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The Bad Faith-Harassment Exception to the Younger Doctrine: Exploring the Empty Universe

C. Keith Wingate*

[The crowning glory of American federalism is not States’ Rights. It is the protection the United States Constitution gives to the private citizen against all wrongful governmental invasion of fundamental rights and freedoms.]

I. Introduction

In *Younger v. Harris* the Supreme Court held that absent extraordinary circumstances a federal court should not issue an injunction against a pending state criminal proceeding. Bad faith and harassment were specifically mentioned as the kind of extraordinary circumstances which would justify federal intervention. Although *Younger* and its progeny have generated a tremendous outpouring of scholarship, to my knowledge few, if

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3. Apparently a state criminal proceeding is pending when an indictment or information has been filed. McSurely v. Ratliff, 282 F. Supp. 848, 853 (E.D. Ky. 1967), appeal dismissed per curiam, 390 U.S. 412 (1968). However, even if a federal complaint is filed before state criminal proceedings are initiated against the federal plaintiffs, *Younger* is applicable unless “proceedings of substance on the merits have taken place in the federal court” before the state criminal proceedings have started. Hicks v. Miranda, 422 U.S. 332, 349 (1975).
any, have focused exclusively on the bad faith-harassment exception.

In this Article I will examine the policies underlying the bad faith-harassment exception to Younger and attempt to answer some of the questions that have confronted the courts in its application. Many scholars have seriously questioned the justification for the broad abstention doctrine engendered by Younger.\(^5\) However, in this Article I have accepted the foundation laid by the Court in the name of federalism. The Younger Court itself recognized that in certain situations concerns of federalism would demand the availability of federal injunctive relief, rather than forbid it, but many have argued that in regard to the bad faith-harassment exception, that recognition has been limited to a virtually empty universe.\(^6\) Be that as it may, even a small universe is worthy of exploration, especially when its boundaries appear uncertain and indistinct. Our point of departure is Younger itself.

II. Younger v. Harris

John Harris, Jr. was indicted in the California state courts and charged with violating the California Criminal Syndicalism Act.\(^7\) Harris then instituted a federal action seeking an injunction prohibiting the District Attorney of Los Angeles County from prosecuting him. He alleged that the prosecution inhibited him in the exercise of the right of free speech guaranteed by the first amendment and that the statute was unconstitutional as an infringement upon that right. His complaint alleged that he had been arrested for distributing leaflets.\(^8\)


\(^5\) See, e.g., Redish, supra note 4.


\(^7\) CAL. PENAL CODE §§ 11400-11401 (West 1982).

The district court, relying on *Dombrowski v. Pfister*,\(^9\) issued the injunction. The Supreme Court reversed, finding the injunction to be “a violation of the national policy forbidding federal courts to stay or enjoin pending state court proceedings except under special circumstances.”\(^{10}\) It noted that the predecessor of the Federal Anti-Injunction Act\(^{11}\) had been enacted in 1793 and that at that early stage in our country’s history Congress expressed a desire to limit federal court interference with state court proceedings.\(^{12}\)

The Younger Court identified the reasons for this policy. First, the basic limitation traditionally imposed on the availability of equitable relief is that the remedy at law must be inadequate. Normally, a defendant in a state criminal proceeding will be able to raise his federal claims in the state courts, and thus his remedy at law will be adequate. While pointing out that the primary basis for this limitation on equitable relief is historical, the Court viewed it as a way of preventing “the erosion of the role of the jury”\(^{13}\) and the “duplication of legal proceedings.”\(^{14}\) Then, the Court added:

This underlying reason for restraining courts of equity from interfering with criminal prosecutions is reinforced by an even more vital consideration, the notion of ‘comity,’ that is, a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fair best if the States and their institutions are left free to perform their separate functions in their separate ways. This, perhaps for lack of a better and cleaner way to describe it, is referred to by many as ‘Our Federalism’...\(^{15}\)

The Court emphasized that generally federal courts should refuse requests for injunctions of state court proceedings. Even a showing of irreparable harm would not entitle a plaintiff to such an injunction unless that harm was “both great and immedi-

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13. 401 U.S. at 44.
14. *Id.*
15. *Id.*
ate." Moreover, the Court made it clear that the burdens and inconvenience associated with defending a single criminal prosecution did not constitute the type of irreparable harm which would justify federal interference. Because the allegations made by Harris in his complaint only set forth such burdens, injunctive relief was not warranted.

However, the Younger opinion did recognize some exceptions to its general command, occasions in which a federal injunction of state court proceedings might be warranted. Pointing to its opinion in Dombrowski v. Pfister, the Court indicated that if a prosecution were brought in bad faith and to harass the criminal defendants, federal injunctive relief would be available. Consequently, any discussion of the bad faith-harassment exception to Younger must look to Dombrowski.

III. Development of the Bad Faith-Harassment Exception

Dombrowski was the Executive Director of the Southern Conference Educational Fund, Inc. (S.C.E.F.), an organization active in promoting civil rights for blacks in Louisiana and other southern states. Two other persons affiliated with S.C.E.F. intervened as plaintiffs in a lawsuit filed in federal court by Dombrowski. Intervenor Smith was the organization's treasurer. Intervenor Waltzer, Smith's law partner, represented the organization as its attorney. Dombrowski, Smith, and Waltzer were arrested in October 1963. The Louisiana officials charged them with violating the Subversive Activities and Communist Control Law and the Communist Propaganda Control Law. Their offices were searched, and many of their records and files seized. A Louisiana court then quashed the arrest warrants, finding that they were not based on probable cause. Later, the court concluded that the search was illegal and suppressed the evidence seized. Despite their initial failure, the Louisiana authorities continued to threaten the S.C.E.F. officials with prosecution under the same statutes. The S.C.E.F. officials responded by seeking relief in

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16. Id. at 46 (quoting Fenner v. Boykin, 271 U.S. 240 (1926)).
17. 401 U.S. at 46.
19. 401 U.S. at 47-49.
federal court. They alleged that the Louisiana statutes were on their face violative of the first amendment guarantee of free speech because of their overbreadth. The complaint also alleged that the threats to enforce the statutes against the federal plaintiffs were not made with the expectation of obtaining valid convictions, but were instead part of a scheme to harass them for their civil rights activities on behalf of Louisiana blacks.

After the federal complaint was filed, Louisiana officials convened a grand jury to hear evidence against the S.C.E.F. officials to determine whether indictments for violating the statutes should be issued. A three-judge panel was constituted to adjudicate the federal suit. It dismissed the complaint for failure to state a claim upon which relief could be granted.\textsuperscript{22} The panel noted that traditionally the federal courts have refused to enjoin state criminal prosecutions except in very unusual circumstances, in which the federal plaintiff clearly shows an injunction is necessary to protect constitutional rights. Although recognizing that in such circumstances an injunction might be issued, the district court concluded that this exception was not applicable. The court reasoned that the Supreme Court did not intend the exception to apply to deprive the state and local courts of "the exercise of their sovereign rights of self-protection."\textsuperscript{23} Thus, the seditious nature of the charges played a major role in the court's decision. Additionally, the court pointed out that the federal plaintiffs would have an opportunity to raise their constitutional objections in the state court proceedings and refused to assume an inability on the part of the state court judges to protect federal constitutional rights.\textsuperscript{24}

Judge Wisdom entered a strong and forceful dissent.\textsuperscript{25} He argued that the central aspect of the case, ignored by the majority, was the contention that the Louisiana state officials, under the guise of combating subversion, were abusing state laws by punishing the plaintiffs for their civil rights activities.\textsuperscript{26} In such circumstances the citizen should not be subjected to the burdens


\textsuperscript{23} Id. at 560.

\textsuperscript{24} Id. at 561.

\textsuperscript{25} Id. at 569.

\textsuperscript{26} Id. at 571.
and expense of an appeal to the United States Supreme Court from the state courts.27 The issue of whether the state was abusing its power could be determined only after a full and fair hearing, and the federal court was the logical choice of forum.28

The Supreme Court agreed and reversed the panel's decision.29 It acknowledged that federal judicial interference with a state's administration of its criminal justice system is generally inconsistent with our principles of federalism.30 State courts and state prosecutors generally will observe and follow the Court's constitutional pronouncements, and the mere possibility of error alone is not sufficient to justify federal obstruction of the state system. However, the Court concluded that the Dombrowski complaint described a situation in which the plaintiffs' constitutional rights could not be adequately protected in their defense of the criminal prosecution.

There were essentially two rationales for this conclusion. The first was the notion that when a statute is justifiably attacked on its face as violative of the right of free speech as guaranteed by the first amendment, the chilling effect on the exercise of those rights constitutes the type of irreparable harm that warrants federal injunctive relief.31 This view did not survive long and received its death knell in Younger.

The second rationale for the Supreme Court's decision in Dombrowski is the basis for the bad faith-harassment exception to the Younger doctrine. The Dombrowski Court noted that the plaintiffs had challenged the good faith of the Louisiana officials, alleging that they had instituted criminal proceedings and threatened to continue invoking the state statutes only to discourage plaintiffs' civil rights activities, without any hope of ultimate success in the criminal proceedings.32 Believing that such allegations stated a claim under the Civil Rights Act,33 the Court concluded that the construction of the statutes by the state courts was irrelevant.34 A state court decision that the statutes were in-

27. Id. at 572.
28. Id.
30. Id. at 484-85.
31. Id. at 483-89.
32. Id. at 490.
34. Id.
applicable to the federal plaintiffs’ activities would not undo the harm or impropriety of the alleged bad faith scheme. Consequently, abstention was inappropriate.\(^{35}\)

As mentioned above, the district court in *Younger* relied upon *Dombrowski* in enjoining the state criminal prosecution. It read *Dombrowski* as establishing an exception to the policy against interference with state criminal cases when the state statute under which the charges are brought has a limiting effect on free speech and is susceptible to overbreadth application.\(^{36}\) Although recognizing that there was language in *Dombrowski* which would support such a view, the *Younger* Court characterized it as dicta.\(^{37}\)

Why was it dicta? Perhaps that misstates the question because the *Dombrowski* opinion itself does not appear to support such a characterization.\(^{38}\) The Court in *Younger* concluded that the *Dombrowski* complaint contained allegations which brought the case within an exception to the traditional rule against interference with state courts, without any regard to the overbreadth challenge to the statute. The proper question, then, might be: what was present in the *Dombrowski* allegations, in addition to the overbreadth challenge, that qualified them for the exception to the rule against interference? The *Younger* Court first pointed out that the *Dombrowski* complaint alleged the prosecutions of the federal plaintiffs were brought with no hope of securing valid convictions, but rather as part of a scheme to harass the S.C.E.F. officials and deter them from their civil rights activities.\(^{39}\) The

\(^{35}\) Justice Brennan apparently directed this discussion at arguments raised by the defendants based upon Railroad Comm’n v. Pullman Co., 312 U.S. 496 (1941). The *Pullman* doctrine requires the federal courts to await state court construction of unclear state laws that are the subject of federal constitutional attack. The purpose of the doctrine is to avoid premature and unnecessary constitutional decisions, to prevent tentative decisions of state law by federal courts, and to avoid unnecessary friction between the two court systems. *Id.* at 500-01.


\(^{37}\) 410 U.S. at 50.

\(^{38}\) The Supreme Court in *Dombrowski* ordered the issuance of an injunction by the lower court although the case reached the Court upon appeal from a dismissal pursuant to *Federal Rule of Civil Procedure* 12(b)(6). An overbreadth challenge presents a pure question of law justifying the injunction order. On the other hand, the bad faith claim would depend upon a factual showing which would have to be made at an evidentiary hearing after remand. Consequently, the overbreadth rationale appears to have been necessary to the Court’s handling of the case. *See* Fiss, *supra* note 4, at 1112; Bartels, *supra* note 4, at 34 n.25 (1976).

\(^{39}\) 401 U.S. at 48.
Court then referred to the allegations which supported these charges:

The appellants in *Dombrowski* had offered to prove that their offices had been raided and all their files and records seized pursuant to search and arrest warrants that were later summarily vacated by a state judge for lack of probable cause. They also offered to prove that despite the state court order quashing the warrants and suppressing the evidence seized, the prosecutor was continuing to threaten to initiate new prosecutions of appellants under the same statutes, was holding public hearings at which photostatic copies of the illegally seized documents were being used, and was threatening to use the copies of the illegally seized documents to obtain grand jury indictments against the appellants on charges of violating the same statutes. These circumstances, as viewed by the Court, sufficiently established the kind of irreparable injury, above and beyond that associated with the defense of a single prosecution brought in good faith, that had always been considered sufficient to justify federal intervention.  

In discussing the bad faith-harassment exception to the doctrine it was defining, the *Younger* Court also referred to *Cameron v. Johnson*. In *Cameron* the plaintiffs sought a judgment declaring a Mississippi statute overbroad and vague in violation of the first amendment, and enjoining pending and future criminal prosecutions thereunder. The plaintiffs alleged that the prosecutions the state pursued against them were selective, that they were brought with no hope of obtaining convictions, and that the state brought the prosecutions to discourage plaintiffs from demonstrating against racial discrimination in voter registration. After holding an evidentiary hearing, a three-judge district court dismissed the complaint. The Supreme Court affirmed.

The Court distinguished *Dombrowski* on the grounds that the district court had expressly found that the plaintiffs were not harassed or intimidated in their efforts to exercise constitutional rights and that they were being prosecuted in good faith. After

40. *Id.*
41. *Id.* at 49.
42. 390 U.S. 611 (1968).
43. *Id.* at 619. The *Cameron* Court also pointed out that “[t]he prosecutions there [*Dombrowski*] begun and threatened were not, as here, for violation of a statute narrowly regulating conduct which is intertwined with expression, but for alleged violations of various sections of excessively broad Louisiana statutes regulating expression itself . . . .” *Id.* at 618.
an independent examination of the record the majority concluded that the district court had not erred in these findings.

The plaintiffs also argued that at the evidentiary hearing they had demonstrated that their conduct was not sufficient to sustain convictions in criminal trials. The Court responded that the question before the district court was not the federal plaintiffs’ guilt or innocence of the pending charges, but “whether the statute was enforced against them with no expectation of conviction . . . [and] only to discourage exercise of protected rights.” 44 Moreover, the majority failed to find any evidence of selective prosecution. 45

In Younger the Court pointed out that although the dissenters in Cameron believed the record established the requisite bad faith and harassment, they had agreed with the majority that federal injunctive relief should not be available in the absence of such a showing. 46 Because there was no indication in Younger that the prosecution was brought in bad faith or under any other unusual circumstances that would call for equitable relief, the Court concluded there was no justification for federal intervention. 47

What were the circumstances in Dombrowski that were not present in Younger? First, the Dombrowski complaint alleged that the prosecution was brought without any expectation of obtaining a valid conviction. How would a court determine whether a criminal prosecution had been brought without any expectation of success? In Dombrowski the proof of this allegation apparently rested primarily on the fact that the Louisiana courts had quashed for lack of probable cause the arrest warrants that had been issued for the S.C.E.F. officials and had found that the search of their office and the seizure of their records had been illegal. Thus, the Louisiana courts had already determined that the S.C.E.F. members’ conduct did not fall within the statutes’ prohibitions. Moreover, these same courts had concluded that the records and files that had been seized could not be used against them in a criminal prosecution. These facts suggest that it would have been difficult or impossible to obtain valid convictions of Dombrowski and his associates. These defects in the

44. Id. at 621.
45. Id. at 622.
46. 401 U.S. at 49.
47. Id. at 54.
prosecution's case, apart from the alleged unconstitutionality of the statute, are important factors in determining whether federal injunctive relief is warranted.\textsuperscript{48}

The defects in the prosecution's case in \textit{Dombrowski} are also important because they support the contention that the charges were brought to harass the S.C.E.F. members and to discourage them from continuing their activities on behalf of Louisiana's black citizens. Despite the setbacks suffered in the state courts, the Louisiana officials continued to threaten the S.C.E.F. officials with prosecution and actually convinced a grand jury, which returned indictments against them. Such conduct, if motivated by a desire to discourage constitutionally protected activity, was itself a violation of constitutional rights and in the view of the \textit{Dombrowski} Court warranted a federal injunction against the state criminal prosecution.\textsuperscript{49}

Additionally, in \textit{Dombrowski} the state threatened to enforce statutory provisions other than those which the plaintiffs had been charged with violating.\textsuperscript{50} Consequently, there was no assurance that defending the criminal charges in state court would resolve all their federal claims. Defending a series of criminal prosecutions was not deemed to provide the S.C.E.F. officials with a satisfactory procedure for the resolution of the federal constitutional issues they raised.\textsuperscript{51}

Thus, the three elements that distinguish \textit{Dombrowski} from \textit{Younger}, and therefore, seem to be important in defining the bad faith-harassment exception to the \textit{Younger} rule, are the following:

1. an impermissibly motivated prosecution;
2. a prosecution brought with no expectation of obtaining a valid conviction; and
3. threats of prosecution under other provisions and thus the prospect of a series of criminal prosecutions.

Must all three elements be present before an exception to \textit{Younger} may be found? Do all three constitute independent exceptions? We will now turn to these and similar questions.

\textsuperscript{48} See Gajon Bar & Grill, Inc. v. Kelly, 508 F.2d 1317, 1320 (2d Cir. 1974).
\textsuperscript{49} See 380 U.S. at 490.
\textsuperscript{50} Id. at 489.
\textsuperscript{51} Id.
IV. Selective Prosecutions

Prosecutors have broad discretion in determining whom to prosecute.\textsuperscript{52} A large number of factors may be relevant in making such a decision. However, "[s]uch factors as the strength of the case, the prosecution's general deterrence value, the Government's enforcement priorities, and the case's relationship to the Government's overall enforcement plan are not readily susceptible to the kind of analysis the courts are competent to undertake."\textsuperscript{53} Thus, the prosecutor is usually allowed to make the decision of whom to prosecute without judicial intervention.

Nonetheless, prosecutorial discretion is not without limits, and is subject to constitutional constraints.\textsuperscript{54} The decision to prosecute may not be based upon an unconstitutional classification such as race or religion or upon the exercise of statutory or constitutional rights.\textsuperscript{55} A prosecutorial decision to bring charges based upon such factors would violate the constitutional guarantee of equal protection.\textsuperscript{56}

In \textit{Dombrowski} the federal plaintiffs alleged that the prosecution was brought to deter, or retaliate for, the exercise of their constitutional rights. They also alleged that it was brought without an expectation of obtaining a valid conviction and that they were faced with a series of criminal prosecutions. A question left open in both \textit{Dombrowski} and \textit{Younger} was whether a showing of an impermissibly motivated prosecution, standing alone, would be recognized as an exception to \textit{Younger} abstention.

One of the first post-\textit{Younger} cases to address this issue was \textit{Wilson v. Thompson}.\textsuperscript{57} The plaintiffs in that case sought injunctive relief from the continued prosecution of criminal charges against them in the Georgia state courts. The two plaintiffs had become involved in an altercation with two sheriff's deputies when the deputies attempted to arrest one of the plaintiffs on civil contempt charges. The deputies arrested both federal plaintiffs on charges of battery and one of them for interfering with a peace

\textsuperscript{52} See Wayte v. United States, 105 S. Ct. 1524, 1531 (1985).
\textsuperscript{53} Id.
\textsuperscript{54} Id.
\textsuperscript{55} Id.
\textsuperscript{56} Id. ("It is appropriate to judge selective prosecution claims according to ordinary equal protection standards.")
\textsuperscript{57} 593 F.2d 1375 (5th Cir. 1979).
officer in performance of his duties. Initially, prosecution of the
charges was not pursued, and the cases were placed on an inac-
tive docket. One of the plaintiffs then filed a civil suit against
the two deputies in state court, seeking damages for injuries aris-
ing from the incident in which they were arrested. After this
plaintiff initiated a civil action in state court, the state removed
the charges against the plaintiffs from the inactive docket. The
plaintiffs sought relief in federal court alleging that the state had
activated the criminal proceedings against them in bad faith, to
retaliate against the plaintiffs state court civil suit against the
deputies.

The district court denied the plaintiffs’ motion for a prelimi-
nary injunction, concluding that Younger precluded injunctive re-
lief absent a threat of repeated or multiple prosecutions. The
court pointed out that the issue of improper motivation could be
decided in the state criminal proceedings and the plaintiffs,
therefore, would not suffer the type of irreparable harm that
Younger established as the requirement for federal injunctive
relief.

A Fifth Circuit panel reversed. The panel disagreed with the
district judge’s conclusion that both improper motive and the
threat of multiple prosecutions had to be shown for the case to
fall within the bad faith exception to Younger.

The panel noted that Younger and other Supreme Court cases
discussing the Younger doctrine used the disjunctive when refer-
ing to the bad faith and multiple prosecution exceptions. Moreover, the court found that the interests of both the criminal
defendant and the state differ significantly from those in Younger
when the state prosecution is found to have been brought to de-

58. Id. at 1377-78. Specifically, the cases were placed on the “dead docket” by or-
der of the state court. The orders cited “insufficient evidence” as the reason for this
disposition; however, the state court judge testified that this notation was not necessarily
the equivalent of a determination of insufficient evidence to prosecute.

59. Id. at 1379. Upon learning of the civil suit against them, the deputies visited the
state judge to determine the status of the criminal prosecutions of the federal plaintiffs.
The state court judge ordered the reactivation of the prosecutions that day, motivated in
part by “his belief that the parties involved were dissatisfied with [the cases] remaining
there.” Id.

60. Id. at 1381.

61. Id.

62. Id.
ter, or retaliate for, the exercise of constitutional rights. In this
situation the criminal defendant’s federal right to freedom from
prosecution in bad faith cannot be protected in the same imper-
missibly motivated prosecution. Younger assumes that the only
constitutional issue is the attack upon the challenged state stat-
ute. However, that is not the case when the prosecution itself is
the constitutional violation. Although there is no constitutional
right to be free from prosecution under a statute which is be-
lieved in good faith to be constitutionally valid, there is a consti-
tutional right to be free from prosecution in bad faith, that is,
because of an impermissible motive. Additionally, the state’s in-
terest in pursuing its legitimate policies, which the panel viewed
as the most important comity rationale of Younger, would not be
frustrated by federal interference because the state has no inter-
est in pursuing a bad faith prosecution. Thus, the court held that
irreparable injury is sufficiently established if the party seeking
federal intervention can show that the state prosecution was
brought to deter, or retaliate for, the exercise of constitutional
rights.

The court next considered what a plaintiff must show in order
to obtain a preliminary injunction in such a situation. It held that
the plaintiff must show that an impermissible, retaliatory, or de-
terrent motive was a factor in the decision to prosecute, rather
than simply that the criminal prosecution was begun in response
to the civil suit. The plaintiff must show that his conduct was
constitutionally protected and that the criminal prosecution was
motivated, at least in part, by a desire to deter, or retaliate for,
that conduct. If the plaintiff meets that burden, the court then
should consider whether the state has shown by a preponderance
of the evidence that it would have prosecuted even if the im-
proper motive had not been present. The Fifth Circuit panel

63. Id. at 1382-83.
64. Id.
65. Id. at 1385-87.
66. Id. at 1387.
67. This test is an adaptation of the one set forth by the Supreme Court in Mt. Healthy City Bd. of Educ. v. Doyle, 429 U.S. 274 (1977). In that case a school teacher without tenure alleged that the defendant school board’s decision not to rehire him was made because he communicated to a local radio station the subject of a memorandum by the principal relating to teacher dress and appearance and that the decision therefore violated his first amendment rights. The Supreme Court held that the plaintiff had the initial burden of showing that his conduct was constitutionally protected and was a sub-
remanded the case with instructions for the district court to make specific factual findings in accordance with its opinion.68

In a later case the Fifth Circuit interpreted Wilson to require that the plaintiff show the predominant motivation for the criminal prosecution was to deter, or retaliate for, the exercise of constitutionally protected conduct.69 However, neither Wilson nor the later case requires a showing of threatened multiple prosecutions or that the state criminal prosecution was brought without a reasonable chance of obtaining a conviction.

As the Wilson court noted, this view is consonant with the Supreme Court’s use, in several Younger cases, of disjunctive language when referring to bad faith prosecutions and situations in which the party seeking federal relief faced a threat of multiple prosecutions. Indeed, in Younger the Court stated, “[t]here is no suggestion that this single prosecution against Harris is brought in bad faith or is only one of a series of repeated prosecutions to which he will be subjected.”70 This language indicates that showing a single criminal prosecution brought in bad faith would justify federal injunctive relief without an accompanying threat of multiple prosecutions.

This conclusion is also consistent with the views of Justice Brennan expressed in his dissenting opinion in another Younger case.71 He wrote that federal interference is justified if a criminal prosecution is brought to discourage conduct protected by the Constitution, because the prosecution is itself a violation of constitutional rights; and thus, raising a defense in the state proceeding will not assure adequate vindication of constitutional rights.72 The federal plaintiff, therefore, is entitled to have the federal

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68. Wilson, 593 F.2d at 1389. Upon remand the district court found that the state officials who instituted the criminal proceedings did so because they thought the federal plaintiffs wanted their criminal case terminated so they could comply with a state law requirement that their criminal case be terminated in order to proceed with their related civil suit. That decision was affirmed on appeal, and consequently, federal injunctive relief was not available to the plaintiffs. Wilson v. Thompson, 638 F.2d 799, 801 (5th Cir. 1981).

69. Smith v. Hightower, 693 F.2d 359, 367 n.9 (5th Cir. 1982).

70. Id. at 287.


72. Id. at 118.
court "cut short the unconstitutional state prosecution." 73

Despite such support for the conclusion in Wilson that an impermissibly motivated prosecution can be sufficient in itself to bring a case within the bad faith-harassment exception to Younger, this view has not been adopted by all the federal courts confronting the question. In Erdmann v. Stevens, 74 the plaintiff, an attorney, sought federal injunctive relief from disciplinary proceedings instituted against him. He contended that the proceedings, which arose from comments critical of state court judges, and which were attributed to him in a magazine article, were brought for the specific purpose of discouraging and preventing his exercise of first amendment rights. The Second Circuit panel first concluded that the Younger limitations on interference with state criminal proceedings were applicable to attorney disciplinary proceedings as well, since these were quasi-criminal in nature. 75 It then found that the injury alleged by the plaintiff was no more than that associated with the defense of a single prosecution and fell far short of the "official lawlessness" of Dombrowski. 76 The concurring opinion asserted that "[o]nly were it abundantly clear that Erdmann had been subjected to multiple prosecutions or continued harassment or action under a patently unconstitutional statute would federal injunctive relief be available." 77 The defense that the charges were brought to chill the plaintiff’s exercise of first amendment rights was to be presented and determined in the state courts. 78

In Williams v. Red Bank Board of Education 79 the court adopted a similar approach. The plaintiff, a teacher against whom the Board of Education brought tenure termination proceedings, sought an injunction against the continuation of those proceedings. She alleged that the proceedings had been instituted as a result of statements she made at a public meeting of the Board of Education. After concluding that the principles of Younger ab-

73. Id.
74. 458 F.2d 1205 (2d Cir.), cert. denied, 409 U.S. 889 (1972).
75. Id. at 1208-10. This same conclusion was later reached by the Supreme Court in Middlesex County Ethics Comm. v. Garden State Bar Assoc., 457 U.S. 423, 431-32 (1982).
76. 458 F.2d at 1210-11.
77. Id. at 1213 (Lombard, J., concurring).
78. Id. at 1211-12.
79. 662 F.2d 1008 (3d Cir. 1981).
stention were applicable to the state administrative proceedings, the panel rejected in a footnote the plaintiff's claim of bad faith, asserting that "Williams would have had to allege something akin to a series of prosecutions brought in bad faith 'with[out] [sic] any expectation of securing a valid conviction'" in order to fall within the exception.

Although the language in Williams and Erdmann is inconsistent with the language in Wilson, the holdings of these cases can perhaps be reconciled. In Wilson the federal plaintiffs alleged that the charges against them were reactivated to deter, or retaliate for, the civil suit against the arresting officers. Thus, the conduct deterred or retaliated against was clearly distinct from the conduct which allegedly violated the statute pursuant to which they were charged. On the other hand, in both Erdmann and Williams the conduct upon which the state based the charges against the federal plaintiffs was also the conduct that allegedly was deterred or retaliated against.

In a very real sense, every prosecution seeks to deter or retaliate against the conduct which is the basis of the charge. Nonetheless, if a prosecutor brings suit in the reasonable belief that the conduct alleged violates the applicable statute or rule, and that such conduct may be deterred or punished without violating constitutional standards, then the prosecution itself does not violate constitutional rights because it seeks to deter or retaliate against the proscribed conduct. Thus, the Erdmann and Williams courts may have viewed the key issue in those cases as whether the alleged misconduct could be punished without violating the Constitution. Rightly or wrongly, Younger commands that this issue generally be left to the state courts when there is a pending state proceeding. Seen in this light, Erdmann and Williams are simply not cases involving selective prosecutions.

However, there is one case decided before Wilson in which a federal court squarely held that allegations of selective prosecution did not give rise to an exception to Younger. In Hendricks v. Hogan, some of the plaintiffs alleged that there were state criminal prosecutions pending against them and that the state statutes

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80. Id. at 1014-22.
81. Id. at 1022 n.14.
were being enforced in a discriminatory manner against persons with unpopular views, including the plaintiffs. While conceding that such allegations might be relevant to show the prosecutions were impermissibly motivated, the court held that because it was clear that the claim of selective prosecution could be raised as a defense in the state court proceeding, the allegations were not sufficient to constitute an exception to the Younger bar. More-\textsuperscript{84} over, there were no allegations that the plaintiffs had been threatened with multiple prosecutions or multiple arrests.\textsuperscript{85}

Just as the Wilson court could point to language in Supreme Court decisions to support its view, the Hendricks court could have referred to language in some Younger cases to support its analysis. For example, in Cameron \textit{v.} Johnson,\textsuperscript{86} the Court stated, “we viewed Dombrowski to be a case presenting a situation of the ‘impropriety of [state officials] invoking the statute in bad faith to impose continuing harassment in order to discourage appellants’ activities . . . .'”\textsuperscript{87} Such language, especially the words “continuing harassment,” can be interpreted to require more than a single prosecution before the bad faith exception can be established.

Additionally, the Wilson approach is based upon the notion that because the bad faith proceeding itself is the constitutional violation, raising the constitutional challenge in the state proceeding is an inadequate remedy. However, the Supreme Court has rejected similar arguments raised in slightly different situations. In Trainor \textit{v.} Hernandez\textsuperscript{88} the plaintiff attacked the constitutionality of the Illinois Attachment Act,\textsuperscript{89} alleging that it allowed the deprivation of property rights without the procedural safeguards required by the fourteenth amendment. The State of Illinois had attached funds in the plaintiffs’ credit union account in the course of a state suit alleging that the federal plaintiffs had fraudulently obtained welfare funds. The Supreme Court held that the Younger doctrine prohibited the district court from issuing an injunction enjoining the state’s use of the Attachment Act

\begin{flushleft}
\textsuperscript{84} Id. at 1282.
\textsuperscript{85} Id.
\textsuperscript{86} 390 U.S. 611 (1968).
\textsuperscript{87} Id. at 619 (quoting Dombrowski, 380 U.S. at 490).
\textsuperscript{88} 431 U.S. 434 (1977).
\end{flushleft}
if the plaintiffs' constitutional challenge could be raised in the state court proceedings. Justice Stevens dissented, arguing that because the plaintiff raised a serious challenge to the fairness of the state's attachment procedures, *Younger* abstention was inappropriate. Justice Stevens raised this same contention in *Judice v. Vail*, in which the Supreme Court held that *Younger* abstention required the dismissal of a federal suit seeking injunctive relief against the use of a state's contempt procedures on the grounds that they were procedurally inadequate in violation of the fourteenth amendment. Justice Stevens, in his dissent, argued that *Younger* abstention was inappropriate because the plaintiffs were seeking protection from forced participation in an unconstitutional proceeding and they were instead forced to participate in that proceeding to assert their constitutional challenge. The argument appears to be essentially the same argument adopted by the *Wilson* Court; that is, if the proceedings themselves are the constitutional violation then *Younger* abstention is inappropriate. However, a majority of the Court found abstention to be appropriate in both cases.

In *Moore v. Sims*, Justice Stevens expanded upon his views. He contended that every *Younger* dismissal involved "an implicit constitutional decision" that to require "the federal plaintiff to defend in the state forum is not itself a deprivation of his constitutional rights." If the state procedures were constitutionally deficient or brought in bad faith, then such a decision would be unwarranted. He compared the situation to that in *Gibson v. Berryhill*, in which the Court held that there was an exception to *Younger* if the state tribunal hearing the federal challenge was biased. If the procedures do not meet the minimum requirements of due process, Stevens argued, there is "no more reason to abstain in favor of an unconstitutionally limited opportunity than in favor of the unconstitutionally composed Board in *Gibson.*"

The majority responded in a footnote that this argument had

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90. 431 U.S. at 467-70.
92. Id. at 340-41 (Stevens, J., dissenting).
94. Id. at 443 n.16 (Stevens, J., dissenting).
96. 442 U.S. at 442 n.15 (Stevens, J., dissenting).
been raised and rejected in the earlier cases.\textsuperscript{97}

If the fact that the proceedings are constitutional violations is not sufficient to avoid \textit{Younger}, then one can argue that a bad faith proceeding, although a constitutional violation, is not sufficient to avoid \textit{Younger}, so long as the bad faith allegations can be presented in the state court. The argument concludes that only if the federal plaintiff is faced with a multiplicity of actions is his state remedy inadequate.

How can the Court's treatment of the procedural due process cases be reconciled with the \textit{Wilson} analysis? First, the nature of the constitutional rights involved is different. The adequacy of the state remedy in the \textit{Younger} context may to some extent depend upon the nature of the federal constitutional issue. The due process clause does not protect one from procedural schemes that are inadequate. Rather, it forbids the deprivation of life, liberty, or property through such a constitutionally inadequate process.\textsuperscript{98} Thus, the relief provided generally requires the state to provide adequate procedures before depriving the plaintiff of any protected interest and to compensate the plaintiff for any injuries suffered as a result of any previous inadequate process.\textsuperscript{99} When \textit{Younger} requires a party to raise his procedural due process challenge in the state court, his fourteenth amendment rights can be adequately protected if the state court provides the same relief that the federal court would.\textsuperscript{100} Of course, if the state court refuses to recognize the asserted constitutional violation, the challenging party can seek review before the Supreme Court. On the other hand, where a party is the victim of a bad faith prosecution, the prosecution itself, not the possible deprivation of life, liberty, or property which may result, is the constitutional violation.

The remedy should be the termination of the prosecution. This remedy should be immediately available to the victim; he should not be forced to acquiesce in the violation of his rights by forced participation in the tainted proceedings. Indeed, the cost, anxiety, and inconvenience associated with the state proceeding

\textsuperscript{97} \textit{Id.} at 427 n.10.
\textsuperscript{100} \textit{See} Marais, \textit{Federal Intervention in State Criminal Proceedings: Dombrowski, Younger, and Beyond}, 50 Tex. L. Rev. 1324, 1339 (1972).
are the very harms from which the state criminal defendant seeks protection. The federal courts should be available in this situation to protect federal constitutional rights, a primary concern of American federalism.

Moreover, it is important that federal injunctive relief be available at the time these federal rights are violated. The victim of an improperly motivated prosecution would be unable to recover from the state prosecutor the damages resulting from the violation of his constitutional rights. Additional, even if damages were available, they would be an inadequate remedy for a violation of constitutional rights.

Furthermore, the federal court should be an available forum to determine whether the motivation for the state prosecution was impermissible. State prosecutors are important actors in state criminal justice systems. When charges are made that they are abusing the system, it seems logical that the victim of such abuse would have the option of a neutral forum not associated with the allegedly abused system.

In some situations, fact finding by a federal court may be crucial to the determination of federal claims. The question of whether a state prosecutor is abusing his office by bringing a prosecution for an improper reason is such a situation. While federal judges will probably be reluctant to find that a prosecution is improperly motivated, state judges may be even more so. State judges often depend upon the approval of the public for their continuance in office. Because the exercise of federal rights is often unpopular, a prosecution to deter or retaliate against the exercise of such rights may "reflect a prevailing community attitude on a strong emotional issue," and a state judge may well hesitate to terminate a prosecution on these grounds. The strong federal interest in favor of vindication of federal rights thus weighs heavily against federal court abstention when it is

105. Maraist, Federal Intervention, supra note 100, at 1341.
alleged that the state has pursued a criminal prosecution because of an improper motive.

The strength of the federal interest against federal abstention is a key factor in determining whether an exception to Younger should be recognized, because the doctrine itself reflects a balancing of state and federal interests. The primary federal interest is the protection of federal rights, while the primary state interest is the interpretation and application of its laws in its own courts. "Our Federalism," as reflected in the Constitution, is concerned with both of these interests and, therefore, entails the balancing between the two which is inherent in Younger. When the federal interests in favor of intervention outweigh the state interests against intervention, then federalism not only allows federal injunctive relief, it demands it. In the case of the impermissibly motivated prosecution, not only is the federal interest against abstention strong, but the state interest in favor of federal abstention is very weak. When the state brings a prosecution which would not have been brought absent a constitutionally impermissible purpose, the prosecution furthers no legitimate state interest. Instead, it is in the state's interest to terminate such an abuse of its criminal process at the earliest possible moment. Treating cases in which selective prosecution has been established as within the bad faith-harassment exception to Younger will not lead to interference with the legitimate enforcement of state substantive policies or with the good faith enforcement of state criminal laws. "Our Federalism" demands that federal injunctive relief be available in cases in which the federal plaintiff has shown selective prosecution, and therefore, these cases fall within the exception to Younger. The plaintiff should not be required to show additionally the threat of multiple prosecutions or that the prosecution was brought without a reasonable expectation of obtaining a valid conviction.

V. Prosecutions Brought with No Reasonable Expectation of Success

In most of the cases in which a federal court has issued an

106. See id. at 1332-33.
108. See Wilson v. Thompson, 593 F.2d 1375, 1383 (5th Cir. 1979).
injunction against a state criminal proceeding pursuant to the bad faith-harassment exception to *Younger*, the court has concluded that the state pursued the prosecution without any reasonable expectation of success. Indeed, the Supreme Court has stated that bad faith "generally means that a prosecution has been brought without a reasonable expectation of obtaining a valid conviction."\footnote{Kugler v. Helfant, 421 U.S. 117, 126 n.6 (1975); see also Perez v. Ledesma, 401 U.S. 82, 85 (1971).} When such a prosecution is brought, often an inference can be drawn that the prosecution has been brought for an impermissible purpose. As discussed above, impermissible motive should be a sufficient basis for federal injunctive relief even when there may be a reasonable likelihood of conviction. However, showing an impermissible motive should be much easier when there is no reasonable hope of convicting the federal plaintiff of the charges brought against him. In fact, the likelihood of an impermissible motive behind such a prosecution may itself justify federal intervention in such cases.\footnote{Cf. Blackledge v. Perry, 417 U.S. 21, 27-29 (1974) (due process clause prohibits a prosecutor from reindicting a convicted misdemeanor on a felony charge after the defendant successfully attacked his conviction on appeal because there is a realistic likelihood of vindictiveness).} Thus, the question arises whether the Supreme Court's recognition of such prosecutions as exceptions to *Younger* can be justified without relying upon the possibility of a constitutionally impermissible motive.

"In our system, so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute . . . generally rests entirely in his discretion."\footnote{Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978) (footnote omitted).} On the other hand, when there is not probable cause, or for some other reason there is no reasonable chance of a conviction, the due process clause of the fourteenth amendment prohibits prosecutors from subjecting individuals to the costs, anxiety, and inconvenience associated with the criminal justice system.\footnote{See Wheeler v. Cosden Oil and Chem. Co., 734 F.2d 254, 257-60 (5th Cir. 1984); Shaw v. Garrison, 467 F.2d 113, 122 (5th Cir.), cert. denied, 409 U.S. 1024 (1972).}

In *Shaw v. Garrison*,\footnote{467 F.2d 113 (5th Cir.), cert. denied, 409 U.S. 1024 (1972).} the plaintiff in the federal suit was the defendant in a pending state perjury prosecution. The district
court found, inter alia, that the state prosecutor knew that the key witness against the plaintiff would be ineffective and that he had a significant financial interest in the plaintiff's continued prosecution. The district court concluded that the state had brought the perjury prosecution in bad faith and issued a permanent injunction. The Fifth Circuit affirmed, holding that the federal right to freedom from a bad faith prosecution cannot be vindicated in the tainted prosecution.

Given the ineffectiveness of the prosecution's only witness, the state criminal prosecution in Shaw was brought without a reasonable expectation of success. However, a prosecutor's interest in fame and financial reward is not a constitutionally impermissible motive for bringing charges. Indeed, when there is a reasonable possibility of obtaining a valid conviction, the fact that the prosecution would not have been brought absent the prosecutor's personal animosity toward the state criminal defendant does not bring the case within an exception to Younger; nor do such circumstances violate constitutional rights. Thus, the key to the Fifth Circuit's decision in Shaw must be that the prosecution was brought with no reasonable chance of obtaining a conviction and that such a prosecution constitutes a violation of federal constitutional rights.

The notion that a state prosecutor could arbitrarily subject someone to criminal charges without any reasonable hope of obtaining a conviction seems repugnant to settled ideas of due process. The recognition of a right to freedom from such charges does not unduly hamper law enforcement, while the failure to do so would leave citizens at the mercy of a prosecutor's whim or caprice. The due process clause offers protection from such arbitrary and unreasonable government action.

One Supreme Court decision, Gerstein v. Pugh, contains language that appears to contradict the conclusion that a prosecu-

115. Id. at 118.
116. Id. at 122 n.11.
118. See Wheeler v. Cosden Oil and Chem. Co., 734 F.2d 254, 259 (5th Cir. 1984).
121. 420 U.S. 103 (1975).
tion brought without a reasonable chance of success constitutes a violation of substantive due process rights. The Court held that before a person arrested can be detained for trial pursuant to a prosecutor’s information, he is constitutionally entitled to a judicial determination of probable cause. The Court went on to state that “[b]ecause the probable cause determination is not a constitutional prerequisite to the charging decision, it is required only for such suspects who suffer restraints on liberty other than the condition that they appear for trial.”

If a prosecutor’s determination of probable cause is not a constitutional prerequisite to the decision to bring charges, then the prosecutor probably has not violated the defendant’s due process rights by bringing charges without probable cause. However, by using the words “probable cause determination,” the Court apparently was referring to the judicial determination of probable cause that it concluded was required before extended detention, and was not suggesting that prosecutorial discretion is so broad that a prosecutor could charge someone he knew was innocent, without running afoul of the Constitution.

Aside from the troubling dicta in Gerstein, the correctness of our conclusion is also called into question by courts holding that a malicious prosecution does not violate federal constitutional rights. Often these decisions simply state this conclusion without explanation. When an explanation is offered, it usually refers to state law that allegedly provides an adequate remedy to the aggrieved individual. However, in this situation, “[t]he federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked.”

Substantive due process protects fundamental rights regardless of whether a state remedy is available. Therefore,

122. Id. at 125 n.26.
124. See, e.g., Bretz v. Kelman, 722 F.2d 503, 505 (9th Cir. 1983); Cloutier v. Town of Epping, 714 F.2d 1184, 1190 (1st Cir. 1983).
125. See, e.g., Cloutier v. Town of Epping, 714 F.2d 1184, 1190 (1st Cir. 1983).
127. Bretz v. Kelman, 722 F.2d 503, 507 (9th Cir. 1983) (Fletcher, J., dissenting); Duncan v. Poythress, 657 F.2d 691, 704-05 (5th Cir. 1981), cert. dismissed, 459 U.S. 1012 (1982). Parratt v. Taylor, 451 U.S. 527 (1981), is not to the contrary. In that case the Supreme Court held that state officials’ negligent loss of the plaintiff’s property did not violate plaintiff’s right to procedural due process because state law provided an adequate remedy for the deprivation. However, Parratt is not applicable to substantive vio-
those courts finding that malicious state prosecutions violate federal constitutional rights appear to be on firmer ground.\footnote{See, e.g., Wheeler v. Cosden Oil and Chem. Co., 734 F.2d 254, 257-60 (5th Cir. 1984); Dunn v. Tennessee, 697 F.2d 121, 125 (6th Cir. 1982), \textit{cert. denied}, 460 U.S. 1086 (1983); Singleton v. City of New York, 632 F.2d 185, 194-95 (2d Cir. 1980), \textit{cert. denied}, 450 U.S. 920 (1981).}

As in the case of an impermissibly motivated prosecution, a prosecution that has no reasonable chance of success is itself a violation of constitutional rights which cannot be vindicated by forcing the victim to defend in the state court. Unlike cases involving violations of the right to procedural due process, such a violation of substantive due process requires that the governmental action be terminated immediately before the victim is subjected to further abuse. In this context it is again true that the cost, anxiety, and inconvenience associated with the state prosecution are the very harms from which the state criminal defendant seeks protection. Indeed, most of the reasons mentioned above justifying federal intervention in cases involving impermissibly motivated prosecutions are relevant to prosecutions brought without any reasonable hope of success. Thus, it is not surprising that the Supreme Court has recognized that in the unusual case in which a state criminal defendant can demonstrate there is no reasonable chance of obtaining a valid conviction against him, a federal court may enjoin the state criminal proceedings. There is little or no state interest in a prosecution that has no reasonable chance of success, while the federal interest in protecting the defendant’s substantive due process rights is very strong. Federalism requires that federal injunctive relief be available. Having concluded that prosecutions brought without a reasonable expectation of success are within the bad faith-harassment exception to \textit{Younger}, we now turn to the question of what constitutes such a prosecution.

In \textit{Dombrowski} the Supreme Court held that if the federal plaintiffs proved their allegations, the district court could find that the state brought the prosecutions with no reasonable expectation of valid convictions. This proposition was supported by allegations that the state courts had quashed an arrest warrant against one of the federal plaintiffs and had found that the evi-
idence to be used against the federal plaintiffs had been seized in an illegal manner and was inadmissible against them. Thus, the actions of the state courts were important in proving that the prosecutions were brought without expectations of success.

The importance of state court activity in this context is also demonstrated by *Hicks v. Miranda*, the most recent major Supreme Court discussion of the bad faith exception. The district court in that case concluded that the plaintiff had shown bad faith and harassment, but the Supreme Court found the relevant findings were vague and conclusory. Citing a pattern of police seizures, the district court had concluded that the police were determined to banish a particular film from their community regardless of the result in any judicial proceeding. However, the Court characterized this conclusion as "unexplicated," noting that "each step in the pattern of seizures . . . was authorized by judicial warrant or order." Because the district court failed to "impeach the entitlement of the prosecuting officials to rely on repeated judicial authorization for their conduct," the Court concluded that bad faith and harassment had not been shown. Thus, state court rejection of prosecutorial conduct may be important evidence in supporting an allegation of bad faith or harassment; conversely, state court endorsement of such conduct argues against federal intervention.

However, *Hicks* does not suggest that judicial authorization of prosecutorial conduct precludes a finding of bad faith or harassment, and the lower courts have not interpreted it in that manner. In *Llewelyn v. Oakland County Prosecutor's Office*, the district court held that a series of arrests of and seizures from the plaintiffs were in bad faith despite the fact that they were conducted pursuant to judicial warrants. The court interpreted *Hicks* to require an examination of all of the relevant circumstances, not merely reliance upon the presence or absence of a single factor such as a warrant. Recognizing that prosecutorial discretion is subject to constitutional limitations, the court concluded that

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129. 422 U.S. 332 (1975).
130. *Id.* at 350.
131. *Id.* at 351.
132. *Id.*
133. *Id.*
134. *See also* Timmerman v. Brown, 528 F.2d 811, 815 (4th Cir. 1975).
“the act of applying for a warrant . . . may in a proper case be found to be in bad faith or an effort to harass, regardless of whether a warrant is ultimately issued.”

*Llewelyn* is also helpful because it again demonstrates that when there is no probable cause to believe the state criminal defendant has violated the statute under which he has been charged, federal injunctive relief is available. The prosecutor had charged the defendant with violating a statute which the prosecutor had reason to know was inapplicable to the defendant’s conduct. Such a showing was deemed to be significant in establishing that the prosecution was brought in bad faith because it demonstrated that the state pursued the prosecution without a reasonable expectation of obtaining a conviction.

*Domrowski* demonstrates that a lack of evidence to support the charges against the state criminal defendant may help to establish the bad faith exception. The plaintiffs’ allegation of the inadmissibility of the evidence to be used against them in any criminal prosecution supported the contention that the prosecution was brought without any hope of ultimate success. However, as the *Cameron* Court warned, “[t]he issue of guilt or innocence is for the state court at the criminal trial . . . .” The state prosecutor is not required to prove the federal plaintiff is guilty to avoid a federal injunction. Nonetheless, the complete absence of evidence, or a paucity thereof, may support the inference that the state has pursued the prosecution without any reasonable chance of success and thus, is a relevant factor in determining whether the prosecution has been brought in bad faith.

Additionally, *Domrowski* suggests that if a prosecution is brought with the intent to terminate the proceedings before trial, then it is brought without a reasonable hope of obtaining a valid conviction. Similarly, the majority in *Cameron*, in rejecting the

136. *Id.* at 1386.
139. See, e.g., *id.* at 626 (Fortas, J., dissenting); *Shaw* v. *Garrison*, 467 F.2d 113, 118 (5th Cir.), *cert. denied*, 409 U.S. 1024 (1972).
140. See *Fiss*, supra note 4, at 1115.
argument that the prosecutions were brought in bad faith, pointed out that the record did not support the conclusion that the state officials started the state criminal proceedings "with no intention of pressing the charges." Thus, it is not surprising that the lower federal courts have found the failure of state officials to present charges to a grand jury, or the simple arrest, booking, and release of individuals without continued prosecution to be factors supporting the availability of federal injunctive relief. If the prosecutor intends to abort the proceedings before trial, then he has not brought them in the hope of obtaining a valid conviction.

Moreover, some courts and commentators have concluded that when it is clearly unconstitutional to apply a statute or ordinance to the conduct with which the state defendant is charged, the prosecution has been brought without any reasonable hope of obtaining a valid conviction. On the other hand, a Second Circuit panel has suggested that defects in a prosecution leading to such a conclusion must be collateral to the constitutional validity of the state statute itself if federal intervention is to be appropriate. This latter view is based on the notion that where there are defects in the prosecution other than the alleged unconstitutionality of the statute, these defects will obviate the adjudication of the constitutional issue in the criminal proceeding. Absent federal intervention, the state criminal defendant will face the irreparable harm which would result from the continued existence of the state statute without any determination of its constitutional validity.

However, this approach misses the point. One key to the bad faith exception to Younger is the determination of whether there is an impermissible motive for the prosecution. If the application of a particular statute to the alleged misconduct of the state criminal defendant is clearly unconstitutional, this certainly would

141. 390 U.S. at 619.
146. Id.
seem to support an inference that there is some impermissible motive behind the prosecution. Such an inference may be significant in determining whether federal injunctive relief is warranted on the grounds of impermissible motive.

Additionally, if application of the statute to the defendant’s conduct is clearly unconstitutional, there is no reasonable likelihood that the prosecution will be successful, and it is a violation of the criminal defendant’s substantive due process rights to allow the prosecution to continue. For the reasons discussed above, in this situation the criminal defendant suffers irreparable harm, both great and immediate, which justifies federal injunctive relief.

VI. Multiple Prosecution Cases

The plaintiffs in *Dombrowski* alleged that they faced threats of prosecution under statutory provisions other than those with which they had been charged. In such a situation the plaintiffs would not have been able to establish in the state criminal proceeding that the statutes other than those under which they had been charged were unconstitutional. Thus, they would have needed a series of legal proceedings to establish the protected nature of the activity in dispute. The *Younger* Court, in discussing the great and immediate irreparable harm needed to warrant federal interference, declared that “the threat to the plaintiffs’ federally protected rights must be one that cannot be eliminated by his defense against a single criminal prosecution.”147 Because the plaintiffs in *Dombrowski* faced prosecutions under other statutes, the threat to their federal constitutional rights could not be eliminated by simply defending the state criminal proceeding. Such situations are properly recognized as exceptions to the *Younger* prohibition against federal interference.

Additionally, multiple prosecutions may be important in establishing impermissibly motivated prosecutions or those brought without a reasonable expectation of success. For example, in *Krahm v. Graham*,148 the state charged the federal plaintiffs with violations of the state’s anti-obscenity law over one hundred times in a two year span. Of the eleven cases that actually went to

147. 401 U.S. at 46.
148. 461 F.2d 703 (9th Cir. 1972).
trial, none resulted in convictions. Because none of the past prosecutions against the plaintiffs for essentially the same activity had been successful, it appeared that the pending prosecutions had not been brought with reasonable expectations of obtaining valid convictions. Therefore, the Ninth Circuit affirmed the trial court's finding of bad faith and its issuance of an injunction against the prosecutions. 149

VII. Conclusion

Federalism involves more than simply recognizing the rights of the individual states to carry out their own substantive policies. It also includes a concern that the federal rights of individual citizens not be trampled by the states without federal intervention. The Younger doctrine represents an attempt to balance these potentially conflicting concerns which are both inherent in our federal system. Federalism may sometimes call for abstention by federal courts, but sometimes it may call for federal intervention to halt state court proceedings. In examining the bad faith-harassment exception to the Younger bar against federal intervention, I have attempted to identify those situations in which federalism calls for federal intervention in state court proceedings.

This occurs in a relatively small number of situations, if the premises of Younger are accepted. First, federal injunctive relief should be available in cases in which prosecutorial discretion has overstepped constitutional boundaries. Where a decision to prosecute would not have been made absent improper considerations such as race or the exercise of constitutionally protected rights, federal injunctive relief should be available. Additionally, federal intervention is justified if there is no reasonable chance that the state criminal proceedings will lead to a valid conviction. In both these situations, forced participation in the state criminal proceedings constitutes a violation of federal constitutional rights which cannot be adequately vindicated by simply asserting a defense therein. Finally, in cases involving multiple prosecutions, a defense to a single proceeding will not offer sufficient protection of federal constitutional rights and federal restraint of the state criminal proceedings is appropriate.

149. 461 F.2d at 706-09.
If Younger is correct, there are relatively few situations in which federal injunctive relief from state criminal proceedings is justified. However few, in these situations federalism itself calls for federal intervention. We must never forget that the most important component of "Our Federalism" is the protection of federal constitutional rights against infringement by state government.