FEDERAL JURISDICTION AND PROCEDURE—FEDERAL COURT INTERVENTION IN STATE CRIMINAL PROCEEDINGS WHEN CHARGES ARE BROUGHT AFTER FILING OF THE FEDERAL COMPLAINT—*Hicks v. Miranda*, 422 U.S. 332 (1975).

In *Hicks v. Miranda*, the Supreme Court denied declaratory and injunctive relief against the enforcement of an allegedly unconstitutional state obscenity statute, on the ground that the state had begun criminal proceedings against the federal plaintiffs one day after service of the federal complaint. Justice White, writing for the five to four majority, stated that so long as no "proceedings of substance on the merits have taken place in the federal court, the principles of *Younger v. Harris* should apply in full force."[1] The purpose of this note is to analyze the content of this test and its probable future effects.[2]

I. THE FACTS

Early on the afternoon of November 23, 1973, after viewing forty-five minutes of the film "Deep Throat" at the Pussycat Theater in Buena Park, California, a municipal court judge issued a warrant for the film and all money contained in the ticket booth cash drawer. After these materials were seized, the theater obtained another somewhat different copy of the film. On the basis of the affidavit by three officers that the new film was in substance identical to the first, a new warrant was issued by the judge, and the film and money were again seized. That evening, the judge viewed a third film, and the process was again repeated. The next day, on the officers' affidavit, the judge issued a warrant for a fourth copy and its proceeds. After execution of the fourth warrant, the theater began to show a different film.[3]

On November 26, charges were filed in municipal court against two employees of the theater. In a separate civil action on the same day, the Superior Court of Orange County ordered the proprietors of the theatre, Vincent Miranda, dba Walnut Properties, Inc., et al., to show cause why "Deep Throat" should not be declared obscene under the California statute. The proprietors objected to the court's jurisdiction on state grounds, and refused to participate further. On

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[1] 422 U.S. at 349.

[2] Identification and analysis of the unarticulated rationale of the holding is a separate problem beyond the scope of this note, and is treated only briefly in the conclusion as a basis for criticizing the test quoted. For a good discussion of the issues, see *The Supreme Court, 1974 Term*, 89 HARV. L. REV. 49, 158-66 (1975).

[3] Miranda v. Hicks, 388 F. Supp. 350, 352-54 (C.D. Cal. 1974).

November 27, after an evidentiary hearing, the superior court declared the film obscene and ordered all copies seized. This order was not appealed.[4]

On November 29, the proprietors filed an action in federal district court against District Attorney Cecil Hicks, his assistant, and four Buena Park police officers, seeking a declaratory judgment that the obscenity statute was unconstitutional, a temporary restraining order and injunction against its enforcement, and a return of all copies of the film. The district court refused to issue the restraining order, but requested that a three-judge panel be convened to consider the merits.[5] The three-judge court was designated on January 8, 1974. The complaint was served on the fourteenth. The next day, criminal charges were filed in municipal court against the proprietors of the theater, the federal plaintiffs.[6]

On June 4, the three-judge court declared the California obscenity statute unconstitutional.[7] The court distinguished *Younger v. Harris*[8] and *Samuels v. Mackell*,[9] which had held on federal-state comity grounds that federal courts may not interfere with pending state prosecutions by declaratory judgment or injunction, without a showing of extraordinary circumstances such as bad faith or harassment by state officials.[10] The court held that these cases did not apply for two reasons: first, there was no pending criminal prosecution, and so declaratory relief was proper under *Steffel v. Thompson*,[11] and

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[4] 422 U.S. at 336.

[5] *Id.* at 338.

[6] *Id.* at 339.

[7] Miranda v. Hicks, 388 F. Supp. 350 (C.D. Cal. 1974).

[8] 401 U.S. 37 (1971).

[9] 401 U.S. 66 (1971).

[10] The *Younger* doctrine is a judicially created equitable limitation on the power of the federal courts, under Ex Parte Young, 209 U.S. 123 (1908), to grant equitable relief against actions under color of state law which will result in deprivation of a constitutional right. 401 U.S. 37, 44-46. *Younger* dealt with injunctive, and *Samuels* with declaratory relief. In each case, the state complaint was filed before the federal complaint. In *Younger*, Justice Black wrote that this rule was required for two reasons:

> One is the basic doctrine . . . that courts of equity should not act . . . when the moving party has an adequate remedy at law and will not suffer irreparable injury if denied equitable relief. . . . [This reason] is reinforced by an even more vital consideration, the notion of "comity," that is, a proper respect for state functions . . . and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways. This . . . is referred to by many as "Our Federalism."

401 U.S. at 43-44.

[11] 415 U.S. 452 (1974). The Court held that "federal declaratory relief is not precluded when no state prosecution is pending" and the plaintiff had established standing by showing a

alternatively, the pattern of repeated seizures by the police constituted "bad faith and harassment," bringing this case within the exception to the rule in *Younger*. On the latter point, the opinion stated that

> [a]ny editorializing of [the] facts would serve no purpose. It is sufficient to note that the pattern of seizures of the plaintiffs' cash receipts and films demonstrate [*sic*] that the police were bent upon a course of action that, regardless of the nature of any judicial proceeding, would effectively exorcise the movie "Deep Throat" out of Buena Park.[12]

In a supplemental memorandum opinion,[13] the three-judge court dealt with the fact, not previously brought to its attention, that criminal charges had been brought the day following service of the federal complaint. It held that the state charges must be brought before the federal action is filed for *Younger* to apply, relying on dicta in *Steffel* to that effect.[14] Moreover, the court concluded that

> the evidence brought to light by the petition for rehearing only serves to strengthen the previous finding of bad faith and harassment. Reasonable people could certainly infer prosecutorial misconduct from the course of action revealed in the latest petition.
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> No explanation is given why criminal charges were not instituted against the plaintiffs here until after the filing and service of the complaint in this action. Without such an explanation it is reasonable for the court to conclude that the institution of the criminal proceedings was in retaliation for the attempt by plaintiffs to have their constitutional rights judicially determined in this court. That conclusion surely removes this case from the abstention doctrine of *Younger* and *Mackell*.[15]

II. THE DECISION

The Supreme Court reversed in a five to four decision, holding that the refusal to follow *Younger* because there was no state prosecution pending at the time of filing was error, and that the finding of "bad faith and harassment" on the part of state authorities had insufficient support in the record.

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present threat of prosecution. 415 U.S. at 475. See note 20 *infra*. This rule was extended to allow preliminary injunctive relief in Doran v. Salem Inn, Inc., 422 U.S, 922 (1975).

[12] 388 F. Supp. at 368.

[13] *Id.*

[14] *Id.* at 361.

[15] *Id.* at 362.

A. *Application of the* Younger *Doctrine: The New Test*

Justice White, writing for the majority of five in *Hicks*, did not question the fact that no criminal charges were pending against the proprietors of the theater when the federal complaint was filed. Rather he indicated two separate bases for the application of *Younger* in this case.

The first basis involved the plaintiffs' relationship to other proceedings pending when the federal complaint was filed. As the court noted:

> [T]wo employees of the theater had been charged and four copies of "Deep Throat" belonging to appellees had been seized, were being held, and had been declared to be obscene and seizable by the Superior Court. Appellees had a substantial stake in the state proceedings, so much so that they sought federal relief, demanding that the state statute be declared void and their films be returned to them. Obviously, their interest and those of their employees were intertwined; and, as we have pointed out, the federal action sought to interfere with the pending state prosecution. Absent a clear showing that appellees, whose lawyers also represented their employees, could not seek the return of their property in the state proceedings and see to it that their federal claims were presented there, the requirements of *Younger v. Harris* could not be avoided on the ground that no criminal prosecution was pending against the appellees on the date the federal complaint was filed. The rule in *Younger v. Harris* is designed to "permit state courts to try state cases free from interference by federal courts," 401 U.S., at 43, particularly where the party to the federal case may fully litigate his claim before the state court. Plainly, "[t]he same comity considerations apply," *Allee v. Medrano*, 416 U.S. 802, 831 (1974) (Burger, C.J., concurring), where the interference is sought by some, such as appellees, not parties to the state case.[16]

The opinion here appears to be addressing two distinct considerations which are inadequately distinguished for purposes of analysis. The first is that federal court action might interfere with the pending prosecution of a party legally distinct from the federal plaintiffs;[17] and

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[16] 422 U.S. at 348-49.

[17] The theory that the comity considerations of *Younger* apply to indirect interference with criminal proceedings against a different party was discussed by the Supreme Court in Doran v. Salem Inn, Inc., 422 U.S. 922 (1975). Consistent with the holding in *Steffel*, 415 U.S. at 471 n.19, the Court upheld a grant of declaratory and preliminary injunctive relief to two parties preventing the enforcement of a statute barring topless dancing, while denying injunctive and

second, that these plaintiffs did have an opportunity to present their federal constitutional claims in a state civil proceeding to which they were already a party when the federal action was sought.[18] The short

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declaratory relief to a third plaintiff because he had already been charged under the statute. Justice Rehnquist wrote for the eight justice majority that:

> While there plainly may be some circumstances in which legally distinct parties are so closely related that they should all be subject to the *Younger* considerations which govern any one of them, this is not such a case—while respondents are represented by common counsel, and have similar business activities and problems, they are apparently unrelated in terms of ownership, control and management.

422 U.S. at 928-29. In the concurring opinion of the Chief Justice in *Allee v. Medrano* (cited by Justice White in the quotation in the text *supra*), he concluded that such a sufficiently close relationship would exist in the case of a labor union suing in federal courts on behalf of its members who were being prosecuted by the state.

In the passage cited in the text, Justice White characterized the relationship between proprietors and the employees of the theater as "obviously intertwined" and asserts that "the federal action sought to interfere with the state prosecution." It is hard to tell whether these parties are to be treated as identical for *Younger* purposes because of the employer-employee relationship, the subjective purpose of the federal suit, or both. Justice White adds that the proprietors' "lawyers also represented their employees," a consideration also noted in the quotation from *Salem Inn, supra*. Whether the privity that existed in *Hicks* will be sufficient to require that all parties "be subject to the *Younger* considerations which apply to any one of them" in the absence of a state court prosecution of the federal plaintiff, remains to be determined.

[18] In this regard, the most directly relevant section of the cited passage is as follows:

> Absent a clear showing that appellees, whose lawyers also represented their employees, could not seek the return of their property in the state proceedings and see to it that their federal claims were presented there, the requirements of *Younger v. Harris* could not be avoided on the ground that no criminal prosecution was pending against appellees on the date the federal complaint was filed.

422 U.S. at 349. Although this language ("whose lawyers also represented their employees") suggests that the prosecution of the employees may have provided a forum in which the proprietors could present their claims, a later footnote (422 U.S. at 351 n.20) indicates that Justice White's main concern was the fact that the proprietors did not pursue their right to appeal the decision against them in the state civil proceedings: "It may be that under *Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975), the failure of appellees to appeal the Superior Court order of November 27, 1973, would itself foreclose resort to federal court, absent extraordinary circumstances . . . ." (The *Huffman* case applied *Younger* to federal interference with a pending state civil proceeding to close a theater because of obscenity, under a public nuisance statute. Justice Rehnquist characterized the state proceeding as "more akin to a criminal prosecution than are most civil cases." 420 U.S. at 604. *See The Supreme Court, 1974 Term*, 89 HARV. L. REV. 49, 151-58 (1975)).

It would appear to follow from Justice White's analysis that, upon a "clear showing" that no state forum was available in which to present the federal plaintiffs' claims, federal relief would become appropriate. Such a showing could be based on the inability of a plaintiff to raise all of the constitutional challenges to the criminal statute in a related civil proceeding, or the possibility that the civil case could be resolved on independent grounds without settling the validity of the constitutional claims.

This approach to the problem would be consistent with the approach of Justice Brennan in the unanimous opinion in *Steffel* and in his dissent in Perez v. Ledesma, 401 U.S. 82 (1971), that the central question in applying *Younger* is the availability of a forum where constitutional

shrift given to these rather complex questions indicates that these are not the true reasons for the Court's holding. At least this was the apparent understanding of the dissenting justices, who did not even raise these questions for consideration.

The second basis indicated by the Court for applying *Younger* here was the criminal action brought against the federal plaintiffs. In this part of the discussion, the Court concisely expressed the significance of the *Hicks* decision; "We now hold that where state criminal proceedings are begun against the federal plaintiffs after the federal complaint is filed but before any proceedings of substance on the merits have taken place in the federal court, the principles of *Younger v. Harris* should apply in full force."[19]

Both *Younger* and its companion case *Samuels* barred federal action where the state prosecution had been instituted before the filing of the federal complaint; and in each case, the question of whether the federal court could act to prevent state enforcement in other circumstances had been explicitly reserved. But the language in which those reservations were expressed indicated that the line would likely be drawn, if at all, according to the status of the state proceedings at the time the federal complaint was filed. In the majority opinion in *Younger*, Justice Black noted that "[w]e express no view about the circumstances under which federal courts may act when there is no prosecution pending in state courts *at the time the federal proceeding is begun.*"[20] Similar language is found in *Samuels*. "We, of course, express no views on the propriety of declaratory relief when no state proceeding is pending *at the time the federal suit is begun.*"[21]

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claims may be heard. *See* note 21 *infra*. However, Justice White makes clear that this analysis is not central to his opinion in a footnote concerning plaintiffs' failure to appeal that state civil judgment. "In view of our disposition of the case, we need not pursue this matter further." 422 U.S. at 341 n.10.

[19] 422 U.S. at 349.

[20] 401 U.S. at 41 (emphasis added).

[21] 401 U.S. at 73-74 (emphasis added). The problem that was to arise in the present case was first foreseen by Justice Brennan in a dissenting opinion in Perez v. Ledesma, 401 U.S. 82 (1971). In that case, charges had been brought before the federal filing, but a nolle prosequi had been entered in the state court by the time the federal three-judge court had convened. Justice Brennan argued that the central question in applying *Younger* is "whether there is a pending state prosecution where the federal court plaintiff may have his constitutional defenses heard and determined. Ordinarily, that question may be answered merely by examining the dates upon which the federal and state actions were filed." 401 U.S. at 103.

Justice Brennan's views were further elaborated in the majority opinion in Steffel v. Thompson, 415 U.S. 452 (1974). There the court held that "federal declaratory relief is not precluded when no state prosecution is pending . . ." and the plaintiff has standing to sue

But in *Hicks*, the Court decided against the use of a test that could be applied merely by looking at the dates of filing of the state and federal complaints. The test adopted is a new one, and not entirely clear. Justice Stewart, joined by Justices Douglas, Brennan and Marshall, stated the problem in a dissent devoted entirely to this part of the majority opinion. "What are 'proceedings of substance on the merits'? Presumably, the proceedings must be both 'on the merits' and 'of substance.' "[22]

In order to understand the probable content of this test, it is necessary to examine the underlying policy goals intended to be served by the formulation, and so to inform the general phrases, "on the merits" and "of subtance," with a more specific content. Recent statements by the Court on the goals served by the *Younger* comity doctrine prove useful in this attempt.

Let us first examine the phrase "proceedings of substance." It might be supposed that one goal intended to be served by this terminology is to avoid conflicting decisions by the first federal court and another federal court which may later have to apply the same body of law to the same facts. For example, this might occur if state charges were filed after the federal complaint, thus ousting federal jurisdiction, and causing the federal complaint to subsequently be dropped. The charged party might then return to federal court. Issues previously litigated in federal court might not be resolved by princi-

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because he has demonstrated "a genuine threat of enforcement of a disputed state criminal statute . . . ." 415 U.S. at 475. The unanimous opinion of the court stated that the express reservations of the question of appropriate relief in the absence of a pending prosecution

> anticipated the Court's recognition that the relevant principles of equity, comity, and federalism "have little force in the absence of a pending state proceeding." *Lake Carriers' Assn. v. MacMullan*, 406 U.S. 498, 509 (1972). When no state criminal proceeding is filed, federal intervention does not result in duplicative legal proceedings or disruption of the state criminal justice system; nor can federal intervention, in that circumstance, be interpreted as reflecting negatively upon the state court's ability to enforce constitutional principles.

415 U.S. at 462. A different result, Justice Brennan added, "would turn federalism on its head." 415 U.S. at 472.

However, the concurring opinions make clear that *Steffel* did not hold that *Younger* never applies when the federal action is first brought. Indeed, Justice Rehnquist asserted with confidence that "any *arrest* prior to *resolution* of the federal action would constitute a pending prosecution and bar declaratory relief under the principles of *Samuels*." 415 U.S. at 480 (emphasis added). In a separate concurrence, Justice White noted that his brother's views were neither expressly nor impliedly embraced by the Court's opinion . . . ." 415 U.S. at 477. But he also endorsed Justice Rehnquist's assumption that a criminal prosecution could cut short a prior federal action when he did not reject, but merely qualified, this assumption. 415 U.S. at 478.

[22] 422 U.S. at 353 n.1.

ples of res judicata and collateral estoppel, since the earlier defect was jurisdictional in nature, and subject to collateral attack in state and federal courts.

However, if prevention of this problem were a major consideration underlying the formulation of the test here, it would seem unimportant whether the "proceedings of substance" that we do not want duplicated were "on the merits" or only on questions of federal procedure. Moreover, the Supreme Court indicated in *Doran v. Salem Inn*,[23] a case decided a week after *Hicks*, that the problem of conflicting results is not a major consideration when federal-state comity is at issue: "[w]e think that the interest of avoiding conflicting outcomes in the litigation of similar issues, while entitled to substantial deference in a unitary system, must of necessity be subordinated to the claims of federalism in this particular area of the law."[24]

Another rational assumption would be that the phrase "proceedings of substance" is intended to serve the interest of judicial economy. Under this analysis, federal jurisdiction would not be defeated if the federal court had already invested a certain quantity of time and resources in consideration of the federal claims. The concurring opinion of Justice White in *Steffel* gives substantial support to the assumption that judicial economy was his central concern in formulating this test. In what he described as "tentative views," he wrote "I would think that a federal suit challenging a state criminal statute on federal constitutional grounds could be sufficiently far along so that ordinary consideration of economy would warrant refusal to dismiss the federal case solely because a state prosecution has subsequently been filed . . . ."[25]

But this hypothesis that judicial economy is the underlying standard by which this test is to be applied is inconsistent with the inclusion of the phrase "on the merits." A substantial expense of judicial resources in consideration of federal procedural issues would be as great a loss as amounts spent dealing with the "merits." On the other hand, the waste would be somewhat greater if the issues considered

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[23] 422 U.S. 922 (1975).

[24] *Id.* at 927-28. The court held that a plaintiff who had been prosecuted one day after filing his federal complaint could not be granted equitable relief. It rejected the reasoning of the Second Circuit in Salem Inn, Inc. v. Frank, 501 F.2d 18 (2d Cir. 1974), that, since two other similarly situated plaintiffs had not violated the statute and were entitled to relief under *Steffel*, "the interests of avoiding contradictory outcomes, of conservation of judicial energy, and of a clear cut method for determining when federal courts should defer to state prosecutions," all militated in favor of granting relief to all three appellees. 422 U.S. at 926-27.

[25] 415 U.S. at 478.

went to the merits because it is likely that these issues would have to be litigated again in state court, an economy consideration not present when the issue is one of federal procedure.

In *Salem Inn*, the Court also underplayed the importance of judicial economy in *Younger* situations. The same may be said of the interest in conservation of judicial manpower as was said of the interest of avoiding conflicting decisions, that it must be subordinated to the comity considerations of *Younger*. Justice Rehnquist wrote for the majority of eight that "[a]s worthy a value as this is in a unitary system, the very existence of one system of federal courts and 50 systems of state courts, all charged with the responsibility for interpreting the United States Constitution, suggests that on occasion there will be duplicating and overlapping adjudication of cases . . . ."[26]

Thus it appears that the interest of judicial economy may carry relatively little weight in the determination of whether a "proceeding of substance on the merits" has occurred. However, should Justice White adhere to the tentative view he expressed in *Steffel* that judicial economy is important in these cases, his view may carry considerable weight: not only because he formulated the test, but also because he will likely have the deciding vote in many of these cases.[27]

Our search for the underlying policy goals intended to be served by this test leads us then to the central issue: what light do the comity considerations of *Younger* shed upon the meaning of the test announced in *Hicks*? As Justice White notes, "The rule in *Younger v. Harris* is designed to 'permit state courts to try state cases free from interference by federal courts,' 401 U.S. at 43 . . . ."[28] If the dictate of *Younger* alone is followed in applying the *Hicks* test, as (it is submitted) the language in *Salem Inn* indicates should be done, then it is always improper to continue a federal proceeding after the filing of state charges. Otherwise, the federal court would be interfering in the state trial of a state case. To this iron-curtain rule there would be one notable exception. If the federal court has *already* interfered,

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[26] 422 U.S. at 928.

[27] Justice Rehnquist, in a concurrence in *Steffel* in which the Chief Justice joined, wrote that "any *arrest* prior to *resolution* of the federal action would constitute a pending prosecution and bar declaratory relief under the principles of *Samuels*." 415 U.S. at 480 (emphasis added). At the other end of this time-line, Justices Stewart, Marshall and Brennan clearly expressed their view that a subsequent state prosecution should never oust federal jurisdiction in the *Hicks* dissent. It would appear then that Justices White, Powell and Stevens will decide where between these two extremes the *Hicks* test has left us.

[28] 422 U.S. at 349.

by ruling on an issue that could also be raised in the state court, the attempt to prevent interference would necessarily be futile, and no interest would be served by a dismissal.

This approach to the *Hicks* test makes clear why the phrase "on the merits" is a part of the formulation. Resolutions of questions of federal procedure imply no irreversible interference, since such questions will not arise before the state court. But a ruling "on the merits" of a federal plaintiff's constitutional claims would necessarily decide an issue that could be properly raised in the state criminal action. After a ruling "on the merits," federal interference would be a *fait accompli*, and the considerations of *Younger* would no longer apply.

If this is a correct analysis of the primary consideration underlying the Court's formulation of the test, why is it not stated as "proceedings on the merits" rather than "proceedings of substance on the merits?" The answer is found in the facts of the *Hicks* case, as explained in Justice Stewart's dissent:

> [I]ndeed, in this case, appellees filed an application for a temporary restraining order along with six supporting affidavits on November 29, 1973. Appellants responded on December 3, 1973, with six affidavits of their own as well as additional documents. On December 28, 1973 [still two weeks before criminal charges were brought], Judge Lydick denied the request for a temporary restraining order, in part because the appellees "have failed totally to make that showing of . . . likelihood of prevailing on the merits needed to justify the issuance of a temporary restraining order." These proceedings, the Court says implicitly, were not sufficient to satisfy the test it announces.[29]

It is submitted that Justice White chose to indicate that those proceedings on the merits were not sufficient by including in the test that the proceedings must be "of substance" to preserve the action in federal court. "Proceedings of substance" may thus be read as similar to, if not congruent with, final determinations.[30]

If the proposed analysis of the test is correct, it is fair to characterize *Hicks* as holding that once a state criminal prosecution is filed, federal courts may not decide issues properly before the state court,

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[29] *Id.* at 353 n.1.

[30] Again, the language in *Salem Inn*, supports the argument here: "When the criminal summonses issued against [one of the three federal plaintiffs] on the days immediately following the filing of the federal complaint, the federal litigation was in an embryonic stage, and *no contested matter had been denied*." 422 U.S. at 929 (emphasis added).

unless it has already done so, and decided the issue with a substantial degree of finality.

B. The Issue of Bad Faith

The Supreme Court also overturned the district court's finding that "extraordinary circumstances had been shown in the form of official harassment and bad faith."[31] Had this finding been allowed to stand, it would have brought the case within the exception to the *Younger* doctrine.

"The relevant findings of the District Court were vague and conclusory," wrote Justice White. The "pattern of seizure of the plaintiffs' cash receipts and films" was insufficient to support this finding because

> each step in the pattern . . . was authorized by judicial warrant or order; and the District Court did not purport to invalidate any of the four warrants . . . . Indeed, such conclusions would not necessarily follow even if it were shown that the state courts were in error on some one or more issues of state or federal law.[32]

Thus it appears that an intention to harass on the part of the police does not constitute bad faith if their actions are judicially sanctioned; and perhaps even that the judicial officer's subjective intent to harass is not bad faith if his decisions are within, or even arguably within, existing law.

But perhaps more significant for the future of federal civil rights litigation was the holding that a state prosecution of a federal plaintiff seeking to have such prosecution enjoined is not, absent evidence to the contrary, sufficient basis for an inference of bad faith. This holding is clearly necessary to the result, for the supplemental memorandum opinion of the three-judge court clearly indicates the legal conclusion that such facts were alone sufficient for this finding.[33] But the Supreme Court's opinion does not even discuss this aspect of the decision. Justice White considered it adequate to present the discussion by the district court in a footnote, and observed in the text only that the lower court's "references to . . . 'the evidence brought to light by petition for re-hearing' " did not support the "unexplicated conclusion" of bad faith prosecution.[34]

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[31] 422 U.S. at 350.

[32] *Id.* at 351.

[33] See text accompanying note 15, *supra.*

[34] 422 U.S. at 350-51.

One reason the district court found its ruling overturned was an apparent misreading of recent comments on the subject by the Chief Justice in a separate opinion in *Allee v. Medrano*.[35] According to the three-judge court, the Chief Justice there "noted that inferences of bad faith can arise from the common activity of the prosecutors and the police, inferences that the state may have had reasons for bringing a prosecution other than an expectation of securing a valid conviction."[36] In fact, the Chief Justice treated the concept of bad faith as much more limited in scope. After cautioning federal judges to "recognize that our criminal justice system works only by according broad discretion to those charged to enforce laws,"[37] he presented the learning of *Cameron v. Johnson*:[38] " 'the question was whether the statute was enforced against them with *no* expectation of convictions but *only* to discourage exercise of protected rights.' "

This question is very different from whether there were "reasons *other* than the expectation" of a conviction. And it should be noted that the Supreme Court's holding did not challenge the district court's finding that, in the absence of a showing to the contrary, it was reasonable "to conclude that the institution of the criminal proceedings was in retaliation"[39] for the plaintiffs' federal suit. But such a conclusion, standing alone, is presumably insufficient basis for a finding of bad faith, because there was not a finding that the "statute was enforced with no expectation of convictions." It appears that the state officials may have as many other reasons as they want, so long as they also have this one.

There are many possible reasons why the state authorities chose to prosecute after the federal suit had begun: normal administrative delays, for example, or even the natural desire to have the facts resolved, once the question had been presented for judicial determination, in a forum sympathetic to the prosecutor's case. Nonetheless, it remains unclear from the *Hicks* opinion why the Supreme Court held it improper for the trier of fact to draw the inference of bad faith in a situation like this, when it is reasonable to conclude that charges were brought solely to oust federal jurisdication with no expectations of a conviction, and when the knowledge of the motives for the prosecutor's action is in his sole possession.

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[35] 416 U.S. 802, 836-38 (1974).
[36] 388 F. Supp. at 361.
[37] 416 U.S. at 836.
[38] 390 U.S. 611, 621 (1968) (emphasis added).
[39] 388 F. Supp. at 362.

III. CONCLUSION

According to Justice Stewart, the Supreme Court in *Hicks* "ousts the federal courts from their historic role as the 'primary reliances' for vindicating constitutional freedoms."[40] This characterization is unduly harsh, for the Court has limited only the federal courts' function as the *initial* forum for such vindication, and not their important role as "primary reliances" in the sense that, in the context of a state criminal prosecution, the federal courts are still the *ultimate* guardians of constitutional rights, through both the writ of habeas corpus under 28 U.S.C. § 2254 and the right of appeal to the Supreme Court under 28 U.S.C. § 1257(2).[41]

But the *Hicks* decision has severely restricted the use of federal courts as initial forums for determining the constitutional limitations upon the state's application of its substantive criminal law. Justice Stewart notes that the decision "is an open invitation to state officials to institute state proceedings in order to defeat federal jurisdiction."[42] In light of the holding that an inference of bad faith cannot be drawn from an acceptance of this invitation, it is clear that the choice of initial forum for determination of these constitutional issues rests with state officials.

Of course, the state officials could not, in the absence of bad faith, act to oust federal jurisdiction by prosecuting until the federal plaintiff had apparently violated the statute at issue.[43] Thus this decision does not involve the concern Justice Brennan expressed in *Steffel*, that "a refusal on the part of the federal courts to intervene when no state proceeding is pending may place the hapless plaintiff between the Scylla of intentionally flouting state law and the Charybdis of forgoing what he believes to be constitutionally protected activity in order to avoid becoming enmeshed in a criminal proceeding."[44] Some forum will still be available at all times for the litigation of constitutional claims.[45]

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[40] 422 U.S. at 366.

[41] *But see* Huffman v. Pursue, Ltd., 420 U.S. 592 (1975), in which the Court applied the *Younger* rule to a state civil proceeding, rejecting the argument that the impossibility of a district court action by writ of habeas corpus mandated a different result. 420 U.S. at 605-06.

[42] 422 U.S. at 357.

[43] If a state prosecution has been instituted before "proceedings of substance on the merits" have occurred, it is irrelevant that the alleged criminal act occurred after the filing of the federal complaint. *Salem Inn*, 422 U.S. 922.

[44] 415 U.S. at 462.

[45] *See* Gibson v. Berryhill, 411 U.S. 564, 577 (1973). For an elaboration of Justice Brennan's concern that a forum be available at all times for this purpose, see note 21 *supra*.

The *Hicks* decision does place the plaintiff in a similar dilemma, however, by creating the possibility that a federal suit to determine constitutional rights may trigger a state prosecution which might otherwise not have been brought. Obviously the Court did not view this potential chilling effect as very significant. This is a natural, if not logical, corollary to the rule stated in *Younger* that federal equitable relief will not be granted solely in order to prevent the kind of injury "incident to every criminal proceeding brought lawfully and in good faith."[46] If we accept this rule as sound in principle,[47] then the decision in *Hicks*, to leave to state officials the choice of two available forums for a constitutional challenge to a state criminal statute, reasonably follows from the basic premise of *Younger* that state courts are as capable as federal courts of adjudicating constitutional rights. Thus any serious disagreement with the essence of this holding would have to be based on a challenge to this premise.[48]

However, the formulation of the new test to decide when federal jurisdiction is ousted by subsequent action in state courts ushers in other major difficulties which are neither necessary to the holding in *Hicks* nor required by the rationale of *Younger*. The first is caused by the adoption of a standard not readily determinable in application and which can be interpreted only by substantial litigation. Little comity would be sacrificed if the state officials' option to transfer the case into a state forum would be made exercisable only within a certain fixed time after service of the federal complaint, *e.g.*, thirty to sixty days. Moreover, such a definite rule would also substantially solve the other serious difficulty with the test as it now stands: the possibilities of great waste of federal judicial resources, and of conflicting applications of federal procedural law to the same set of facts by different courts within the federal system.

A thirty or sixty-day rule would not conflict with the holding of *Hicks*, for in this case the state prosecution was instituted one day after service of the federal complaint. And it would as well avoid the

[46] Douglas v. City of Jeannette, 319 U.S. 157 (1943), as quoted in *Younger*, 401 U.S. at 49.

[47] The idea from *Younger* underlying this rule is that the injuries caused by becoming a defendant in a criminal prosecution "could not by themselves be considered 'irreparable' in the special legal sense of that term." 401 U.S. at 46. Query whether this is not one case where the "special legal sense" has strayed too far from empirical reality.

[48] For a discussion of the idea that such a fundamental attack on *Younger* is at the heart of the dissent in *Hicks*, *see The Supreme Court, 1974 Term*, 89 HARV. L. REV. 49, 162-64 (1975).

unseemly "race to the courthouse" that a strict "first filed" rule would have implied. It would place on state officials the relatively light burden of having to exercise their option within a reasonable time or else waiving it, and thereby allowing the federal suit to proceed free from the shadow of an impending loss of jurisdiction. And since the *Younger* doctrine is a judicially created limitation on jurisdiction, the Supreme Court appears to have the power, in its supervisory capacity, to establish such a rule for the federal court system.

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