DISTRIBUTED FEDERALISM: THE TRANSFORMATION OF *YOUNGER*

Anne Rachel Traum†

For decades federal courts have remained mostly off limits to civil rights cases challenging the constitutionality of state criminal proceedings. Younger abstention, which requires federal courts to abstain from suits challenging the constitutionality of pending state prosecutions, has blocked plaintiffs from bringing meritorious civil rights cases and insulated local officials and federal courts from having to defend against or decide them. Younger's reach is broad. It has forced political protestors (from the Vietnam era to Black Lives Matter) to challenge the constitutionality of their arrests and prosecutions within their state criminal proceedings. The doctrine also has made it difficult to challenge in federal court the constitutionality of serious, routine, and widespread practices impacting indigent criminal suspects and defendants. Only recently have civil rights litigants dared to test Younger. And, lo and behold, federal courts are pivoting away from Younger abstention, granting relief in some cases, and opening the possibility that federal courts could become an important venue for criminal justice reform.

This Article argues that courts are rejecting Younger abstention and instead distributing federalism concerns throughout the litigation. This "distributed federalism" approach was modeled decades ago in Gerstein v. Pugh, which powerfully showed that by rejecting Younger abstention, federal courts do not reject federalism. Today federalism is baked into the civil procedure infrastructure and courts' reluctance—institutional, doctrinal, and federalism-based—to order injunctive relief against state courts. As litigants get past Younger abstention, the new battleground will be the degree to which federalism shapes the scope of constitutional rights and injunctive and declaratory relief. In this new terrain, Younger's noninterference principle will transform from an abstention doctrine to a remedial tool that helps courts justify the manner and degree of relief that will protect individual rights in state criminal proceedings.

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† Professor of Law, University of Nevada, Las Vegas. Thanks to Fred Smith, Charlie Gerstein, Richard Fallon, Daryl Levinson, Bret Birdsong, Eve Hanan, and participants at the Southwest Criminal Law Workshop, including Daniel Epps, Daryl Brown, Barbara Fedders, Jack Chin, and Carissa Hessick. Esteban Hernandez and Dallas Anselmo provided valuable research assistance and the UNLV William S. Boyd School of Law provided financial support for this project.

INTRODUCTION

For decades, the doors to the federal courthouse were effectively closed to civil suits challenging the constitutionality of state criminal proceedings. It was common wisdom that federal courts would abstain from hearing such suits under *Younger v. Harris*,[1] which requires federal courts to dismiss suits challenging the constitutionality of ongoing state criminal proceedings. Scholars routinely acknowledged that federal courts were off limits to such suits and civil rights litigators stopped bringing them.[2] The Court's stated rationale for

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1 Younger v. Harris, 401 U.S. 37, 45, 54 (1971).

2 *See* Cara H. Drinan, *The Third Generation of Indigent Defense Litigation*, 33 N.Y.U. REV. L. & SOC. CHANGE 427, 441 & nn.81–86 (2009) (discussing Luckey v. Miller, 976 F.2d 673 (11th Cir. 1992); citing to Foster v. Kassulke, 898 F.2d 1144 (6th Cir. 1990) ("rejecting inmate's challenge to Kentucky public defense system"), Gardner v. Luckey, 500 F.2d 712 (5th Cir. 1974) ("rejecting class action challenging Florida public defense system"), and Wallace v. Kern, 499 F.2d 1345 (2d Cir. 1974) ("rejecting class action by inmates to enforce their right to a speedy trial"));

Younger abstention was, in capital letters, "Our Federalism," a policy of allowing state courts to redress constitutional challenges without federal interference.[3] State criminal defendants were left to fend for themselves, many without access to counsel, meaningful review, or corrective relief.[4] Due to *Younger* abstention many allegedly unconstitutional state policies and practices––including wealth-based detention, shackling, failing indigent defense services, trial and counsel fees, systemic discovery violations, and discriminatory charging and sentencing practices––have been extremely difficult to challenge either in a state criminal case or in a federal civil rights action. While criticism of *Younger* was legion, the policy of federal noninterference remained strong for decades, sidelining federal courts as an important venue for criminal justice reform.[5]

United States v. Sanchez-Gomez, 138 S. Ct. 1532, 1538 (2018) (rejecting as moot a challenge to the district court's policy of shackling in full restraints in-custody defendants during nonjury proceedings); Justin F. Marceau, *Challenging the Habeas Process Rather than the Result*, 69 WASH. & LEE L. REV. 85, 188–90 (2012) (identifying *Younger* abstention as a significant possible barrier to civil rights suit challenging the constitutionality of state post-conviction proceedings); Wendy R. Calaway & Jennifer M. Kinsley, *Rethinking Bail Reform*, 52 U. RICH. L. REV. 795, 819–22 (2018) (identifying *Younger* abstention as a significant potential barrier to civil rights suit challenging constitutionality of state court bail system); Erwin Chemerinsky, Remarks, *Lessons from Gideon*, 122 YALE L.J. 2676, 2692–93 (2013) (explaining that *Younger* abstention and standing pose barriers to a systemic challenge of the adequacy of indigent defense: "A person who is being prosecuted in state court cannot, because of abstention doctrines, challenge the adequacy of representation in a federal court action. But a person who is not a defendant is unlikely to be able to meet the requirements for standing and ripeness."); Donald H. Zeigler, *An Accommodation of the* Younger *Doctrine and the Duty of the Federal Courts to Enforce Constitutional Safeguards in the State Criminal Process*, 125 U. PA. L. REV. 266, 268–69 (1976) (arguing that in lieu of *Younger* abstention federal courts should vindicate the constitutional rights of state criminal defendants while avoiding overly broad interference in state proceedings consistent with the principles underlying *Younger*).

3 *Younger*, 401 U.S. at 44.

4 While nearly all defendants charged with felonies are represented by counsel, the rate of representation among defendants charged with misdemeanors is much less clear. *See* Erica Hashimoto, *The Problem with Misdemeanor Representation*, 70 WASH. & LEE L. REV. 1019, 1023 nn.13–14, 1024–25 (2013) (observing that there is no national database on representation in misdemeanor cases and citing, *inter alia*, INTER-UNIV. CONSORTIUM FOR POL. & SOC. RESEARCH, SURVEY OF INMATES IN LOCAL JAILS (2002) (citation appended)); Argersinger v. Hamlin, 407 U.S. 25, 37 (1972) (extending right to counsel to misdemeanors with risk of actual jail time); Scott v. Illinois, 440 U.S. 367, 373–74 (1979) (holding that a defendant sentenced to a fine had no right to counsel even though crime was punishable by imprisonment).

5 *See, e.g.*, Fred O. Smith, Jr., *Abstention in the Time of Ferguson*, 131 HARV. L. REV. 2283, 2339 (2018) (arguing for a *Younger* abstention exception for structural or systematic constitutional violations in state criminal proceedings); Owen M. Fiss, *Dombrowski*, 86 YALE L.J. 1103, 1104–05 (1977) (explaining how *Younger* severely limited access to federal courts and injunctive relief); Douglas Laycock,

Today, fifty years later, *Younger* is a doctrine in transition. *Younger* abstention is under the microscope as civil rights litigants challenge state criminal practices in federal court.[6] These lawsuits, often alleged as class actions, have targeted a range of policies impacting indigent defendants in state court, especially wealth-based detention.[7] Though some of these suits have been brought in state courts, eschewing abstention and federalism issues, others have directly confronted the barrier of *Younger* abstention.[8] Today many federal courts are rejecting *Younger* abstention, yet they remain extremely cautious about articulating or enforcing rights that will burden state courts or require federal interference. Plaintiffs who succeed in getting past *Younger* abstention face new challenges: getting courts to articulate constitutional rights and securing enforcement mechanisms that protect individual rights while minimizing federal interference. Defendants, be they state court officials, counties, or public defender offices, are navigating new litigations risks, including attorney fees and court-mandated (as well as negotiated) reforms. These results, while uneven, are shining a light on state criminal proceedings and forcing a new dialogue on the role of federal courts in enforcing constitutional rights in state courts.

Federal Interference with State Prosecutions: The Cases Dombrowski *Forgot*, 46 U. CHI. L. REV. 636, 642 & n.48 (1979) [hereinafter *The Cases* Dombrowski *Forgot*] (observing that before *Dombrowski* the Supreme Court frequently reviewed on the merits suits seeking to enjoin state enforcement of state statutes); Donald H. Zeigler, *Federal Court Reform of State Criminal Justice Systems: A Reassessment of the* Younger *Doctrine from a Modern Perspective*, 19 U.C. DAVIS L. REV. 31, 32 (1985) [hereinafter *Federal Court Reform*] (arguing that *Younger* abstention "should be abandoned"); Douglas Laycock, *Federal Interference with State Prosecutions: The Need for Prospective Relief*, 1977 SUP. CT. REV. 193, 229 (1977) [hereinafter *The Need for Prospective Relief*] (arguing that a pending state prosecution should not automatically operate to bar a federal action and urging federal courts to evaluate the adequacy of state remedies).

6 Organizations filing suits include the American Civil Liberties Union and the Lawyers Committee for Civil Rights, and new players, most significantly, Equal Justice Under Law and a split-off firm called Civil Rights Corps. *See, e.g.*, Rodriguez v. Providence Cmty. Corr., Inc., 155 F. Supp. 3d 758, 761 (M.D. Tenn. 2015) (challenging detention based on court debt enforcement by private probation company); Cain v. City of New Orleans, 186 F. Supp. 3d 536, 550–51 (E.D. La. 2016), *aff'd sub nom*, Cain v. White, 937 F.3d 446 (5th Cir. 2019) (debtor's prison); ODonnell v. Harris County., 251 F. Supp. 3d 1052, 1062–64 (S.D. Tex. 2017), *aff'd as modified*, 882 F.3d 528 (5th Cir. 2018), *and aff'd as modified sub nom*, ODonnell v. Harris County., 892 F.3d 147 (5th Cir. 2018) (pretrial detention); Walker v. City of Calhoun, 901 F.3d 1245, 1251 (11th Cir. 2018) (pretrial detention).

7 *See, e.g.*, *Rodriguez*, 155 F. Supp. 3d at 761 (challenging detention based on court debt enforcement by private probation company).

8 *See ODonnell*, 892 F.3d at 156–57; *Walker*, 901 F.3d at 1254–55; Arevalo v. Hennessy, 882 F.3d 763, 766–67 (9th Cir. 2018).

This Article develops the concept of distributed federalism to theorize this transformation and help frame the challenges ahead. Distributed federalism accepts that federalism is an important principle that can be expressed in varying degrees at different stages of litigation, namely, at the justiciability, merits, or remedial stages. The main worry in *Younger* was a remedial concern: the Court feared that federal injunctive relief could disrupt individual prosecutions or lead to federal courts micromanaging day-to-day operations in state criminal courts. *Younger* elevated federalism to a justiciability issue, requiring federal courts to abstain from hearing valid, important civil rights claims within the court's jurisdiction.

Distributed federalism builds on an alternative approach, initially modeled in *Gerstein v. Pugh*, in which the Court rejected *Younger* abstention without rejecting federalism.[9] The Court in *Gerstein* permitted a class action lawsuit challenging state pretrial detention and relied on federalism to inform the scope of the constitutional rights and the remedies. Today, especially in cases challenging criminal procedure issues, courts are relying on the *Gerstein* model of distributed federalism. *ODonnell v. Harris County* showcases the key features of this approach: a narrow application of *Younger* abstention, reliance on federal pleading standards to vet claims and frame the factual and legal issues, a hearing to evaluate the alleged violations, and a decision on the merits that justifies the relief with sensitivity to federalism concerns.[10] Today the justification for *Younger* abstention is substantially weakened: courts are less willing to rely on a judge-made doctrine to avoid hearing claims within their jurisdiction, early stage claim vetting is a better mechanism than abstention for identifying which claims should proceed, and the prospect of obtaining meaningful relief in state criminal court is dim. Shifting federalism to the rights and remedies stages ensures that court decisions are fact-based and legally justified.

This Article explores the shift from *Younger* abstention toward distributed federalism, the doctrinal and practical justifications for the shift, and its significance and limitations for civil

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9 Gerstein v. Pugh, 420 U.S. 103, 108 n.9 (1975).

10 ODonnell v. Harris County, 227 F. Supp. 3d 706, 734–37 (S.D. Tex. 2016) (granting in part and denying in part defendants' motion to dismiss), 251 F.Supp.3d 1052, (S.D. Tex. 2017) (granting after a hearing preliminary injunctive relief to remedy due process and equal protection violations) , *aff'd in part and reversed in part on appeal*, 892 F.3d 147, 156–57 (5th Cir. 2018) (affirming rejection of *Younger* abstention, narrowing scope of due process claim, and limiting the scope of injunctive relief).

rights litigation. Part I begins by describing how *Younger* and *Gerstein* offer contrasting approaches to federalism and situates them within a theoretical framework, drawing on Richard Fallon's and Daryl Levinson's work on the linkages between justiciability, rights, and remedies in constitutional adjudication. *Younger* abstention converted the possibility of injunctive relief into a threshold issue that blocked access to federal courts, immunized state courts from accountability, and spared federal courts from having to articulate or remedy constitutional violations. *Gerstein*, in contrast, provided an alternative by articulating a narrow, clear federal right but allowing states broad flexibility on implementation without federal interference.

Part II describes how courts today are revisiting *Younger* and *Gerstein* in a changed doctrinal and legal landscape. The Supreme Court has signaled that *Younger* abstention is the exception, not the rule.[11] State criminal justice systems are bigger, harsher, and more rushed, and federal civil litigation emphasizes early-stage litigation, not trial, as the proving grounds for most claims. Cases like *ODonnell v. Harris County* show how courts that reject *Younger* abstention are considering federalism concerns at later stages to shape constitutional rights and injunctive relief.[12] As courts revisit the scope of *Younger*, appellate courts are closely monitoring results––reversing decisions to abstain and reigning in rights and remedies that they view as too broad.[13] For plaintiffs the victory of getting past *Younger* abstention must be tempered by the risk of loss or modest or incomplete relief achieved in federal court.

Part III considers the benefits and challenges of distributed federalism as litigants test the viability of federal courts as a venue for criminal justice reform. Having overcome the barrier of abstention, civil rights groups have scored a major victory in getting courts to articulate rights and find constitutional violations, particularly on wealth-based detention. But the results have been mixed: courts have narrowly construed rights, limited injunctive relief so as not to burden or interfere in state court matters, and warned that claims seeking systemic relief

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11 Sprint Commc'ns, Inc. v. Jacobs, 571 U.S. 69, 77 (2013).

12 *ODonnell*, 227 F. Supp. 3d at 734–37 (S.D. Tex. 2016).

13 *Id.* at 166–67 (affirming rejection of *Younger* abstention, but limiting the scope of injunctive relief); *Walker*, 901 F.3d at 1254–55, 1272 (affirming rejection of *Younger* abstention but reversing limiting right to judicial hearing and reversing grant of preliminary injunctive relief); *Arevalo*, 882 F.3d at 766–68 (reversing district court's dismissal based on *Younger* abstention).

would remain barred by *Younger*. In short, federalism remains a significant barrier to plaintiffs pursuing similar claims in federal court. A key battleground is whether federal courts can structure relief that will vindicate constitutional rights and withstand appellate scrutiny, either by minimizing federal interference or sufficiently justifying federally mandated reforms. Litigants also may test whether courts will permit other kinds of suits historically blocked by *Younger*: challenges to the adequacy of indigent defense offices and the constitutionality of statutes enforced against the homeless or political protestors. Distributed federalism does not forecast particular results but supports a more transparent dialogue on the role of federal courts in enforcing constitutional rights, so that courts' reliance on federalism is explained, justified, and reviewable.

I
YOUNGER AND *GERSTEIN:* CONTRASTING APPROACHES TO FEDERALISM

As a new crop of litigants flocks to federal court to challenge the constitutionality of state court criminal procedures, federal courts are revisiting *Younger* and *Gerstein*, two seminal cases that offer different approaches to claimants seeking injunctive relief in state court. *Younger* required a federal court to abstain from hearing a claim that sought to enjoin a pending state criminal prosecution. While *Younger* was later expanded to prohibit injunctive relief in civil matters, this Article focuses on its application in cases challenging the constitutionality of criminal proceedings.[14] In stark contrast is *Gerstein*, in which the Supreme Court held that *Younger* abstention did not apply to a procedural challenge to state pretrial detention. *Younger* and *Gerstein* address the same basic question, namely, whether and to what extent federal courts can order injunctive relief in state criminal proceedings to correct constitutional violations. But the cases address different legal issues, yield different answers, and express a commitment to federalism in different ways. Courts and scholars understandably distinguish *Younger* and *Gerstein* based on the nature of the claim

14 Younger v. Harris, 401 U.S. 37, 45, 54 (1971); Aviam Soifer & H.C. Macgill, *The* Younger *Doctrine: Reconstructing Reconstruction*, 55 TEX. L. REV. 1141, 1143 (1977) (arguing that *Younger* and subsequent cases "seriously undermined" the role of the federal courts in vindicating individual rights secured by the Reconstruction amendments and postbellum statutory reforms); Barry Friedman, *A Revisionist Theory of Abstention*, 88 MICH. L. REV. 530, 540 (1989) (arguing that *Younger* and its progeny "appears gradually to have abdicated much federal civil rights jurisdiction in favor of state court jurisdiction over these cases").

and the relief sought.[15] While those differences are important, the more striking feature in these cases is how they express federalism at different stages of the litigation. *Younger* elevated federalism to a threshold issue, causing immediate dismissal of the entire case. *Gerstein*, by contrast, considered federalism later on, informing the scope of rights and remedies.

Professor Richard Fallon's Equilibrium Thesis is helpful for situating *Younger* and *Gerstein* in theoretical terms.[16] As Fallon recognizes, constitutional adjudication generally unfolds in three stages: first, the court ascertains its jurisdiction; second, it renders a decision on the merits; and third, it awards a remedy.[17] The Equilibrium Thesis holds that decisions at each stage––justiciability (stage one), substantive/merits (stage two), and remedial (stage three)––are substantially interconnected and that courts frequently face a choice about which doctrine to adjust in order to achieve what they deem acceptable results overall.[18] Fallon built on the work of others, particularly Daryl Levinson, who developed the concept of equilibrium by showing how courts shrink substantive constitutional rights in order to avoid expansive remedies. Nonretroactivity rules provide a classic example, according to Levinson, in that they allow the Supreme Court to create new rights of criminal procedure without providing new remedies, thus lowering the costs of complying with the new rights.[19] Building on this commonsense insight, Fallon's Equilibrium Thesis linked all three stages––justiciability, merits, and remedies––observing that courts "peek ahead" to later stages and make adjustments in earlier stages to achieve a balance, or equilibrium, about what the court deems as acceptable results.[20]

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15 *See, e.g.*, Richard H. Fallon, Jr., *The Ideologies of Federal Courts Law*, 74 VA. L. REV. 1141, 1238–39 (1988) (considering a request to enjoin a criminal prosecution or the intrusiveness of remedy as "federalist" factors favoring *Younger* abstention).

16 Richard H. Fallon, Jr., *The Linkage Between Justiciability and Remedies—and Their Connections to Substantive Rights*, 92 VA. L. REV. 633, 635 n.3, 639–42 (2006) (citing Paul Gewirtz, *Remedies and Resistance*, 92 YALE L.J. 585, 678–79 (1983) (suggesting courts "peek ahead" at the consequences of the remedy when deciding which claims to uphold on the merits) and Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 889–99 (1999) (arguing that the cost of enforcement, i.e., the severity or scope of the remedy, may influence a court's construction of constitutional rights and its willingness to find violations)).

17 *Id.* at 639.

18 *Id.* at 683–84.

19 Levinson, *supra* note 16, at 913.

20 Fallon, *supra* note 16, at 642.

The Equilibrium Thesis helps to frame *Younger* and *Gerstein* as different expressions of federalism. *Younger* abstention operates as a justiciability rule (stage one) that reflects concerns about disruptive federal remedies (stage three).[21] *Younger* abstention functions as an all-or-nothing on/off switch: either the court abstains, or it hears the case. But *Gerstein* reveals an alternative, more fine-tuned approach: the court rejected abstention (stage one) and arguably relied on federalism to inform the merits and remedial stages (stages two and three). In the *Gerstein* model, federalism operates not as a switch but as an adjustable dial tuned at each stage. This kind of distributed federalism has two key features: it distributes federalism throughout the federal litigation process (at the pleading, merits, and remedial stages) and incorporates a form of cooperative federalism that minimizes federal interference in state criminal proceedings.[22]

Distributed federalism describes a procedural approach, not a particular result or viewpoint on the degree to which federalism should shape constitutional rights and remedies. Federalism addresses the balance of authority between state and federal governments, particularly the role of federal courts in adjudicating matters of importance to state courts or administrations.[23] Courts and scholars disagree on the proper balance, which tends to ebb and flow over time, reflecting different judicial viewpoints and sensitivities about the justification for injunctive relief or its scope.[24] Whereas the Equilibrium Thesis presumes that courts have in mind certain acceptable results, distributed federalism recognizes that the existing federal process is a better mechanism for identifying meritorious claims that may warrant injunctive relief. Distributed federalism relies on courts evaluating claims that challenge the constitutionality of state criminal proceedings the same as any other claim. If jurisdiction exists and the claim survives dismissal, it should proceed, and the court can identify and explain any federalism concerns at the rights and remedies stages. Whereas abstention reflects a judicial refusal to exercise juris-

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21 *Cf.* Julie A. Davies, Pullman *and* Burford *Abstention: Clarifying the Roles of State and Federal Courts in Constitutional Cases*, 20 U.C. DAVIS L. REV. 1, 23–26 (1986) (arguing that abstention doctrines ebb and flow, reflecting the prevailing conceptions of federalism and the degree to which federal courts should decide or remedy constitutional challenges impacting state court adjudication).

22 *See* Smith, Jr., *supra* note 5, at 2328–30 (explaining how *Younger* facilitates a kind of cooperative federalism in which federal courts defer to state court implementation of constitutional standards).

23 *Id.*; Davies, *supra* note 21, at 22.

24 Davies, *supra* note 21, at 23–26.

diction over a case within the court's statutory jurisdiction, distributed federalism provides a framework for courts to more straightforwardly and transparently articulate and remedy constitutional violations without shirking their obligation to decide cases.[25]

A. Younger Elevated Federalism to a Threshold Issue

Younger and *Gerstein* present contrasting visions of how to operationalize federalism in suits challenging the constitutionality of state criminal proceedings. The Supreme Court in *Younger* required federal courts to abstain from hearing suits seeking to enjoin pending state criminal proceedings. *Younger* and its progeny (1) converted a stage-three question about injunctive relief into a quasi-justiciability issue to be resolved at stage one; (2) created a near-blanket rule against injunctive relief; and (3) deprived injured plaintiffs of a federal forum to secure rights and remedies unavailable in criminal court. By elevating federalism to a threshold issue resulting in dismissal (stage one), *Younger* categorically prevented federal courts from having to decide or remedy constitutional claims (stages two and three).[26]

In *Younger*, the plaintiff, John Harris, had been indicted for violating the California Criminal Syndicalism Act, which criminalized activity "effecting any political change."[27] He and several associates sued in federal court claiming that the state prosecution should be enjoined because the statute violated his rights to free speech and press and was overbroad.[28] A three-judge panel in federal district court concluded that the California statute was void for vagueness and overbreadth in violation of the First and Fourteenth Amendments and enjoined the state prosecutor from enforcing the statute.[29] The Supreme Court reversed, requiring the lower court to abstain so that the state court should try the case "free from interference by federal courts."[30]

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25 *Id.* at 23–24; *see* Sprint Commc'ns. v. Jacobs, 571 U.S. 69, 77 (2013) (observing "a federal court's 'obligation' to hear and decide a case is 'virtually unflagging.'" (citing Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 817 (1976))).

26 *See* Younger v. Harris, 401 U.S. 37, 44–45, 54 (1971); Middlesex Cty. Ethics Comm. v. Garden State Bar Ass'n., 457 U.S. 423, 432, 437 (1982).

27 *Younger*, 401 U.S. at 38 n.1.

28 *Id.* at 38–40.

29 *Id.* at 37.

30 *Id.* at 43. 28 U.S.C. § 2283 provides that federal courts "may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or

The Court in *Younger* built on traditional equity factors and federalism to justify dismissal based on abstention.[31] Starting with equity principles, the Court expressed reluctance to act when "the moving party has an adequate remedy at law and will not suffer irreparable injury if denied equitable relief."[32] Efficiency and deference to the role of the jury provided additional reasons to avoid "a duplication of legal proceedings . . . where a single suit would be adequate to protect the rights asserted."[33] But the primary justification was comity, specifically, the policy of non-interference premised on respect for state courts, which the Court termed "Our Federalism," capitalizing the words for emphasis.[34] "Our Federalism," the Supreme Court explained, represents "a system in which there is sensitivity to the legitimate interests of both the State and National Governments," and a 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."[35] Local prosecutors, the Court stated, fulfill a vital local function "of prosecuting offenders against the laws of the State and must decide when and how this is to be done."[36] That means leaving local courts and prosecutors to do their jobs without federal interference.[37]

The court elevated these two principles—federalism and equity—by making the basic inquiry for injunctive relief a threshold issue. When a party in federal court is simultaneously defending a state criminal prosecution, federal courts "should not act to restrain [the state] criminal prosecution,

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effectuate its judgments." 28 U.S.C. § 2283 (2018). Such cases are heard by three-judge panels. *See* Roudebush v. Hartke, 405 U.S. 15, 18 (1972) (relying on 28 U.S.C. § 2284).

31 ERWIN CHEMERINSKY, FEDERAL JURISDICTION 876–77 (7th ed. 2016); James E. Pfander & Nassim Nazemi, *The Anti-Injunction Act and the Problem of Federal–State Jurisdictional Overlap*, 92 TEX. L. REV, 1, 59–68 (2013) (arguing that the Court in *Younger* justified abstention on equity principles instead of the Anti-Injunction Act, which would have supported dismissal).

32 *Younger*, 401 U.S. at 43–44.

33 *Id.* at 44.

34 *Id.* at 43–45.

35 *Id.* at 44. *But see* Joshua G. Urquhart, *Younger Abstention and Its Aftermath: An Empirical Perspective*, 12 NEV. L.J. 1, 22 & nn.150–52 (2011) (describing scholarly debate on whether state or federal courts are better situated to resolve constitutional claims challenging state statutes and court proceedings, citing, *inter alia*, Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105, 1117–18 (1977); Erwin Chemerinsky, *Ending the Parity Debate*, 71 B.U. L. REV. 593, 593–94 (1991)).

36 *Younger*, 401 U.S. at 45 (quoting Fenner v. Boykin, 271 U.S. 240, 243–44 (1926)).

37 *Id.*

when the moving party has an adequate remedy at law and will not suffer irreparable injury if denied equitable relief."[38] This came to be restated in a three-part test requiring *Younger* abstention when there is (1) "an ongoing state judicial proceeding" (2) that "implicate[s] important state interests" and (3) offers "adequate opportunity" to "raise constitutional challenges."[39] The Court left open the door to federal court in "extraordinary circumstances": when there was no "adequate opportunity" to litigate the issue in state court, when a prosecution was initiated in bad faith, or when the state statute was "flagrantly and patently" unconstitutional.[40] Clearly the facially invalid statute at issue in *Younger* failed to satisfy this new standard. The injuries that Harris faced (risk of conviction, chilled speech, and stigma) were dismissed as "incidental to every criminal proceeding."[41] Harris could litigate his constitutional claim in the state court proceeding. The Court explained that the "normal thing to do when federal courts are asked to enjoin pending proceedings in state courts is not to issue such injunctions."[42] This new "normal," which strengthened courts' reluctance to grant injunctive relief, became a new default rule.

Younger and *O'Shea v. Littleton*,[43] decided three years later, articulated a "near-blanket rule against injunctions" in state court proceedings.[44] *O'Shea v. Littleton* continues to cast a long shadow on the civil rights cases seeking to effectuate criminal justice reform. The plaintiffs in *O'Shea* claimed that local judges intentionally discriminated against African American residents in bond-setting, sentencing, and imposing a fee for jury trials for some offenses.[45] In contrast to *Younger*, the plaintiffs in *O'Shea* were not being prosecuted in state court and neither challenged the constitutionality of a state statute

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38 *Id.* at 43–44.

39 Middlesex Cty. Ethics Comm. v. Garden State Bar Ass'n., 457 U.S. 423, 432 (1982).

40 *Younger*, 401 U.S. at 53–54; *Middlesex*, 457 U.S. at 437. *But see* Pfander & Nazemi, *supra* note 31, at 63 n.366 (citing Fiss, *supra* note 5, at 1115 ("[T]he universe of bad-faith-harassment claims . . . is virtually empty.")); *see also* CHEMERINSKY, *supra* note 31, at 908–09 (noting that bad faith and patently unconstitutional exceptions to *Younger* have never been applied by the Supreme Court).

41 *Younger*, 401 U.S. at 47 (citing Douglas v. City of Jeannette, 319 U.S. 157 (1943)).

42 *Id.* at 45.

43 O'Shea v. Littleton, 414 U.S. 488 (1974).

44 Steven G. Calabresi & Gary Lawson, *Equity and Hierarchy: Reflections on the Harris Execution*, 102 YALE L.J. 255, 264 (1992) (arguing that *Younger* made federalism "always decisive in favor of the state").

45 *O'Shea*, 414 U.S. at 491–92.

nor sought to enjoin a prosecution, so the federal court did not have a specific state court proceeding to defer to.[46] The Supreme Court in *O'Shea* held that the plaintiffs lacked standing because they were not facing prosecution and could not show that they would be prosecuted in the future. More significantly, the Court held that "even if" it found standing, *Younger* would preclude equitable relief.[47] Injunctive relief, the Court explained, "would contemplate interruption of state proceedings to adjudicate" instances of alleged discrimination,[48] and amount to "nothing less than an ongoing federal audit of state criminal proceedings which would indirectly accomplish the kind of interference that *Younger v. Harris* and related cases sought to prevent."[49] The prospect of "day-to-day supervision" of state criminal proceedings, the Court said, would be "intrusive and unworkable."[50]

B. Gerstein: A Procedural Approach

Gerstein models a different approach to federalism that allows federal courts to decide constitutional claims while deferring to state court actors. *Gerstein* and *Younger* can be distinguished based on the nature of the claim and relief requested. In *Younger* the plaintiff sought to enjoin a state court prosecution based on an allegedly unconstitutional state statute,[51] whereas in *Gerstein* the plaintiffs claimed they were entitled to a probable cause hearing in state court to review their pretrial detention.[52] While those distinctions are impor-

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46 *Id.* at 492, 497–98 (citing Perez v. Ledesma, 401 U.S. 82, 101–02 (1971)).

47 *Id.* at 493, 495–99 (explaining on standing that the plaintiffs' past injuries were insufficient to support injunctive relief and future injuries were too speculative because none could show that they "will again be arrested for and charged with violations of the criminal law and will again be subjected to bond proceedings, trial, or sentencing" by these judges). The Court added that a request for relief from "current, existing custody" would be barred by *Preiser v. Rodriguez*, 411 U.S. 475 (1973), and injunctive relief from a pending proceeding would be barred by *Younger*. *Id.* at 496. The Court in *O'Shea* pointed to procedures in state court that, at least in theory, could redress racial discrimination by local judges in criminal cases, including requesting a different judge or change of venue, direct appeal, post-conviction collateral review, judicial discipline, and "[i]n appropriate circumstances," federal habeas relief. *Id.* at 502. It is not clear that any of these remedies would have allowed plaintiffs the opportunity to prove and remedy claims of racial discrimination by state court judges.

48 *Id.* at 500.

49 *Id.*

50 *Id.* at 500–01.

51 Younger v. Harris, 401 U.S. 37, 49 (1971).

52 Gerstein v. Pugh, 420 U.S. 103, 105 (1975); Fallon, *supra* note 16, at 1238–39 (identifying request to enjoin a state prosecution as a factor favoring *Younger* abstention); CHEMERINSKY, *supra* note 31, at 910–11 (explaining that state

tant, they fail to capture how *Gerstein* modeled an approach that considered federalism at each stage of litigation––as an abstention question, in deciding the merits, and in fashioning a remedy. This distributed federalism approach has several laudable features in that it (1) entrusts federal courts to decide cases, articulate and adjudicate constitutional claims, and then carefully craft injunctive relief, (2) shows how federalism can inform every stage, and (3) exemplifies a preference for hands-off injunctive relief that relies on state actors to achieve compliance, leaving open the possibility of more hands-on enforcement and oversight, if needed. Whereas *Younger* operated as a blunt instrument of federalism, an on/off switch, *Gerstein* shows how federalism can be integrated as an adjustable dial and highlights how local efforts at policy reform are an important lever for avoiding or justifying injunctive relief.

The plaintiffs in *Gerstein* had been arrested, charged by information, and detained in the local jail.[53] Having been denied bail, they brought a class action claiming that they were entitled to a judicial probable cause determination and that there was no effective way under Florida law to challenge their continued, indefinite detention.[54] Under state law, there was no procedure, such as a preliminary hearing or habeas corpus, for defendants to promptly test the probable cause for their detention.[55] Although a statute allowed a preliminary hearing after thirty days, defendants could be detained at length based solely on the decision of a prosecutor without any judicial oversight.[56] The plaintiffs in *Gerstein* faced an additional challenge in that their constitutional claims would be moot as soon as they were indicted by a grand jury or afforded a judicial hearing.[57]

1. *Younger Abstention*

The Supreme Court in *Gerstein* adopted the lower courts' reasoning for rejecting *Younger* abstention based on the nature of the claim and requested relief. The Court distinguished

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courts will be deemed inadequate under *Younger* if they provide no available remedy).

53 *Gerstein*, 420 U.S. at 105 & n.1. One of the plaintiffs was unable to afford bail and the other was denied bail based on the seriousness of the charges. *Id.*

54 *Id.* at 106–07 (explaining that Florida law provided neither a right to a prompt preliminary hearing nor a pre-trial habeas remedy so that a person could be detained for substantial time without any judicial review).

55 *Id.* at 105–06.

56 *Id.* at 106.

57 *Id.* at 105–07.

Younger in footnote 9, explaining that the plaintiffs' request for injunctive relief "was not directed at the state prosecutions as such," but instead was directed "only at the legality of pretrial detention without a judicial hearing, an issue that could not be raised in defense of the criminal prosecution. The order to hold preliminary hearings could not prejudice the conduct of the trial on the merits."[58] This reasoning underscored that the plaintiffs' claim was procedural: they merely sought to correct a procedure within the prosecution, not to enjoin it. Further, the hearing the plaintiffs sought would not impact the disposition of the case: it provided neither a substantive defense as in *Younger*, nor a dispositive remedy, such as dismissal or suppression, that could prejudice the trial.[59] Additionally, the harm of unjustified pretrial detention amounted to a "significant pretrial restraint on liberty."[60]

The plaintiffs in *Gerstein* alleged a class action and sought a procedural fix, namely, a post-arrest, judicial probable cause hearing, tailored to their pretrial detention status.[61] This particular claim and remedy were extremely time sensitive because, as the Court recognized, pretrial detention is an inherently transitory injury that could be mooted by a probable cause determination, release, or conviction.[62] This harm, the Court explained, fits the "capable of repetition, yet evading review" exception to the mootness doctrine because it was "by its nature temporary" and "most unlikely" that a plaintiff could "have his constitutional claim decided on appeal before he is either released or convicted."[63] The claim could not be addressed after conviction because, as the Court acknowledged, an "illegal arrest or detention does not void a subsequent con-

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58 *Id.* at 108 n.9 (citing Conover v. Montemuro, 477 F.2d 1073, 1082 (3d Cir. 1972 [sic]); then comparing to Perez v. Ledesma, 401 U.S. 82 (1971) and Stefanelli v. Minard, 342 U.S. 117 (1951)).

59 *See id.* at 106–08 & n.9. The Court acknowledged that the temporary nature of pretrial detention meant that the injury met the "capable of repetition, yet evading review" exception to the mootness doctrine, so the fact that the named plaintiffs' detention had since resolved did not moot the class action. *Id.* at 110 n.11.

60 *Id.* at 125 & n.26.

61 *Id.* at 108. *Gerstein* also identified the class action as an essential tool for challenging the "inherently transitory" harms for which "the challenged conduct was effectively unreviewable because no plaintiff possessed a personal stake in the suit long enough for litigation to run its course." Genesis Healthcare Corp. v. Symczyk, 569 U.S. 66, 76 (2013).

62 *Gerstein*, 420 U.S. at 110 n.11 & 119 (acknowledging that the claim could not be addressed after conviction because an "illegal arrest or detention does not void a subsequent conviction.").

63 *Id.*

viction."[64] These features made the injury difficult to redress in a timely way before conviction and nearly impossible to redress after conviction.[65]

Although the Supreme Court's discussion of *Younger* abstention was minimal, touching on key distinguishing features, the lower courts addressed the issue of abstention more fully by focusing on the practical difficulty of redressing pretrial detention in a state criminal case that offers limited remedies. *Younger* did not apply, the district court explained, because the plaintiffs were not seeking to enjoin a prosecution and instead merely "pray[ed] for a declaration of procedural rights and an injunction from the continued denial thereof."[66] Even if *Younger* did apply, the court explained, the irreparable harm exception was satisfied because the plaintiffs' indefinite pretrial detention exceeded the ordinary "cost, anxiety, and inconvenience of having to defend against a single criminal prosecution."[67]

The Fifth Circuit rejected *Younger* for three reasons. First, the plaintiffs' claims were not against a "state prosecution *as such*" but only against pretrial detention without a judicial finding of probable cause.[68] Second, *Younger* is not a bar to a constitutional claim that "*cannot* be vindicated" in the state criminal proceeding.[69] Comity should bar a federal lawsuit challenging the constitutionality of a search or seizure, the court explained, because that claim could be remedied by suppression of evidence in the state criminal case.[70] The plaintiffs' challenge to their pretrial detention, in contrast, could not be timely vindicated in the state criminal case because there was no probable cause hearing, other remedies added delay, and their pretrial detention claim would be mooted by a conviction or exoneration.[71] Finally, the appellate court rejected the notion that plaintiffs could pursue their civil action in state, as opposed to federal, court, adding that *Younger* does not "force a federal court to relinquish jurisdiction over a federal claim which could not be adjudicated in a *single* pending or future

64 *Id.* at 110?19.
65 *Id.*
66 Pugh v. Rainwater, 332 F. Supp. 1107, 1111 (S.D. Fla. 1971).
67 *Id.*
68 Pugh v. Rainwater, 483 F.2d 778, 782 (5th Cir. 1973).
69 *Id.*
70 *Id.* (citing Mapp v. Ohio, 367 U.S. 643 (1961)).
71 *Id.*

state proceeding."[72] In other words, the court recognized that *Younger* required abstention only if the plaintiff's claim could actually be litigated and remedied in their pending state criminal case.[73] Having concluded that *Younger* did not apply, the appellate court declined to address whether the plaintiffs also satisfied the irreparable harm exception to *Younger* abstention.[74]

2. *Federalism at Every Stage*

By rejecting *Younger* abstention, neither the lower courts nor the Supreme Court abandoned federalism. To the contrary, these courts considered federalism at every stage of litigation. Had the district court abstained, the plaintiffs' right to pretrial detention review might never have been decided precisely because it could not be litigated in a criminal case. By rejecting *Younger* and hearing the case, the district court set in motion a resolution: the lawsuit spurred the defendants to pursue policy change and their eventual failure to adopt constitutionally adequate reforms justified the need for federal intervention. While the Supreme Court did not explicitly reference federalism in shaping the right to a judicial pretrial detention hearing, it arguably relied on federalism to significantly trim the right imposed by the lower courts. The federal courts at every level—district, circuit, and supreme—appear to have weighed comity in shaping the right to a hearing and fashioning a hands-off remedy.

The failure of local policy reform in *Gerstein* bolstered the justification for federal relief. The district court generously allowed time for local officials to adopt policy reforms that could have obviated the need for federal intervention. The court delayed ruling on the constitutional claims to allow time for the Florida Legislature to act, which it failed to do, and then al-

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72 *Id.*; CHEMERINSKY, *supra* note 31, at 897 ("[T]here is no doctrine that the availability or even the pendency of state judicial proceedings excludes the federal courts.").

73 *Pugh*, 483 F.2d at 782. Critics recognize that a court reviewing a civil First Amendment claim could provide more complete relief than a court would normally provide in a criminal case. *See, e.g.*, Laycock, *The Cases Dombrowski Forgot*, *supra* note 5, at 667 (explaining that criminal courts the power to grant prospective relief and the power to grant interlocutory relief which are essential to protecting individuals from future prosecutions); *see also* Smith, Jr., *supra* note 5, at 2293 (observing that before *Dombrowski* and *Younger* federal courts would enjoin an unlawful state prosecution, discussing Owen M. Fiss, *Dombrowski*, 86 YALE L.J. 1103, 1104–05 (1977) and Laycock, *The Cases Dombrowski Forgot*, 46 U. CHI. L. REV. 636, 645–59 (1979)).

74 *Id.* at 782–83.

lowed the parties "reasonable time" after a hearing to resolve the matter on their own.[75] The district court then allowed the county defendants more time to develop a plan to provide preliminary hearings, which the district court mostly adopted.[76] The Fifth Circuit stayed the plan pending appeal and upon learning that the county judges "voluntarily adopted" similar procedures, remanded the case to the district court to evaluate the new rules.[77] Before the district court ruled, however, the Florida Supreme Court issued new statewide rules on preliminary hearings, so the district court reviewed those rules instead.[78] The federal courts expressed comity by remaining open to the possibility that these local reform efforts could resolve the suit, stepping in only after those new procedures proved constitutionally inadequate.

Although it did not clothe its analysis in the rhetoric of federalism, the Supreme Court in *Gerstein* appeared to rely on federalism principles in shaping the right and the remedy. The Supreme Court narrowed the scope of the right to a hearing: while it agreed with the lower courts that the Fourth Amendment requires a timely judicial probable cause hearing for detained individuals, it rejected the right to counsel at the hearing.[79] The Supreme Court crafted a bright-line rule requiring a finding of probable cause by a neutral arbiter (a judge or grand jury), "someone independent of police and prosecution," either in obtaining a warrant or "promptly after arrest."[80] The hearing could be an informal, ex parte and non-adversarial, the Court explained, similar to an ex parte hearing used to obtain an arrest warrant.[81] Because of its limited function, the hearing did not need to be adversarial and "is not a 'critical stage' in the prosecution that would require appointed counsel."[82] By not requiring counsel, the Supreme Court dramatically limited the scope of the hearing right and the burden it would place on lower courts.[83]

A key feature of federalism in *Gerstein* is that the Supreme Court crafted a declaratory, hands-off right and remedy that did not require federal oversight. The Court required a "fair

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75 Pugh v. Rainwater, 332 F. Supp. 1107, 1109 (1971).
76 Gerstein v. Pugh, 420 U.S. 103, 108 (1975).
77 *Id.* at 109.
78 *Id.*
79 *Id.* at 122–23, 125.
80 *Id.* at 114, 118.
81 *Id.* at 119–21.
82 *Id.* at 122–23.
83 *Id.* at 123–25.

and reliable determination of probable cause . . . before or promptly after arrest."[84] This standard was more streamlined than the relief ordered by the district and appellate courts, which had required a hearing within four days.[85] The Court stated: "There is no single preferred pretrial procedure."[86] "While we limit our holding to the precise requirement of the Fourth Amendment, we recognize the desirability of flexibility and experimentation by the States."[87] So while *Gerstein* boldly articulated a new right to a probable cause hearing, the scope of the right—no right to counsel, no timing requirement—appears to have been tempered by federalism, specifically, the Court's deference to state courts on implementation and enforcement.[88]

C. The Toll of *Younger* Abstention

Younger abstention exacts a high toll, cutting off the availability of federal courts to articulate and enforce constitutional rights in state criminal proceedings. *Younger* abstention is forum-shifting in that it denies plaintiffs the forum and civil remedies they sought in federal court. Though *Gerstein* offered an alternative approach tempered by federalism, it failed to gain traction. Instead, as scholars have recognized for decades, *Younger* abstention operated as a federalism-based doctrine of constitutional avoidance, prompting dismissal of cases challenging the constitutionality of state court criminal proceedings

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84 *Id.* at 125. The district court had also created sanctions in state courts for non-compliance that the appellate court eliminated "until such time as experience shows" that the state court actors "are not following" the new rules. Pugh v. Rainwater, 483 F.2d 778, 790 (5th Cir. 1973).

85 The appellate court trimmed the relief imposed by the district court, which had also created sanctions for noncompliance. *Pugh*, 483 F.2d at 790.

86 *Gerstein*, 420 U.S. at 123.

87 *Id.* Two decades later the Court required the *Gerstein* hearing to occur within forty-eight hours of arrest. County. of Riverside v. McLaughlin, 500 U.S. 44, 56 (1991). Commenters have criticized the forty-eight-hour rule for sanctioning detention without cause. *See, e.g.*, Steven J. Mulroy, *"Hold" On: The Remarkably Resilient, Constitutionally Dubious 48-Hour Hold*, 63 CASE W. RES. L. REV. 815 (2013), https://scholarlycommons.law.case.edu/cgi/viewcontent.cgi?article=1215&context=caselrev [https://perma.cc/8AFB-NU9B] (arguing that the forty-eight-hour hold is "constitutionally problematic" because the prosecution, by circumventing procedural safeguards, can extend the period of detention following arrest).

88 By connecting the claim to counsel's performance, a convicted defendant could grieve the denial of counsel or ineffectiveness of his appointed counsel, a claim that could be brought post-conviction and potentially undo a conviction. Coleman v. Alabama, 399 U.S. 1, 3, 11 (1970); *see also* Marceau, *supra* note 2, at 189–90 (discussing the unlikely possibility that a federal court would entertain a civil rights suit challenging the constitutionality of state post-conviction proceedings).

even when there was no pending criminal case or comparable remedies in state court. There are many reasons to criticize the doctrine: it is judicially created, results in the dismissal of cases within the courts' statutory jurisdiction, results in underarticulation and underenforcement of civil rights, privileges unconstitutional conduct by certain state court actors, and treats plaintiffs facing prosecution worse than less-injured plaintiffs. Perhaps most importantly, the doctrine seems to be more about avoidance than parity, one of its stated justifications.

Younger abstention is forum-shifting: it channels a federal case into a pending state case (if one exists), and even more consequentially, converts a civil case into a criminal one.[89] Due to standing requirements, *Younger* favors plaintiffs who are at risk of, but not actually facing, state prosecution.[90] Abstention is not required absent a pending state prosecution because the risks of duplication, disruption, or lack of respect do not exist.[91] Absent a prosecution, however, standing is a hurdle because to establish standing a plaintiff must show a credible threat of enforcement. In *Younger*, for example, Harris's injury of actually facing prosecution was sufficient to establish standing but that then triggered abstention.[92] Harris's fellow activists lacked standing because they were neither facing nor threatened with prosecution.[93] They sued too soon (no standing), whereas Harris sued too late (because his pending prosecution triggered abstention).[94] The ideal federal plaintiff

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89 *See* Fiss, *supra* note 5, at 1135–36 (1977). Assuming a case proceeds in federal court, the federal court may not grant declaratory relief if the plaintiff is the subject of a state criminal prosecution. *See* Samuels v. Mackell, 401 U.S. 66, 73 (1971).

90 *See* Chemerinsky, *supra* note 2, at 2692–93 (2013) (explaining with respect to enforcing the right to counsel: "A person who is being prosecuted in state court cannot, because of abstention doctrines [citing *Younger*], challenge the adequacy of representation in a federal court action. But a person who is not a defendant is unlikely to be able to meet their requirements for standing and ripeness.").

91 Steffel v. Thompson, 415 U.S. 452, 462 (1974) (quoting Lake Carriers' Assn [sic] v. MacMullan, 406 U.S. 498, 509 (1972)); *see also* Wooley v. Maynard, 430 U.S. 705, 711 (1977) (*Younger* abstention not required for plaintiffs who did not seek to undo state convictions and merely sought to block a future prosecution for violation of the state statute they were challenging in federal court); Doran v. Salem Inn, Inc., 422 U.S. 922, 930–31 (1975) (*Younger* abstention not required for when there were no state proceedings pending against the defendants seeking to challenge the constitutionality of a state statute).

92 Younger v. Harris, 401 U.S. 37, 39–40 (1971).

93 *Id.* at 41–42.

94 Fiss, *supra* note 5, at 1118; *see also Steffel*, 415 U.S. at 463 n.12 (observing that a federal plaintiff not facing prosecution in state court may lack the standing to proceed on a claim for injunctive relief).

could show they faced a credible threat of prosecution but had not yet been prosecuted.

Prosecutors also gained the power to redirect federal litigation back to state court, where they dictate whether and how to prosecute. In *Hicks v. Miranda*, the Supreme Court held that *Younger* abstention bars a federal suit so long as no "proceedings of substance on the merits have taken place in the federal court."[95] Hence a prosecutor can "institute state proceedings in order to defeat federal jurisdiction" by initiating prosecution in state court after a federal civil rights suit has already been filed, thus converting the threat of prosecution (necessary for a plaintiff to establish standing) into a reality (triggering *Younger* abstention).[96] *Younger* and *Hicks* empower prosecutors broad authority to avoid constitutional litigation in federal court.

This loss of the federal forum has practical and theoretical significance. As a practical matter, *Younger* abstention denies federal plaintiffs the kinds of relief available in a civil rights action: preliminary injunctive relief, prospective relief, class relief, and attorney's fees.[97] *Younger* "close[s] the door to federal injunctive relief" because such relief is simply not available in a criminal case.[98] Preliminary injunctive relief can prevent immediate harm and permanent injunctive relief can lock in policy change and enforcement mechanisms going forward. Class relief may be necessary to redress challenges to systemic or policy issues that cannot be presented in a criminal proceeding.[99] In a criminal prosecution, pretrial issues such as deten-

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95 422 U.S. 332, 337, 349 (1975).

96 *Id.* at 354, 357 (Stewart, J., dissenting) ("There is, to be sure, something unseemly about having the applicability of the *Younger* doctrine turn solely on the outcome of a race to the courthouse. The rule the Court adopts today, however, does not eliminate that race; it merely permits the State to leave the mark later, run a shorter course, and arrive first at the finish line. This rule seems to me to result from a failure to evaluate the state and federal interests as of the time the state prosecution was commenced.").

97 *See also id.* ("[C]onsiderations of equity practice and comity in our federal system . . . have little force in the absence of a pending state proceeding.").

98 Fiss, *supra* note 5, at 1118.

99 *See, e.g.*, Drinan, *supra* note 2, at 441 nn.81–86 (discussing Luckey v. Miller, 976 F.2d 673 (11th Cir. 1992); citing to Foster v. Kassulke, 898 F.2d 1144 (6th Cir. 1990) ("rejecting inmate's challenge to Kentucky public defense system"), Gardner v. Luckey, 500 F.2d 712 (5th Cir. 1974) ("rejecting class action challenging Florida public defense system"), and Wallace v. Kern, 499 F.2d 1345 (2d Cir. 1974) ("rejecting class action by inmates to enforce their right to a speedy trial")); *see also* United States v. Sanchez-Gomez, 138 S. Ct. 1532, 1542 (2018) (rejecting as moot criminal defendants' challenge to use of full restraints on pretrial detainees); Chemerinsky, *supra* note 2, at 2687 n.38 (citing *Luckey*, *Foster*, *Gardner*, and *Wallace* as "[c]hallenges in federal court to the inadequacy of criminal representation in state courts" that were dismissed on abstention grounds); Marceau,

tion and shackling become moot upon conviction and nonjusticiable in any forum absent a class action to keep the controversy alive.[100] The possibility of attorney's fees provides incentive for counsel to pursue civil lawsuits,[101] and because most criminal defendants are not entitled to appointed counsel, such access to civil counsel might provide their only shot at challenging or reforming state criminal practices. And while plaintiffs ordinarily can choose whether to bring a civil rights action in federal or state court, the risk of *Younger* abstention may force them to sue in state court.[102]

The idea of parity, which is at the heart of *Younger*, is that federal and state courts are equally competent to protect constitutional rights.[103] In fact *Younger* abstention may have little to do with parity because the federal and the state court are performing completely different jobs: the plaintiff's federal case is civil and the state prosecution is criminal. The Supreme Court assumed in *Younger* that the plaintiff had an "adequate remedy at law" because he could raise his First Amendment claim as a defense to the state prosecution.[104] The Court in *Younger* tolerated the chilling effect on speech and minimized the disadvantages of challenging a statute in criminal court.[105] The Court later extended *Younger* to block suits when there was no pending criminal prosecution, paying little attention to

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supra note 2, at 177–78 (discussing the benefits of class actions brought by prisoners); Calaway & Kinsley, *supra* note 2, at 795 (discussing class action lawsuits and bail reform).

100 Calaway & Kinsley, *supra* note 2, at 822 n.183–84 (citing Complaint at 2, Robinson v. Martin, No. 2016-CH-13587 (Ill. Cir. Ct. Oct. 14, 2016)); *see also* Drinan, *supra* note 2, at 463 (discussing the indigent defense crisis and offering solutions); Chemerinsky, *supra* note 2, at 2680 (linking attorney compensation to the quality of defense counsel and case outcomes); *Sanchez-Gomez*, 138 S. Ct. at 1540–42 (holding that defendants' shackling challenge, asserted in a criminal case, was mooted by their convictions, but they could challenge the policy in a civil rights class action).

101 *See* 42 U.S.C. § 1988(b); *see* Evans v. Jeff D., 475 U.S. 717, 751 (1986) (Brennan, J., dissenting) (explaining that "by awarding attorney's fees Congress sought to attract competent counsel to represent victims of civil rights violations").

102 Hurrell-Harring v. New York, 930 N.E.2d 217, 224–25 (N.Y. 2010) (holding that state's failure to provide counsel to indigent defendants in arraignment proceedings violated their Sixth Amendment right to counsel); Wilbur v. City of Mount Vernon, 989 F. Supp. 2d 1122, 1124 (W.D. Wash. 2013) (holding that indigent defendants' Sixth Amendment right to counsel was violated where "appointment of counsel was . . . little more than a formality").

103 *See* Davies, *supra* note 21, at 27–28 (exploring and critiquing the roles of state and federal courts in adjudicating federal constitutional issues in cases susceptible to abstention).

104 Younger v. Harris, 401 U.S. 37, 43–44 (1971).

105 *Id.* at 49–51.

whether the remedy in a state criminal case is "actually adequate."[106] The practical reality is that *Younger* abstention exacts a high toll, leading either to limited relief or none at all.

Criminal adjudication in state court is a poor substitute for a federal civil rights action. Criminal adjudication is "atomistic": it focuses on the fate of a single defendant, based on the statute as applied to him, and is not designed to "vindicate quickly and effectively" social rights, including free expression.[107] Criminal cases are litigated individually for sound reasons: case by case analysis allows for tailored attention to the investigation, procedural fairness, guilt adjudication, and individualized sentencing. But, aside from joinder of co-defendants, criminal law contains no mechanism for injunctive relief or aggregating claims.[108] Criminal courts can dismiss a case or order evidence suppressed or a new trial, but they cannot grant the kind of prospective injunctive relief that is available in § 1983 suits.[109] Criminal defendants also face different risks compared to civil plaintiffs, including detention, the risk of conviction, and reputational harm. Though these aspects of a criminal case are routine, they can drive the disposition of a criminal case and contrast sharply with the plaintiff's rights-testing motive and procedural advantages in a civil case, such as discovery, burden of proof, and remedies, including attorney's fees.

Scholars have rightly focused on different ways to redress the gap in remedies that results from *Younger* abstention. Professor Laycock, for example, proposed that federal courts remain free to "provide supplemental relief where needed" with the goal of not disrupting the state court prosecution.[110] Under this approach, which could involve a federal court deciding the federal legal issue or staying the federal case until the state prosecution is resolved, the essential point is that "*Younger*'s deference to state courts should be limited to cases in which the state court has power to grant full relief."[111] Others have criticized the rule that *Younger* also bars declara-

106 O'Shea v. Littleton, 414 U.S. 488, 499 (1974); *see also Prospective Relief*, *supra* note 5, at 193–94 (arguing that federal courts should consider the "actual adequa[cy]" of state remedies before withholding federal relief).

107 Fiss, *supra* note 5, at 1113.

108 Brandon L. Garrett, *Aggregation in Criminal Law*, 95 CALIF. L. REV. 383, 389–93 (2007).

109 Fiss, *supra* note 5, at 1118 (explaining that *Younger* "close[d] the door to federal injunctive relief").

110 *Prospective Relief*, *supra* note 5, at 194.

111 *Id.* at 238.

tory relief, which is nonintrusive, statutorily authorized, and provides an opportunity to articulate constitutional rights, if not remedies.[112]

Though *Gerstein* provided a pathway for navigating these issues, it proved elusive. The Supreme Court extended *Younger* to cases like *O'Shea* where there was no pending state prosecution,[113] while suits patterned on *Gerstein* were rejected. Two notable examples illustrate the point. In *Wallace v. Kern*, the Second Circuit explicitly rejected a challenge based on "footnote 9 in the *Gerstein* opinion,"[114] and in *Luckey v. Miller*, the Eleventh Circuit rejected a federal suit alleging the systemic denial of counsel for indigent defendants even though it acknowledged the claim presented a "systemic issue[ ] which cannot be raised in any individual case."[115] The *Younger* abstention argument in these cases boiled down to a conflict between the strong policy of noninterference (*Younger* and *O'Shea*) and allowing procedural challenges to proceed under *Gerstein* because there was no effective remedy in a state criminal proceeding. The courts in *Wallace* and *Luckey* abstained because the courts deemed the possibility of imposing, monitoring, or enforcing constitutional standards in state courts "intrusive" and "unworkable"[116] and feared such relief would involve the kind of "day-to-day supervision"[117] that the Supreme Court "found to be objectionable in *O'Shea*."[118] Even a reporting requirement, the court stated in *Luckey*, "strikes at the heart of the prohibitions that are embedded into constitutional law by Younger and its progeny."[119]

Gerstein also provided a blueprint for noninvasive, mostly declaratory, injunctive relief that embodies federalism con-

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112 *See* Samuels v. Mackell, 401 U.S. 66, 73 (1971) (extending *Younger* to suits seeking declaratory relief); Pfander & Nazemi, *supra* note 31, at 59–68; *see also* Emily Chiang, *Reviving the Declaratory Judgment: A New Path to Structural Reform*, 63 BUFF. L. REV. 549, 571–75 (2015) (arguing that the declaratory judgment is a necessary tool in structural reform litigation).

113 Sprint Commc'ns, Inc. v. Jacobs, 571 U.S. 69, 77–78 (2013) (citing New Orleans Pub. Serv., Inc. v. Council of the City of New Orleans, 491 U.S. 350, 364 (1989)).

114 520 F.2d 400, 406 (2d Cir. 1975).

115 976 F.2d 673, 677–79 (11th Cir. 1992). The Court added that plaintiffs could have sued in state court, presumably an identical suit under § 1983. *See id.* Normally, such a plaintiff could choose whether to bring such a § 1983 suit in state or federal court.

116 *Id.* at 676.

117 O'Shea v. Littleton, 414 U.S. 488, 501 (1974).

118 *Wallace*, 520 F.2d at 406.

119 976 F.2d at 678 (quoting *O'Shea*, 414 U.S. at 501) ("[P]eriodic reporting 'would constitute a form of monitoring of the operation of state court functions that is antipathetic to established principles of comity.'").

cerns. The federal courts in *Gerstein* modeled this by hearing the case, delaying proceedings to allow a local solution, deciding the right, and soliciting a workable compliance plan from local actors. Building in such opportunities for policy reform is useful for theoretical and practical reasons. As Professor Fred Smith has argued, *Younger* facilitates a kind of cooperative federalism or federal-state partnership in that the Supreme Court says what the constitution requires and entrusts state courts to implement and enforce that standard.[120] This partnership is tested in a case seeking federal injunctive relief to ensure that state officials comply with constitutional standards. Practically, allowing state officials to achieve compliance on their own (through policy reform) preserves the federal-state partnership and is an attractive alternative to mandating injunctive relief. Just as importantly, the failure of local reforms to achieve constitutional compliance may justify federal interference. In *Gerstein*, this dynamic played out in stages over many years. The failure of local reforms justified a new rule, articulated in broad strokes, that the Fourth Amendment requires a "fair and reliable" hearing before a neutral judge, "promptly after arrest."[121] The Supreme Court left the rest to states without specifying a time limit for the hearing, an enforcement mechanism, or a remedy.[122] It took another sixteen years before the Court required a judicial probable cause hearing within forty-eight hours after a warrantless arrest.[123]

Professor Smith recently proposed a *Younger* exception for civil rights cases alleging systemic or structural constitutional violations.[124] This approach is attractive in that it builds on *Younger*'s existing irreparable harm exception and has the potential to capture both procedural and substantive constitutional violations. Smith defines systemic violations to include those that happen as a result of local "pattern, practice, policy, or custom," which relies on the standard for proving official policy in § 1983 civil rights cases.[125] "A structural violation," according to Smith, would include those errors that strike at

120 Smith, Jr., *supra* note 5, at 2328–29 (citing ROBERT A. SCHAPIRO, POLYPHONIC FEDERALISM 121–50 (2009); Jessica Bulman-Pozen & Heather K. Gerken, Essay, *Uncooperative Federalism*, 118 YALE L.J. 1256, 1258 (2009)) (explaining how *Younger* is "an opinion in the tradition of cooperative federalism").

121 Gerstein v. Pugh, 420 U.S. 103, 125 (1975).

122 *Id.* at 123–25 ("While we limit our holding to the precise requirement of the Fourth Amendment, we recognize the desirability of flexibility and experimentation by the States.").

123 County of Riverside v. McLaughlin, 500 U.S. 44, 56 (1991).

124 Smith, Jr., *supra* note 5, at 2324.

125 *Id.* at 2324, 2343.

the heart of the procedures' "reliability, such that the resultant harm is both presumed and immeasurable."[126] This approach could guide courts in a broader *Younger* abstention inquiry and provide a framework for considering the types of injuries that qualify as irreparable harms.[127] But this proposal also is limited in that it adds to the abstention inquiry instead of simplifying or replacing it. The basic operation of *Younger* abstention would remain unchanged in that courts would need to decide, in the context of an early stage motion to abstain under *Younger*, whether the plaintiff has stated a claim for a systemic or structural constitutional violation. That inquiry could replicate the shortcomings that already exist in a *Younger* analysis, in which courts evaluate a claim and possible remedies at the earliest stage of litigation without the benefit of discovery, a hearing, or findings on the challenged state court practices. Finally, it is unclear if systemic or structural harms could be litigated by individuals (as opposed to a class).

II
THE RISE OF DISTRIBUTED FEDERALISM

The distributed federalism approach rejects abstention as the primary expression of federalism. It recognizes instead that while federalism remains a strong force, federal courts should hear meritorious claims and more transparently address federalism concerns at later stages. In numerous civil rights cases challenging state criminal procedures,[128] federal courts decisively have rejected *Younger* abstention and instead relied on *Gerstein*, allowing the case to proceed in federal court.[129] Dis-

126 *Id.* at 2324.

127 *Id.* at 2324–27.

128 Numerous lawsuits brought by advocacy organizations have challenged wealth-based policies in state courts, including bail policies, debtor's prison, and practices related to private probation. Organizations filing suits include the American Civil Liberties Union, the Lawyers Committee for Civil Rights, and new players—most significantly, Equal Justice Under Law and a split-off firm called Civil Rights Corps. *See, e.g.*, Rodriguez v. Providence Cmty. Corrs., Inc., 155 F. Supp. 3d 758, 761–65 (M.D. Tenn. 2015) (challenging detention based on court debt enforcement by private probation company); Cain v. City of New Orleans, 186 F. Supp. 3d 536, 550–51 (E.D. La. 2016), *affirmed sub nom*, Cain v. White, 937 F.3d 446, 454 (5th Cir. 2019) (debtor's prison); ODonnell v. Harris County, 251 F. Supp. 3d 1052, 1062–64 (S.D. Tex. 2017), *aff'd as modified*, 882 F.3d 528, 543 (5th Cir. 2018), *and aff'd as modified sub nom*, ODonnell v. Harris County, 892 F.3d 147, 160 (5th Cir. 2018) (pretrial detention); Walker v. City of Calhoun, Ga., 901 F.3d 1245, 1251 (11th Cir. 2018) (pretrial detention).

129 *ODonnell*, 892 F.3d at 156–57 (declining to abstain under *Younger* because the adequacy of the state court pretrial detention proceedings was the merits issue and the relief sought is unavailable in a criminal proceeding); *Walker*, 901 F.3d at 1254–55 (declining to abstain under *Younger* because the plaintiff did not

tributed federalism frames *Younger* abstention as the exception, not the rule, and recognizes that federalism concerns can be more transparently weighed at every stage of litigation. Distributed federalism envisions *Younger* as an adjustable dial, not an on/off switch, that informs federal decisions on important constitutional claims, allowing them to be tested and proven like others in the regular course of litigation instead of being compressed into a threshold justiciability determination. This approach does not yield a particular outcome and litigants certainly will contest the federalism balance courts strike in determining the scope and existence of rights and the appropriate relief. But this approach will allow for more informed and transparent decisions by forcing federal courts to justify how and why their analysis of rights or remedies is shaped by federalism concerns.

A. A Changed Landscape

Courts today are reexamining *Younger* abstention in a changed legal landscape. *Younger* abstention was predicated on several core principles including parity, efficiency, comity, federalism, and traditional equity rules. Parity included the premise that state courts are equally capable of deciding and remedying constitutional violations, while comity and federalism supported a reluctance to intervene in essential state functions.[130] Central to *Younger* was the assumption that state courts provided an adequate forum for defendants to litigate their constitutional challenges and there was no need for duplicative litigation in federal court addressing the same issue. The reality is that criminal and civil proceedings are distinct and provide different kinds of relief. The core premise that a defendant could get adequate relief in his state criminal case probably was never accurate and is even less true today.

In the intervening decades, changes on both sides of the ledger—the state criminal side and the federal civil rights

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seek to enjoin any state prosecution and the concerns underlying *Younger* do not apply); Arevalo v. Hennessy, 882 F.3d 763, 766–67 (9th Cir. 2018) (declining to abstain under *Younger* because the case met the irreparable harm exception); Ewell v. Toney, 853 F.3d 911, 916–17 (7th Cir. 2017) (declining to abstain under *Younger* because the federal case has proceeded to the merits).

130 *See* Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105, 1131 (1977) (criticizing the notion that state and federal courts are equally competent to adjudicate constitutional claims); Erwin Chemerinsky, *Ending the Parity Debate*, 71 B.U. L. REV. 593, 601 n.40 (1991) (citing Martin H. Redish, *Abstention, Separation of Powers, and the Limits of the Judicial Function*, 94 YALE L.J. 71, 110 (1984)) ("arguing that judge-made abstention doctrine violates separation of powers in the absence of express congressional delegation of authority").

side—have eroded the justification for *Younger* abstention. First, the Supreme Court has acknowledged that *Younger* is an exceptional rule and that a civil rights case is a proper vehicle for challenging the constitutionality of criminal procedure policies. Second, state criminal justice systems have grown exponentially and in ways that make it unrealistic to assume that individual defendants have a meaningfully opportunity to litigate constitutional challenges in their state criminal case or only do so at significant personal risk. Third, the early stage vetting of federal civil claims, especially in civil rights cases affecting criminal defendants, obviates the need for *Younger* abstention. These doctrinal and practical realities inform how courts interpret and apply *Younger*.

1. *Doctrinal Changes*

Two recent Supreme Court decisions shed light on the scope and impact of *Younger* abstention. The Supreme Court's 2013 decision in *Sprint Communications, Inc. v. Jacobs*, which held that the plaintiffs were not required to assert their constitutional challenge in a pending state utility proceeding, signaled a more cautious approach to *Younger* abstention.[131] *Sprint* reaffirmed the bedrock rule that a "parallel, pending state criminal proceeding" is a scenario when "federal courts must refrain from enjoining the state prosecution."[132] But the Court cautioned that *Younger* abstention is "exceptional," explaining, "our dominant instruction" is that "even in the presence of parallel state proceedings, abstention from the exercise of federal jurisdiction is the 'exception, not the rule.'"[133] The Court had used similar language decades earlier, emphasizing that "Congress, and not the Judiciary, defines the scope of federal jurisdiction."[134] Justice Scalia, writing for the Court in *NOPSI*, wrote that where Congress has conferred jurisdiction, federal courts "lack the authority to abstain" and "cannot abdicate their authority or duty in any case in favor of another jurisdiction."[135] *Sprint,* in a unanimous opinion, made the point even more forcefully, stating that "a federal court's 'obli-

131 571 U.S. 69, 81–82 (2013).

132 *Id.* at 72.

133 *Id.* at 81–82 (quoting Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 236 (1984)).

134 *See* New Orleans Pub. Serv., Inc. v. Council of the City of New Orleans, 491 U.S. 350, 359 (1989) (citing Kline v. Burke Constr. Co., 260 U.S. 226, 234 (1922)).

135 *Id.* at 358 (quoting Chicot Cnty. v. Sherwood, 148 U.S. 529, 534 (1893)).

gation' to hear and decide a case is 'virtually unflagging.'"[136] *Sprint* reaffirmed *Younger*, but clearly signaled that *Younger* applies to specific identified categories "but no further." Before *Sprint*, courts favored *Younger* abstention.[137] Today, courts rely on *Sprint* to limit and reject *Younger* abstention.

The before and after effect of *Sprint* is striking. Only a few years ago, courts applied *Younger* expansively and relied heavily on *O'Shea* to block procedural challenges. The Fifth Circuit's decision in *Bice v. Louisiana Public Defender Board* is a prime example, reflecting a general hostility to claims seeking procedural, policy reform.[138] The plaintiffs in *Bice* sought to suspend collection of a thirty-five-dollar indigent defense fee imposed on defendants who were found or pled guilty, arguing that the fee, which was used to fund public defense, discouraged public defenders from seeking to exonerate their clients.[139] The court acknowledged that a "successful challenge to the statutory scheme for funding public defenders" would delay the plaintiff's prosecution "until adequate funding is located" because "in the aggregate, the $35 dollar fees constitute a sufficient percentage" of the indigent defense board's budget and suspending the fee would slow the criminal docket.[140] Relying on *O'Shea*, the court held that abstention was required because "the relief requested 'would indirectly accomplish the kind of interference that *Younger v. Harris* and related cases sought to prevent.'"[141]

Since *Sprint*, the message that abstention is the "exception, not the rule," has reverberated in the lower courts.[142] Despite

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136 571 U.S. at 77 (quoting Colo. River Water Conservation Dist. v. United States, 424 U.S. 800, 817 (1976)).

137 *See* Preiser v. Rodriguez, 411 U.S. 475, 491–92 (1973) (citing *Younger*'s federal-state comity principle in holding that federal habeas is state prisoners' sole remedy for claims that challenge the duration of confinement); Heck v. Humphrey, 512 U.S. 477, 487 (1994) (holding that a plaintiff pursuing federal damages action challenging the legality of state criminal conviction must prove the conviction was invalidated).

138 *See* Bice v. La. Pub. Def. Bd., 677 F.3d 712, 718 (5th Cir. 2012).

139 *Id.* at 714–16.

140 *Id.* at 717. "In deciding whether to abstain pursuant to *Younger*, we must be practical in assessing the most likely result of granting plaintiff's requested relief. *See Luckey v. Miller*, 976 F.2d 673, 679 (11th Cir.1992 [sic]) ('This Court is constrained, therefore, to focus on the likely result of an attempt to enforce an order of the nature sought here.')." *Id.* at 718. The court also found that the plaintiff, who had not attempted to bring the claim in state court, had not established that the state courts provided an inadequate forum, noting that Louisiana rules technically did not preclude the claim or remedy he sought. *Id.* at 719–20.

141 *Id.* at 717, 720 (quoting *O'Shea v. Littleton*, 414 U.S. 488, 500 (1974)).

142 Sprint Commc'ns, Inc. v. Jacobs, 571 U.S. 69, 82 (2013) (quoting Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 236 (1984)).

Bice, the Fifth Circuit in *ODonnell* and lower courts within the circuit have rejected *Younger* abstention as a bar to civil rights suits challenging state criminal proceedings.[143] *ODonnell* began its discussion of *Younger* with a word of caution from *Sprint*: "As long as a federal court has jurisdiction over an action, the obligation to hear and decide a case is virtually unflagging."[144] Another district court held that *Younger* did not bar the plaintiffs' challenge to debtor's prison for failure to pay court fines and fees.[145] The Eleventh Circuit in *Walker* stated with reference to *Sprint*, "[a]bstention . . . has become disfavored in recent Supreme Court decisions."[146] One federal district court observed that *Sprint* is "a forceful reminder" of federal courts' obligation to hear cases within their jurisdiction and suggested that courts might revisit the scope of *Younger* abstention "since *Sprint*,"[147] especially when the plaintiff is not seeking to enjoin a state prosecution.[148] Though *Sprint* reaffirmed the core holding in *Younger*, courts have relied on it to apply *Younger* narrowly and bolster reliance on *Gerstein*.

The Supreme Court also recently acknowledged that many policies impacting criminal defendants cannot be litigated in a criminal case. The Court made this point in response to a suit challenging a court's shackling policy brought by federal criminal defendants, each with a pending criminal case.[149] Analogizing to *Gerstein* and civil class actions, the lower court ruled on the claim even though the defendant's cases had resolved. The Supreme Court rejected the claims as moot, explaining that in criminal procedure there is neither a mootness exception nor a procedure for aggregating claims: for criminal cases

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143 *See* ODonnell v. Harris County, 227 F. Supp. 3d 706, 734 (S.D. Tex. 2016); Cain v. City of New Orleans, 186 F. Supp. 3d 536, 550–51 (E.D. La. 2016); Caliste v. Cantrell, 2017 WL 3686579, at *4 (E.D. La. 2017).

144 *ODonnell*, 227 F. Supp. 3d at 726 (internal quotation marks omitted) (quoting *Sprint*, 571 U.S. at 77).

145 *See Cain*, 186 F. Supp. 3d at 550–51 (distinguishing *Bice*, 677 F.3d at 715), *aff'd on appeal*, Cain v. White, 937 F.3d 446 (5th Cir. 2019).

146 Walker v. City of Calhoun, 901 F.3d 1245, 1254 (11th Cir. 2018).

147 Holland v. Rosen, 277 F. Supp. 3d 707, 735–36 (D.N.J. 2017) (challenging a New Jersey law that reformed the administration of pretrial detention in state court (citing Hunt v. Roth, 648 F.2d 1148, 1154 (8th Cir. 1981)); *ODonnell*, 227 F. Supp. 3d at 734–35; and Rodriguez v. Providence Cmty. Corr., Inc., 155 F. Supp. 3d 758, 765–66 (M.D. Tenn. 2015), *not raised on appeal*, 895 F.3d 272 (3d Cir. 2018).

148 *See Holland*, 277 F. Supp. 3d at 737 ("Plaintiffs . . . challenge the procedure by which the conditions of pre-trial release during that prosecution was decided and seek an injunction ordering a different procedure."); *Walker*, 901 F.3d at 1255 (stating that plaintiff "merely asks for a prompt pretrial determination of a distinct issue, which will not interfere with subsequent prosecution.").

149 United States v. Sanchez-Gomez, 138 S. Ct. 1532, 1538 (2018).

there is "no vehicle comparable to . . . [a] collective action, much less the class action. And we have never permitted criminal defendants to band together to seek prospective relief in their individual criminal cases on behalf of a class."[150] In other words, the defendants would need to allege a civil class action under § 1983—likely one patterned on *Gerstein*—in order to challenge a pretrial policy and avoid mootness problems.[151] Though *Sanchez-Gomez* involved criminal defendants in federal court, it recognizes that criminal defendants must rely on civil rights suits to challenge certain criminal policies that cannot be litigated within a criminal case.

2. *Contextual Changes in Criminal Justice*

Younger was decided at a turning point in criminal justice history when federal courts charted a more limited role in protecting state criminal defendants. The "criminal procedure revolution" of the 1960s prompted a swift and lasting backlash in the courts and in Congress.[152] The expansion and subsequent contraction of constitutional criminal rights occurred on three different tracks. In the decades before *Younger*, the Warren Court expanded federal constitutional protections in state criminal proceedings,[153] the scope of federal habeas review, and the availability of civil rights suits against government officials.[154] The Burger Court, beginning in 1969, worked to reign in federal oversight of state criminal enforcement: it halted the expansion of criminal procedure rights by limiting remedies like the exclusionary rule, expanded doctrines that reinforced prosecutorial powers in charging and plea bargaining,[155] dra-

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150 *Id.* at 1539, 1542.

151 *See id.* at 1542.

152 See, e.g., William J. Stuntz, *Unequal Justice*, 121 HARV. L. REV. 1969, 2003 (2008) ("As the risk of pro-defendant constitutional rulings grew, so did politicians' incentives to find ways to evade those rulings.").

153 *See* Erwin Chemerinsky & Larry Kramer, *Defining the Role of the Federal Courts*, 1990 BYU L. REV. 67, 79 (1990).

154 *See e.g.*, Brown v. Allen, 344 U.S. 443, 486 (1953) ("[H]abeas corpus is available following . . . refusal to review . . . state habeas corpus proceedings."); Monroe v. Pape, 365 U.S. 167, 245 (1961) (stating that municipal officials acting under the color of state law may be sued for damages); Monell v. Dep't of Soc. Servs., 436 U.S. 658, 682 (1978) (noting there is recourse against municipal officials who violate the federal constitution); Ex parte Young, 209 U.S. 123, 168 (1908) (discussing the use of habeas corpus to discharge persons from custody).

155 *See, e.g.*, Bordenkircher v. Hayes, 434 U.S. 357, 364–65 (1978) (holding that provided charges were supported by probable cause, a prosecutor did not violate due process by threatening severe charges in order to induce a negotiated guilty plea).

matically limited habeas review,[156] and barred the use of federal civil rights suits to challenge state court convictions.[157] Adding to these restrictions, *Younger* abstention closed off civil remedies for violations of criminal constitutional rights.[158]

Over those same decades, the criminal justice system grew exponentially on every scale except judicial capacity, making it even less likely that criminal defendants could meaningfully litigate constitutional claims in state court. Today, state criminal courts, where over ninety-five percent of criminal prosecutions are brought, are busier and harsher with less appellate oversight.[159] The number of justice-involved individuals has soared.[160] Penalties are harsher due to the war on drugs, three-strikes laws, mandatory minimum sentences, and the elimination of parole, which all have contributed to more defendants in prison serving longer prison sentences.[161] Prison

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156 *See* Anti-Terrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, §§ 102–08, 110 Stat. 1214; Rose v. Lundy, 455 U.S. 509, 520 (1982) (exhaustion); Brecht v. Abrahamson, 507 U.S. 619, 636–38 (1993) (standard of review); Wainwright v. Sykes, 433 U.S. 72, 89–90 (1977) (procedural default).

157 *See* Preiser v. Rodriguez, 411 U.S. 475, 500 (1973) (explaining that habeas is the sole remedy for any claim challenging the fact or duration of a prisoner's physical imprisonment); Heck v. Humphrey, 512 U.S. 477, 487–88 nn.7–8 (1994) (noting that a defendant claiming damages for an allegedly unconstitutional conviction or imprisonment must exhaust state court remedies and show that the conviction or sentence has been overturned in some way).

158 *See* Garrett, *supra* note 108, at 401 n.90 (citing to Younger v. Harris, 401 U.S. 37, 42 (1971)) ("holding that federal courts must abstain from enjoining pending state prosecutions except in highly extraordinary circumstances"); *see, e.g.*, *Heck*, 512 U.S. at 477 (requiring acquittal or vacatur as a precondition to a non-habeas § 1983 suit challenging a conviction); Imbler v. Pachtman, 424 U.S. 409, 431 (1976) (holding that prosecutors are absolutely immune from civil suits for their work as officers of the court).

159 *See* Michael J. Graetz, Trusting the Courts: *Redressing the State Court Funding Crisis*, 143(3) DAEDALUS 96, 96–98 (2014) (describing chronic budget challenges impacting state criminal and civil courts);*see also* Kevin R. Reitz, *Demographic Impact Statements, O'Connor's Warning, and the Mysteries of Prison Release: Topics from a Sentencing Reform Agenda*, 61 FLA. L. REV. 683, 684–85 (2009) (observing that ninety-five percent of criminal cases arise and are sentenced in state courtrooms).

160 *See* Press Release, Wendy Sawyer & Peter Wagner, Prison Pol'y Initiative, *Mass Incarceration: The Whole Pie 2020* (Mar. 24, 2020), https://www.prisonpolicy.org/reports/pie2020.html [https://perma.cc/AQG4-KVQT]; *Americans with Criminal Records*, THE SENTENCING PROJECT (depicting, inter alia, the rise in incarceration and the number of Americans with criminal records), https://www.sentencingproject.org/wp-content/uploads/2015/11/Americans-with-Criminal-Records-Poverty-and-Opportunity-Profile.pdf [https://perma.cc/D7Y6-2PZC] (last visited Sept. 2, 2021).

161 *See Criminal Justice Facts*, SENT'G PROJECT, https://www.sentencingproject.org/criminal-justice-facts/ [https://perma.cc/S6M3-8TJD] (last visited May 8, 2021) (detailing that harsh sentencing laws like mandatory minimums and cutbacks in parole release keep people in prison for longer periods of time, with increase in sentence length accounting for nearly half of the 222% growth in the

populations have ballooned since the 1980s by some 222%.[162] Millions more individuals have suffered misdemeanor and felony convictions, been detained, supervised, and/or incarcerated, and have experienced lasting collateral consequences.[163] State court dockets have swelled and indigent defenders, long overburdened, face crushing caseloads. For decades courts have meted out "assembly line justice" in a "rush, rush" atmosphere.[164] With busier courts, overwhelmed counsel, and defendants facing higher stakes, state criminal courts have long been operating in overdrive.

In today's massive, overburdened, diverse, and harsh state criminal justice system, there is very little judicial oversight at the state or federal level. Only defendants charged with felonies or facing jail time have a right to counsel, so millions of defendants are unrepresented in criminal court each year.[165] Nearly all defendants plead guilty, many simply to get released from jail.[166] The Supreme Court has acknowledged that in our

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state prison population between 1980 and 2010 and one in nine people in prison now serving a life sentence, nearly a third of whom are sentenced to life without parole).

162 *Id.*

163 *See* Megan Stevenson & Sandra Mayson, *The Scale of Misdemeanor Justice*, 98 B.U. L. REV. 731, 737 (2018).

164 Argersinger v. Hamlin, 407 U.S. 25, 35, 58 (1972); *see, e.g.*, Scott v. Illinois, 440 U.S. 367, 373 (1979) (adopting "actual imprisonment as the line defining the constitutional right to appointment of counsel").

165 *See Argersinger*, 407 U.S. at 40 (holding that right to counsel applies when a person is charged with a felony or a misdemeanor with an actual risk of jail time); Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 1313, 1320–21 (2012) (stating that with an estimated 10.5 million prosecutions annually, misdemeanors constitute approximately eighty percent of state criminal dockets, excluding traffic cases). *See, e.g.*, ALEXANDRA NATAPOFF, PUNISHMENT WITHOUT CRIME: HOW OUR MASSIVE MISDEMEANOR SYSTEM TRAPS THE INNOCENT AND MAKES AMERICA MORE UNEQUAL 2 (2018) (explaining how eighty percent of criminal offenses roughly thirteen million per year are for misdemeanors, which typically are processed without defense counsel, regard for legal rules, or examination of guilt); Alexandra Natapoff, *The Penal Pyramid*, *in* THE NEW CRIMINAL JUSTICE THINKING 78–79 (Sharon Dolovich & Alexandra Natapoff eds., 2017) (describing criminal adjudication for defendants charged with low-level misdemeanors as rushed and informal, with little regard for legal standards and rules or actual guilt or innocence); Jenny Roberts, *Why Misdemeanors Matter: Defining Effective Advocacy in the Lower Criminal Courts*, 45 U.C. DAVIS L. REV. 277, 293–97 (2011) (discussing the lack of zealous representation of impoverished individuals charged with misdemeanors).

166 *See, e.g.*, Andrew Manuel Crespo, *Systemic Facts: Toward Institutional Awareness in Criminal Courts*, 129 HARV. L. REV. 2050, 2086 & n.154 (2016) (observing that more than ninety-five percent of defendants plead guilty and the "plea bargaining process, which, as scholars frequently lament, is not only troublingly coercive, but is also largely insulated from judicial review, despite mounting evidence that the process contributes significantly to massive and racially disproportionate incarceration rates" (citing inter alia, Missouri v. Frye, 566 U.S. 134,

"system of pleas,"[167] defendants at every level are under extreme pressure to plead guilty, and those who choose to litigate issues or proceed to trial do so at their peril.[168] While negotiated guilty pleas have been the dominant mode of conviction for a century, guilty plea rates have climbed steadily higher.[169] Before the 1960s, one-quarter to one-third of state felony charges led to a trial, compared to just five percent today.[170] The percentage of criminal defendants who appeal their felony convictions is extremely low—less than four percent—while the number seeking state or federal postconviction review is a smaller fraction and the rate of appeals for misdemeanors is infinitesimal.[171] As a practical matter, postconviction remedies—which can take years to litigate—are only practical for defendants suffering lengthy prison sentences.[172]

The reality today is that the opportunities for most criminal defendants to litigate constitutional challenges in state court are slim to nonexistent. Certain remedies are simply unavailable in criminal proceedings and never were. Other remedies for constitutional violations may exist in theory or on paper but are impractical due to the delay or personal risk at stake. The pressures on the system, courts, defense counsel, and individual defendants make it even more difficult and risky for individuals to effectively vindicate their rights within their criminal cases. These realities dim the prospect of a state criminal defendant finding an "adequate remedy" for a constitutional vio-

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143 (2012); quoting Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1912 (1992) (observing "plea bargaining . . . is not some adjunct to the criminal justice system; it *is* the criminal justice system.")).

167 Lafler v. Cooper, 566 U.S. 156, 170 (2012); *Frye*, 566 U.S. at 143.

168 *See* Richard A. Oppel, Jr., *Sentencing Shift Gives New Leverage to Prosecutors*, N.Y. TIMES, (Sept. 25, 2011), https://www.nytimes.com/2011/09/26/us/tough-sentences-help-prosecutors-push-for-plea-bargains.html [https://perma.cc/7SNZ-UVSQ].

169 *See* George Fisher, *Plea Bargaining's Triumph*, 109 YALE L.J. 857, 902 fig.3 (2000).

170 *See* WILLIAM J. STUNTZ, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE 32 n.56 (2011); *see also* Emily Yoffe, *Innocence is Irrelevant*, ATLANTIC (Sept. 2017), https://www.theatlantic.com/magazine/archive/2017/09/innocence-is-irrelevant/534171/ [https://perma.cc/AWB2-F32W] (citing STUNTZ).

171 *See* Nancy J. King, *Appeals*, *in* ACAD. FOR JUST., 3 REFORMING CRIMINAL JUSTICE: PRETRIAL AND TRIAL PROCESSES 254 & n.6–7 (Erik Luna ed., 2017) (citing SEAN ROSENMERKEL, MATTHEW DUROSE, & DONALD FAROLE, JR., BUREAU OF JUST. STAT., U.S. DEP'T OF JUST., FELONY SENTENCES IN STATE COURTS, 2006– STATISTICAL TABLES 1 (rev. Nov. 2010), and NICOLE L. WATERS, ANNE GALLEGOS, JAMES GREEN, & MARTHA ROZSI, BUREAU OF JUST. STAT., U.S. DEP'T OF JUST., CRIMINAL APPEALS IN STATE COURTS 4–5 (2015)). *See also* Nancy J. King & Michael Heise, *Misdemeanor Appeals*, 99 B.U. L. REV. 1933, 1938 (2019) ("We estimate that, at most, approximately eight in ten thousand misdemeanor judgments are appealed.").

172 King, *supra* note 172, at 254.

lation. At a minimum, federal courts should carefully examine that premise of *Younger* abstention.

3. *Evolving Federal Practice*

On the other side of the ledger, federal civil practice also has evolved in the intervening decades in ways that are incompatible with *Younger* abstention. Here it is useful to return to the stages of litigation (justiciability, merits, remedy) that Fallon describes in articulating his Equilibrium Theory to reiterate how *Younger* abstention operates.[173] In the typical litigation timeline, the pleading, discovery, and trial phases identify and resolve disputed issues of fact and law, while in the remedial phase courts justify and tailor appropriate relief. *Younger* abstention turns on highly factual issues—the threat of irreparable injury and the adequacy of the state court forum—and yet expects courts to evaluate them at the pleadings stage before discovery and without factfinding. Using Fallon's stages, *Younger* abstention reframes a remedial concern (stage three) as a justiciability issue (stage one) that compresses legal and factual merits questions (stage two) about the right itself, the existence and adequacy of state court remedies, and the justification for injunctive relief.

Today, the *Younger* inquiry seems at odds with the rigorous claim vetting in early stage federal litigation and the careful screening of disputed factual issues.[174] All plaintiffs must establish standing and allege facts that give rise to a plausible claim "for each type of relief sought."[175] Civil rights plaintiffs must do even more to sue local officials, establish standing for injunctive relief, overcome immunities, and avoid specific bars on challenging criminal convictions.[176] These demanding

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173 *See* Fallon, *supra* note 16, at 639.

174 *See* John H. Langbein, *The Disappearance of Civil Trial in the United States*, 122 YALE L.J. 522, 527 (2012).

175 ODonnell v. Harris County, 227 F. Supp. 3d 706, 724 (S.D. Tex. 2016) (citing Summers v. Earth Island Inst., 555 U.S. 488 (2009) (citing City of Los Angeles v. Lyons, 461 U.S. 95, 105 (1983))). *See also* Ashcroft v. Iqbal, 556 U.S. 662, 687 (2009) (holding that a complaint must "plead sufficient facts to state a claim"); Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007) (requiring that a complaint must contain enough facts to state a claim to relief that is plausible on its face).

176 *See, e.g.*, James M. Wagstaffe, *Supreme Court's Stealth Revolution in Civil Procedure*, LEXISNEXIS (July 3, 2019), https://www.lexisnexis.com/community/lexis-legal-advantage/b/insights/posts/supreme-court-s-stealth-revolution-in-civil-procedure-by-jim-wagstaffe [https://perma.cc/4JKW-VBAB] (discussing how plaintiffs view the Supreme Court as limiting access to justice by empowering defendants with powerful procedural tools); *ODonnell*, 227 F. Supp. 3d at 725 (citing Monell v. N.Y.C. Dep't of Soc. Servs., 436 U.S. 658, 691 (1978)) (requiring

pleading requirements act as a powerful filter in identifying which claims and parties survive dismissal and advance to the merits stage.[177]

These rigorous early stage mechanisms for vetting claims provide a better gatekeeper than *Younger* abstention for determining which cases get to stay in federal court. *Younger* abstention can result in the dismissal of a properly filed, meritorious federal civil rights suit based on a concern that the claim might eventually warrant declaratory or injunctive relief. When a federal court abstains, it is abdicating its congressionally mandated jurisdiction based on a preliminary understanding of the claim. Courts have abstained even in the absence of a pending state criminal prosecution and without fully understanding the availability and adequacy of state criminal remedies. *Younger* abstention is unnecessary for a claim that would not survive early-stage vetting (due to jurisdictional defects or failure to state a claim) and hard to justify for a claim that survives such rigorous testing. The preferred approach would be to hear the case, decide the claim, determine whether declaratory or injunctive relief is justified, and explain how federalism concerns modify the relief granted.

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that localities' actions were taken pursuant to local policy or custom). To allege a claim under § 1983 against a municipality, "a plaintiff must show that (1) an official policy (2) promulgated by the municipal policymaker (3) was the moving force behind the violation of a constitutional right." *ODonnell*, 227 F. Supp. 3d at 725 (citing Peterson v. City of Fort Worth, 588 F.3d 838, 847 (5th Cir. 2009)). *ODonnell* also recognized an exception to Eleventh Amendment immunity for suits for prospective injunctive relief against individuals in their official capacity, as agents of the state or a state entity under *Ex parte Young*, 209 U.S. 123 (1908). *See also Lyons*, 461 U.S. at 105 (requiring plaintiffs to demonstrate standing to pursue injunctive relief).

177 Racial discrimination and qualified immunity are two examples of how strict legal requirements may operate to eliminate the need to resolve factual issues. *See* Comcast Corp. v. Nat'l Ass'n of African American-Owned Media, 140 S. Ct. 1009, 1021 (2020) (holding that to allege a claim of discrimination, a plaintiff must allege that his race was the but-for cause of the injury). Qualified immunity has evolved from a triable issue of fact that turned on the official's state of mind to a legal issue that does not consider subjective intent and can be resolved on pleadings. *See, e.g.*, Scheuer v. Rhodes, 416 U.S. 232, 247–48 (1974) (whether the official acted in good faith and reasonably under the circumstances); Harlow v. Fitzgerald, 457 U.S. 800, 818–19 (1982) (whether the official violated "clearly established" constitutional law); Anderson v. Creighton, 483 U.S. 635, 641 (1987) (whether, in light of the information the agent possessed, the warrantless search violated clearly established law); *See also Iqbal*, 556 U.S. at 677 (requiring plaintiff claiming discrimination to allege that the official purposefully discriminated on the basis of race, religion, or national origin).

B. Distributed Federalism

Distributed federalism captures the transformation of *Younger*—from a policy favoring abstention to a principle that informs adjudication and remedying of constitutional violations. As courts revisit *Younger* abstention, they are relying on a different expression of federalism. Recent suits, especially *ODonnell v. Harris County*, illustrate how federal courts are rejecting *Younger* but still relying on federalism to shape constitutional rights and remedies.[178] Stage one in *ODonnell* focused on claim vetting, including a motion to abstain under *Younger*, which the court rejected. Stage two focused on the remaining legal and factual issues, specifically the alleged Equal Protection and Due Process violations and the request for prospective injunctive relief. In stage three, the district and appellate courts hammered out the scope of the legal rights and injunctive relief imposed in state court, expressly invoking federalism concerns. *ODonnell* is not unique in this regard as other courts have rejected *Younger* abstention while incorporating federalism concerns at later stages. Distributed federalism acknowledges that by hearing a properly filed case and evaluating it like any other, courts can express their federalism concerns at the merits and remedial stages. This approach ensures that courts' reliance on federalism as a limitation on rights and remedies is explained, justified, and reviewable.

1. *Early Stage: Rejecting* Younger

The most important insight about *ODonnell* is that the court treated the case like any other at the early stage: it evaluated based on the pleadings whether the plaintiffs had stated valid legal claims. The district court in *ODonnell* refused to decide the plaintiffs' central legal claim, which challenged the adequacy of the state court pretrial detention process, at the motion to dismiss stage.[179] *ODonnell* exemplifies how courts are relying on a mix of arguments to reject *Younger* abstention: construing *Younger* narrowly, recognizing that abstention is "exceptional" and "disfavored," rejecting abstention, and following *Gerstein*.[180]

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178 Redish, *supra* note 130, at 74 (arguing that *Younger* abstention violates separation of powers and its "total abolition would not seriously undermine the efficient workings of judicial federalism"); *Federal Court Reform*, *supra* note 5, at 111 (arguing that *Younger* abstention "should be abandoned").

179 892 F.3d 147, 156 (5th Cir. 2018).

180 *ODonnell*, 227 F. Supp. 3d at 734–37 (denying motion to dismiss because plaintiff's suit did not meet "exceptional" circumstances justifying *Younger* abstention); Walker v. City of Calhoun, 901 F.3d 1245, 1254 (11th Cir. 2018) (deny-

Each of the three named plaintiffs in *ODonnell* was arrested on misdemeanor charges and detained because they were unable to afford bail.[181] They claimed that the bail-setting policies for misdemeanor defendants violated state law, due process, and equal protection because the courts relied on the bail schedule without regard for individuals' ability to pay and discriminated against indigent defendants.[182] The defendants in *ODonnell*—Harris County, the sheriff, county judges, and hearing officers—promptly moved to dismiss on various grounds including *Younger* abstention, standing, failure to state a claim, improper party under § 1983, and immunities. They argued that "all three conditions for *Younger* abstention are met" because the plaintiffs "'were in ongoing criminal proceedings'" when they filed their federal lawsuit and could "challenge their bail in the very proceedings at issue or through filing habeas corpus petitions."[183]

Rejecting abstention, the court in *ODonnell* relied on a blended strategy, holding that *Younger* does not apply but would not require abstention "even if" it did.[184] The court explained that *Gerstein*, not *Younger*, applied because the plaintiffs challenged a procedural issue that neither tested the merits of the state prosecution nor sought to enjoin it.[185] Just as in *Gerstein*, this challenge to pretrial detention would be "mooted by conviction or exoneration."[186] But "[e]ven if *Younger* applied," the court reasoned, "this case would fail *Younger*'s conditions for abstention."[187] This blended strategy bolstered the court's analysis by showing that *Younger* and *Gerstein* yielded the same result.[188]

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ing motion to dismiss based on *Younger* abstention, which "has become disfavored"); Arevalo v. Hennessy, 882 F.3d 763, 766–67 (9th Cir. 2018) (reversing dismissal based on *Younger*'s abstention because plaintiff's suit would not interfere with state prosecution and because he satisfied *Younger*'s "irreparable harm exception").

181 ODonnell v. Harris County, 251 F. Supp. 3d 1052, 1062–63 (S.D. Tex. 2017).

182 *Id.* at 1063–64 (observing that the judicial officials were legally proscribed under Texas law from mechanically applying the bail schedule to a given arrestee and instead had to conduct an individualized review based on five enumerated factors, which included the defendant's ability to pay, the charge, and community safety, citing TEX. CODE CRIM. PROC. art. 17.15).

183 *ODonnell*, 227 F. Supp. 3d at 734.

184 *Id.* at 735.

185 *Id.* at 736 (citing Gibson v. Berryhill, 411 U.S. 564, 577 (1973)).

186 *Id.* at 735 ("[M]any misdemeanor defendants plead guilty to end their pretrial detention.")

187 *Id.*

188 *See* Arevalo v. Hennessy, 882 F.3d 763, 766–67 (9th Cir. 2018).

The court in *ODonnell* narrowly construed the first and third prongs of the *Younger* test, holding that there was no "ongoing proceeding" in state court and that the "adequacy prong" was "not met."[189] Bail hearings are not themselves criminal prosecutions, the court reasoned, so "there are no ongoing state proceedings to which this court can or should defer."[190] Other courts have similarly ruled that there were no pending judicial proceedings when plaintiffs had been arrested and booked, but not formally charged,[191] or when plaintiffs were arrested and detained for unpaid court debts.[192] One appellate court held that *Younger* abstention is not required when the state prosecution is initiated after the federal court resolves substantive issues.[193] *Younger*'s third prong was "not met," the court found, because the adequacy of the state bail process was the merits issue: "the adequacy of a timely hearing[ ] is precisely what the plaintiffs are challenging in this case."[194] *Younger* did not apply because "[t]o find that the plaintiffs have an adequate hearing on their constitutional

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189 *ODonnell*, 227 F. Supp. 3d at 735–36;*see, e.g.*, Agriesti v. MGM Grand Hotels, Inc., 53 F.3d 1000, 1002 (9th Cir. 1995) (holding that *Younger* does not apply when plaintiffs are not formally charged in state court because arrest is an executive, not a judicial act). *But see* Trump v. Vance, 395 F. Supp. 3d 283, 294 (S.D.N.Y. 2019) (abstaining under *Younger* and finding that a grand jury proceeding is a pending criminal prosecution for *Younger* purposes).

190 *See ODonnell*, 227 F. Supp. 3d at 735.

191 Buffin v. City & Cty. of San Francisco, No. 15-CV-04959-YGR, 2016 WL 374230, at *2–3 (N.D. Cal. Feb. 1, 2016) (mentioning *Gerstein* for the proposition that *Younger* does not bar a claim that could not be raised in a criminal prosecution and relying on *Agriesti*, where the plaintiffs were arrested and booked, but not formally charged before filing suit, so the detention was an executive decision and not judicially imposed); Welchen v. Cty. of Sacramento, No. 2:16-cv-00185-TLN-KJN, 2016 WL 5930563, at *6–7 (E.D. Cal. Oct. 11, 2016).

192 Cain v. City of New Orleans, 186 F. Supp. 3d 536, 550 (E.D. La. 2016) (distinguishing *Bice*). The Seventh Circuit held that *Younger* abstention is not required if the federal court resolves substantive issues before the initiation of a pending state prosecution. *See* Ewell v. Toney, 853 F.3d 911, 916 (7th Cir. 2017). The Defendant in *Ewell* was held for more than forty-eight hours without a probable cause determination, which amounted to false arrest and unlawful detention. *See id.* at 915. *Younger* abstention did not apply because a proceeding was not pending when Defendant filed her § 1983 case, so the *Hicks* rule did not apply because when the Defendant's charges were filed, the case was no longer in its "infancy." *See id.*

193 *See Agriesti*, 53 F.3d at 1002 (stating that *Younger* does not apply when plaintiffs are not formally charged in state court because arrest is an executive not a judicial act).

194 ODonnell v. Harris County, 892 F.3d 147, 156 (5th Cir. 2018); *ODonnell*, 227 F. Supp. 3d at 736 (citing Gibson v. Berryhill, 411 U.S. 564, 577 (1973)).

claim in state court would decide [its] merits."[195] The Fifth Circuit affirmed, quoting the district court on this point.[196]

Proceeding with a mix of caution and resolve, the court in *ODonnell* relied on "[c]areful case management . . . not abstention."[197] The court used this phrase to reject the defendants' argument that abstention was appropriate because evolving policy reforms at the local level provide the plaintiffs an adequate state court remedy.[198] While acknowledging that local corrective action could resolve the suit at some point, the court found that it was not a basis to abstain. Instead, in the same order rejecting abstention, the court held that the plaintiffs' due process and equal protection claims "survive[d]" dismissal, set forth the legal standard for both claims, and framed the key factual questions for the evidentiary hearing.[199] The Equal Protection analysis would require the court to "resolve critical factual disputes about the Harris County bail system[,]" including the efficacy of bail in securing court appearances, whether courts consider inability to pay before imposing bail, and the number of misdemeanor defendants detained based on indigency alone.[200] The Due Process analysis would require the court to evaluate the "federal, state, and local rules" against the "customs or practices of applying these rules."[201]

Distributed federalism is consistent with careful case management in that it shifts federalism concerns to the merits and remedial stages, when courts have a full understanding of the alleged violations and justification for injunctive relief.[202] Courts recognize that abstention means dismissing a valid, significant legal claim in favor of state court proceedings that

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195 *ODonnell*, 227 F. Supp. 3d at 736 ("This factor is not properly included in the abstention analysis here."). *See* Rodriguez v. Providence Cmty. Corr., Inc., 155 F. Supp. 3d 758, 765–66 (M.D. Tenn. 2015) (*Younger* abstention is inappropriate if the state proceeding would come so late that the probationers would first have to suffer the deprivation they allege).

196 *ODonnell*, 892 F.3d at 156 ("[T]o find that the plaintiffs have an adequate hearing on their constitutional claim in state court would decide its merits." (alterations in original omitted)).

197 *ODonnell*, 227 F. Supp. 3d at 737.

198 *Id.* (rejecting state defendants' argument that policy reforms justified abstention and responding, "[c]areful case management to allow time for reform, not abstention, is the better response to the defendants' argument.").

199 *Id.* at 730–31, 733 ("Rational basis is a factual inquiry. Courts are properly reluctant to dismiss without permitting plaintiffs to make a factual showing that a government policy is irrational.").

200 *Id.* at 731.

201 *See id.* at 732.

202 *See* Calabresi & Lawson, *supra* note 44, at 265 ("*Younger*-style remedial abstention is wrong, but a measured regard for principles of federalism—favoring exclusively neither the national nor the state governments—is not.").

might not provide a full opportunity to litigate or remedy those claims. As *ODonnell* illustrates, distributed federalism resolves that difficulty by allowing courts to sort cases as they normally would with sensitivity to federalism.

2. *Merits Stage: The Legal Policy in Fact*

When courts get past *Younger* abstention, they face the challenging task of examining the factual and legal aspects of the constitutional claims. Distributed federalism empowers courts to probe the adequacy and availability of state court procedures and remedies and the justification for any injunctive relief. The district court in *ODonnell* conducted an eight-day hearing that yielded a remarkable 116-page ruling that detailed local pretrial detention policies in fact, pinpointed the violations, identified the harms to defendants, and justified injunctive relief.[203] The court's central finding was that the state court pretrial detention procedures violated state law, due process, and equal protection and that injunctive relief was necessary to correct these harms.

Local court practices on pretrial detention, the court found in *ODonnell*, were constitutionally defective. Many features of the Harris County process, at least on paper, were similar to federal pretrial detention statutes and would permit, though not require, constitutionally "minimum standards and procedures."[204] State law and local practices prohibited routine use of money bail, permitted unsecured bonds, required individualized hearings that considered the individual's ability to pay, and afforded prompt judicial review.[205] These policies included an individualized detention hearing within twenty-four hours of arrest and "next business day" review by county judges.[206]

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203 ODonnell v. Harris County, 251 F. Supp. 3d 1052, 1062, 1084 (S.D. Tex. 2018) (acknowledging a "growing movement against using secured money bail to achieve a misdemeanor arrestee's continued detention"). The district court situated the issues within a broader legal and national context and considered a wide range of sources including testimony from fact and expert witnesses detailing local bail procedure and its impacts. The court heard from an assistant district attorney, the local sheriff, a hearing officer, three county judges, and a pretrial detention consultant who had been assisting Harris County on implementing reforms to its pretrial process during the pendency of the lawsuit. It also heard from experts in criminology, court administration, and pretrial detention, each of whom had analyzed county data, and a retired judge familiar with the use of nonmonetary bail in misdemeanor cases. *Id.*

204 *Id.* at 1084.

205 *Id.* at 1086 (citing HARRIS CNTY. CRIM. CTS., RULES OF COURT 17 (2020)).

206 TEX. CODE. CRIM. PROC. art. 2.09, 17.15, 17.033; HARRIS CNTY. CRIM. CTS., RULES OF COURT 9–10 (2020).

In fact the "unwritten custom and practice" in Harris County fell far short of these standards.[207] Local officials (prosecutors, hearing officers, and county judges) relied almost exclusively on money bail without individualized findings or meaningful judicial review.[208] The individualized hearing (where bail is usually set) did not occur within twenty-four hours of arrest, rarely lasted more than a minute, and provided no opportunity for arrestees to speak or submit evidence relevant to the detention decision.[209] Local data showed that officials "impose[d] the scheduled bail amounts on a secured basis about 90 percent of the time,"[210] rarely assigned an unsecured personal bond,[211] and routinely rejected recommendations for release by their own pretrial service officers.[212] Finally, despite a right to prompt judicial review before a county judge, there was no meaningful review: arrestees often waited days to see a county judge who adjusted bail amounts or granted unsecured bonds in less than one percent of cases.[213]

The as-applied process failures in *ODonnell* underscore a key risk of *Younger* abstention—namely that courts will evaluate the adequacy of state court remedies or the threat of irreparable harm without probing the factual realities.[214] The process failures in *ODonnell* resulted in prolonged, unjustified detention of misdemeanor arrestees that hurt defendants, especially the poor, for whom "secured money bail function[ed] as a pretrial detention order."[215] Local data showed that the pretrial risk assessment tool used by local courts discriminated against the poor by scoring poverty indicators (such as not owning a car) the same as prior criminal violations or prior failures to appear in court; hearing officers imposed bail knowing that it would result in detention for indigent defendants, and secured release did not result in better court appearance

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207 *See ODonnell*, 251 F. Supp. 3d at 1130–31.

208 *See id.* at 1059–60, 1068.

209 *See id.* at 1093.

210 *Id.* at 1130.

211 *Id.* at 1151.

212 *Id.* at 1095 (stating that official rejected suggestions to release the person on personal bond sixty-six percent of the time).

213 *See id.* at 1104, 1131, 1154.

214 Wallace v. Kern, 520 F.2d 400, 407–08 (2d Cir. 1975) (rejecting district court's finding that bail reviews were perfunctory and pointing to "unlimited opportunities" for bail review under state law); *Cf.* Gerstein v. Pugh, 420 U.S. 103, 126 (1975) (requiring a judicial determination of probable cause before or promptly after arrest as a prerequisite for detention).

215 *ODonnell*, 251 F. Supp. 3d at 1130. *See also* Russell v. Harris County, 454 F. Supp. 3d 624, 640 (S.D. Tex. 2020) (challenging the pretrial bail system for setting the amount of bond for indigent felony defendants in Harris County).

rates or law-abiding conduct before trial.[216] Voluminous empirical data and academic literature reinforced that defendants who are detained pretrial fare worse at every stage of adjudication: they are significantly more likely to plead guilty, be sentenced to imprisonment, and receive sentences that are on average twice as long as released defendants.[217] The district court also noted the collateral harms of detention, including job loss, family stress, and even an increase in likeliness to commit crime.[218] These critical findings would not have come to light if the court only assessed, at the dismissal stage, the adequacy of the process as written, instead of as applied.

3. *Final Stage: Remedying Violations*

Federal courts remain cautious about finding and correcting constitutional violations in state criminal proceedings and invoke federalism to limit the scope of federal rights and injunctive relief. In *Walker* and *ODonnell*, the appellate courts rejected *Younger* abstention, but narrowed the scope of the constitutional right and streamlined the injunctive relief so that what remained was a bright line rule that avoided direct federal oversight. As in *Gerstein*, these courts articulated important rights relying on a flexible but clear constitutional standard without federal enforcement. Such broad rules may leave both sides dissatisfied, thus making the additional point that the litigants may fare better in state court or through a negotiated settlement.[219] Both courts also reinforced that

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216 The district court concluded that, in fact, "release on secured financial conditions does not assure better rates of appearance or of law-abiding conduct before trial compared to release on unsecured bonds or nonfinancial conditions of supervision." *ODonnell*, 251 F. Supp. 3d at 1131–32.

217 *Id.* at 1130–31.

218 ODonnell v. Harris County, 892 F.3d 147, 155 (5th Cir. 2018).

219 Successful settlements on pretrial detention reform include: Agreed Final Judgment, Willey v. Ewing, No. 3:18-cv-00081 (S.D. Tex. Apr. 22, 2019), ECF No. 36; Order, Rodriguez v. Providence Cmty. Corr., No. 3:15-cv-01048 (M.D. Tenn. Aug. 8, 2018), ECF No. 232; Consent Judgment, Powell v. City of St. Ann, No. 4:15-cv-00840 (E.D. Mo. May 4, 2018), ECF No. 42; Consent Decree Granting 38 Joint Motion, Cooper v. City of Dothan, No. 1:15-cv-00425-WKW-TFM (M.D. Ala. Apr. 13, 2016), ECF No. 40; Notice of Settlement, Kennedy v. City of Biloxi, No. 1:15-cv-00348 (S.D. Miss. Mar. 4, 2016); Notice of Settlement, Chevon Thompson v. Moss Point, No. 1:15-cv-00182-LG-RHW (S.D. Miss. Oct. 14, 2015); Judgment, Jones v. City of Clanton (Varden v. City of Clanton), No. 2:15-cv-00034-MHT-WC (M.D. Ala. Sept. 14, 2015), ECF No. 77; Order Granting Motion for Settlement, Snow v. Lambert, No. 15-567-SDD-RLB (M.D. La. Sept. 3, 2015), ECF No. 29; Joint Motion to Approve Consent Judgment, Jenkins v. City of Jennings, No. 4:15-cv-00252-CEJ (E.D. Mo. Aug. 26, 2015), ECF No. 13; Order (Settlement), Pierce v. City of Velda, No. 4:15-cv-00570 (E.D. Mo. June 3, 2015), ECF No. 16;

Younger might bar more ambitious requests for injunctive relief.

The appellate courts in *ODonnell* and *Walker* narrowly construed the constitutional rights at issue without relying expressly on federalism. In *ODonnell*, the Fifth Circuit affirmed the due process and equal protection violations, including the district court's "factual findings" showing that secured bail was imposed "automatically on indigent" defendants without regard for their ability to pay, operated as detention orders, were an "instrument of oppression,"[220] and discriminated against the poor.[221] The court disagreed on the scope of the due process liberty interest, stating that the right recognized by the district court was "too broad" because there is no "automatic right to pretrial release."[222] Still, the court agreed that local procedures were constitutionally "inadequate––even when applied to our narrower understanding of the liberty interest at stake."[223]

Federalism concerns prompted the courts in *Walker* and *ODonnell* to cut back on the scope of injunctive relief initially ordered in the trial courts. In *ODonnell*, the district court had identified five ingredients for an adequate pretrial detention hearing, including a hearing within twenty-four hours of arrest and written findings to support orders to detain.[224] The twenty-four-hour requirement was required by state law but had not been enforced, and the written findings were intended to facilitate meaningful judicial review, which was also found to be lacking.[225] The Fifth Circuit eliminated both requirements because they would be too burdensome. On the written findings, the court stated that "such a drastic increase in the burden imposed upon Hearing Officers will do more harm than good" and will require some "50,000 written opinions per year

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Order, Mitchell v. Montgomery, No. 2:14-cv-00186 (M.D. Ala. Nov. 17, 2014), ECF No. 65.

220 *See ODonnell*, 892 F.3d at 159, 166 (agreeing that the county's pretrial detention procedures discriminated against the poor).

221 *See id.* at 161.

222 *Id.* at 158.

223 *Id.* at 159.

224 *Id.* ("Due process requires: (1) notice that the financial and other resource information Pretrial Services officers collect is for the purpose of determining a misdemeanor arrestee's eligibility for release or detention; (2) a hearing at which the arrestee has an opportunity to be heard and to present evidence; (3) an impartial decisionmaker; (4) a written statement by the factfinder as to the evidence relied on to find that a secured financial condition is the only reasonable way to assure the arrestee's appearance at hearings and law-abiding behavior before trial; and (5) timely proceedings within 24 hours of arrest.").

225 *Id.* at 154, 160.

to satisfy due process."[226] Requiring magistrates to specify reasons would suffice, the court held. And the "24-hour requirement is too strict under federal constitutional standards," which merely requires a probable cause hearing within forty-eight hours.[227]

In *Walker*, the Eleventh Circuit also adopted a forty-eight-hour rule instead of the stricter twenty-four-hour rule imposed by the district court.[228] Local officials in *Walker* adopted a "Standing Bail Order" shortly after they were sued in federal court that included a bail schedule and authorized wealth-based detention pending the forty-eight-hour probable cause hearing.[229] The district court initially found the Standing Bail Order to be unconstitutional and ordered local officials "to implement post-arrest procedures that comply with the Constitution."[230] The Eleventh Circuit reversed, finding that order was "insufficiently specific,"[231] and on remand the district court ordered the local courts to provide a detention hearing within twenty-four hours.[232] But the Eleventh Circuit vacated the twenty-four-hour requirement, holding that local courts could detain indigents based on a bail schedule pending the forty-eight-hour hearing.[233] Citing *ODonnell*, the court agreed that "indigency determinations for purposes of setting bail are presumptively constitutional if made within 48 hours of arrest," adding that federal courts should grant "States wide latitude to fashion procedures for setting bail."[234] Because these findings meant that the Standing Bail Order would likely withstand constitutional scrutiny, the Eleventh Circuit vacated the preliminary injunction.[235]

These courts, while firmly rejecting *Younger* abstention, did not reject federalism. This approach is consistent with *Gerstein* in several respects: it limits the constitutional right in light of federalism concerns and relies on mostly declaratory relief that articulates a bright-line rule without specifying particulars. This bright-line, hands-off approach affords state

226 *Id.* at 160.
227 *Id.*
228 Walker v. City of Calhoun, 901 F.3d 1245, 1253, 1281 (11th Cir. 2018).
229 *Id.* at 1252.
230 *Id.* at 1253 (quoting Walker v. City of Calhoun (*Walker I*), No. 4:15-CV-0170-HLM, 2016 WL 361612, at *14 (N.D. Ga. Jan. 28, 2016).
231 *Id.*
232 *Id.*
233 *See id.* at 1271–72.
234 *Id.* at 1266, 1268.
235 *Id.* at 220.

courts "wide latitude" in achieving compliance without federal oversight or enforcement.

4. *The Shadow of* O'Shea

O'Shea, which continues to cast a shadow over *Younger* analysis, can be reassessed using the distributed federalism model. *O'Shea* represented the "most dramatic extension of *Younger*" based on a strongly worded policy of federal noninterference in state criminal proceedings.[236] Today, courts continue to invoke *O'Shea* to warn that federal courts will not entertain constitutional claims, regardless of their merit, that contemplate day-to-day oversight of state criminal proceedings.[237] While both *Walker* and *ODonnell* distinguished *O'Shea*, they relied on it to signal that *Younger* abstention would be justified if the relief sought is "intrusive and unworkable"[238] or involved "'continuous supervision by the federal court.'"[239] As these cases show, the distributed federalism model mostly alleviates that worry by relying on traditional litigation vetting and integrating federalism at every stage of the proceeding. Revisiting *O'Shea* helps to illustrate the point.

As a preliminary matter, by interpreting *O'Shea* more narrowly in light of *Sprint*, courts likely would find that *Younger* does not apply because the first and third prongs cannot be met. In *O'Shea* there were no pending state court prosecutions, so it seems obvious that the first prong of the *Younger* test would not be met.[240] Though critics lodged this point long ago, it is sharper after *Sprint*, which supports applying *Younger* narrowly.[241] The third prong also could not be met because the plaintiffs in *O'Shea* challenged the adequacy of the state-court process. As Professor Tribe observed, the plaintiffs in *O'Shea* "challenged the constitutionality of the very judicial processes to which the ordinary *Younger* rules would remand them."[242] So in *O'Shea*, just as in *ODonnell*, "to find that the plaintiffs

236 CHEMERINSKY, *supra* note 31, at 902.

237 *See* ODonnell v. Harris County, 892 F.3d 147, 157 (5th Cir. 2018); *Walker*, 901 F.3d at 1254–55.

238 *See Walker*, 901 F.3d at 1255.

239 *ODonnell*, 892 F.3d at 157 (quoting O'Shea v. Littleton, 414 U.S. 488, 501 (1974)).

240 *O'Shea*, 414 U.S. at 495–96; CHEMERINSKY, *supra* note 31, at 902 (discussing *O'Shea* and citing LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 207 (2d ed. 1988)).

241 CHEMERINSKY, *supra* note 31, at 902.

242 *Id.* (discussing *O'Shea* and citing TRIBE, *supra* note 240, at 207.

have an adequate hearing on their constitutional claim in state court would decide [the] merits" of their federal claim.[243]

Evaluating *O'Shea* through the lens of distributed federalism shows that the risk of day-to-day federal interference in state criminal proceedings is negligible. Early stage vetting would screen constitutional claims for standing, legal validity, and immunities. In *O'Shea* the Supreme Court dismissed the plaintiffs' claim on ripeness grounds because they were neither currently facing nor likely to face prosecution again in the municipal courts.[244] Lack of standing, not abstention, would justify dismissal of the entire case, and any remaining claims against local judges, the prosecutor, and law enforcement would be analyzed for absolute and qualified immunity.[245]

Assuming no standing and immunity problems existed, the federal court next would determine claim by claim whether the plaintiffs had stated a valid legal challenge to wealth-based detention, selective enforcement, imposition of trial fines, or discriminatory sentencing.[246] Today plaintiffs might be less likely to allege such diverse claims in a single suit, but even if they did, the court would scrutinize the sufficiency of the pleadings as to each claim. Surviving claims would advance to the merits stage for summary judgment or fact finding. The Supreme Court in *O'Shea* assumed, without examining the issue, that numerous state remedies were available to victims of the alleged discriminatory practices, including substitution of a judge, change of venue, direct appeal, state postconviction review, judicial disciplinary proceedings, and federal habeas relief.[247] Today when plaintiffs challenge the state judicial process, the viability and efficacy of those state court remedies

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243 *ODonnell*, 892 F.3d at 156 (quoting *ODonnell v. Harris County*, 227 F. Supp. 3d 706, 736 (S.D. Tex. 2017)) (alterations in original omitted).

244 CHEMERINSKY, *supra* note 31, at 902 n.98 (citing *O'Shea*, 414 U.S. at 495–99); *see also* City of Los Angeles v. Lyons, 461 U.S. 95, 103–06 (1983) (noting that the plaintiff lacked standing to seek injunctive relief because he could not demonstrate that he was likely to suffer future injury from the use of chokeholds by police officers, and highlighting the Court's focus on standing in *O'Shea*); Rizzo v. Goode, 423 U.S. 362, 372 (1976) (reiterating the holding in *O'Shea* that past wrongs do not establish an immediate threat of injury sufficient to invoke federal jurisdiction).

245 *See* ODonnell v. Harris County, 227 F. Supp. 3d 706, 755 (S.D. Tex. 2017) (citing the Federal Courts Improvement Act of 1996, Pub. L. No. 104–317, which amended § 1983 to make judicial officers acting in their judicial capacities immune from injunctive relief unless "a declaratory decree was violated or declaratory relief was unavailable. 42 U.S.C. § 1983").

246 *O'Shea*, 414 U.S. at 493.

247 *Id.* at 502.

cannot be assumed, but must be examined in fact, just as in *ODonnell*.

If constitutional violations are found, the relief ordered would not necessarily be "intrusive and unworkable" or involve day-to-day supervision, as the Court feared in *O'Shea*. Rather, as *ODonnell*, *Walker*, and *Gerstein* show, the relief would be mostly declaratory, for example, by setting forth clear rules on whether or when wealth-based detention is allowed, trial fines are permissible, or prosecution or sentencing policies violate equal protection or due process, ensuring that state courts enjoy "wide latitude" to comply with constitutional requirements and are not overburdened by them. This kind of relief is unlikely to involve day-to-day federal interference.

Federal courts can articulate and vindicate federal constitutional rights without subjecting state courts to the kind of intrusive and unworkable interference that *Younger* and *O'Shea* aimed to prevent. Distributed federalism contemplates that courts' willingness to grant injunctive relief will vary and may evolve over time. Either way, courts that seek to limit or justify rights and relief can explain that on the record, allowing the litigants and reviewing courts to weigh in.[248] Distributing federalism across every stage does not predict outcomes or eliminate federalism, but it does serve to make it more transparent and responsive to alleged violations.

III
THE CHALLENGES OF DISTRIBUTED FEDERALISM

Distributed federalism is a straightforward approach but raises new questions for litigants and courts. *Gerstein*, *ODonnell*, and *Walker* are examples of distributed federalism and reveal its benefits and built-in limitations. While these courts rejected *Younger* abstention, they can be seen as expressing federalism in other ways by limiting the scope of the right and dramatically limiting injunctive relief imposed on state courts so as to avoid burdensome requirements or intrusive federal oversight. This approach provides profound benefits in that courts are deciding, not abstaining from, important constitutional issues that have been underdeveloped for decades. These plaintiffs chalked up significant victories in persuading the courts to articulate federal rights, find violations, and order injunctive relief. But appellate courts took corrective action on

248 *See generally* Fallon, *supra* note 16, at 701 (explaining, with respect to the Equilibrium Thesis, the value of courts explaining their refusal to grant injunctive relief).

the scope of rights and relief, warning that *Younger* would prohibit claims for broader relief. As courts pivot away from *Younger* abstention, many appear to remain firmly committed to federalism.

Younger is a doctrine in transition, raising questions about how it should be applied and whether federal courts are a promising venue for criminal justice reform. First, does distributed federalism add value or merely swap one form of federalism for another? Distributed federalism supports greater transparency and accountability so that federalism choices are visible, explained, and reviewable. Second, should *Younger* abstention continue to categorically bar certain kinds of claims in federal court and, if so, which ones? The short answer is that *Younger* should bar relief that is actually available in pending state criminal proceedings but not eliminate federal civil remedies that are necessary to vindicate constitutional rights.[249] Third, in light of *Gerstein*, *ODonnell*, and *Walker*, can federal courts impose injunctive relief sufficient to achieve constitutional compliance? In *ODonnell* and *Walker*, federal appellate courts expressly tolerated unconstitutional practices, such as wealth-based detention. These cases hint that those rights and remedies questions will be the new battleground.

A. Transparent Federalism

Distributed federalism recognizes that the policy of federal noninterference remains a strong force even as reliance on *Younger* abstention wanes. *Younger* built on courts' institutional reluctance to grant injunctive relief absent a very specific showing of need (no adequate remedy and irreparable injury). Though *Younger* and its progeny deterred plaintiffs from suing in federal court, today plaintiffs are bringing such suits to achieve criminal justice reform in a changed landscape. Courts are rejecting *Younger* abstention, acknowledging that it is "exceptional" and "disfavored,"[250] narrowly applying its

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249 *See* Pugh v. Rainwater, 483 F.2d 778, 782 (5th Cir. 1973) ("[W]hen a plaintiff who happens also to be a defendant in a simultaneous state court proceeding seeks to challenge an aspect of the criminal justice system which adversely affects him but which *cannot* be vindicated in the state court trial, comity is no bar to his challenge."), *rev'd on other grounds sub nom.* Gerstein v. Pugh, 420 U.S. 103 (1975); Fallon, *supra* note 16, at 1240 (observing that there is no disruption to state proceedings if the federal suit seeks relief that is not available in the criminal prosecution).

250 Sprint Commc'ns v. Jacobs, 571 U.S. 69, 73 (2013) (describing circumstances justifying *Younger* abstention as "exceptional"); Walker v. City of Calhoun, 901 F.3d 1245, 1254 (11th Cir. 2018) (acknowledging that *Younger* abstention "has become disfavored").

terms, and instead incorporating federalism concerns at the merits and remedial stages and on appeal. Federalism continues to limit the extent to which federal courts can provide an effective venue for criminal justice reform. Even if the results are limited, this transformation of *Younger* is positive.

Distributed federalism provides a flexible framework for evaluating federalism in civil rights cases challenging the constitutionality of state criminal proceedings. These cases often raise urgent, recurring issues of liberty, safety, dignity, and fairness in state criminal justice systems. As a doctrine of avoidance, *Younger* favored state-court actors (prosecutors, judges, and other local officials), who enjoyed a kind of federalism-based immunity.[251] Distributed federalism shows how instead of abstaining, courts can hear claims without abandoning federalism principles. A motion to dismiss provides an early opportunity for the court to explain what makes a viable claim and whether the plaintiffs have satisfied that standard. The same is true with procedural issues, such as class actions, and justiciability issues, such as standing, ripeness, and mootness. Rejecting abstention will require courts to resolve and develop the law on these underdeveloped issues.

Distributed federalism promotes transparency and accountability in federal and state courts. Fallon's Equilibrium Thesis also shared the goal of fostering "greater transparency and integrity of analysis."[252] His purpose was not to stop courts from worrying about the overall balance of relief, but rather for them to abandon "confusing and cynicism-inducing" manipulations that obscure rather than illuminate their reasoning.[253] "If courts are troubled about unacceptable remedies, they should be willing to say so openly and to shoulder the responsibility for withholding injunctive relief within a framework that calls for a weighing of public and private interests."[254] Distributed federalism supports a similar goal. *Younger* abstention cut the litigation short, required a less-than-fulsome exploration or explanation of the issues, and made it harder to challenge the result. Going forward, courts will continue to rely on federalism to limit the scope of constitutional rights or procedures, limit the burdens on state courts, and limit federal intrusion into state court proceedings. It is

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251 *See* Calabresi & Lawson, *supra* note 44, at 264 (arguing that *Younger* made federalism "always decisive in favor of the state").

252 Fallon, *supra* note 16, at 701.

253 *Id.*

254 *Id.*

better for courts to do so openly, explaining their choices on the record so that litigants and appellate courts can participate in developing rights and shaping remedies. This transparency enhances federal court accountability for their decisions and will enhance enforcement of constitutional rights in state criminal proceedings. While such progress may be gradual or uneven, it is preferable to the total avoidance of these issues due to *Younger* abstention.

B. Which Rights

Federal cases triggering *Younger* abstention primarily touch on three categories of claims that are differentiated by the nature of the claim and relief sought. The first category is *Younger* itself, when a plaintiff challenges the constitutionality of a state or local criminal law that would provide a substantive or merits defense to prosecution. The second category of claims are those in *Gerstein*, *ODonnell*, and *Walker*, which challenge a procedure within a state criminal proceeding, such as pretrial detention, debtors' prison, or shackling.[255] The third category would include broader systemic challenges like the one in *Luckey v. Miller*, which alleged that the local indigent defense system deprived indigent defendants of their Sixth Amendment right to counsel.[256] Federal courts generally should reject *Younger* abstention if there is no pending criminal proceeding or if the claim cannot be vindicated in the pending criminal case. The recent cases provide a compelling argument that *Younger* abstention does not apply to the second category (claims patterned on *Gerstein*) and should extend to the third category (systemic challenges). Though overruling *Younger* seems improbable and even unwise, as it could seriously disrupt state criminal proceedings, courts should more carefully analyze the critical elements: the adequacy and actual availability of state court remedies to timely and fully redress the alleged violations.

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255 *See* Cain v. White, 937 F.3d 446, 450, 454 (5th Cir. 2019) (holding that incarceration of debtors for unpaid court fees without consideration of their ability to pay violated due process); United States v. Sanchez-Gomez, 138 S. Ct. 1532, 1542 (2018) (suggesting that a challenge to a shackling policy should be alleged in a civil rights action, not a criminal proceeding).

256 *See* 976 F.2d 673, 676 (11th Cir. 1992) (noting plaintiffs' claim that local indigent defense system violates the Sixth and Fourteenth Amendments because it "is inherently incapable of providing constitutionally adequate services").

1. *Younger-type Claims*

The overall test for applying *Younger* should follow what courts and scholars have expressed for years: *Younger* should bar a federal suit if the defendant has a remedy in their pending criminal case, but should not bar a claim that cannot be vindicated in the pending state criminal proceeding.[257] In *Younger*, the plaintiff could raise his First Amendment challenge as a defense to the state court prosecution and eventually on appeal to the Supreme Court, so the court rejected concerns about chilling protected speech, reasoned that a state court would be better positioned to narrowly construe a state statute in light of local concerns, and specified that this claim was a defense to prosecution.[258] The court in *Pugh v. Rainwater* reasoned that *Younger* properly bars a federal lawsuit claiming a Fourth Amendment violation because the defendant has the exclusionary remedy in state court.[259] Preserving *Younger*, while interpreting it narrowly, is also consistent with *Sprint*.[260] With this in mind, courts are likely to abstain under *Younger* when litigants have a merits-based defense to prosecution in state court.

But even for *Younger*-type claims, where a merits-based defense is possible, the availability and adequacy of state-court remedies should be examined carefully and not assumed. Enforcement of anti-homeless ordinances and the arrest of Black Lives Matter protestors provide two examples of how a merits-based defense in state court may fail to protect individual rights. Anti-homeless ordinances can be challenged on the merits under the Eighth Amendment or the Due Process Clause.[261] These laws, which typically criminalize sleeping or camping in public, can lead to a range of criminal enforcement actions including a warning, forced movement, destruction of property, citation, arrest, booking, pretrial detention in the jail, conviction, more jail time, fines, and other sanctions. Individuals may have a merits defense that is virtually impossible to assert in criminal court: they may be subjected to enforcement activity (a forced move, loss of property, arrest, or detention)

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257 *See* Pugh v. Rainwater, 483 F.2d 778, 782 (5th Cir. 1973); Fallon, *supra* note 15, at 1240; *The Cases* Dombrowski *Forgot*, *supra* note 5, at 667.

258 *See* 401 U.S. 37, 49–51 (1971).

259 *See* 483 F.2d at 782 (discussing Mapp v. Ohio, 367 U.S. 643 (1961)).

260 *See* 571 U.S. 69, 77–78 (2013).

261 *See* Martin v. City of Boise, 920 F.3d 584, 604 (9th Cir. 2019) (holding that a local ordinance criminalizing outdoor sleeping violates the Eighth Amendment when no alternative shelter is available and approving prospective injunctive relief).

without being charged,[262] they are unlikely to be appointed counsel, and their case may resolve quickly with a conviction or dismissal at their first court appearance. Any of these circumstances could mean that there is no meaningful opportunity to challenge their arrest or conviction. So, while a state court remedy of dismissal exists, as in *Younger*, the practical difficulty (or impossibility) of challenging the prosecution on the merits mimics the transitory features of the pretrial detention claims in *Gerstein* and *ODonnell*. Litigating and aggregating these claims in a civil-rights suit makes sense and plaintiffs actually facing prosecution should not be disqualified from suing on the basis of a pending prosecution.[263]

Some Black Lives Matter protestors were stuck in a similar kind of limbo, unable to challenge their arrest on the merits. Many Las Vegas protestors who were arrested in Clark County, Nevada in the summer of 2020 were ordered to return to court on their citations only to be told the district attorney's requested several more months to decide whether to prosecute.[264] In the meantime, protestors did not know whether their arrests—for such crimes as breaching the peace and failure to disperse—were lawful, could not challenge them in criminal court, and did not know if or how to lawfully protest.[265] Could they sue in federal court to challenge the legality of the statutes or their arrests? Traditionally, a federal district court would abstain under a straightforward application of *Younger*,

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262 *See, e.g.*, Sara K. Rankin, *Punishing Homelessness*, 22 NEW CRIM. L. REV. 99, 113 (2019) (identifying noncriminal punishments, such as property loss, psychological and emotional harm, and loss of identification and benefits, that can result from enforcement of anti-homeless ordinances).

263 *See also* Chemerinsky, *supra* note 2, at 2692–93 (observing the vexing problem of standing in criminal reform suits: "[a] person who is being prosecuted in state court cannot, because of abstention doctrines, challenge the adequacy of representation in a federal court action. But a person who is not a defendant is unlikely to be able to meet the requirements for standing and ripeness." (internal citations omitted)).

264 *See* Ricardo Torres-Cortez, *80 Protesters Arrested, 12 Officers Injured in George Floyd Demonstration on Strip*, LAS VEGAS SUN (May 30, 2020, 12:14 AM), https://m.lasvegassun.com/news/2020/may/30/george-floyd-protesters-march-on-strip-for-justice/ [https://perma.cc/GF55-SGTT]; Dana Gentry, *Right to Protest Proves Costly in Las Vegas: Bail Voided for Strip Protesters, Not Downtown Activists*, NEV. CURRENT (June 26, 2020, 5:55 AM), https://www.nevadacurrent.com/2020/06/26/right-to-protest-proves-costly-in-las-vegas/ [https://perma.cc/G4AZ-Q5TH]; *see, e.g.*, Case No. 20-CR-005318 (Las Vegas J. Ct.) (showing prosecutor declined to prosecute a protestor more than four months after arrest).

265 These questions are similar to those in *Younger*, which required dismissal because the plaintiff was actually facing state prosecution, and *Steffel v. Thompson*, 415 U.S. 452, 462 (1974), in which the Court held that declaratory relief was available to plaintiffs not facing prosecution.

which presented similar issues and dismissed concerns about chilling political speech.[266] The protestors could assert standing based on the threat of subsequent arrest,[267] argue that there was no pending criminal proceeding (because charges had not been filed),[268] and request only declaratory relief (without seeking to enjoin any prosecution).[269] These arguments would require the federal court to carefully parse *Younger* in deciding whether there was a pending prosecution or an adequate remedy in the state criminal court for the protestors to promptly vindicate their rights.

2. *Systemic Challenges*

The third major category of claims are systemic claims like those challenging state indigent defense systems.[270] Over the past decade, plaintiffs have successfully claimed that underfunded, overburdened indigent defense systems violate the Sixth Amendment because they constructively deny individuals the right to the effective assistance of counsel.[271] This novel claim has primarily evolved in state court due to the risk of *Younger* abstention in federal court under the Eleventh Circuit's decision in *Luckey v. Miller* nearly three decades ago.[272]

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266 Younger v. Harris, 401 U.S. 37, 50 (1971) (acknowledging that inhibiting full exercise of the First Amendment "should not by itself justify federal intervention").

267 *See Steffel*, 415 U.S. at 459.

268 *See* Rothgery v. Gillespie County, 554 U.S. 191, 213 (2008) (holding that a criminal judicial proceeding starts at a criminal defendant's initial appearance before a judicial officer).

269 FILL IN FOOTNOTE.

270 Smith, *supra* note 5, 2343–45 (describing criteria for systemic harms).

271 *See, e.g.*, Wilbur v. City of Mount Vernon, 989 F. Supp. 2d 1122, 1123–24 (W.D. Wash. 2013) (finding inadequate funding and denial of counsel at critical stages of criminal proceedings systematically deprived indigent defendants the assistance of counsel); Hurrell-Harring v. State, 930 N.E.2d 217, 224–25 (N.Y. 2010) (recognizing a claim of constructive denial of counsel based on alleged deficiencies in indigent defense system); State v. Waters, 370 S.W.3d 592, 597 (Mo. 2012) (en banc) (recognizing that high public defender caseloads may violate Sixth Amendment right to effective and competent counsel); Pub. Def., Eleventh Jud. Cir. of Fla. v. State, 115 So. 3d 261, 270 (Fla. 2013) (acknowledging that public defenders' excessive caseloads render them unable to provide constitutionally adequate representation); Kuren v. Luzerne County, 146 A.3d 715, 717–18 (Pa. 2016) (holding that a class of indigent criminal defendants alleged a valid cause of action for systemic denial of counsel due to underfunding and could seek an injunction forcing a county to adequately fund a public defenders' office); Duncan v. State, 774 N.W.2d 89, 97–98 (Mich. Ct. App. 2009) (holding that plaintiffs can sue state officials and seek injunctive relief for systemic denial of counsel due to lack of adequate funding and oversight), *aff'd on other grounds mem.*, 780 N.W.2d 843 (Mich. 2010).

272 *See* 976 F.2d 673, 673–74 (11th Cir. 1992) (affirming dismissal based on *Younger* abstention of class action challenging adequacy of Georgia's indigent

In *Luckey*, the plaintiffs did not seek to enjoin a prosecution and argued unsuccessfully that *Gerstein*, not *Younger*, controlled. The problem, the court explained, was not a pending state prosecution but the breadth of their challenge.[273] As the Eleventh Circuit reiterated with approval in *Walker*, the plaintiffs in *Luckey* "intend to restrain every indigent prosecution and contest every indigent conviction until the systemic improvements they seek are in place."[274] The court in *Walker* analogized such "pervasive federal court supervision of State criminal proceedings" to the kind of "intrusive and unworkable" relief requested in *O'Shea*.[275]

These claims should not be barred under *Younger* abstention based merely on their scope and impact. In fact, some federal courts are deciding indigent defense claims. In *Wilbur v. City of Mount Vernon*, which the local defendants removed to federal court, the court found a Sixth Amendment violation and imposed injunctive relief, including a part-time monitor to track, evaluate, and report on public defender performance, and ordered defendants to pay attorneys' fees and costs.[276] This claim could not have been brought within a criminal case: criminal defendants cannot aggregate their claims to challenge policy issues or secure prospective injunctive relief, and no single defendant could vindicate this Sixth Amendment claim within their state criminal case. Instead, a federal court should process the claim like any other, by ruling on justiciability issues, resolving motions to dismiss, making factual findings, and ruling on the merits.[277] A constructive denial of counsel claim, courts have held, imposes on plaintiffs a "weighty" standard of proof, requiring allegations of "systematic deficiencies"

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defense system under Sixth, Eighth, and Fourteenth Amendments); *see also* Drinan, *supra* note 2, at 468 ("[T]o date, a federal forum has not been available to indigent defendants seeking to vindicate their Sixth Amendment right to counsel on a systemic basis."); Rodger Citron, Note, *(Un)*Luckey v. Miller*: The Case for a Structural Injunction to Improve Indigent Defense Services*, 101 YALE L.J. 481, 501–02 (1991) (arguing in favor of structural injunctions to reform indigent defense systems and urging state courts to issue guidelines governing the provision of indigent defense services).

273 *See Luckey*, 976 F.2d at 679 (noting that the requested injunctive relief would be "significant" and "inevitably set up the precise basis for future intervention condemned in *O'Shea*").

274 901 F.3d 1245, 1255 (11th Cir. 2018).

275 *See id.*

276 989 F. Supp. 2d at 1123, 1133–37; *see also* Wilbur v. City of Mount Vernon, No. C11-1100RSL, 2014 WL 11961980, at *5 (W.D. Wash. Apr. 15, 2014) (awarding plaintiffs over $2 million in attorney fees, plus costs).

277 *See* Kuren v. Luzerne Cty., 146 A.3d 715, 718 (Pa. 2016); Stephen F. Hanlon, *The Appropriate Legal Standard Required to Prevail in a Systemic Challenge to an Indigent Defense System*, 61 ST. LOUIS U. L.J. 625, 638–39 (2017).

and "substantial structural limitations" on the right to counsel and a "likelihood of substantial and immediate irreparable injury."[278] If plaintiffs with standing state a valid claim under that demanding standard, their claims should be heard and the need for and scope of relief should be decided later based on the facts and constitutional violations.

C. Structuring Adequate Remedies

Decreased reliance on *Younger* abstention raises remedial questions for courts and litigants. The limitation on remedies flows from courts' reticence, both institutional and federalism-based, to impose injunctive relief in state court. Even without *Younger* abstention as a barrier, federal courts may adhere to the policy of noninterference, limit the scope of the federal rights, and restrict injunctive relief in state court. Caution about federal injunctive relief in state court propelled the creation of *Younger* abstention, so it makes sense that courts will exercise extreme care in cases that actually reach the remedial stage.[279] Federal courts can take steps to secure constitutional protections for state criminal defendants while minimizing federal interference and oversight. These include carefully managing or staying the case, providing declaratory relief, approving state court enforcement procedures that do not require federal oversight, and scaffolding federal enforcement measures if hands-off remedies prove insufficient to protect individuals. The reticence of federal courts to grant injunctive relief in state courts may cause plaintiffs to opt to sue in state court instead.

Time is a powerful tool that federal courts can deploy to obviate the need for injunctive relief or justify it. In a case challenging a state criminal statute, the defendants will argue that the constitutional issue can be resolved in the pending criminal prosecution. In a case challenging state criminal procedures, local officials may claim that policy reform efforts will resolve the alleged constitutional violations.[280] In either situation, a federal court could stay the case, instead of abstaining,

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278 *Kuren*, 146 A.3d at 744–45.

279 *See* Calabresi & Lawson, *supra* note 44, at 264.

280 *See, e.g.*, Pugh v. Rainwater, 332 F. Supp. 1107, 1109 (S.D. Fla. 1971) (discussing local reform efforts); Gerstein v. Pugh, 420 U.S. 103, 108 (1975) (discussing local reforms); ODonnell v. Harris County, 227 F. Supp. 3d 706, 736 (S.D. Tex. 2016) (discussing local reform efforts), *aff'd in part, rev'd in part* 892 F.3d 147 (5th Cir. 2018).

to await further developments.[281] In *ODonnell*, the district court stated that "[c]areful case management . . . not abstention" would allow the court to hear the case and consider any policy updates.[282] In *Gerstein*, the district and appellate courts reviewed the claims in light of numerous policy changes. Waiting for reforms or redress can serve two useful purposes: it can obviate the need for federal intervention if the violations are resolved or redressed, or it can help justify the need for federal intervention if local reforms or remedies are inadequate to protect the defendants' rights.[283]

Another option is to adopt state-court enforcement mechanisms as a term of federal relief in order to postpone or eliminate the need for federal interference.[284] In *Gerstein* and *Walker*, for example, the federal courts required local officials to develop an implementation plan subject to federal approval.[285] This empowered local authorities to structure compliance in a way that is feasible and sensitive to their institutions, which they best understand. Local enforcement mechanisms can directly benefit criminal defendants in their individual cases without federal court involvement. The district court in *ODonnell* attempted to do exactly this by enforcing the state's forty-eight-hour detention rule and requiring that poor defendants be released in "the same time frame" as those who are able to post bail.[286] The Fifth Circuit rejected both terms, however, as not constitutionally required, adding "[s]ome wealth-based detention is permissible."[287] The Fifth Circuit's strong rebuke of the lower court on this point signaled that at least some courts would curtail remedial measures in the state court.

Scaffolding federal intervention can help to sequence and graduate enforcement: if the local authorities adequately prevent or enforce remedies for constitutional violations, no federal interference is required. But if they fail to comply with the plan, federal intervention may be justified. In *Caliste v. Cantrell*, for example, the plaintiffs claimed that a local judge violated due process because he managed fee revenue for the

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281 *Prospective Relief*, *supra* note 5, at 237–38 (examining options to stay the pending state criminal or federal civil rights case).

282 227 F. Supp. 3d at 737.

283 *See Gerstein*, 420 U.S. at 108–09.

284 *See* ODonnell v. Goodhart, 900 F.3d 220, 222–23 (5th Cir. 2018).

285 *See Gerstein*, 420 U.S. at 108; Walker v. City of Calhoun, 901 F.3d 1245, 1253 (11th Cir. 2018).

286 900 F.3d at 222.

287 *Id.* at 225.

court while also determining ability to pay and setting bail for pretrial detainees.[288] The defendant entered a consent decree in which he "agreed to amend his bail practice to consider an arrestee's finances before setting bail and whether nonfinancial conditions of release are available."[289] Six months later, the plaintiffs asked the federal court to hold the defendant in contempt based on several transcripts that showed that he had violated the consent decree.[290] Though the district court granted the plaintiffs' post judgment discovery request to access more hearing transcripts, it denied the contempt motion stating, "a finding of contempt would be premature until more conclusive evidence emerges."[291] This cautious approach shows that even with a consent decree in place, federal courts may exercise restraint and prefer a graduated approach.

Finally, the prospect of limited injunctive relief in federal court may steer some litigants back to state court where they may be more likely to secure sweeping, enforceable reforms. In California and Nevada, for example, civil rights organizations partnered with public defenders' offices to challenge pretrial detention policies in state criminal cases and related habeas actions.[292] In both cases, the state appellate courts required the lower courts to consider ability to pay and nonfinancial alternatives to detention; impose detention only upon a showing by "clear and convincing evidence that no less restrictive alternative will" secure the defendant's presence or public safety; and make record findings on the basis for detention.[293] This relief, anchored in the expansive right to bail provisions under state law, strictly limits wealth-based detention and fa-

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288 No. 17-6197, 2020 WL 814860, at *1-2 (E.D. La. Feb. 19, 2020) (detailing the Fifth Circuit's decision affirming that a local judge's "dual role" of determining bail and overseeing bail revenues violated due process, citing Caliste v. Cantrell, 937 F.3d 525 (5th Cir. 2019)).

289 *Id.* at *2.

290 *Id.* ("Plaintiffs allege that [the d]efendant continues to impose secured money bail on defendants who cannot afford it without first considering the adequacy of nonfinancial conditions of release." (internal quotations omitted)).

291 *Id.* at *5.

292 *See In re* Humphrey, 228 Cal. Rptr. 3d 513, 515, 545 (Cal. Ct. App. 2018) (remanding for a new bail hearing to consider defendant's ability to pay or nonfinancial conditions of bail), *aff'd,* 482 P.3d 1008 (Cal. 2021); Valdez-Jimenez v. Eighth Judicial District, 460 P.3d 976, 980 (Nev. 2020) (en banc).

293 *In re Humphrey*, 228 Cal. Rptr. 3d at 545; Riley Snyder, *Nevada Supreme Court Orders Significant Limits on Cash Bail*, NEV. INDEP. (Apr. 9, 2020, 2:44 PM), https://thenevadaindependent.com/article/nevada-supreme-court-orders-significant-limits-on-cash-bail [https://perma.cc/NNL5-LTRW] (citing *Valdez-Jimenez*, 460 P.3d).

cilitates meaningful judicial review.[294] Unlike in federal court, these state courts could formulate bold, direct action to eliminate wealth-based pretrial detention. In *Humphrey*, the court acknowledged that it was imposing new obligations on local court officials "already burdened by limited resources," which were necessary "to correct a deformity in our criminal justice system that close observers have long considered a blight on the system."[295] This language contrasts sharply with the cautious reluctance among many federal courts to impose injunctive relief on already burdened state courts.

As *Younger* abstention recedes, federal plaintiffs will continue to confront federalism as a barrier to securing injunctive relief to redress constitutional violations in state court. This limitation on federal relief will cause litigants to seek negotiated solutions that more fully and effectively redress constitutional violations than a federal court may be willing to impose by order. Some litigants may decide that state courts are more promising venue for justice reform.

CONCLUSION

Courts and litigants are revisiting the scope of *Younger* and engaging in a new conversation about the role of federal courts in enforcing constitutional rights in state criminal proceedings. For decades when state criminal defendants complained of injustices, *Younger* required federal courts to look the other way. Times have changed. Today state criminal justice systems are vastly expanded, harsher, more rushed, and mostly unsupervised by state or federal courts. This high-volume, high-pressure, high-stakes atmosphere, which drives nearly all defendants to plead guilty, makes it difficult for any defendant promptly and effectively to vindicate their constitutional rights in a state criminal case especially if they lack counsel. The Supreme Court has recognized that *Younger* abstention is the exception, not the rule, and that civil-rights suits, particularly class actions, are a proper vehicle for challenging the constitutionality of criminal policies.

Distributed federalism helps capture this transformation of *Younger* and supports greater transparency, so that courts' reliance on federalism is explained, justified, and reviewable. Plaintiffs are discovering that federalism is shifting from a justiciability concern to a merits and remedial issue. While this is

294 *See Valdez-Jimenez*, 460 P.3d at 987; *In re Humphrey*, 228 Cal. Rptr. 3d at 545.

295 228 Cal. Rptr. 3d at 545.

a major victory, many courts that reject *Younger* abstention remain cautious about imposing new burdens on state courts or overseeing compliance. A key battleground in this new terrain is whether federal courts can structure relief that will vindicate constitutional rights and withstand appellate scrutiny, either by minimizing federal interference or sufficiently justifying federally mandated reforms. Until they do, plaintiffs must carefully weigh whether to pursue state criminal justice reform in federal court. Litigants also will test whether and to what extent *Younger* will continue to block suits challenging the adequacy of indigent defense services and the constitutionality of statutes enforced against the homeless or political protestors. Addressing these questions openly, instead of turning a blind eye to injustices, is an encouraging step forward.