices across the country, including in Alabama, Mississippi, Tennessee, Louisiana, Missouri, and elsewhere.”)

<sup>175</sup> *Cain v. City of New Orleans*, No. 2:15-cv-04479, Doc. 1 (E.D. La., Sept. 17, 2015) (“Complaint”).

<sup>176</sup> *Id.*, at 25.

<sup>177</sup> *Ibid.*

<sup>178</sup> 409 U. S. 57 (1972).

<sup>179</sup> *Id.*

<sup>180</sup> *Cain v. City of New Orleans*, No. 2:15-cv-04479, Doc. 109 (E.D. La., April, 21, 2016) (“Order and Reasons”)

is undisputed, the Court explained, “that OPCDC depends heavily on fines and fees revenue, that many criminal defendant subject to these fines and fees are indigent, and that collection rates are only 40% to 50%. Based on these facts, it is clear the Judges’ motive to maximize fines and fees revenue is strong enough reasonably to warrant fear of partisan influence on ability-to-pay determinations.”<sup>181</sup>

A different fate, however, has met another suit challenging fees used to fund the criminal justice apparatus in the State of Louisiana. In *Bice v. Louisiana Public Defender Board*, plaintiffs alleged that their lawyers had an economic incentive to help incarcerate them.<sup>182</sup> In that case, the Fifth Circuit Court of Appeals accepted the defendants’ invitation to dismiss the suit on abstention grounds.<sup>183</sup> The case helps further illustrate the limits of body of abstention doctrine that lacks an exception for systemic or structural constitutional violations. The facts are as follows.

Under Louisiana law, the public defenders board receives the majority of its funding from criminal defendants themselves.<sup>184</sup> In particular, under La. R.S. § 15:168, any time a defendant pleads guilty, pleads nolo, or is convicted after a trial, the defendant is assessed a \$35 fee that goes to the fund that finances public defenders. The fee is not assessed if the defendant is found not guilty. And as the Fifth Circuit observed, without this fee, it is uncertain how the state would fund public defenders’ salaries.<sup>185</sup>

Steve Bice is poor person who was charged with public intoxication and a crime called “public inhabitation” in New Orleans; the State assigned him a public defender because he could not afford a lawyer.<sup>186</sup> He filed a putative class action alleging that the manner in which public defenders’ officers are funded creates skewed incentives for public defenders to, among other things, encourage poor defendants to accept guilty pleas. He initially filed the suit pro se, but a federal judge appointed a local legal clinic at Tulane to represent him, though he warned at the outset whilst making the appointment that he would not enjoin Bice’s case.<sup>187</sup>

In Bice’s view, the system sets up a conflict of interest that violates the Fourteenth and Sixth Amendment Rights of all indigent defendants represented by public defenders. He sought two primary forms of relief. First, he sought a “declaratory judgment that collecting the statutory fee ...violates the rights of Plaintiff Bice and all similarly situated criminal defendants represented by public defenders as conferred by the Sixth and Fourteenth Amendments of the United States Constitution and Article I Section 13 of the Louisiana Constitution.”<sup>188</sup> Second, he sought to “[e]njoin the Louisiana Public Defender Board from accepting the statutory fee” at issue.<sup>189</sup> He did not seek to enjoin the criminal proceedings, or to prohibit the public defenders service from representing him.

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<sup>181</sup> Cain v. City of New Orleans, No. CV 15-4479, 2017 WL 6372836, at \*26 (E.D. La. Dec. 13, 2017)

<sup>182</sup> Bice v. Louisiana Pub. Def. Bd., 677 F.3d 712 (5th Cir. 2012).

<sup>183</sup> *Id.*

<sup>184</sup> *Id.*, at 714.

<sup>185</sup> *Id.*, at 718 (“That the Board thought it necessary to bring a lawsuit in 2010 compelling judges to assess the \$35 fee tends to show the fee’s importance to the Board’s operations.”)

<sup>186</sup> *Id.*, at 714-15.

<sup>187</sup> *Id.*, at 715.

<sup>188</sup> Bice v. Louisiana Public Defenders Bd., Case 2:11-cv-00477-JCZ-DEK, Doc. 1 (E.D. La., Feb. 28, 2011) (“Complaint”).

<sup>189</sup> *Id.*, at 9.

The public defenders office filed a motion to dismiss the suit, arguing that *Younger* abstention barred federal courts from entertaining their client’s contention that Louisiana law violated the federal constitution.<sup>190</sup> Further, they contended that substantively, the fee did not constitute a conflict of interest under the constitution and they could continue to represent Bice and others in the putative class without constitutional trouble.<sup>191</sup>

The district court held a hearing, wherein it signaled it had concerns that “Big Brother Federal Government shouldn’t be the one sitting here at this point when [a case] is pending before the state judge.”<sup>192</sup> Was not Bice “getting ahead of [himself],” the court asked, by filing in federal court first?<sup>193</sup> The court noted that by seeking relief that would invite a federal court to “make an inquiry on a systemic basis on a statewide basis as to the constitutionality of [state law],” Bice was arguably exacerbating comity concerns by “taking away from the court of first impression” an opportunity to correct the problem first.<sup>194</sup> At the conclusion of the hearing, the court accordingly dismissed the suit on *Younger* grounds from the bench without a written opinion.<sup>195</sup>

The Fifth Circuit affirmed.<sup>196</sup> It found that halting the fee would also end or stall state court proceedings for Bice and others because state officials would have to scramble to resolve how to pay public defenders’ salaries in Louisiana in the absence of guilty-plea fees and conviction fees. In the words of the court, “Bice’s proceedings would likely be halted until the Board determines a way to fill the funding gap that would be created by an injunction prohibiting the state from collecting the \$35 fee. The Board asserts unequivocally in its briefing that a ruling in favor of Bice would lead it to withdraw from Bice’s proceedings.”<sup>197</sup> Fees from defendants who plead guilty or are convicted are “importan[t] to the Board’s operations,” the panel explained.<sup>198</sup> Further, under state law, criminal defendants may raise constitutional defenses in municipal court, including due process challenges. Finally, in a footnote, the Court rejected the notion that it should adopt or apply an exception to *Younger* for systemic harm, distinguishing the district court case of *M.D. v. Perry*.<sup>199</sup> *M.D.* involved the foster care system, and should be limited to those facts the court concluded. In addition, *M.D.* involved a certified class action, not a putative one.<sup>200</sup>

*Bice* lays bare the limits of *Younger*’s current safety valves. While the Fifth Circuit acknowledged the importance of the availability of a state forum to raise claims, it looked solely to state jurisdictional law to answer that question, without regard for

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<sup>190</sup> *Bice v. Louisiana Public Defenders Bd.*, Case 2:11-cv-00477-JCZ-DEK, Doc. 16-1 (E.D. La., Mar. 11, 2011) (“Motion to Dismiss”), 7.

<sup>191</sup> *Id.*, at 14.

<sup>192</sup> *Bice v. Louisiana Public Defenders Bd.*, Case 2:11-cv-00477-JCZ-DEK, Doc. 43 (E.D. La., Aug. 10, 2011) (“Proceedings”), 38.

<sup>193</sup> *Ibid.*

<sup>194</sup> *Ibid.*

<sup>195</sup> *Id.*, at 74.

<sup>196</sup> *Bice v. Louisiana Pub. Def. Bd.*, 677 F.3d 712, 720 (5th Cir. 2012).

<sup>197</sup> *Id.*, at 718.

<sup>198</sup> *Ibid.*

<sup>199</sup> *M.D. v. Perry*, 799 F.Supp.2d 712, 721–22 (S.D.Tex.2011), rev’d on other grounds, 675 F.3d 832, No. 11–40789, 2012 WL 974878 (5th Cir. Mar. 23, 2012),

<sup>200</sup> *Bice*, 677 F.3d, at 720 n.8.

defects in the state judicial process.<sup>201</sup> The notion that state courts could adequately address his constitutional concerns, simply because state courts had jurisdiction over such matters, depends on a rather restricted view of what it means to have an adequate forum to raise constitutional concerns. Should Bice have raised these concerns himself, without the assistance of counsel, and potentially in opposition to his counsel? Should Bice have expected his own attorney to raise concerns about the funding structure upon which his or her salary depended? The Fifth Circuit's ruling depends on public defenders raising a defense that, on the ruling's terms, would potentially cause their dockets and paychecks to dry up. Indeed, one of the most prominent efforts public defenders in Louisiana have made to improve indigent services as a writ of mandamus aimed at *increasing* fees assessed to persons convicted of traffic tickets.<sup>202</sup>

### C. Post- Judgment Debtors Prisons

The criminalization of poverty does not end when the trial concludes. In yet another set of cases, poor Americans have filed suit alleging that they are being incarcerated for their inability to pay a court judgments and or related fines or fees levied against them. Governmental defendants have sometimes mounted *Younger* abstention objections to those sets of cases as well. What follows is a deeper description of these sometimes complex types of regimes, the role that *Younger* plays in suits challenging them, and what these cases tell us about *Younger*'s limits.

In American locales that include, but are not limited to, Ferguson, Missouri; Jennings, Missouri; New Orleans, Louisiana; Rutherford County Tennessee; Sherwood, Arkansas; Montgomery, Alabama; and Broward County, Florida, groups of poor Americans have filed suits charge that they have faced detentions when they are unable to pay traffic tickets or other judgments and fees.<sup>203</sup> These detentions are sometimes indefinite, with access to courts being sporadic, or otherwise fundamentally

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<sup>201</sup> *Id.*, at 719.

<sup>202</sup> Twenty-Fourth Judicial Dist. Indigent Def. Bd. v. Molaison, 522 So. 2d 177 (La. Ct. App.), writ denied sub nom. Twenty Fourth Judicial Dist. Indigent Def. Bd. v. Molaison, 524 So. 2d 512 (La. 1988). This is not to say that defendants never raise claims in criminal proceedings that challenging various funding structures, especially funding structures that render their offices under-resourced. *See, e.g.,* Phan v. State, 290 Ga. 588 (2012); Kennedy v. Carlson, 544 N.W.2d 1 (Minn. 1996). Indigent defendants have also brought class actions in State court. *See* Kuren v. Luzerne Cty., 146 A.3d 715 (Pa. 2016); Hurrell–Harring v. State, 930 N.E.2d 217 (N.Y. 2010). In one case, public defenders successfully moved to withdraw from non-felony cases, citing a lack of resources. Public Defender, 11th Jud. Circuit v. State, 115 So.3d 261 (Fla. 2013). One of the most successful challenges to a public defenders' funding regime, however, came in federal court. Wilbur v. City of Mount Vernon, 989 F. Supp. 2d 1122, 1124 (W.D. Wash. 2013) (“Plaintiffs have shown, by a preponderance of the evidence, that indigent criminal defendants in Mount Vernon and Burlington are systematically deprived of the assistance of counsel at critical stages of the prosecution and that municipal policymakers have made deliberate choices regarding the funding, contracting, and monitoring of the public defense system that directly and predictably caused the deprivation.”)

<sup>203</sup> Carter v. City of Ferguson, No. 4:15-cv-00253, Doc. 1 (E.D. Mo., Feb. 8, 2015) (“Complaint”); Cain v. City of New Orleans, No. 2:15-cv-04479, Doc. 1 (E.D. La., Sept. 17, 2015) (“Complaint”); Rodriguez v. Providence Corrections Corp., No. 3:15-cv-01048 (M.D. Tenn); Mitchell v. City of Montgomery, No. 3:15-cv-01048 (M.D. Ala.); Pompey v. Broward Cnty., 95 F.3d 1543 (11th Cir. 1996).

compromised.<sup>204</sup> Poor Americans who face these types of detentions maintain that they are sometimes told that the only way to achieve timely release is by making a large monetary payment, or by performing work for private corporations or the government.<sup>205</sup> Further, fearful of these regimes, poor Americans in some of these jurisdictions regularly refuse to appear in court to account for post-judgment fees or fines when they cannot afford to pay, because they believe the only other alternative is incarceration.<sup>206</sup> This decision results in fresh arrest warrants and new fines.

Of these locales, one municipality's regime that deserves extended discussion is Rutherford County, Tennessee.<sup>207</sup> This is because Rutherford County's carceral apparatus involved more than alleged detentions for failure to pay fines and fees. Their system combined that feature with financial incentives to incarcerate poor Americans, keep them on probation for as long as possible, and saddle them with new fines or fees.

Cindy Rodriguez and other impoverished people convicted of misdemeanors in Rutherford County contend in a detailed 74-page complaint that their local probation system was recently plagued by "systemic illegality" through constitutional violations and corruption.<sup>208</sup> They argue that they were victimized by "an extortion scheme" in which the county contracted with a corporation to supervise misdemeanants who owed "court costs," and the corporation then extorted money from these impoverished probationers by threatening them with new jail terms and fees.<sup>209</sup> The unfortunate language that probationers apparently often used when making these threats is that, absent a payment, they would "violate" the probationer by recommending arrest for failing to comply with terms of probation.<sup>210</sup>

Under the contract, the government did not pay that corporation. Instead, the company's profit came entirely from the people supervised by means of a "user-funded model" wherein the corporation threatened arrest or revocation of probation absent the payment of fees, surcharges, and court costs.<sup>211</sup> Fees included, among other things, \$25 charges for drug-testing fees; the probation officers had that power to order such drug testing indiscriminately and frequently.<sup>212</sup>

Despite their financial stake in this model, probation officers had a substantial say in whether probationers were re-incarcerated. They could initiate arrest for failure to make a payment and recommend incarceration to a judge. Judges generally followed

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<sup>204</sup> Carter v. City of Ferguson, No. 4:15-cv-00253, Doc. 1 (E.D. Mo., Feb. 8, 2015) ("Complaint") ("Although the Plaintiffs pleaded that they were unable to pay due to their poverty, each was held in jail indefinitely and none was afforded a lawyer or the inquiry into their ability to pay that the United States Constitution requires.")

<sup>205</sup> Mitchell v. City of Montgomery, No. 3:15-cv-01048 (M.D. Ala.).

<sup>206</sup> Ferguson Report, supra note \_\_\_, 52; see also Torie Atkinson, *A Fine Scheme: How Municipal Fines Become Crushing Debt in the Shadow of the New Debtors' Prisons*, 51 HARV. C.R.-C.L. L. REV. 189, 203 (2016).

<sup>207</sup> Rodriguez v. Providence Corrections Corp., No. 3:15-cv-01048 (M.D. Tenn).

<sup>208</sup> Rodriguez v. Providence Corrections Corp., No. 3:15-cv-01048, Doc. 1 (M.D. Tenn, Oct. 01, 2015) ("Complaint"), 3.

<sup>209</sup> *Id.*, at 7.

<sup>210</sup> *Id.*, at 26. ("On one occasion in which Ms. Rodriguez was not able to bring any money, a PCC, Inc. supervisor got mad at her for not bringing any money and told Ms. Rodriguez: 'one more time of this bullshit, and I'm gonna violate you. You'll spend 7 days in jail.'")

<sup>211</sup> *Id.*, at 17.

<sup>212</sup> *Id.*, at 18.

these recommendations.<sup>213</sup> What is more, new jail terms generally meant new court fees, as well as a longer probation terms. Additionally, because probation officers had the discretion to impose no fees, and because the officers also had the discretion to use probationers' payments to fund their corporate employer before funding the court, many residents remained under supervision even after they have paid more money than they originally owed.<sup>214</sup>

Arrest warrants show that, once incarcerated for violations, probationers in the County were not released absent a "secured money bond," generally in the range of \$10,000.<sup>215</sup> These bonds were issued without regard to the inmate's ability to pay; there were no inquiries into whether the inmates were indigent. Whether and when a person was released when failing to pay these money bonds was, according to the probationers, arbitrary.

Impoverished probationers in Rutherford County filed federal suit and sought a preliminary injunction. The court then conducted a hearing to determine whether to issue a preliminary injunction.<sup>216</sup> The evidence included declarations from impoverished people on probation who described their experiences in what they and guards purportedly regularly referred to as "kangaroo court."<sup>217</sup> These experiences included facing *weeks* in jail without seeing a judge for failure to pay and threats of jail when they were unable to pay. They further testified that if they chose to contest the violation, and if they could not afford to pay for their release, they spent an additional thirty to sixty days in jail awaiting a court date.<sup>218</sup> According to the government's own witnesses, repeated violations for failure to pay could result in 60 to 90 days because the repeated failures meant they did not "get the message."<sup>219</sup>

Among the other witnesses was state Judge Benjamin McFarlin, Jr., an elected judge in Rutherford County with an exclusively criminal docket.<sup>220</sup> His testimony produced the following memorable exchange between himself and the federal district court judge presiding over the case, federal Judge Kevin H. Sharp of the Middle District of Tennessee. Chief Judge Sharp asked Judge McFarlin whether there was a way to end or "fix" the cycle of impoverished people being caught up in a cycle of violating probation for their inability to pay, and then racking up more fees as a result.

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<sup>213</sup> *Id.*, at 68.

<sup>214</sup> *Id.*, at 44.

<sup>215</sup> *Id.*, at 35.

<sup>216</sup> *Rodriguez v. Providence Corrections Corp.*, No. 3:15-cv-01048 (M.D. Tenn, Nov. 06, 2015) ("Transcript").

<sup>217</sup> *Id.*, at 10.

<sup>218</sup> *Id.*, at 87.

<sup>219</sup> *Id.*, at 78.

<sup>220</sup> *Id.*, at 61.

12 THE COURT: Okay. There's got to be a way to fix  
13 that. I mean, that may be above your pay grade but --  
14 THE WITNESS: Money makes the world go round --  
15 THE COURT: It does, but we can't base our justice  
16 system on, right, whether money makes somebody else's world go  
17 round because we've got real people.

On December 17, 2015, impoverished people on probation received an early Christmas gift from Judge Sharp, preliminarily enjoining the corporation and government from jailing any probationer if their only violation was nonpayment of fees, fines, or court costs.<sup>221</sup> The court rejected the government's *Younger* abstention argument, reasoning that, as in *Gerstein*, probationers do not receive a timely hearing upon being arrested; even if these detentions are challenged later at trial, the constitutional damage has already been done.<sup>222</sup> And while the defendants initially appealed, ultimately resulted in a class-wide settlement that ended private probation in the County, and resulted in payments of \$14.3 million to the victims.<sup>223</sup> The Rutherford County, case, then shows what is possible when victims and attorneys can navigate the byzantine set of procedural obstacles that lay in the way of criminal justice reform by means of litigation.

Not all individuals who have experienced debtors prisons have been able to overcome barriers like *Younger* abstention, however. In September 2016, poor residents of Sherwood, Arkansas filed suit against the town, alleging that government officials there routinely arrest and incarcerate individuals who "have been sentenced to pay court costs, fines, and fees without making any inquiry into whether those individuals are able to pay and/or notwithstanding their inability to pay."<sup>224</sup> A magistrate recommended dismissing the suit on *Younger* grounds.<sup>225</sup> The district court accepted this recommendation in a terse three-page order.

Further, in at least one case that predates the recent spate of cases challenging post-judgment debtors prisons, the Eleventh Circuit accepted the government's *Younger* argument. In *Pompey v. Broward Cnty.*, that court found that *Younger* abstention prevented a challenge to a post-judgment proceeding in which courts determined whether to incarcerate men for failure to pay child support. In reaching that conclusion, the court found that attorney-less proceedings with no inquiries into indigence were adequate

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<sup>221</sup> *Rodriguez v. Providence Corrections Corp.*, No. 3:15-cv-01048, Doc. 68 (M.D. Tenn, Dec. 17, 2015) ("Memorandum Opinion of the Court").

<sup>222</sup> *Id.*, at 9.

<sup>223</sup> Adam Tamburin, *Probation company, Rutherford County paying \$14.3 million to settle extortion lawsuit*, THE TENNESSEAN, Sept. 19, 2017, available at <http://www.tennessean.com/story/news/local/rutherford/2017/09/19/probation-company-rutherford-county-paying-14-3-million-settle-extortion-lawsuit/682379001/>

<sup>224</sup> *Dade v. Sherwood*, No. 4:16-cv-00602, Doc. 13, 3-4. (E.D. Ark., Sept. 13, 2016) ("First Amended Complaint").

<sup>225</sup> *Dade v. Sherwood*, No. 4:16-cv-00602, Doc. 59 (E.D. Ark., Jan. 24, 2017) ("Proposed Findings and Recommendations").

forums to rise constitutional objections.<sup>226</sup> In future instances in which courts find that *Younger* attaches in the post-judgment debtor's prison context, then, even cases with factual settings highly similar to Rutherford County's are vulnerable to similar rulings in the absence of an exception for systemic, structural constitutional violations. This is especially true in the Eleventh Circuit, where the *Pompey* ruling remains binding.

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During the federal court proceedings assessing the constitutionality of Louisiana's method of primarily funding public defenders through convictions, the transcript of the district court hearing almost certainly misquotes the district court as saying: "because of federalism, because of commodity, you don't want Big Brother Federal Court to come in and interfere with state court proceedings."<sup>227</sup> The court likely used the word "comity," not "commodity." But what happens when state courts *do* treat human beings as commodities in their state judicial apparatus rather than accused citizens in a democracy? What happens a municipality's carceral apparatus is constructed as it is in part because "money makes the world go round." Part III makes the case that these types of harms are: (a) irreparable and (b) allowing systemically and structurally unsound proceedings to persist does not further federalism in a principled or justifiable way.

### III. Our Federalism in the Time of Our Ferguson

The events in Scott County, Mississippi and Rutherford County, Tennessee call to mind one of Walter Lee Younger's plaintive insights in the legendary play *A Raisin in the Sun*. "Mama," Walter Lee tells his mother Lena, "you know it's all divided up. Life is. Sure enough. Between the takers and the 'tooken.' I've figured it out finally. ... Some of us always getting 'tooken.'"<sup>228</sup> Indeed, the state court judge's defense in the Rutherford County case— wherein he explained that "[m]oney makes the world go 'round'"<sup>229</sup>— calls to mind Lena Younger's equally poignant observation earlier in the play. "Once upon a time freedom used to be life – now it's money. I guess the world really do change."<sup>230</sup>

As illustrated in Part II, litigants seeking to stop the criminalization of poverty often must navigate the barrier of *Younger* abstention.<sup>231</sup> And because litigants continue to file similar cases across the nation, there is a non-trivial risk that abstention will end future suits as well. What is more still, other suits may never be filed because of troubling authority in the Fifth<sup>232</sup> and Eleventh Circuits.<sup>233</sup> This Part aims to develop two related arguments. First, when *Younger* prevents Americans from challenging systemic or structural constitutional violations, the harm that follows is irreparable, serious, and

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<sup>226</sup> *Pompey v. Broward Cnty.*, 95 F.3d 1543 (11th Cir. 1996).

<sup>227</sup> *Bice v. Louisiana Public Defenders Bd.*, Case 2:11-cv-00477-JCZ-DEK, Doc. 43 (E.D. La., Aug. 10, 2011) ("Proceedings"), 16.

<sup>228</sup> Lorraine Hansberry, *A RAISIN IN THE SUN* (1959).

<sup>229</sup> *Rodriguez v. Providence Corrections Corp.*, No. 3:15-cv-01048 (M.D. Tenn, Nov. 06, 2015) ("Transcript"), 101.

<sup>230</sup> Hansberry, *supra*.

<sup>231</sup> *See generally* Part II.

<sup>232</sup> *Bice v. Louisiana Pub. Def. Bd.*, 677 F.3d 712 (5th Cir. 2012).

<sup>233</sup> *Pompey v. Broward Cnty.*, 95 F.3d 1543 (11th Cir. 1996).

immediate. Second, federalism interests asserted by the State are no match for the irreparable harm that would persist in the absence of independent judicial intervention. If “Our Federalism” is stopping us from fixing our Ferguson, it is time to revisit our federalism.

### A. Irreparable Harm

One of the most illuminating articulations of irreparable harm comes from Doug Laylock’s oft-cited Article *The Death of the Irreparable Injury Rule*.<sup>234</sup> Irreparable means that there is no other adequate remedy available. Accordingly, one’s understanding of irreparability is as broad or as narrow as one’s understanding of whether another remedy is adequate. “[W]hat makes an injury irreparable is that no other remedy can repair it.”<sup>235</sup> This conception helps explain why irreplaceable and intangible harms—such as constitutional, procedural and dignitary harms—are generally presumed to be irreparable. Compared to an injunction, a traditional monetary award cannot fully remedy a violation because money is designed to compensate or (perhaps) deter harm. It is not designed to prevent harm.

The doctrine of *Younger* abstention attempts to mediate this relationship between irreparability and the existence of an adequate remedy in the context of states’ criminal justice regimes. Beginning with *Ex parte Young*,<sup>236</sup> the Court repeatedly affirmed that federal courts could intervene in State prosecutions where serious irreparable would otherwise result. In *Younger*, it became particularly clear that this means, at least in part, that constitutional claims generally cannot be brought when an ongoing state criminal trial provides an immediate, adequate forum to stop end constitutional harm. A State’s criminal justice apparatus is a particularly sensitive sphere, that goes to the heart of a State’s ability to govern itself. And given that state criminal proceedings are capable of repairing most unconstitutional state prosecutions, deferring to that process generally provides a means of ending unconstitutional harm whilst respecting a State’s ability to manage its own police powers.

Exceptions to *Younger* are consistent with this conceptual framework. Sometimes a victim must have the option of appealing to a federal court, *even* in the criminal context, because the state system is sufficiently broken that another forum must be available to provide assurance that irreparable harm will discontinue. For example, the chief reason that plaintiffs have access to federal court when a state forum is biased is because a biased forum is not an adequate means of ending unconstitutional harms.<sup>237</sup> Similarly, federal courts are open when the state criminal system that provides no *timely* means to abate immediate harm because, in those circumstances, the state forum is similarly inadequate. Likewise, subjecting a plaintiff to a criminal justice system plagued by bad faith raises similar concerns. When core actors in the criminal justice system—such as prosecutors – are wielding the power of the State for illegitimate reasons, general deference to States to stop unconstitutional harm is an untenable proposition.

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<sup>234</sup> Douglas Laycock, *The Death of the Irreparable Injury Rule*, 103 HARV. L. REV. 687 (1990).

<sup>235</sup> *Id.*, at 694.

<sup>236</sup> *Ex parte Young*, 209 U.S. 123 (1908).

<sup>237</sup> *Gibson v. Berryhill*, 411 U.S. 564, 570-71 (1973). *See also* Part I(C)(2).

Against that background, in this Part, I argue that when a state criminal process is infected with systemic or structural constitutional violations, federal courts should not rely on such a forum to cure irreparable harm. The *Younger* compromise – that is, trust State juridical systems to fix their own mistakes—cannot hold. This is true for three reasons. First, systemic and structural constitutional violations *are* irreparable harm. Second, such violations lead to other irreparable harm. Third, the federalism interests that generally support the staying of federal courts’ hands in the context of State criminal enforcement are not salient when that enforcement is marred by systemic and structural errors.

### 1. Irreparable Procedural Harm

When an adversarial process denies a systemic or structural constitutional right that denial is, in and of itself, irreparable harm. A systemic violation, as defined here, is one that happens as a matter of pattern, practice, policy, or custom.<sup>238</sup> A structural violation, as defined by case law, is one that strikes at the heart of a proceeding’s reliability, such that the resultant harm is both presumed and immeasurable.<sup>239</sup> On the structural front, it *is* irreparably harmful to perpetuate a system that routinely denies persons lawyers at a critical stage or routinely gives financial incentives to government actors who are central in the adversarial process. These types of structural procedural constitutional rights are both intangible and difficult to quantify. Procedural constitutional violations are, and long have been, considered a prototypical example of irreparable harm.<sup>240</sup> When violations are structural, such they are presumed to infect the defendant’s entire process, the harm surely heightens.

Systemic constitutional violations are also: (a) difficult to measure and (b) inspire little trust that the State system could adequately resolve the issues. Insights from scholarship on procedural justice and legal cynicism help elucidate some of the ways in which it is irreparably harmful to subject a people to systemically unsound criminal procedures. It is well-documented that that when a person perceives that a process is unfair, that perception weakens confidence in the propriety of the outcome,<sup>241</sup> as well as the person’s sense that the process is worthy of respect.<sup>242</sup> Such findings have both deontological and consequentialist dimensions. It is intrinsically important that people perceive that they are being heard when the government deprives them of liberty or property. As Justice Sotomayor explained, an unfair or abusive police state sends the message “that you are not a citizen of a democracy but the subject of a carceral state, just waiting to be cataloged.”<sup>243</sup> Monica Bell has persuasively offered an amendment to this thesis that has particular force in the context of systemic harm, arguing when *groups*

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<sup>238</sup> See *infra* Part IV.

<sup>239</sup> *Id.*

<sup>240</sup> Laylock, *supra* note \_\_\_\_, at 707-08.

<sup>241</sup> Tom R. Tyler, *Procedural Justice, Legitimacy, and the Effective Rule of Law*, 30 CRIME & JUST. 283, 350 (2003).

<sup>242</sup> Tom R. Tyler & Yuen J. Huo, TRUST IN THE LAW 7 (2002).

<sup>243</sup> *Utah v. Strieff*, 136 S. Ct. 2056, 2068 (2016) (Sotomayor, J., dissenting). See also Professors Charles Epp, Steven Maynard-Moody, and Donald Haider-Markel, PULLED OVER: HOW POLICE STOPS DEFINE RACE AND CITIZENSHIP (2014) (documenting racially inflected “investigatory stops” and arguing that they undermine a black American’s sense of citizenship).

perceive the state's police power as routinely abusive, this encourages a sense of "legal cynicism" in which people feel entirely stateless and outside of the law. Second-class citizenship and worse, a sense of statelessness, are both intrinsically troubling.<sup>244</sup>

Beyond that, there are downstream consequences when people perceive governmental power to be illegitimate. As Tom Tyler has demonstrated, perceptions of benevolent motives and fairness both foster compliance with future governmental directives.<sup>245</sup> There is also evidence that an overly intrusive, arbitrary police state renders citizens less likely to vote, or otherwise participate in civic life.<sup>246</sup> Fundamentally broken process is itself irreparable harm.

To be sure, whether criminal tribunals could ever be equipped to root out systemic harm is the subject of academic debate. One view expresses skepticism that criminal tribunal's individualized nature and limited remedies<sup>247</sup> could eradicate systemic constitutional violations.<sup>248</sup> Andrew Crespo has recently challenged that conventional account, arguing that improving criminal courts' knowledge about systemic constitutional violations ("systemic facts") can help open the door to more reforms that render them better equipped to take on systemic harm.<sup>249</sup> The outcome of this debate presents no significant challenge to my argument however. Crespo's central claim is not that criminal trials *do* provide a reliable site to resolve irreparable harm, but that they can be so transformed. Indeed, he concedes that "improving criminal courts' capacity for institutional awareness will not alone transform them into fully competent systemic actors."<sup>250</sup> Thus, even under his account, improving criminal courts' institutional knowledge *and* the remedial toolkit available to them are necessary prerequisites to more systemically-effective criminal courts.

## 2. Irreparable Substantive Harm

When the State criminalizes poverty in the ways described in this Article, the irreparable harm also extends beyond the procedural realm. A structurally or systemically broken process cannot be trusted to correct other more substantive

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<sup>244</sup> Monica C. Bell, *Police Reform & the Dismantling of Legal Cynicism*, 126 YALE L.J. \_\_ (forthcoming 2017).

<sup>245</sup> Jason Sunshine & Tom R. Tyler, *The Role of Procedural Justice and Legitimacy in Shaping Public Support for Policing*, 37 LAW & SOC'Y REV. 513 (2003); *see also* Tyler & Huo, *supra* note \_\_, at 7 ("There is considerable evidence that when people regard the particular agents of the legal system whom they personally encounter as acting in a way they perceive to be fair and guided by motives that they infer to be trustworthy, they are more willing to defer to their directives.")

<sup>246</sup> Amy E. Lerman & Vesla M. Weaver, *ARRESTING CITIZENSHIP* (2014).

<sup>247</sup> Barry Friedman & Maria Ponomarenko, *Democratic Policing*, 90 N.Y.U. L. REV. 1827, 1832 (2015) (observing that courts finding violations by police "mostly in the context of suppression motions").

<sup>248</sup> Tracey L. Meares, *Programming Errors: Understanding the Constitutionality of Stop-and-Frisk as a Program, Not an Incident*, 82 U. CHI. L. REV. 159, 164 (2015) (contending that individualized inquiries are "unsuitable for assessing the nature of violations" that are "carried out systematically").

<sup>249</sup> Andrew Manuel Crespo, *Systemic Facts: Toward Institutional Awareness in Criminal Courts*, 129 HARV. L. REV. 2049 (2016).

<sup>250</sup> *Id.*, at 2053.

constitutional harms, including indefinite deprivations of physical liberty. Like procedural harm, courts and commentators have long accepted that the deprivation of physical liberty is a rather axiomatic example of harm that is intangible and immeasurable.<sup>251</sup> The logic of *Younger* is rooted in a compromise. Given the centrality of criminal justice to States' autonomy and sovereignty, Our Federalism defers to States to root out such harm when there is an ongoing criminal proceeding. The traditional criminal justice apparatus can end ongoing constitutional harm. This compromise falls apart when the State criminal justice system is unwilling to end the harm. But when the State's process is characterized by systemic or structural violations, harms such as indefinite detention may well go unabated without a means of correction beyond equitable relief in another forum.

By way of concrete example, recall the case of Cindy Rodriguez in Rutherford County, Tennessee. She and others similarly situated lived in constant fear that if they missed a payment for arbitrary drug tests, a "probation officer" with the backing of State authority would command their arrest, determine when they got court hearings, and recommend (and thereby all but secure) their detention. But the probation officers had a financial incentive in extracting as much money from people like Ms. Rodriguez as possible. Should federal courts remain supine in the face of such facts, trusting that the state criminal system would end the perpetual threat of detention Ms. Rodriguez lived under? Should federal courts trust that she can or should raise her complaint to the very officials whose economic livelihood was tied to how much money they could extract from her? No.

The same is true in the case of Octavious Burks in Scott County, Mississippi, wherein he alleged that he and others like him are routinely denied lawyers and indigency-determinations during bail hearings. If the right to a lawyer at a critical stage means anything, it cannot or should not be the law that federal courts presume that pro se defendants are readily equipped to argue their way out of unlawful detentions during lawyerless hearings. Languishing in jail without basic liberty is an intangible and immeasurable harm. Further, these detentions lead to other "downstream" harm such as "induc[ing] otherwise innocent defendants to plead guilty in order to exit jail, potentially creating widespread error in case adjudication."<sup>252</sup>

### *B. Federalism(s)*

The question that remains is whether the failure to stop this irreparable harm is justified on federalism grounds. As noted, this area of law that has long been marked by a compromise: Given the importance of criminal justice to States' governance, federal courts have relied on state criminal trials to end irreparable harm in this context. After all, federalism is or should be present in any discussion of criminal justice reform. While *Younger* emphasizes the importance of correcting irreparable harm when the State systems are inadequate, those are not the most memorable or cited passages. *Younger* is remembered as an ode to federalism. "It should never be forgotten that this slogan, 'Our

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<sup>251</sup> Laylock, *supra note* \_\_\_, at 707-08.

<sup>252</sup> Paul Heaton, Sandra Mayson, and Megan Stevenson, *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 STAN. L. REV. \_\_\_ (forthcoming 2017).

Federalism,' born in the early struggling days of our Union of States, occupies a highly important place in our Nation's history and its future."<sup>253</sup>

In the decades after *Younger*, constitutional theorists have deepened our collective understanding of federalism's dimensions. In addition to vigorously debating the proper role of courts in enforcing federalism,<sup>254</sup> commentators have offered useful theoretical frameworks, taxonomies and normative justifications for the role of federalism in American society.<sup>255</sup> Do contemporary notions of federalism justify relying on State processes plagued by structural and systemic constitutional errors to correct their own errors? Navigating those theories, in my view, demonstrate that the answer is no.

## 1. Uncooperative Federalism

In our federal system, State and local officials often work with federal officials to carry out national goals on issues ranging from health care to immigration. This model has been described as "cooperative federalism"<sup>256</sup> and "cooperative localism."<sup>257</sup> Dean Robert Schapiro has explained that since at least the New Deal, the theory of cooperative federalism has "acknowledge[d] and endorse[d] the close relationships between and national governments in a variety of areas... Cooperative federalism seeks to legitimate in theory the state-federal partnerships that in fact pervade governmental operations."<sup>258</sup> About eight years ago, Jessica Bulman-Pozen and Dean Heather Gerken made the case

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<sup>253</sup> *Younger*, 401 U.S., at 44.

<sup>254</sup> Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 546 (1954) ("[T]he states are the strategic yardsticks for the measurement of interest and opinion, the special centers of political activity, the separate geographical determinants of national as well as local politics."); Jesse H. Choper, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS 175-83 (1980) (describing the protection of state interests in the constitutional design); *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 550-51 (1985) (adopting this view); see also Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215 (2000) (exploring the role of partisanship in shaping national and state's relative choices); Saikrishna B. Prakash & John C. Yoo, *The Origins of Judicial Review*, 70 U. CHI. L. REV. 887 (2003) (defending judicial enforcement of federalism norms).

<sup>255</sup> Heather K. Gerken, *Our Federalism(s)*, 53 WM. & MARY L. REV. 1549 (2012); Robert A. Schapiro, POLYPHONIC FEDERALISM (2009); Ernest A. Young, *The Rehnquist Court's Two Federalisms*, 83 TEX. L. REV. 1, 14 (2004); Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1, 25-26 (1988); Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1466 (1987). See generally Robert B. Ahdieh, *From Federalism to Intersystemic Governance: The Changing Nature of Modern Jurisdiction*, 57 Emory L.J. 1 (2007) (outlining various approaches to understanding federalism); Cf. Malcolm Feeley & Edward Rubin, FEDERALISM: POLITICAL IDENTITY AND TRAGIC COMPROMISE (2011); Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. REV. 903, 931 (1994) (critiquing a version of federalism that conflated decentralization with state sovereignty).

<sup>256</sup> See, e.g., Daniel J. Elazar, AMERICAN FEDERALISM: A VIEW FROM THE STATES 162 (2D ED. 1972); MORTON GRODZINS, *The American System: A New View of Government in the United States* (1966); John Kincaid, *The Competitive Challenge to Cooperative Federalism: A Theory of Federal Democracy, in Competition Among State and Local Governments: Efficiency and Equity in American Federalism* 87 (Daphne A. Kenyon & John Kincaid eds., 1991); Susan Rose-Ackerman, *Cooperative Federalism and Co-optation*, 92 YALE L.J. 1344 (1983)

<sup>257</sup> Nestor M. Davidson, *Cooperative Localism: Federal-Local Collaboration in an Era of State Sovereignty*, 93 VA. L. REV. 959 (2007).

<sup>258</sup> Schapiro, *supra* note \_\_\_, at 90.

for “uncooperative federalism” as well.<sup>259</sup> That is, just as state and local governments can cooperate with federal officials, the corollary is that state and local governments can decline to cooperate or resist. This offers room for what Gerken later called the “loyal opposition” to help govern.<sup>260</sup> “[W]hile proponents of state resistance generally insist that autonomy is necessary for states to challenge the federal government, it may be that forcing states into the role of federal servants ultimately does more to foster state-centered dissent.”<sup>261</sup> This dissent can range from “from restrained disagreement to fighting words.”<sup>262</sup>

One could conceivably cast *Younger* as an opinion in the tradition of cooperative federalism. Typically, this concept is associated with administrative and legislative officials helping implement federal statutory programs. Still, *Younger* abstention does give State courts an initial role in implementing federal constitutional norms, at least temporarily locking our federal courts. Under the dominant doctrinal model, the United States Supreme Court offers the authoritative word on matters of constitutional interpretation.<sup>263</sup> But state courts and inferior courts take front stage in implementing these norms, often in dialogue with one another.<sup>264</sup> Without a general presumption against enjoining state prosecutions, one might imagine that State courts could often get locked out of this shared role. *Younger* avoids that outcome.

If we can think of *Younger* as facilitating cooperative federalism, can we think of States regimes documented in this Article—debtors’ prisons, denial of counsel, and judicial financial-interest—as justifiable uncooperative resistance? To ask the question is almost to answer it. *Younger* may well promote cooperative federalism. And uncooperative federalism may well have normatively desirable dimensions. Nonetheless, presumably few would defend the notion of State courts’ can resist the United States Supreme Court’s explicit interpretations of the federal *constitution* by routinely implementing those interpretations on matters that go to the heart of procedural fairness in criminal cases. State judges are bound by federal law under the unambiguous terms of Article VI in the United States Constitution.<sup>265</sup> Relatedly, since the days of *Martin v. Hunters Lessee*<sup>266</sup> and *Cohens v. Virginia*,<sup>267</sup> it is been nearly axiomatic that State courts are bound by the United States Supreme Court’s interpretation of federal constitutional

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<sup>259</sup> Jessica Bulman-Pozen, Heather K. Gerken, *Uncooperative Federalism*, 118 YALE L.J. 1256, 1271 (2009).

<sup>260</sup> Heather K. Gerken, *The Loyal Opposition*, 123 YALE L.J. 1958, 1978 (2014).

<sup>261</sup> Bulman-Pozen & Gerken, 118 YALE L.J., at 1259.

<sup>262</sup> *Id.*, at 1271.

<sup>263</sup> *Cooper v. Aaron*, 358 U.S. 1 (1958). For a scholarly defense of this view, see Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359 (1997); but see Mark Tushnet, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (1997) (advocating for a robust role of elected officials in defining constitutional norms); Larry D. Kramer, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004) (providing a historical defense of this view).

<sup>264</sup> See Fred O. Smith, Jr., *Undemocratic Restraint*, 69 VAND. L. REV. \_\_\_\_ (2017) (forthcoming); Schapiro, *supra* note \_\_, at 121-50; see generally Shirin Sinnar, *Procedural Experimentation, National Security and the Courts* (manuscript on file with author).

<sup>265</sup> U.S. Const., Art. VI (“This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.”) (emphasis added).

<sup>266</sup> *Martin v. Hunter’s Lessee*, 14 U.S. 304 (1816).

<sup>267</sup> *Cohens v. Virginia*, 19 U.S. 264 (1821).

law. Further, it has been settled for over a half-century that state courts generally have an obligation to hear federal claims;<sup>268</sup> they cannot duly obstruct or discriminate against such claims.<sup>269</sup>

Indeed, when States offer such resistance through obstruction or discrimination against federal claims, federal courts can sometimes entertain cases that they otherwise could not. For example, the United States Supreme Court generally may not hear federal claims emanating from state supreme courts when there were alternative adequate and independent state grounds for state courts' final judgments.<sup>270</sup> This "adequate and independent grounds" bar presents no barrier, however, when the State law grounds is obstructionist, discriminatory, or unconstitutional.<sup>271</sup> The same is so with respect to federal collateral review of state criminal convictions. If a state court dismisses a criminal defendants case on state procedural grounds, this generally presents a bar to federal collateral relief.<sup>272</sup> This bar falls, however, when the state procedural ground is obstructionist, discriminatory, unconstitutional,<sup>273</sup> or even when this brand of deference to state procedure would result in a "miscarriage of justice."<sup>274</sup> In those cases, the state law ground is not "adequate."

Further, nothing about Bulman-Pozen and Gerken's model itself leads to the inescapable conclusion that state courts can resist federal constitutional commands. In *Uncooperative Federalism*, the authors provide examples of state policymakers showing resistance to federal statutory and regulatory commands on matters of national security, the environment, and welfare reform.<sup>275</sup> It does not follow that state and local courts could upend centuries of settled law by ignoring federal constitutional commands while simultaneously neutering federal courts' ability to stop resultant irreparable harm. The model of uncooperative federalism, while useful in many contexts, is a poor fit for instances of structural, systemic constitutional violations. Embracing "federalism all the way down"<sup>276</sup> need not mean accepting Ferguson all the way down.

## 2. Process Federalism

In his ambitious 183-page Article *The Rehnquist Court's Two Federalisms*, Ernie Young presented a defining and illuminating perspective on what has come to be known as the Federalism Revolution of the 1990's and early 2000's.<sup>277</sup> In the 1980's the Supreme Court initially purported to have retreated from aggressive federalism doctrines,

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<sup>268</sup> *Testa v. Katt*, 330 U.S. 386 (1947).

<sup>269</sup> *Haywood v. Drown*, 556 U.S. 729 (2009); *Howlett v. Rose*, 496 U.S. 356 (1990); *Felder v. Casey*, 487 U.S. 131, 150-51 (1988). Charlton C. Copeland, *Federal Law in State Court: Judicial Federalism Through A Relational Lens*, 19 WM. & MARY BILL RTS. J. 511 (2011).

<sup>270</sup> *Murdock v. City of Memphis*, 87 U.S. 590 (1874)

<sup>271</sup> Erwin Chemerinsky, FEDERAL JURISDICTION § 10.5.2 (6th ed. 2012).

<sup>272</sup> Fallon, J. Manning, D. Meltzer, & D. Shapiro, Hart and Wechsler's *The Federal Courts and the Federal System* 1281 (6th ed. 2009).

<sup>273</sup> *Ibid.*

<sup>274</sup> *Coleman v. Thompson*, 501 U.S. 722 (1991).

<sup>275</sup> Bulman-Pozen & Gerken, 118 YALE L.J., at 1274-81.

<sup>276</sup> Heather K. Gerken, *Foreword: Federalism All the Way Down*, 124 HARV. L.REV. 4, 23-24 (2010) (advocating local autonomy as important dimension of federalism).

<sup>277</sup> Ernest A. Young, *The Rehnquist Court's Two Federalisms*, 83 TEX. L. REV. 1, 14 (2004).

especially doctrines that turned on whether an area of law was a “traditional state function.”<sup>278</sup> The political process, the Court maintained, was better equipped to maintain those boundaries.<sup>279</sup> Federalism came roaring back several ways under the Rehnquist court. The Court articulated an anti-commandeering doctrine that prevents federal officials from forcing state and local officials to implement federal regulatory regimes.<sup>280</sup> The Court also expanded the doctrine of “sovereign immunity,” clarifying that (a) Congress cannot abrogate sovereign immunity when enacting legislation under its Commerce Clause power<sup>281</sup> and (b) sovereign immunity sometimes extends into state courts.<sup>282</sup> Further, the Court placed new limits on Congress’s ability to pass legislation under the Commerce Clause, emphasizing the importance of distinguishing what is “truly national” from what is “truly local.”<sup>283</sup> The Court also placed restrictions on the scope of Congress’s ability to enforce the Fourteenth Amendment.<sup>284</sup> Nonetheless, the Court simultaneously (and perhaps curiously) remained open to broad claims that federal law preempted various state law torts.<sup>285</sup>

In assessing this revolution, Young articulated a multi-dimensional taxonomy. Some federalism opinions emphasize “sovereignty,” whereas others focus on “autonomy.”<sup>286</sup> Some federalism opinions articulate “hard” rules that Congress cannot amend or breach, whereas others provide “soft” rules that Congress can overcome with either the right record or right set of magic words.<sup>287</sup> And some federalism opinions rest on ideas about what belongs to the states as a matter of “substance” by placing certain regulatory areas out of Congress’s reach, whereas other federalism opinions are rooted in fostering procedural norms that aim to protect states’ from thoughtless or overly-invasive intrusion.<sup>288</sup> Young privileges autonomy over unadorned sovereignty. He further contends that procedural rules offer a better approach than the dualist substantive approach. “Sovereignty,” he observes, suggests supremacy, and, as a result, the ability to flout federal norms without consequence.<sup>289</sup> Autonomy, by contrast, “emphasizes the positive use of governmental authority, rather than the unaccountability of the government itself.”<sup>290</sup>

If we are to read *Younger* as a case about autonomy rather than above-the-law-style sovereignty, one of the most important words in the opinion’s soaring rhetoric about

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<sup>278</sup> *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 550-51 (1985).

<sup>279</sup> *Id.*

<sup>280</sup> *New York v. United States*, 505 U.S. 144 (1992); *Printz v. United States*, 521 U.S. 898 (1997).

<sup>281</sup> *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996).

<sup>282</sup> *Alden v. Maine*, 527 U.S. 706 (1999).

<sup>283</sup> *United States v. Morrison*, 529 U.S. 598, 618 (2000).

<sup>284</sup> *Id.*, at 619. See also *City of Boerne v. Flores*, 521 U.S. 507 (1997). Cf. Pamela S. Karlan, *Disarming the Private Attorney General*, 2003 U. ILL. L. REV. 183, 188-93 (noting that following *Seminole Tribe v. Florida*, 517 U.S. 44 (1996), “a court that used to see the Fourteenth Amendment as a limitation on the Eleventh has come to see the Eleventh as a constraint on the Fourteenth”).

<sup>285</sup> See generally Schapiro note \_\_\_, at 113-14 (describing this paradox). Cf. Jonathan Remy Nash, *Null Preemption*, 85 NOTRE DAME L. REV. 1015 (2010) (cautioning against preemption when Congress fails to affirmatively regulate).

<sup>286</sup> Young, *supra* note \_\_\_, at 13.

<sup>287</sup> *Id.*, at 16.

<sup>288</sup> *Id.*, at 15.

<sup>289</sup> *Id.*, at 23.

<sup>290</sup> *Id.*, at 14.

federalism becomes the word “legitimate.” Federal courts should avoid interfering with the “*legitimate* activities of the States” when aiming to protect federal rights. Structural, systemic constitutional violations of the sort at the heart of this project are not legitimate because they are, by definition, illegal, immeasurably harmful, and routine.<sup>291</sup> To hold that these activities are inherently legitimate merely because States condone them would be to fully take *Younger* across the sovereignty-autonomy threshold, into the territory of virtually unreviewable sovereignty. *Younger* does not have to be read as an opinion that blocks constitutional accountability. And it ought not be read that way under the process federalism model.

### 3. Polyphonic Federalism

Another theoretical framework against which to test a new exception to *Younger* abstention is the notion of “interactive federalism” or, more specifically, “polyphonic federalism.”<sup>292</sup> Robert Schapiro has written extensively about this framework over the past two decades, with the most extended treatment coming in a 2009 book.<sup>293</sup> This approach is designed to counter what he calls dated, outmoded “dualist” conceptions of federalism. Schapiro cautions against notions of federalism that attempt to sort what is “truly national” and “truly local.” Schapiro instead emphasizes the value of multiple systems of government—state governments and the national government—speaking collectively and simultaneously. Federalism, best achieved, promotes “plurality, dialogue, and redundancy” without unduly undermining “uniformity, finality, and hierarchal accountability.”<sup>294</sup>

Schapiro’s approach, on its own terms, has direct implications in the field of federal jurisdiction generally, and federal abstention doctrine in particular. This is because Schapiro expressly promotes the view that federal and state courts both have a role in defining federal and state law, even if they sometimes disagree with one another. So long as the state and federal supreme courts have the ultimate say on state and federal law respectively, one need not worry about lower state courts deciding issues of federal law or about lower federal courts deciding issues of state law.

To the contrary, allowing multiple judicial voices on such matters may sometimes lead to the greater protection of individual rights. State courts’ jurisdictional norms are sometimes more hospitable to civil rights claims than federal courts’.<sup>295</sup> And when a plaintiff chooses to bring state constitutional claims alongside federal constitutional claims through supplemental jurisdiction, this choice of forum is worthy of respect. He notes that sometimes, federal courts abstain from answering civil rights questions, encouraging state courts to answer the state constitutional claims first. This, in his view, is a mistake, because it deprives civil rights jurisprudence of the dialogue and the

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<sup>291</sup> Cf. *Monell v. Dep’t of Soc. Servs. of City of N.Y.*, 436 U.S. 658, 700 (1978) (“[M]unicipalities simply cannot arrange their affairs on an assumption that they can violate constitutional rights indefinitely since injunctive suits against local officials under § 1983 would prohibit any such arrangement.”).

<sup>292</sup> Schapiro, *supra* note \_\_\_\_.

<sup>293</sup> *Id.*, at xii (describing prior work based on these themes).

<sup>294</sup> *Id.*, at 103.

<sup>295</sup> See generally Zachary Clopton, *Procedural Retrenchment and the States*, 106 CALIF. L. REV. \_\_\_\_ (2018) (forthcoming).

protection that comes from multiple forums. This also has the advantage of potentially reducing the rights-remedies gap that pervades federal constitutional law.

Schapiro's book does not explicitly address *Younger* abstention. And there are aspects of his theory that could be used either to buttress *Younger* or to rebut it. On the one hand, he does emphasize the importance of protecting state and local governments regulatory processes, even if we need not always defer to the outputs from that process. To the extent *Younger* is seen as allowing state judges (who are often elected) to decide matters of state and federal law in pending cases, it is potentially wholly consistent with a polyphonic approach. An injunction could deprive state courts of that role. On the other hand, to the extent *Younger* is seen as locking out federal courts' from important civil rights, leaving the federal constitutional matters exclusively or predominantly to the States in the sphere of criminal justice, *Younger* abstention starts to look both dualist and monophonic.

For the purposes of this Article, however, one need not resolve whether *Younger* is ever supportable under the polyphonic framework. The more important question really is what polyphonic federalism can teach us specifically about preventing federal courts from hearing federal claims with respect to claims of structural or systemic violations in the state forum. On that score, in my view, closing the federal courthouse door on such claims undermines "plurality, dialogue, and redundancy." This is especially true given that *Younger* abstention not only bars injunctive relief, but declaratory relief as well. If abstention doctrine forces federal courts to remain silent in the face of well-pleaded, well-documented structural and systemic violations, not only does that deprive us of plural voices from state and federal courts, it deprives us all of any untainted voice at all. It also undermines hierarchal accountability, to the extent a setting is so tainted that any hope of an appeal is illusory. How does one "appeal" an indefinite detention wherein an inmate never (or belatedly) sees a judge? Even if an appeal were available, the damage has been done. Denying federal jurisdiction in such cases would exacerbate the very rights-remedies gap that the theory of polyphonic federalism is designed to narrow.

#### 4. Reconstructed Federalism

Commentators have sometimes made efforts to reorient federalism in ways that privilege the special role the Civil War and Reconstruction Amendments played in altering the state-federal balance.<sup>296</sup> From time to time, this view makes its way into doctrine. It explains why, for example, Congress may still abrogate sovereign immunity when it is acting pursuant to its powers under Section 5 of the Fourteenth Amendment, even though it can no longer abrogate when it is acting pursuant to the Commerce Clause. The Civil War, Reconstruction, and the language of the Fourteenth Amendment furnish a

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<sup>296</sup> See Erwin Chemerinsky, *Rehabilitating Federalism*, 92 MICH. L. REV. 1333, 1340 (1994) (book review) ("[T]he Civil War and the constitutional amendments that followed it dramatically changed the conception of the relationship of the federal and state governments."); Michael Stokes Paulsen, *The Civil War as Constitutional Interpretation*, 71 U. CHI. L. REV. 691, 691 (2004) (book review) ("The outcome of *Grant v Lee* [sic] resolved the most important issue of antebellum constitutional dispute—the nature of the Union—in favor of the nationalist view of sovereignty and against the South's state-sovereignty view.").

basis for this kind of accountability in a way that, according to the Court, other constitutional grants of Congressional power do not.<sup>297</sup> But some jurists and scholars have gone further. Justice Thurgood Marshall contended that through the Fourteenth Amendment, a new document was born: “While the Union survived the civil war, the Constitution did not. In its place arose a new, more promising basis for justice and equality, the fourteenth amendment, ensuring protection of the life, liberty, and property of all persons against deprivations without due process, and guaranteeing equal protection of the laws.”<sup>298</sup>

Norman Spaulding has pushed for an active role for Reconstruction in our understanding of federalism. In a solemn 2003 award-winning Article,<sup>299</sup> Spaulding contends that the Supreme Court’s federalism jurisprudence sometimes “turns on a chillingly amnesic reproduction of antebellum conceptions of state sovereignty.”<sup>300</sup> He argues that in our system of governance, Courts have a special role in refusing to forget—or allowing others to forget—the past. “The Reconstruction Amendments... mark injustices that cannot be disowned, injustices opaquely but deliberately inscribed in the founding instrument itself, injustices that are unavoidably American—inseparable from the national body.”<sup>301</sup> Spaulding takes particular aim at decisions that restrict the scope of the Supreme Court’s Fourteenth Amendment powers. He traces ways that the Rehnquist Court’s sovereignty jurisprudence explicitly invoked “dualist sovereignty” and state’s “dignitary” interests in a manner that, in his view, are difficult to defend in a post-Fourteenth Amendment world.

Spaulding’s ask is at once simple and profoundly difficult. Simple because it demands no precise doctrinal outcomes, instead inviting us to simply remember. To never forget. And difficult still because of what he is asking America to remember: The brutality of the Middle Passage, when human beings were shipped to the United States in a manner worse than we treat animals or inanimate cargo; the institution of chattel slavery, in which “the African race had no rights that the white man was bound to respect;”<sup>302</sup> and the rape and whippings so central to that institution. This is difficult work. Even for myself as a descendant of American slaves, the temptation to censor the horror and to look away haunts. As I type this, I consider accessing a learned index of antiseptic language, and choke down the nation’s failures as they form a lump in my throat. “So massive was the failure of democracy, so abhorrent the trauma to our national conscience, our ‘constitutional faith,’ so profound the desire for the ‘savage fraternal

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<sup>297</sup> Compare *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976) (permitting Congress to abrogate sovereign immunity in a statute passed pursuant to the Fourteenth Amendment) to *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996) (disallowing abrogation in a statute passed pursuant to the Indian Commerce Clause).

<sup>298</sup> Thurgood Marshall, *Reflections on the Bicentennial of the United States Constitution*, 101 HARV. L. REV. 1, 4 (1987)

<sup>299</sup> Norman W. Spaulding, *Constitution as Countermonument: Federalism, Reconstruction, and the Problem of Collective Memory*, 103 COLUM. L. REV. 1992 (2003). The article was awarded as the Best Article by an Untenured Scholar by the American Association of Law Schools.

<sup>300</sup> *Id.* at 2015; cf. Rebecca E. Zietlow, *The New Parity Debate: Congress and Rights of Belonging*, 73 U. CIN. L. REV. 1347, 1348 (2005) (“Congress plays an irreplaceable role in the protection of individual rights, such that the inevitable result of a reduction in that institution’s power will be a rollback in the protection of rights of belonging.”).

<sup>301</sup> Spaulding, *supra*, at 2000.

<sup>302</sup> *Dred Scott v. Sandford*, 60 U.S. 393 (1857).

conflict' to end, that we began to censor, to forget, the implications of slavery, fratricide, emancipation, and reconciliation before even the first shot at Fort Sumter."<sup>303</sup>

The exception to *Younger* that I have proposed in this Article is consistent with Spaulding's Reconstructed federalism. Due to the groundbreaking work of scholars like Michelle Alexander, the link between America's abhorrent past and its troubling present is increasingly well documented and understood.<sup>304</sup> What is also understood is that the burden of America's mass-incarceration and its criminalization of poverty disproportionately fall on the backs of descendants of American chattel-slavery.<sup>305</sup> To offer access-to-federal courts when a state or local court is engaging systemic or structural constitutional violations is consistent with an ethic of remembrance.<sup>306</sup> This is all the more true given the pervasive concern the drafters of Section 1983 had about the role of state court judges in perpetuating American apartheid in the years after slavery formally ended.<sup>307</sup> As Gene Nichol has observed, "The refusal of state courts to protect the fundamental human liberties of both Unionists and the newly freed slaves was a major focus of the legislative debates on both sections one and two of the Act."<sup>308</sup>

This need not mean that federal jurisdictional doctrine dispose of *Younger* or all notions of local and state autonomy. It bears stating explicitly that nothing in this discussion supposes that federalism inherently rests on the back of antebellum notions of federalism. The point here is that an exception to *Younger* for systemic or structural constitutional violations is consistent with a wide range of conceptions of federalism, including one that remembers, rather than forgets, slavery, the Civil War, and Reconstruction.

## 5. Republican Federalism

A final federalism framework that merits discussion is one that emphasizes the relationship between federalism and republican principles like popular sovereignty and equality. Under this view, the only sovereignty that exists in our system of governance is *popular* sovereignty. Akhil Amar prominently advanced this view in now-classic Article *Of Sovereignty and Federalism*,<sup>309</sup> where he sought "to counter the Supreme Court's version of federalism and sovereignty with the framers' version—to replace 'Our Federalism' with their federalism, and government sovereignty with popular

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<sup>303</sup> Spaulding, *supra*, at 2030.

<sup>304</sup> Michelle Alexander, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010); James Forman, Jr., *Racial Critiques of Mass Incarceration: Beyond the New Jim Crow*, 87 N.Y.U. L. Rev. 21, 69 (2012)

<sup>305</sup> See generally Alexander, *supra*.

<sup>306</sup> During a recent oral argument in a case challenging a rigid bail schedule, an attorney told Judge Lee Rosenthal that many people in jail *want* to be there to access free shelter and food. Consistent with an ethos of remembrance Judge Rosenthal replied that this was "a very dicey argument to make" and noted that the idea was "reminiscent of a historical argument that people enjoyed slavery because they were afraid of the alternative." See Meagan Flynn, *Claiming Some People "Want to Be in Jail," County Loses Argument to Delay Bail Lawsuit*, HOUSTON PRESS (Feb. 9, 2017), available at <http://www.houstonpress.com/news/claiming-some-people-want-to-be-in-jail-county-loses-argument-to-delay-bail-lawsuit-9184266>.

<sup>307</sup> Gene R. Nichol, Jr., *Federalism, State Courts, and Section 1983*, 73 VA. L. REV. 959 (1987)

<sup>308</sup> *Id.*, at 974.

<sup>309</sup> Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425 (1987).

sovereignty.”<sup>310</sup> As my work makes plain, I am partial to that view. My work has also emphasized the role of “republican sovereignty” in American history and jurisprudence—a form of federalism in which self-government and egalitarianism are core principles.<sup>311</sup>

An exception to *Younger* abstention for systematic or structural constitutional violations does not undermine popular sovereignty or equality. It would provide a channel to flush out unconstitutional violations when the more common channel is clogged or corrupted. For *Younger* to clog the alternative channel would exalt a version of sovereignty that insulates the government from accountability for violating the nation’s highest republican charter. Blocking such suits would treat the State as an entity deserving of unchecked deference, rather than entity with powers that are both conferred and limited by the people themselves. It would also undermine equality by placing a burden on the poor; recent research powerfully demonstrates this group has little political power relative to their counterparts.<sup>312</sup> When this is layered with the racial dimensions of mass incarceration,<sup>313</sup> it becomes all the more apparent that my proposed exception bolsters, rather than compromises, egalitarian values.

#### IV. Implementation and Implications

This Part offers a practical account of how the proposed new exception to *Younger* would operate doctrinally, and makes the additional case that federal judges can implement the exception without any changes to existing Supreme Court doctrine. Like district court judges in the 1960’s and 1970’s, judges are equipped to deem state court proceedings inadequate; and state proceedings are not adequate when a litigant is alleging a structural or systemic violation in the state process. After outlining the scope of the exception and the manner in which it could and should be implemented, the Part then turns to some of the more theoretical implications of such an exception. By protecting against irreparable harm without unduly trampling legitimate federalism interests, the proposed exception would render *Younger* abstention itself more legitimate.

##### A. The “Structural or Systemic” Exception to *Younger* Abstention

Under extant *Younger* doctrine, federal courts should generally decline to interfere with state criminal proceedings when that state forum provides an “adequate” means to address a litigant’s federal constitutional concerns. This Article has developed the case that a structurally or systemically infirmed forum is never “adequate,” both

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<sup>310</sup> *Id.*, at 1426–27.

<sup>311</sup> See, e.g., Fred O. Smith, Jr., *Local Sovereign Immunity*, 116 COLUM. L. REV. 409 (2016); Fred O. Smith, Jr., *Awakening the People’s Giant: Sovereign Immunity and the Constitution’s Republican Commitment*, 80 FORDHAM L. REV. 1941, 1969 (2012). See also Fred O. Smith, Jr., *Due Process, Republicanism, and Direct Democracy*, 89 N.Y.U. L. REV. 582 (2014). A point of divergence in my work Amar’s is whether republican governance privileges *representative* self-government, as I have argued, or whether other forms of self-government are sufficient as well.

<sup>312</sup> Bertrall Ross & Su Li, *Measuring Political Power: Suspect Class Determinations and the Poor*, 104 CAL. L. REV. 323-391 (2016) (with Su Li)

<sup>313</sup> See generally David Cole, *No Equal Justice: Race and Class in the American Criminal Justice System* (2000).

because such a forum *is* irreparable harm and such a forum *facilitates* irreparable harm. By outlining in more rigorous detail the metes and bounds of the words “structural” and “systemic,” the aim now is to show that this exception is administrable and narrowly tailored to root out irreparable harm without unduly undermining federalism.

## 1. Structural

Federal courts need not re-invent the wheel in determining what constitutes a structural constitutional violation. The concept has already been developed in the field of criminal procedure. In the 1991 case of *Arizona v. Fulminante*, the Supreme Court considered what standard of review should govern appeals when a defendant argues that his or her confession was unconstitutionally coercive under the Fifth Amendment and, therefore, should not be admitted.<sup>314</sup> Should courts apply the standard that typically applies to federal constitutional errors, in which appellate courts determine whether an error was harmless beyond a reasonable doubt? Or should courts overturn all verdicts marred by a coercive confession? The Court held that the harmless standard applied. In doing so, the Court reasoned that automatic reversal is only appropriate with respect to “structural” errors, and, in its view, a coerced confession did not qualify. A structural error, the Court explained, is one that directly bore on the “framework within which the trial proceeds.”<sup>315</sup>

Notably, the types of constitutional errors the court had determined to be structural rest at the heart of some criminalization-of-poverty cases. For example, in *Burks v. Scott County*, a federal district court abstained under *Younger* even where one of the key allegations was that the litigants were being denied attorneys at a critical stage of a criminal trial. Under settled Supreme Court jurisprudence, this is a structural violation.<sup>316</sup> Deprivation of counsel affects a criminal proceeding’s framework in part because attorneys’ “affect whether and on what terms the defendant cooperates with the prosecution, plea bargains, or decides instead to go to trial.”<sup>317</sup>

Cases alleging that core government decisionmakers have a pecuniary interest in the outcome also raise the specter of structural error. It is well established that when a *judge* is demonstrably biased, this constitutes structural error. *Younger* doctrine already has a response for that particular error; when the state decisionmaker is partial, the forum is not adequate. What *Younger*’s judicial-bias exception does not explicitly account for, however, is when another key actor in the adversarial process has a pecuniary interest. The Supreme Court has concluded in *Young v. U.S. ex rel. Vuitton et Fils S.A.*,<sup>318</sup> and *Marshall v. Jerrico, Inc.*,<sup>319</sup> that that this can constitute a structural error as well. As the Supreme Court reasoned when determining that a prosecutor’s pecuniary interest constitutes structural error, “A concern for actual prejudice in such circumstances misses

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<sup>314</sup> *Arizona v. Fulminante*, 499 U.S. 279 (1991).

<sup>315</sup> *Id.*, at 309.

<sup>316</sup> Indeed, even the denial of counsel of choice is reversible error. *U.S. v. Gonzalez-Lopez*, 548 U.S. 140 (2006).

<sup>317</sup> *Id.*

<sup>318</sup> 481 U.S. 787, 809–12 (1987).

<sup>319</sup> 446 U.S. 238 (1980).

the point, for what is at stake is the public perception of the integrity of our criminal justice system.”<sup>320</sup>

The private probation officers in cases like *Rodriguez v. Providence Corrections Corp.* make apparent that these types concerns can infect the criminalization of poverty.<sup>321</sup> A company with a direct financial interest had a substantial (and in some instances exclusive) role in determining when a probationer: could see a judge; must take a costly and gratuitous drug tests; or would face incarceration.<sup>322</sup> The company could pay itself from the probationers’ payments before paying the courts, meaning that a person could remain indebted to the government in perpetuity even after paying more than their initial fine. The government had no interest in correcting this system, because they paid the probation company nothing. The company funded itself using a “user-funded” model. These probation officers could reasonably be classified as either quasi-prosecutors or quasi-judges given their outsized role in determining the fates of Cindy Rodriguez and others like her.<sup>323</sup> The harm wrought by such a system is difficult to quantify, and arguably impacts the perceived legitimacy of the criminal justice system.

Taken together then, an exception to *Younger* for structural violations has several advantages.<sup>324</sup> First, it would help abate the risk that federal courts would abstain from hearing cases of this kind, given that irreparable harm would otherwise continue. Second, there is already a body of law that provides guidance as to when an error is structural. Third, the notion of “structural” harm is not altogether unrelated from the concept of “irreparable harm”—a type of harm that *Younger*, by its own terms, is not supposed to stand in the way of addressing. Irreparable harm is sometimes classified as such when it is intangible or immeasurable, such that no other remedy (or in this case, forum), will adequately address the problem. The concept of structural harm is similarly designed to address serious harm that is difficult to measure, such that some other approach (like a harmless-error standard) would not resolve the core issues. The Court has concluded that denial of counsel of choice, for example, is structural in part because “[i]t is impossible to know what different choices the rejected counsel would have made, and then to quantify the impact of those different choices on the outcome of the proceedings.”<sup>325</sup>

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<sup>320</sup> *U.S. ex rel. Vuitton et Fils S.A.*, 481 U.S., at 812. Cf. Janet Cooper Alexander, *Judges’ Self-Interest and Procedural Rules: Comment on Macey*, 23 J. LEGAL STUD. 647 (1994) (noting that in the federal system, under 28 U.S.C. 455(b)(4), “[e]ven a minuscule financial interest in a case is ground for disqualification.”)

<sup>321</sup> *Rodriguez v. Providence Corrections Corp.*, No. 3:15-cv-01048 (M.D. Tenn).

<sup>322</sup> See Part II(C).

<sup>323</sup> *Id.*

<sup>324</sup> Academic critique of the structural v. harmless-error dichotomy have been prominent and sharp. See Charles J. Ogletree, Jr., Comment: *Arizona v. Fulminante: The Harm of Applying Harmless Error to Coerced Confessions*, 105 HARV. L. REV. 152 (1991) (“The opinion never clearly articulates the structure that the structural errors undermine. The structure, I assert, is the fair trial. Thus, the [decision’s] distinction can never be more than a distinction of degree.” *Id.* at 163-64. See also David McCord, *The “Trial/structural” Error Dichotomy: Erroneous, and Not Harmless*, 45 U. KAN. L. REV. 1401, 1461 (1997) (arguing that the seriousness of the error should guide whether it results in reversal); Jason S. Marks, 1993 CRIM. JUST. 2, 58 (Spring 1993) (same); Gregory Mitchell, Comment, *Against “Overwhelming” Appellate Activism: Constraining Harmless Error Review*, 82 CAL. L. REV. 1335, 1365-66 (1994) (arguing that fair process, rather than fair result, should be the lodestar). The fact that the standard may be underinclusive, however, does nothing to undermine the idea that the small class of cases labeled structural *do* cause immeasurable, intangible harm.

<sup>325</sup> *U.S. v. Gonzalez-Lopez*, 548 U.S. 140 (2006).

## 2. Systemic

In *M.D. v. Perry*,<sup>326</sup> a federal district court in the Southern District of Texas confronted youth in that State alleged widespread patterns of harms that included “repeated placements, over-medication, abuse, neglect, and deprivation of familial relationships with siblings.”<sup>327</sup> Rejecting the State’s *Younger* argument, the district court reasoned that “[the] lawsuit focuses on systemic problems and seeks systemic solutions, it would not ‘duplicate’ the individualized reviews that occur in the state courts.”<sup>328</sup>

The Fifth Circuit has limited the reach of this holding to certified class actions and foster care proceedings.<sup>329</sup> But those limitations present normative and practical challenges. First, if *Younger* blocks a suit at an early stage, then a case may never convert from a putative class to a certified class because proceedings cease. In *Burks v. Scott County*, for example, *Younger* blocked a suit where litigants challenged systemic violations in the county’s bail system even though class certification had been sought, but not yet certified.<sup>330</sup> Given that all of the claims were either stayed or dismissed, there was no opportunity to determine whether a class *should* be certified given the common facts and issues that united the parties who had allegedly experienced systemic harm. If certified class actions are sufficient to overcome *Younger*, the better course is to rule on the class certification motion before adopting or rejecting *Younger*.

Second, the Supreme Court has never adopted divergent *Younger* abstention rules predicated on the precise type of state proceeding at issue. Under the Supreme Court’s jurisprudence, either a case triggers *Younger* in light of the nature of the proceeding and the importance of the State’s interest, or it does not. As this Article has shown, systemic irreparable harm can haunt criminal justice. And while one could argue that criminal law implicates federalism interests in a uniquely important way, structural or systemic constitutional violations cause these interests to diminish or perhaps even collapse.<sup>331</sup>

The question remains, though, as to how precisely to define a “systemic” violation. *M.D. v. Perry* did not offer an express definition. In addition, unlike the word “structural,” which comes with an established set of legal principles and caselaw, this is not as true of the word “systemic.” An error could be structural—that is, presumptively harmful because it infected a proceeding’s basic framework and fundamental fairness—without amounting to a system-wide error.<sup>332</sup> For example, a prosecutor or judge could be demonstrably biased without triggering a system-wide error that applied to a broad class.<sup>333</sup> Likewise, an error can be deeply rooted, pervasive, and cause irreparable harm without belonging to the narrow class of cases current law deems “structural.” Starkly put, a “structural error” framework alone could fail to capture cases where a state or local government has constructed a modern system of debtors prisons by routinely jailing

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<sup>326</sup> *M.D. v. Perry*, 799 F. Supp. 2d 712 (S.D. Tex. 2011).

<sup>327</sup> *Id.* at 714-15.

<sup>328</sup> *Id.*, at 720-21.

<sup>329</sup> *Bice v. Louisiana Pub. Def. Bd.*, 677 F.3d 712, 720 n.8 (5th Cir. 2012).

<sup>330</sup> *Burks v. Scott County*, Mississippi, No. 3:14-cv-745-HTW-LRA, Doc. 86, (S.D. Miss. Sept. 20, 2015).

<sup>331</sup> See Part III(B).

<sup>332</sup> See, e.g., *Young v. United States ex rel. Vuitton et Fils, SA*, 481 U.S. 787 (1987) (interested prosecutor assigned to contempt charge).

<sup>333</sup> *Id.*

people who cannot pay a fine of fee without inquiring into their indigence. When these errors are routine, however, the resultant irreparable harm is demonstrable and vast.<sup>334</sup> This speaks to the need for litigants to demonstrate that a state forum is inadequate based on constitutional errors that are systemic, even when they are not structural.

How, then, does a court know whether a case presents a systemic violation? At least three legal models of systemic harm furnish administrable definitions that would improve the law of abstention. The first is the policy-or-custom approach outlined in *Monell v. Department of Social Services*,<sup>335</sup> and *Adickes v. S. H. Kress & Co.*<sup>336</sup> The Court has interpreted Section 1983 as requiring a “policy” or “custom” before a municipality can be sued. And a “policy” is generally required before a person can sue a State official in her official capacity for injunctive relief.<sup>337</sup> The policy requirement for suits against cities, in particular, is a controversial one. It not only departs from the principle of *respondeat superior*; it inoculates local governments that act negligently, defines the list of actors who can make local policy very narrowly, and sometimes leaves victims of lawless conduct with no one to hold accountable whatsoever.<sup>338</sup>

Despite its severe limitations in the context of municipal liability, the policy-or-custom approach nonetheless does provide a set of recognized legal principles aimed at determining when a government’s policy caused a violation, as distinguished from a rogue one-off. In particular, liability is permitted when: a city adopts an unconstitutional ordinance or regulation; a person with final policymaking authority commands or condones unconstitutional conduct; or when a final policymaker exhibits deliberate indifference to known or highly probably constitutional violations. A custom also triggers liability; that is, a practice so rooted in a government’s practices that it can be said to be “permanent” and “well-settled.”<sup>339</sup>

A second approach to understanding when harm is systemic is the language of “pattern or practice” that pervades American statutory law.<sup>340</sup> Under the Civil Rights Act of 1964, for example, the Attorney General may bring claims to end a “pattern or practice” of unlawful discrimination.<sup>341</sup> The key cases implementing this provision understand the phrase to reference practices that are “regular[,]” “systemwide,” and “more than the mere occurrence of isolated or ‘accidental’ or sporadic discriminatory acts.”<sup>342</sup> This comports with Senator Herbert Humprey’s description of the provision during the Congressional debates, where he explained that “a pattern or practice would be present only when the denial of rights consists of something more than an isolated, sporadic incident, but is repeated, routine, or of a generalized nature.”<sup>343</sup> In the context of discrimination, to prove pattern or practice, a plaintiff must demonstrate

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<sup>334</sup> Part III (A).

<sup>335</sup> 436 U.S. 658 (1978).

<sup>336</sup> 398 U.S. 144 (1970),

<sup>337</sup> *Ex parte Young*, 209 U.S. 123 (1908).

<sup>338</sup> See generally, Fred O. Smith, Jr., *Local Sovereign Immunity*, 116 COLUM. L. REV. 409 (2016).

<sup>339</sup> 398 U.S. 144 (1970),

<sup>340</sup> See Real Estate Settlement Procedures Act, 12 U.S.C.A. § 2605(f) (2012); 18 U.S.C.A. §§ 1961(5), 1962 (2012); Civil Rights Act of 1964 § 707, 42 U.S.C. § 2000e-6(a) (2006).

<sup>341</sup> 42 U.S.C.A. § 2000e-6 (West).

<sup>342</sup> *Int’l Bhd. of Teamsters v. United States*, 431 U.S. 324, 334–36 (1977)

<sup>343</sup> 110 CONG. REC. 14, 270 (1964).

“preponderance of the evidence that ... discrimination was the ... standard operating procedure.”<sup>344</sup>

A third paradigm is the class action framework. Rule 23 of the Federal Rules of Civil Procedure outlines requirements for bringing a class action through what a leading treatise calls “an intricate formula.”<sup>345</sup> Under Rule 23(a), a class may only be certified where: “(1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class.”<sup>346</sup> As shorthand, these four requirements are often referred to as numerosity, commonality, typicality, and adequacy.<sup>347</sup> In addition, a class action may be maintained if one of three conditions is met. First, a class action is appropriate if there is otherwise a risk of “inconsistent or varying adjudications with respect to individual class members” that would create conflicting obligations and rights for the parties. Second, “the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole.”<sup>348</sup> Or third, “the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.”<sup>349</sup>

An adoption of any of these three paradigms— policy-or-custom; pattern-or-practice; and the class action paradigm(s)— would supply reasonable and administrable proxies for whether harm is “systemic” within the meaning of this Article. Unconstitutional policies, customs, patterns, and practices could undermine a system’s perceived legitimacy and perpetuate massive dignitary harms. Indeed, the leading cases challenging the criminalization tend to plead all three paradigms. They allege unconstitutional “policies,”<sup>350</sup> “patterns and practices,”<sup>351</sup> and eligibility for class certification.<sup>352</sup>

These three paradigms are not, however, identical with respect to the factual scenarios they cover. A “policy” under *Monell* could be a one-time incident, so long as it

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<sup>344</sup> *Teamsters*, 431 U.S., at 336. One contested question is how much weight should be assigned to evidence of a pattern or practice when an individual sues (rather than the government or a class). David J. Bross, *The Use of Pattern-and-Practice by Individuals in Non-Class Claims*, 28 NOVA L. REV. 795, 804 (2004).

<sup>345</sup> *Introduction: definiteness and membership*, NEWBERG ON CLASS ACTIONS § 3:1 (5th ed.)

<sup>346</sup> Fed. R. Civ. P. 23.

<sup>347</sup> *Id.*

<sup>348</sup> *Id.*

<sup>349</sup> *Id.*

<sup>350</sup> *See, e.g.*, Cain v. New Orleans Case No. 2:15-cv-04479, Doc.1, 26 (“Complaint”) (E.D. La. Sept. 25, 2015) (“Pursuant to Collections Department policy and practice, no inquiry is ever made into a person’s ability to pay, even when former defendant debtors are known to be indigent.”).

<sup>351</sup> *Id.*, at 20-21. (“The Plaintiffs and many other witnesses have, in recent months and years, observed numerous other indigent New Orleans residents jailed as a matter of pattern and practice by the Collections Department. These residents are kept in jail for non-payment of debts without an inquiry into their ability to pay...”)

<sup>352</sup> *Id.*, at 29. (“A class action is a superior means, and the only practicable means, by which Plaintiffs and unknown Class members can challenge the Defendants’ unlawful debt-collection scheme.”)

was a final policymaker that condoned it. For example, it would constitute a “policy” for a city to pass an ordinance or regulation that purported to single out one resident and deny her, and her alone, a constitutionally mandated hearing of some sort.<sup>353</sup> But such an ordinance would not arise to a “pattern or practice” of constitutional violations, nor would such a scenario satisfy the numerosity requirement under the class-action paradigm. In other ways, however, a policy is narrower than a “pattern or practice.” The civil rights workers in *Dombrowski*,<sup>354</sup> who routinely and regularly were subjected to searches and prosecutions, may well have been able to prove a pattern or practice. But in the absence of evidence of involvement or deliberate indifference from final policymakers, these actions would not arise to a municipal “policy.”

Beyond this divergent coverage, the three paradigms have received varied reception from commentators and jurists. As observed, the stringent policy-or-custom requirement has been oft-criticized by scholars in the context of governmental liability, including by myself.<sup>355</sup> Four justices once suggested that the approach should be abandoned altogether in favor of respondeat superior.<sup>356</sup> Further, the Court’s crabbed approach to understanding Rule 23 has also met a chilly reception from commentators.<sup>357</sup> By contrast, while there is controversy related to the evidentiary value of patterns and practices when an individual (rather than group or government) sues her employer,<sup>358</sup> there does not appear to be controversy about its scope.

Still, one advantage of the class-action approach over the pattern-or-practice approach is that it already has a foothold in the Fifth Circuit, which has acknowledged that *Younger* abstention may potentially be inappropriate with respect to *certified* class actions.<sup>359</sup> What is more, “certified class actions” already form a well-known exception in the world of federal courts; certified class actions can survive under Article III even where a lead plaintiff’s claims become moot.<sup>360</sup>

Given the divergent scope and nature of these three approaches, perhaps the soundest understanding of systemic harm is one that captures all three. Systemic harm is present where a state’s process is characterized by: (1) unconstitutional policy, custom, pattern, or practice; or where (2) constitutional errors give rise to a properly certified

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<sup>353</sup> Owen v. City of Independence, 445 U.S. 622 (1980).

<sup>354</sup> Dombrowski v. Pfister, 380 U.S. 479, 485-86 (1965).

<sup>355</sup> See Smith, *Local Sovereign Immunity*, supra note \_\_, at n. 41-42 (collecting criticisms).

<sup>356</sup> Bryan Cty. v. Brown, 520 U.S. 397, 430-37 (1997) (Breyer, J., dissenting); id. at 416, 429-30 (Souter, J., dissenting).

<sup>357</sup> See, e.g., Bernadette Bollas Genetin, *Back to Class: Lessons from the Roberts Court Class Action Jurisprudence*, 48 AKRON L. REV. 697, 702–703 (2015) (discussing the author’s and other scholars’ view of the Roberts Court’s “restrictive approach to class certification under Rule 23”); A. Benjamin Spencer, *Class Actions, Heightened Commonality, and Declining Access to Justice*, 93 B.U. L. REV. 441 (2013); see also Richard D. Freer, *Front-Loading, Avoidance, and Other Features of the Recent Supreme Court Class Action Jurisprudence*, 48 AKRON L. REV. 697, 723 (2015) (describing the non-plaintiff-friendly nature of recent Supreme Court class action jurisprudence); see generally Robert H. Klonoff, *The Declien of Class Actions*, 90 WASH. U. L. REV. 729 (2013) (describing various courts’, including the Supreme Court’s, limitations on class action lawsuits). Cf. Robert H. Klonoff, *Class Actions Part II: A Respite from the Decline*, 92 NYU L. REV. . \_\_ (2017) (observing a decline in hostility toward class actions in eight-member Court).

<sup>358</sup> David J. Bross, *The Use of Pattern-and-Practice by Individuals in Non-Class Claims*, 28 NOVA L. REV. 795, 804 (2004).

<sup>359</sup> Bice v. Louisiana Pub. Def. Bd., 677 F.3d 712, 720 n.8 (5th Cir. 2012).

<sup>360</sup> Sosna v. Iowa, 419 U.S. 393, 402-03 (1975).

class action. As observed, however, if certified class actions are an exception to *Younger*, it is important that judges consider class certification motions before dismissing or staying proceedings under *Younger* when no other exception to *Younger* is present (i.e., bias; bad faith; patent unconstitutionality; structural violations; and systemic policies, customs, patterns, or practices). After all, a class certification proceeding and motion, in and of itself, represents no apparent, immediate interruption to an ongoing state criminal proceeding.

### 3. Balancing-Test Alternative

Commentators have sometimes advocated a balancing approach to *Younger* abstention with less specificity than what the Article is advocating. Under this approach, courts should balance federalism interests and the plaintiffs' interests in order to achieve an equitable outcome. Steven Calabresi and Gary Lawson are among those who have argued for such (re)balancing. As an initial matter, they note that federalism interests could sometimes weigh in favor of an injunction. "Federalism, after all, has both a localist and a nationalist dimension. Arguments for a state's autonomy and ability to carry out judgments with certainty and finality can be countered by equally compelling arguments for national supremacy and the need for federal protection of federal statutory and constitutional rights."<sup>361</sup> A careful balance of federalism and other equitable considerations "will undoubtedly be far narrower than the existing *Younger* doctrine."<sup>362</sup> This is especially true, in their view, given that Section 1983 authorizes injunctions and against state actors.<sup>363</sup>

Nothing in this Article is intended to suggest that, at a macro-level, balancing federalism and equity could not lead to other exceptions beyond the narrow one articulated in this project. Further, at the micro-level, courts retain the authority to decide that state court forums are not adequate, notwithstanding whether a case falls into one of the explicitly enumerated, including the one advocated for here. The point is that under current doctrine, courts are sometimes treating the *Younger* issue as a far more serious barrier than it ought be in light of systemic and structural procedural errors, or worse, they are adopting *Younger* abstention notwithstanding these errors. A clear exception for systemic or structural errors reduces the likelihood of such outcomes.

### 4. The Floodgates Objection

On the opposite end of the spectrum, a skeptic of this Article's proposal could argue that an exception for systemic or structural constitutional violations might either overburden federal courts, or result in so much liability that state courts would be routinely interrupted. One might broadly cite *O'Shea v. Littleton* for such a principle.<sup>364</sup> In that case, the Court declined to issue a broad injunction against municipal court judges

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<sup>361</sup> Steven G. Calabresi, *Equity and Hierarchy: Reflections on the Harris Execution*, 102 YALE L.J. 255, 264 (1992).

<sup>362</sup> *Ibid.*

<sup>363</sup> *Mitchum v. Foster*, 407 U.S. 225 (1972).

<sup>364</sup> *O'Shea v. Littleton* 414 U.S. 488 (1974).

who purportedly, on average, issued harsher terms to black defendants than white ones. Would an exception for systemic and structural violations undo *O’Shea*, and place federal courts into the constantly superintending state courts based on nebulous and broad allegations? This outcome seems unlikely not only because the terms of my proposed exception are defined rather narrowly, but also because in the post-*O’Shea* era, at least three doctrines have emerged that should abate that concern.

First, *O’Shea* was decided before *Monell* and its progeny. As observed, *Monell* makes plain that a plaintiff may not sue a local government unless a municipal policy has caused the violation.<sup>365</sup> Courts have defined the term “policy” so narrowly that the doctrine, especially when individualized immunities are taken into account, leaves some victims of lawless conduct with no one to hold accountable. I have called this area of law “local sovereign immunity,” in light of its ideological underpinnings and functional effects.<sup>366</sup> Further, in *Los Angeles v. Humphreys*, the Court held that these rules not only apply to monetary damages, but to claims for injunctive relief as well.<sup>367</sup> Given that these rules already make it exceptionally difficult to get relief against local governments (and local officials in their official capacity), the concern about floodgates of *unwarranted* liability seems misplaced.

Second, *O’Shea* was decided before the famous, albeit controversial, case of *Los Angeles v. Lyons*.<sup>368</sup> In *Lyons*, the court held for the first time that even where a plaintiff had a viable damages claim, Article III of the United States Constitution bars injunctive relief unless the plaintiff can show that he or she is highly likely to be injured in the future.<sup>369</sup> This ruling alone would prevent prospective relief cases like *O’Shea* where the plaintiffs had *formerly* been in the criminal justice system, even if the *O’Shea* plaintiffs had been able to establish a damages claim.

Third, pleading requirements have become more onerous in recent years, in ways that are also famous and controversial.<sup>370</sup> In *Bell Atlantic Corp. v. Twombly*,<sup>371</sup> the Court held that under Rule 8(a), litigants must plead facts that demonstrate *plausible* entitlement to relief.<sup>372</sup> In *Ashcroft v. Iqbal*,<sup>373</sup> the Court reaffirmed this view of Rule 8(a) in a constitutional civil rights case. A complaint must “state a claim to relief that is plausible on its face.”<sup>374</sup> This means that to survive a motion to dismiss, a plaintiff must

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<sup>365</sup> *Monell*, 436 U.S. 658.

<sup>366</sup> See Smith, *supra* note \_\_\_\_

<sup>367</sup> *Los Angeles County v. Humphries*, 562 U.S. 29 (2010).

<sup>368</sup> *Los Angeles v. Lyons*, 461 U.S. 95 (1983).

<sup>369</sup> *Id.*

<sup>370</sup> See, e.g., A. Benjamin Spencer, *Pleading and Access to Civil Justice: A Response to Twiqbal Apologists*, 60 UCLA L. REV. 1710, 1739 (2013) (describing the response to *Iqbal* and *Twombly* as an “uproar,” and listing critics); Steve Subrin, *Ashcroft v. Iqbal: Contempt for Rules, Statutes, the Constitution, and Elemental Fairness*, 12 NEV. L.J. 571, 571 (2012) (“calling *Iqbal* “an embarrassment to the American Judicial System”); Arthur R. Miller, *From Conley to Twombly to Iqbal: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1, 15 & n.52, 16 (2010) (identifying observers who “believe these two cases represent a major departure from the Court’s established pleading jurisprudence”).

<sup>371</sup> 550 U.S. 544, 554-55, 560-61 (2007).

<sup>372</sup> A. Benjamin Spencer, *Understanding Pleading Doctrine*, 108 MICH. L. REV. 1, 4 (2009) (“In *Twombly*, the Court reinterpreted Rule 8 as requiring allegations that show a plausible entitlement to relief, a feat accomplished by offering substantiating facts that move liability from a speculative possibility to something that discovery is reasonably likely to confirm.”)

<sup>373</sup> *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

<sup>374</sup> *Id.*, at 678 (internal citations omitted).

“plead[] factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.”<sup>375</sup> “Where a complaint pleads facts that are merely consistent with a defendant’s liability, it stops short of the line between possibility and plausibility of entitlement to relief.”<sup>376</sup>

To survive motions to dismiss, plaintiffs are necessarily alleging sufficient facts to render their claims of government abuse plausible. The litigants’ complaint against New Orleans was 44 pages;<sup>377</sup> Ferguson, 55 pages;<sup>378</sup> Jennings, Missouri, 62 pages;<sup>379</sup> and so on. All of these complaints replete with detail about the systemic and structural constitutional violations the plaintiffs suffered. If an express exception to *Younger* for systemic or structural constitutional violations opens the door to more cases, it is only because there are other places where people can plausibly allege that these schemes are causing them unconstitutional systemic or structural harm.

Fourth, nothing in this Article supports the view that, as matter of routine, those facing prosecution could have access to federal courts every time they experiences a routine constitutional violation during the course of a trial. Losing an objection about whether to admit a confession or piece of evidence—even a meritorious objection—does not arise to the type of structural or systemic violation described in this Article. State court judges would have control over their docket in the run-of-the-mill case. And the *Younger* compromise would remain intact in the vast majority of cases. Only a constitutional error is structural or systemic would upset this compromise.

## 5. Beyond Abstention: Revisiting *Preiser*’s Dimensions

In *Preiser v. Rodriguez*, the United States articulated another judge-made barrier to liability.<sup>380</sup> A person convicted of a crime may not seek an injunction under Section 1983 that reduces the duration of her confinement.<sup>381</sup> Such a person must instead rely on federal habeas for relief. The Court later expanded this rule to damages claims as well; a person may not seek Section 1983 relief that necessarily invalidates her conviction or results in her speedier release.<sup>382</sup> The distinction between Section 1983’s cause of action and federal habeas’ is important because while Section 1983 does not require plaintiffs to exhaust state law remedies, federal habeas statute do. Under the *Preiser* rule, a plaintiff must rely on habeas and therefore exhaust state law remedies if she is a prisoner challenging the fact or duration of their confinement.<sup>383</sup> The Court adopted this rule a mere two years after *Younger*, and was born of the same concerns. “The rule of exhaustion in federal habeas corpus actions is rooted in considerations of federal-state

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<sup>375</sup> *Id.*

<sup>376</sup> *Id.* (internal citations omitted)

<sup>377</sup> *Cain v. New Orleans*, Case 2:15-cv-04479-SSV-JCW Document 7 Filed 09/21/15. ED Louisiana

<sup>378</sup> *Fant v. Ferguson*, Case: 4:15-cv-00253 Doc. #: 1 Filed: 02/08/15 Page: 1 of 55 ED missouri

<sup>379</sup> *Jenkins v. Jennings* : 4:15-cv-00252 Doc. #: 1 Filed: 02/08/15 Page: 1 of 62 ED Missouri #: 1

<sup>380</sup> *Preiser*, 411 U.S. 475.

<sup>381</sup> *Id.* This exception has at least one implied statutory exception. A judge may order release as one of the terms of a prison-overcrowding injunction under limited circumstances. *See generally* *Brown v. Plata*, 563 U.S. 493 (2011).

<sup>382</sup> *Heck v. Humphrey*, 512 U.S. 477, 486-87 (1994).

<sup>383</sup> *Id.*

comity. That principle was defined in *Younger v. Harris*, as ‘a proper respect for state functions,’ and it has as much relevance in areas of particular state administrative concern as it does where state judicial action is being attacked.”<sup>384</sup>

Because judicially-enforced conceptions of federalism and comity motivate *Younger* and *Preiser* alike, it bears serious consideration whether habeas’s exhaustion requirement, too, should be tempered with an exception for structural or systemic constitutional violations. That question is beyond the scope of this project, but to the extent an appellate process or collateral-review procedures are themselves marred by structural or systemic constitutional violations, an exception in that context has surface level appeal. This is especially true given that *Preiser* states that “[r]equiring exhaustion in situations like that before us means, of course, that a prisoner’s state remedy must be adequate and available.”<sup>385</sup> The word “adequate”—upon which *Younger* abstention’s generally exceptions stand—is at least nominally a safety valve in the context of *Preiser* as well. As complicated *Preiser* questions stalk cases seeking to redress the criminalization of poverty,<sup>386</sup> the applicability of this exception in the context of exhaustion deserves further consideration from courts and commentators alike.

### B. *The Role of District Courts*

Implementing this exception to *Younger* requires no change in doctrine from the United States Supreme Court. District Courts may adopt this exception, and some already have either explicitly or implicitly to varying degrees.<sup>387</sup> Unlike the days of the three-judge panels in civil rights cases that were immediately appealable to the Supreme Court, it will likely take some time for such an exception to make its way to consideration at One First Street. Judge John Minor Wisdom could argue for a bad-faith exception on a three-judge district court panel in 1964,<sup>388</sup> and watch it become the national norm by 1965.<sup>389</sup> Judges Rives, Johnson, and Varner could assert a bias exception in 1971,<sup>390</sup> and watch it become nationally binding law in 1973.<sup>391</sup> Judge Tuttle could require timely hearings as a precondition to *Younger* in 1973,<sup>392</sup> and see it adopted by the Supreme Court in 1975.<sup>393</sup>

Because three-judge panels were more common, and because the Supreme Court had direct so-called mandatory jurisdiction over these claims, there was swift, frequent dialogue between the United States Supreme Court and the courts on the front lines of civil rights in the American South. And when the Supreme Court adopted exceptions

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<sup>384</sup> *Preiser*, 411 U.S., at 491 (citing *Younger*, 401 U.S., at 44.)

<sup>385</sup> *Id.*, at 493.

<sup>386</sup> *Walker v. City of Calhoun*, Case No. 4:15-CV-0170-HLM, Doc. 40 (Order Granting Preliminary Injunction) (N.D. Ga., Jan. 28, 2016); *Cain v. City of New Orleans*, Case No. 2:15-cv-04479-SSV-JCW Doc. 52-1 (“Motion to Dismiss”) (E.D. La., Nov. 2, 2015)

<sup>387</sup> *Cf.* Pamela Bookman and David Noll, *Ad Hoc Procedure*, 92 N.Y.U. L. REV. \_\_\_\_ (2017) (observing ways that courts and legislatures engage in innovative approaches to balancing access-to-courts and pragmatic docket-based concerns).

<sup>388</sup> *Dombrowski v. Pfister*, 227 F. Supp. 556 (E.D. La. 1964), rev’d, 380 U.S. 479 (1965).

<sup>389</sup> *Dombrowski v. Pfister*, 380 U.S. 479, 485 (1965).

<sup>390</sup> *Berryhill v. Gibson*, 331 F. Supp. 122, 126 (M.D. Ala. 1971).

<sup>391</sup> *Gibson v. Berryhill*, 411 U.S. 564, 570-71 (1973).

<sup>392</sup> *Pugh v. Rainwater*, 483 F.2d 778, 782 (5th Cir. 1973).

<sup>393</sup> *Gerstein v. Pugh*, 420 U.S. 103, 111 (1975).

articulated by the judges on the front lines, they did so with an appreciation for the particular expertise district courts by virtue of their proximity to unconstitutional schemes that unfold. “As remote as we are from the local realities underlying this case,” the Supreme Court observed in *Berryhill*, the Court observed that it was “very likely that the District Court has a firmer grasp of the facts and of their significance to the issues presented.”<sup>394</sup> Today’s inter-level dialogue is undoubtedly less frequent and more muted than it was under the old system. Nonetheless, district courts maintain their vital role as in shaping the contours of *Younger*’s crucial safety valves when irreparable harm would otherwise erupt or persist.

Two district courts have served that role in articulating a “systemic” exception to *Younger*.<sup>395</sup> Judge Lee Rosenthal’s groundbreaking opinion on *Younger* abstention in a recent case in the Southern District of Texas stops short of that, but an exception for either systemic or structural violations is perhaps implicit in her reasoning as well. In that case, indigent men and women challenge the fact they have been jailed due to their inability to pay bail. Rejecting the government’s argument that the case should be dismissed on *Younger* grounds, she held that the “adequacy” requirement of *Younger* was “not met.” She observed that “the adequacy of a timely hearing, is precisely what the plaintiffs are challenging in this case,” and thus “[t]o find that the plaintiffs have an adequate hearing on their constitutional claim in state court would decide the merits.” This reasoning was reminiscent of the Supreme Court’s opinion in *Berryhill* when the court adopted a bias exception to *Younger*: “[t]he adequacy of the administrative remedy, an issue which under federal law the District Court was required to decide, was for all practical purposes identical with the merits of appellees’ lawsuit.”<sup>396</sup>

Judge Rosenthal’s reasoning is a proverbial stone’s throw from what the exception advanced in this Article, and has laid the groundwork for relief that has been influential far beyond Houston. *Younger* doctrine should end a suit only when a state proceeding furnishes an adequate forum to raise the federal constitutional claims. Some forums are not adequate, in part for reasons like untimeliness. How do we *know* that forum is adequate? What principle renders inadequate a system that provides for untimely hearings or a forum that is biased? This Article has advanced the view that an answer is the systemic and structural nature of these violations. The doctrine of *Younger* abstention would improve if it included an explicit recognition that a systemically or structurally infirm process *is* inadequate because it constitutes irreparable harm, and perpetuates irreparable harm.

### C. Theoretical Implications: Abstention’s Legitimacy

The themes, cases and principles that animate this Article also have implications for one of the most prominent questions in the literature on federal jurisdiction: Is abstention legitimate? This final sub-part outlines the contours of that academic

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<sup>394</sup> *Id.*, at 579.

<sup>395</sup> *M.D. v. Perry*, 799 F. Supp. 2d 712 (S.D. Tex. 2011); *Tinsley v. McKay*, No. CV-15-00185-PHX-ROS, 2015 WL 9690914, at \*13 (D. Ariz. Sept. 29, 2015).

<sup>396</sup> *Id.*, at 575.

discussion, and offers preliminary thoughts as to how this Article interacts with that debate.

Just shy of two centuries ago, Chief Justice John Marshall announced an oft-repeated conception of federal jurisdiction. In the case of *Cohens v. Virginia*, a unanimous Court declared that federal courts have “no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given.”<sup>397</sup> As some scholars have noted, this understanding of federal jurisdiction has an uneasy relationship with self-imposed doctrines of judicial restraint. Such doctrines include those that courts label “abstention;” there are a set of circumstances in which federal courts abstain from hearing cases due to federalism principles. The role and parameters of *Younger* abstention have been established, but there are others. Under the doctrine of *Thibodaux* abstention, for example, guards against deciding cases sounding in diversity jurisdiction where the underlying state law implicates core aspects of state sovereignty.<sup>398</sup> Under the doctrine of *Pullman* abstention, federal courts should abstain from deciding questions of federal constitutional law if the resolution of an ancillary state law question would obviate the need to reach the constitutional question.<sup>399</sup>

Because courts generally describe these doctrines as self-imposed doctrines of judicial restraint, the legitimacy of abstention doctrines have accordingly long faced academic scrutiny. Most prominently, in 1984, Martin Redish argued abstention is illegitimate. He reasoned that, absent an unconstitutional law, the American legal system equips elected representatives, not judges, with the decision to decide whether that law should take effect.<sup>400</sup> No one would argue that courts could declare a constitutionally sound grant of jurisdiction entirely void, he noted. As such, refusing to exercise jurisdiction is tantamount to partially reversing a statute without warrant.

David Shapiro disagreed. He argued that courts regularly employ self-imposed limitations on judicial power in a wide range of circumstances for reasons of justifiability, exhaustion, and abstention. This type of restraint had “ancient and honorable roots at common law as well as in equity.”<sup>401</sup> As such, “far from amounting to judicial usurpation, open acknowledgment of reasoned discretion is wholly consistent with the Anglo-American legal tradition.”<sup>402</sup> Indeed, a “rush to judgment, in the absence of a sufficiently concrete and immediate controversy, may unduly shorten the time between enactment and adjudication or may unduly broaden the questions held appropriate for decision.”<sup>403</sup>

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<sup>397</sup> *Cohens v. Virginia*, 6 Wheat. 264, 404 (1821); see also *New Orleans Pub. Serv., Inc. v. Council of New Orleans*, 491 U.S. 350, 358-59 (1989) (“Our cases have long supported the proposition that federal courts lack the authority to abstain from the exercise of jurisdiction that has been conferred.”); *Chicot County v. Sherwood*, 148 U.S. 529, 534 (1893) (“[T]he courts of the United States are bound to proceed to judgment and to afford redress to suitors before them in every case to which their jurisdiction extends. They cannot abdicate their authority or duty in any case in favor of another jurisdiction.”) (citations omitted); *Willcox v. Consolidated Gas Co.*, 212 U.S. 19, 40 (1909) (“When a Federal court is properly appealed to in a case over which it has by law jurisdiction, it is its duty to take such jurisdiction.... The right of a party plaintiff to choose a Federal court where there is a choice cannot be properly denied.”)

<sup>398</sup> *Louisiana Power & Light Co. v. City of Thibodaux*, 360 U.S. 25 (1959).

<sup>399</sup> *Railroad Commission v. Pullman Co.*, 312 U.S. 496 (1941)

<sup>400</sup> *Id.*

<sup>401</sup> *Id.* at 544.

<sup>402</sup> *Id.* at 545.

<sup>403</sup> *Id.*

Among the most recent entrants in this debate is the Richard Fallon, who recently contended in a short essay that abstention is legitimate because it has achieved general acceptance.<sup>404</sup> Understanding this thesis in context requires consulting his earlier work, which offers one of the leading accounts of constitutional legitimacy.<sup>405</sup> He argues that questions of constitutional legitimacy take place on a range of axes and that it is important to disaggregate them. While “minimal legitimacy” turns on whether a constitution is sufficient to pass a certain threshold of acceptance or acceptability, claims about “ideal legitimacy” turn on the whether a constitution has achieved the best norms on matters such as democratic assent.<sup>406</sup> While substantive legitimacy turns on the content of legal provisions and related decisions, procedural legitimacy focuses on the manner in which a constitution comes into force.<sup>407</sup> Further, while legal legitimacy may turn on whether a document or legal doctrine is deeply accepted as a matter of practice, sociological legitimacy turns on a document or doctrine’s broader acceptance beyond legal actors.<sup>408</sup>

The application of *Younger* abstention in civil rights cases like those described in this Article complicates the binary nature of poles like “procedural” and “substantive,” or even “minimal” and “ideal.” If *Younger* abstention unduly obstructs constitutional rights and facilitates irreparable harm, this raises questions about the substantive legitimacy of a procedural doctrine. As Daniel Meltzer observed, “there is reason to doubt that ‘the central problems for constitutional law . . . are issues of the definition of rights rather than the creation of a machinery of jurisdiction and remedies that can transform rights proclaimed on paper into practical protections.’”<sup>409</sup> Further, there is a continuum between the minimal and the ideal. Even if we cannot yet say that *Younger* abstention fails to meet a threshold of minimal legitimacy, the doctrine is sliding in that direction if it prevents plaintiffs from challenging systemic and structural constitutional violations in an adequate forum. A doctrine need not cross into illegitimacy overnight.

This Article raises questions about *Younger* abstention’s *declining* legal and sociological legitimacy in the absence of the types of safety valves advanced in this Article. As a legal matter, the criminalization of poverty—that is, jailing or punishing someone because they cannot afford to pay a fine or fee—violates well-established law. In the set of cases discussed this Article, every court to have addressed the merits (as opposed to jurisdictional hurdles) has concluded that these practices are unconstitutional. Further, one of the leading institutional legal actors in the United States today—the American Bar Association—has filed amicus briefs challenging the legality of various schemes that jail or punish people for being poor.<sup>410</sup> Relegating these claims to

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<sup>404</sup> Richard H. Fallon, Jr., *Why Abstention Is Not Illegitimate: An Essay on the Distinction Between “Legitimate” and “Illegitimate” Statutory Interpretation and Judicial Lawmaking*, 107 Nw. U. L. Rev. 847 (2013).

<sup>405</sup> Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787, 1794-1801 (2005).

<sup>406</sup> *Id.*, at 1806.

<sup>407</sup> *Id.*, at 1829.

<sup>408</sup> 1842-43.

<sup>409</sup> Daniel J. Meltzer, *Deterring Constitutional Violations by Law Enforcement Officials: Plaintiffs and Defendants As Private Attorneys General*, 88 COLUM. L. REV. 247, 282 (1988).

<sup>410</sup> *Walker v. City of Calhoun, No.*, 16-10521 (“Amicus Brief on Behalf of the American Bar Association”) (11th Cir., Oct. 4, 2016); *Walker v. City of Calhoun, No.*, 16-10521 (“Amicus Brief on Behalf of the United States”) (11th Cir., Aug. 18, 2016).

structurally infirm forums would create or widen a lacuna between the scope of *Younger* abstention and these leading institutional actors. Perhaps this would be justified in the presence of countervailing legal norms, such as federalism. But as observed, ignoring structural and systemic federal constitutional violations under these circumstances does not advance federalism.<sup>411</sup> This restraint may well undermine federalism.

As a sociological matter, the continual criminalization of poverty through structurally or systemically unjust practices creates the risk that Americans—especially poor Americans of color—might lose faith in the nation’s legal institutions in the absence of procedural justice. As documented in Part III, when a sense of procedural fairness is illusory, this fosters a sense of second-class citizenship; increases the likelihood people will fail to comply with the legal directives; and induces anomie in some groups that renders them with a sense of statelessness. Which of these three harms is more substantial is an ongoing debate among sociological and psychological experts. But none of these harms is a risk that crafters of legal doctrine should ignore if the architecture of constitutional practice is to remain sound. Surely the law cannot label as “adequate” the kinds of municipal courts documented in Ferguson by the Department of Justice. That is, courts that jail poor people (sometimes indefinitely) for debts without inquiring into indigence, without counsel, and sometimes with no timely hearing at all.<sup>412</sup>

This discussion is not intended to provide a comprehensive account of what the criminalization of poverty can teach about abstention’s legitimacy. It remains true that Congress has permitted doctrines like abstention to go unabated and unedited, lending an important layer of democratic legitimacy to abstention doctrines. Still, these facts do remind that legitimacy need not be conceived of as an on-off switch. Even if abstention remains across some threshold of democratic, legal, and sociological legitimacy, it is cause for concern if the doctrine is inching closer to the barely legitimate minimum, and further from our ideal. The procedural bar against federal suits that would disrupt state criminal proceedings was never designed to disempower federal courts where irreparable constitutional harm would otherwise follow. Neither law nor logic requires federal courts to stand by idly as people suffer one of the most irreparable injuries of all: a crisis of faith in the very institutions that purport to protect them.

## Conclusion

*The caged bird sings with a fearful trill/ of things unknown but  
longed for still/ and his tune is heard on the distant hill/ for the  
caged bird sings of freedom.*

-Maya Angelou, Caged Bird

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<sup>411</sup> See Part III(B).

<sup>412</sup> Dept. of Justice, CIVIL RIGHTS DIV., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 47, 55 (2015) (Ferguson Report), online at [https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson\\_police\\_department\\_report.pdf](https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf).

450,000. On any given day, about 450,000 Americans are in county and local jails awaiting trial.<sup>413</sup> Some have economic means, and can pay a small fixed bail amount for a misdemeanor, pay a fine, and go on with their lives, shaken by the experience of being behind bars, but not irrevocably pulled into a cycle of “cages”<sup>414</sup>—both real and metaphorical. Others meet a different fate. Some remain in jail for days or weeks while waiting to see a judge. Away from their families. Away from their hourly wages. Away from their lives. Others remain there considerably longer, because even when they do see a judge, there is no attention paid to their indigence or to whether a bail amount is so high that they cannot afford to actually purchase their re-entry into the free world. To plead guilty might mean freedom in the way of “time-served.” But these convictions come with life-long consequences. These convictions also sometimes come with fines and fees that poor people cannot afford to pay. Failure to pay sparks new arrests. And the cycle starts anew.

Americans who are in this cycle are lifting their voice and singing by way of the vociferous chants and marches that seem to erupt each summer in cities from Ferguson to Baltimore to Baton Rouge. Some are allegorically singing “redemption songs”<sup>415</sup> by way of federal suit in the form of complaints and testimony. The question is whether “Our Federalism” is capacious enough to hear them. It should be. *Younger* abstention need not and should not block their access to federal court. When there are structural or systemic constitutional flaws built into in a state’s procedural apparatus, federalism interests diminish. And the risk of irreparable harm is grave. The abstention doctrine has traditionally been flexible enough to correct this kind of irreparable harm. It is time to ensure that it remains so. No one should be in jail or punished because she is poor.

*A free bird leaps on the back of the wind/ and floats downstream  
till the current ends/ and dips his wing in the orange sun rays/ and  
dares to claim the sky.*<sup>416</sup>

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<sup>413</sup> Gouldin, *supra* \_\_\_\_, at 837.

<sup>414</sup> The language of “cages” is used in the litigants’ complaints. *See, e.g.*, Cain v. City of New Orleans, No. 2:15-cv-04479, Doc. 1, 20 (E.D. La., Sept. 17, 2015) (“Complaint”) (“The City of Ferguson locked Mr. Morris in a cage because he failed to pay fines and costs associated with violations of a municipal ordinance that purports to prohibit people from having friends, relatives, or romantic partners stay overnight in their homes without naming the person on a written document in advance.”)

<sup>415</sup> Lea Vandervelde employs this metaphor in a recent book about slaves suing for freedom in state courts before Dred Scott. REDEMPTION SONGS: SUING FOR FREEDOM BEFORE DRED SCOTT (2014).

<sup>416</sup> Maya Angelou, *Caged Bird*.