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Federal Intervention in State Criminal Proceedings (Salem Inn, Inc. v. Frank)

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class action standing can play in the outcome of a lawsuit, other circuits should make use of the *Herbst* approach in determining whether an interlocutory appeal of this issue is appropriate.

Thomas A. O'Rourke

FEDERAL INTERVENTION IN STATE CRIMINAL PROCEEDINGS

Salem Inn, Inc. v. Frank

The issuance of federal injunctive relief against the enforcement of allegedly unconstitutional state criminal statutes raises delicate questions of comity and federalism.[1] Accordingly, the Supreme Court in *Younger v. Harris*,[2] established the basic principle that, absent extraordinary circumstances,[3] federal courts should not interfere with pend-

satisfactory in meeting changing circumstances. Judge Mansfield, concurring in *General Motors*, aptly cautioned against inflexible utilization of the *Herbst* standard:

> While the "three pronged" test . . . sets forth relevant factors that should be considered in deciding whether a class action certification is appealable, not all of them strike me as mandatory conditions precedent to review. Moreover, I fear that too strict or mechanical an adherence to the test, coupled with the engrafting of excessively specific conditions on appealability, will lead to violation of the Supreme Court's direction that § 1291 be given a "practical rather than a technical construction."

501 F.2d at 656-57, *quoting* Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 546 (1949).

1 Spears, *The Supreme Court February Sextet: Younger v. Harris Revisited*, 26 BAYLOR L. REV. 1 (1974). For an in depth analysis of developments in this area, see Note, *Federal Relief Against Threatened State Prosecutions: The Implications of Younger, Lake Carriers and Roe*, 48 N.Y.U.L. REV. 965 (1973).

2 401 U.S. 37 (1971). The plaintiff was indicted for violation of the California Criminal Syndicalism Act. CAL. PENAL CODE §§ 11400-01 (West 1970). He brought an action in federal court to enjoin the prosecution, alleging that the Act was unconstitutional on its face and that he would suffer irreparable harm. A three-judge court, holding that the law was impermissibly vague and overbroad, enjoined further prosecution. *Id.* at 40. The Supreme Court reversed the lower court's determination, holding that in order to enjoin a pending state prosecution, the federal plaintiff must establish the existence of extraordinary circumstances. *Id.* at 54. In this instance, the plaintiff would be required to prove that his federally protected rights could not be vindicated by his defense in a single prosecution. *Id.* at 46.

Decided the same day as *Younger* were five companion cases which both extend and interpret the Court's holding. *See* Samuels v. Mackell, 401 U.S. 66, 73 (1971) (declaratory relief denied for failure to meet *Younger* requirements); Boyle v. Landry, 401 U.S. 77, 81 (1971) (no threat of great and immediate injury); Perez v. Ledesma, 401 U.S. 82, 84-85 (1971) (suppression of evidence would stifle good faith state prosecution); Dyson v. Stein, 401 U.S. 200, 203 (1971) (no irreparable injury); Byrne v. Karalexis, 401 U.S. 216, 220 (1971) (failure to show that federal rights would not be adequately protected by defense in state prosecution).

3 401 U.S. at 54. The most commonly cited extraordinary circumstances are bad faith or harassment on the part of the state prosecutors. However, these are not exclusive, and other unusual situations might develop which would mandate federal intervention.

In Dombrowski v. Pfister, 380 U.S. 479 (1965), the Court reversed the denial of injunctive relief to a plaintiff being prosecuted pursuant to a statute which on its face violated first amendment rights. *Id.* at 497. The Court emphasized the "chilling effects" that a prosecution would have upon the exercise of such rights, regardless of the probable out-

ing state prosecutions. However, the Second Circuit, in *Salem Inn, Inc. v. Frank*,[4] declined to extend the scope of the *Younger* doctrine, holding it inapplicable to instances where the state prosecution is commenced subsequent to the filing of the federal complaint but prior to the issuance of injunctive relief.[5]

In 1973, the town of North Hempstead, New York, enacted an ordinance purporting to ban the offering of "topless" entertainment in cabarets, bars or any other public places.[6] Three bars, which had provided topless dancing for their patrons, filed a complaint in federal district court seeking to declare the ordinance unconstitutional and to enjoin local officials from its enforcement.[7] Although District Judge

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come. *Id.* at 487. Although the Court also found "bad faith," the implication was that the "chilling effect" of an overbroad statute would be a sufficient basis for federal intervention. *Id.* at 490-91.

Younger, however, rejects this "chilling effect" argument, 401 U.S. at 51, and requires more. The Court therein felt that the finding of "bad faith" in *Dombrowski*, not the mere "chilling effects," justified federal intervention. *Id.* at 50. Thus, *Younger* is viewed by commentators as a retreat from *Dombrowski*. *See, e.g.*, Note, *Federal Jurisdiction and Procedure*, 85 HARV. L. REV. 301 (1971).

[4] 501 F.2d 18 (2d Cir. 1974), *cert. granted*, 43 U.S.L.W. 3399 (U.S. Jan. 20, 1975) (No. 74-337). The majority was composed of Circuit Judges Oakes and Timbers; Judge Lumbard dissented.

[5] *Id.* at 23.

[6] The ordinance provided that it is

> unlawful for any person conducting, maintaining, or operating a carbaret, bar and/or lounge, dance hall, or discotheque, or any other public place . . . to suffer or permit any waitress, barmaid, entertainer, or other person who comes in contact with, or appears before . . . persons with breasts uncovered . . . or to appear in any scene, sketch, act or entertainment with breasts . . . uncovered.

North Hempstead, N.Y., Local Law 1-1973, § 3.0(1), July 17, 1973, *quoted in* Salem Inn, Inc. v. Frank, 364 F. Supp. 478, 479 n.1 (E.D.N.Y. 1973) (Bartels, J.). The ordinance subjected violators to a penalty of up to $500 in fines or 15 days imprisonment for each violation. Each day's performance would constitute a separate violation. 364 F. Supp. at 480. Section 3.0(2) made it unlawful for any person to appear with breasts uncovered. *Id.* at 479 n.1. The ordinance further prohibited both males and females from exposing their lower torsos. *Id.*

[7] The ordinance was passed on July 17, 1973. *Id.* at 480. The federal complaint was filed on August 9, 1973. *Id.*

The plaintiffs alleged that enforcement of the ordinance was a violation of their civil rights and therefore they were entitled to injunctive relief under 42 U.S.C. § 1983 (1970), which provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

The Anti-Injunction Statute, 28 U.S.C. § 2283 (1970), severely limits the power of a federal court to enjoin state court proceedings. The statute provides that such injunctions may issue only if expressly authorized by another statute, or if necessary in aid of the court's jurisdiction or to protect or effectuate the court's judgments. *Id.*

In Mitchum v. Foster, 407 U.S. 225, 243 (1972), the Supreme Court held that actions under section 1983 were an "expressly authorized" exception to the Anti-Injunction Statute. The Court recognized that the principles of *Younger* must be considered in deciding

Dooling signed an order requiring the town to show cause why a preliminary injunction should not be issued, the court denied plaintiff's motion for a temporary restraining order.[8] Nonetheless, one of the plaintiffs, M & L Rest, Inc., resumed its topless performances and, as a result, was served with criminal summonses for violating the ordinance.[9] The two remaining complainants, Salem Inn, Inc. and Tim-Rob Bar, Inc., complied with the ordinance by refraining from resuming the topless entertainment.[10] Eventually, the district court granted the preliminary injunction and found the ordinance to be impermissibly overbroad.[11]

The Second Circuit, with Judge Lumbard dissenting, affirmed the grant of preliminary relief.[12] The majority found that the traditional requirements for the issuance of injunctive relief had been satisfied. First, the plaintiffs had displayed a probability of success on the merits.[13] Previous decisions established that nude dancing is a form of expression which may, in certain instances, be protected by the first amendment.[14] The state, therefore, cannot ban such dancing in all situations. Since the North Hempstead ordinance was an "across the board" prohibition, it could not be constitutionally valid.[15] Secondly, the court found that

whether to grant relief under § 1983, but that the Anti-Injunction Statute is not an absolute bar. *Id.* If it were, the *Younger* court could have based its holding on that point alone. *Id.* at 231.

8 364 F. Supp. at 480. The order to show cause was signed on August 9, 1973, the same day the complaint was filed. The return date of the motion for a preliminary injunction was August 22. *Id.*

9 *Id.* On August 10, the day after the filing of the complaint, the topless dancing was reinstituted. On that day, as well as the three succeeding days, the criminal summonses were served.

10 *Id.*

11 *Id.* at 483. The preliminary injunction was issued on September 6, 1973. A hearing in the Nassau County Court on the criminal charges had been set for September 13. *Id.* at 480.

12 501 F.2d at 23.

13 *Id.* at 20-21.

14 *Id.* at 20, *citing* California v. LaRue, 409 U.S. 109, 118 (1972) (Rehnquist, J.). *See also* Southeastern Promotions, Ltd. v. City of Atlanta, 334 F. Supp. 634 (N.D. Ga. 1971); P.B.I.C., Inc. v. Byrne, 313 F. Supp. 757, 764 (D. Mass. 1970), *vacated and remanded to consider mootness*, 401 U.S. 987 (1971).

The local authorities did not contend that nude dancing was not protected by the first amendment. 364 F. Supp. at 483. Nor did they contend that the dancing involved in this case was actually obscene. 501 F.2d at 20 n.2. Rather, it was argued that the ordinance was a valid exercise of the local police power. *Id.* at 20. The authorities contended that a community can ban conduct which it feels is injurious to the safety, general welfare, or morals of the community. 364 F. Supp. at 482. This argument was based on Miller v. California, 413 U.S. 15, 24 (1973), which permitted courts to apply a "community standards" test in dealing with obscenity. The district court rejected this contention, stating that where no obscenity is alleged, there is no "community standard" test to apply to restrict the exercise of first amendment rights. 364 F. Supp. at 482.

15 501 F.2d at 20-21. The ordinance on its face purports to ban all nudity in all public places, regardless of form or context. *See* note 6 *supra*. Since some forms of nudity are

plaintiffs would suffer irreparable injury if relief were denied.[16] The plaintiffs alleged that the discontinuance of topless entertainment had caused a substantial loss of revenue, threatening them with bankruptcy.[17] Yet, violation of the ordinance would subject the bars' operators to a fine of $500 and up to 15 days imprisonment for each violation.[18]

Having determined that plaintiffs established the essential predicates for the granting of injunctive relief, the court next considered the applicability of *Younger v. Harris*.[19] The *Younger* decision was based

within the scope of the first amendment, *see* note 14 and accompanying text *supra*, the ordinance "sweeps within its ambit other activities that in ordinary circumstances constitute an exercise of freedom of speech." Thornhill v. Alabama, 310 U.S. 88, 97 (1940).

It was unnecessary for the plaintiffs to prove that their conduct would not be controllable under a properly constructed statute. Persons engaging in such "controllable" activities may attack a statute as overbroad. 501 F.2d at 21 n.3. *See* Gooding v. Wilson, 405 U.S. 518, 521 (1972), wherein the Supreme Court stated:

> [T]he transcendent value to all society of constitutionally protected expression is deemed to justify allowing "attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity . . . ."

Id. at 521, *quoting* Dombrowski v. Pfister, 380 U.S. 479, 486 (1965). *See also* Coates v. City of Cincinnati, 402 U.S. 611 (1971); Thornhill v. Alabama, 310 U.S. 88, 97-98 (1940).

The patrons of the three bars could assert constitutional rights to view the dancing. 501 F.2d at 21 & n.4. The right to receive communication is as equally protected as is the right to express it. *See, e.g.*, Procunier v. Martinez, 416 U.S. 396, 408-09 (1974) (censorship of mail of prison inmates). *See also* Kleindienst v. Mandel, 408 U.S. 753, 762-63 (1972); Lamont v. Postmaster General, 381 U.S. 301 (1965).

[16] 501 F.2d at 21. Judge Oakes, in reaching this conclusion, relied on his opinion in 414 Theater Corp. v. Murphy, 499 F.2d 1155, 1159-60 (2d Cir. 1974). There, the court stated that when a plaintiff is forced to forego constitutionally protected activity in order to avoid criminal prosecution, irreparable harm will result. *Id.*

Judge Lumbard, in his dissent, rejected the majority's reliance on *414 Theater Corp.*, distinguishing it on its facts. 501 F.2d at 25. In the earlier decision, the federal court had initially denied the request for the preliminary injunction. 499 F.2d at 1156. According to Judge Lumbard, the injunction was granted only after 414 Theater had established harassment by local officials who planned the institution of civil suits and the state courts had been given an opportunity to decide the constitutional issue but had refused to do so. 501 F.2d at 25.

In *Salem Inn*, there was no harassment and the state courts had been given no opportunity to decide the issue. However, a state court previously had reviewed a virtually identical ordinance and held it to be constitutional. Brandon Shores, Inc. v. Incorporated Village of Greenwood Lake, 68 Misc. 2d 343, 325 N.Y.S.2d 957 (Sup. Ct. Orange County 1971). Under these circumstances, the argument for abstention, pending a narrowing state construction, is less persuasive. The district court placed great emphasis on this factor in granting the preliminary injunction. 364 F. Supp. at 483. *See* 501 F.2d at 23 n.6. Nonetheless, Judge Lumbard concluded that *414 Theater Corp.* was not controlling. *Id.* at 25.

While the distinctions raised by the dissent are valid, they are not dispositive of the issue of irreparable harm. In *414 Theater Corp.*, the plaintiff faced a situation in which it had to choose between refraining from the questionable activity or risking criminal sanctions. This led the court to conclude that irreparable injury existed. 499 F.2d at 1160. The *Salem Inn* plaintiffs faced the same choice and therefore a finding of threatened irreparable injury was proper.

[17] 501 F.2d at 21 & n.5. While this allegation was not established by the plaintiffs, it was not denied by the defendant. *Id.* at 21 n.5.

[18] *See* note 6 *supra*.

[19] 401 U.S. 37 (1971).

primarily upon two doctrines fundamental to American Jurisprudence.[20] The first principle dictates 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."[21] Considerations of comity and the related need to maintain harmonious federal-state relations form the second ground for the *Younger* holding.[22] Accordingly, the federal government, in protecting rights guaranteed by federal law, must not "unduly interfere with the legitimate activities of the states."[23]

Despite the wide-sweeping doctrines underlying the Court's decision, *Younger* dealt only with pending state prosecutions. The Court specifically declined to express a view as to whether the same considerations would attach where the state proceeding had not as yet been instituted at the time the federal action was commenced.[24] Subsequent cases have indicated that *Younger* does not apply to threatened future prosecutions.[25] Similarly, *Younger* has been held not to extend to a plaintiff threatened with future prosecution where a co-plaintiff faces a pending proceeding.[26] Consequently, the Second Circuit had little

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[20] *Id.* at 43-44 (Black, J.).

[21] *Id.* The opportunity to raise the constitutional defense in a state action provides the federal plaintiff with an adequate remedy at law. *See id.* at 48-49. In channeling constitutional defenses into the state criminal proceeding, the Court sought to avoid duplication of proceedings. *Id.* at 44.

To satisfy the irreparable harm requirement, the plaintiff must establish not only the existence of an injury, but also that such harm is "great and immediate," *e.g.*, that a defense to the state prosecution could not serve to protect the complainant's federal rights. *Id.* at 46, *quoting* Fenner v. Boykin, 271 U.S. 240, 243 (1926). *See also* Douglas v. City of Jeannette, 319 U.S. 157, 163-64 (1943); Speilman Motor Sales Co. v. Dodge, 295 U.S. 89, 95 (1935).

[22] 401 U.S. at 44.

[23] *Id.* The importance of this consideration is underscored by the federal Anti-Injunction Statute, 28 U.S.C. § 2283 (1950), which restricts the power of federal courts to enjoin state court proceedings to a limited number of situations. *See* note 7 *supra*.

[24] 401 U.S. at 41. *See also id.* at 56 (Stewart, J., concurring).

[25] *See* Lake Carriers' Ass'n v. MacMullan, 406 U.S. 498 (1972), wherein the Court recognized that the *Younger* decisions

> were premised on considerations of equity practice and comity in our federal system that have little force in the absence of a pending state proceeding. In that circumstance, exercise of federal court jurisdiction ordinarily is appropriate if the conditions for declaratory or injunctive relief are met.

Id. at 509. *Accord*, Steffel v. Thompson, 415 U.S. 452, 462 (1974), wherein the Court also noted that absent a pending prosecution, the propriety of injunctive and declaratory relief is to be considered independently.

[26] *See* Roe v. Wade, 410 U.S. 113, 127 (1973). In *Roe*, an unmarried pregnant woman sought injunctive and declaratory relief against the enforcement of a Texas criminal statute banning abortions. Her doctor, who faced pending prosecution under the statute, joined in the action. The district court declared the statute to be unconstitutionally vague and overbroad. *Id.* at 122. The Supreme Court affirmed as to Roe, the pregnant woman. *Id.* at 166-67. However, the Court reversed as to the physician, based on Samuels v. Mackell, 401 U.S. 66 (1971). 410 U.S. at 126-27. *See* note 2 *supra*. It is apparent, therefore,

difficulty in affirming the award of injunctive relief to Salem Inn and Tim-Rob Bar, since each was merely threatened with prosecution.[27]

In the case of M & L Rest, Inc., the plaintiff facing a pending prosecution, the decision was more difficult. Nevertheless, the court developed three reasons for its refusal to apply *Younger*. The court first reasoned that equitable considerations dictated against the granting of relief to Salem Inn and Tim-Rob Bar and a denial of the same relief to M & L Rest.[28] Since all three plaintiffs came equally before the court, it was deemed inequitable for M & L Rest to be excluded because of subsequent events beyond its control.[29] Secondly, judicial energies were felt to be conserved by determining the merits as to all plaintiffs.[30] Additionally, the majority recognized that federal courts are the primary source for the vindication of federal rights.[31] Thus, the plaintiffs' choice of a federal forum should be given due consideration.

In reaching its decision, the court placed substantial reliance on the "practical wisdom of having a clear-cut method of determining when federal courts shall defer to state prosecutions . . . and when not."[32] Consequently, Judge Oakes, speaking for the majority, developed a rule whereby the forum first presented with a question should adjudicate the merits.[33] Although use of the "first forum" test could result in the

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that the fact that one plaintiff faces pending prosecution, does not bar federal relief to a co-plaintiff who is merely threatened with prosecution. *See also* Thoms v. Heffernan, 473 F.2d 478 (2d Cir. 1973), *vacated and remanded*, 94 S. Ct. 3199 (1974) (plaintiff when faced with a "credible threat of enforcement," deemed entitled to relief despite pendency of criminal proceedings against others); Lewis v. Kugler, 446 F.2d 1343 (3d Cir. 1971) (court refused standing to those plaintiffs facing pending criminal prosecutions, but granted standing to those not faced with pending prosecutions).

[27] 501 F.2d at 21-22.

There are a number of sound reasons for not applying the *Younger* rationale to threatened prosecutions. First, absent a pending state proceeding, the federal court is not expressing a lack of confidence in the state court's ability to protect constitutional rights. This, perhaps, is the prime consideration underlying the notion of comity. Moreover, there is no duplication of effort. The state and federal courts will not be focusing on the same issue simultaneously and, therefore, no judicial time will be wasted. Finally, when no state proceeding is pending, there is no guarantee that the plaintiff will be able to vindicate his federal rights. To deny relief in this situation would in effect require the suitor to violate the law to determine his rights. *See* Note, *Implications of the Younger Cases for the Availability of Federal Equitable Relief When No State Prosecution is Pending*, 72 COLUM. L. REV. 874 (1972).

[28] 501 F.2d at 22.

[29] *Id.* This argument is not entirely convincing. M & L Rest voluntarily violated the ordinance and, therefore, it cannot be said that the subsequent events were beyond its control.

[30] *Id.*

[31] *Id.*; Lake Carriers' Ass'n v. MacMullen, 406 U.S. 498, 510 (1972); Zwickler v. Koota, 389 U.S. 241, 248 (1967).

[32] 501 F.2d at 22.

[33] *Id.* Judge Oakes stated:

Without such a guide uncertainty and inequitable treatment are bound to result

"proverbial race to the courthouse door,"[34] the court favored its adoption as a means of preventing state and federal courts from ousting each other from duly acquired jurisdiction.[35] Moreover, the certainty obtained from this approach was deemed likely to save the court time, thereby resulting in a speedy disposition of the merits.[36]

Judge Lumbard, in his dissent, intimated that *Younger* applied even to threatened prosecutions[37] and contended that the plaintiffs had failed to demonstrate the existence of special circumstances, as mandated by *Younger*, which would justify federal intervention.[38] Plaintiffs never established that the state trial would not provide an adequate setting for the vindication of their federal rights.[39] Thus, since an adequate remedy existed at law and since comity required that due deference be shown to the state judicial system, the dissent would permit the state courts to adjudicate in the present instance.[40]

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with the possibility of an Alphonse-Gaston routine developing between state and federal courts.

Id.

[34] *Id.* at 22-23.

[35] *Id.*

[36] *Id.*

[37] *Id.* at 23. The judge further argued that while a distinction drawn between prosecutions which are pending and those which are merely threatened might be usefully employed as a rule of thumb, such a distinction should not be controlling. *Id.* at 24.

Judge Lumbard's position, however, is undermined by language employed by the Supreme Court in *Younger* and by subsequent Court decisions. In *Younger*, Mr. Justice Black, writing for the majority, expressly refused to indicate whether *Younger* would apply where "there is no prosecution pending in state courts at the time the federal proceeding is begun." 401 U.S. at 41. Moreover, in a concurring opinion, Mr. Justice Stewart (who was joined by Mr. Justice Harlan) stated that the Court did not speak to the issues raised by a request to enjoin future state prosecutions. *Id.* at 55.

This distinction may indeed prove to be determinative. In Lake Carriers' Ass'n v. MacMullen, 406 U.S. 498, 509 (1972), the Court indicated that the considerations which underlie *Younger* "have little force" if no state proceeding is pending. *See* Steffel v. Thompson, 415 U.S. 452 (1974), wherein the Court refused to apply *Younger* to the issuance of declaratory relief when no state prosecution was pending. *Id.* at 462. However, Judge Lumbard found *Steffel* to be inapplicable, 501 F.2d at 24 n.1, since the Court there had limited its holding to declaratory relief, and did not address itself to the appropriateness of injunctive relief in similar circumstances.

[38] 501 F.2d at 23-24. Judge Lumbard stated that the plaintiffs had failed to demonstrate the existence of bad faith, harassment or other unusual circumstances. He concluded that no injury had been shown "'other than that incidental to every criminal proceeding brought lawfully and in good faith.'" *Id.*, *quoting* Douglas v. City of Jeannette, 319 U.S. 157, 164 (1943).

[39] 501 F.2d at 23-24. In Fenner v. Boykin, 271 U.S. 240, 244 (1926), the Supreme Court ruled that a defendant must set up his constitutional claims in state court "unless it plainly appears that this course would not afford adequate protection."

[40] 501 F.2d at 23. The dissent argued that, at the very least, the state should be given an opportunity to interpret the ordinance. Thus, a narrow interpretation along the lines of California v. LaRue, 409 U.S. 109 (1972), could render a decision by the federal court unnecessary. In *LaRue*, the Court upheld a statute banning sexually explicit entertainment in bars and nightclubs. However, that case is distinguishable from *Salem Inn*. In *LaRue*, the act was based on the state's power to regulate the sale of liquor. 409 U.S. at 114. It

The dissent further objected to the "first forum" test adopted by the majority. Judge Lumbard argued that the principles of federalism and comity are too important to be decided by a simple test of which court is first presented with the issue.[41] He indicated that use of such a "hard and fast" rule runs counter to traditional equitable principles, leaving little room for analysis of the unique factors in each case.[42] Specifically, Judge Lumbard was disturbed by the fact that M & L Rest had reinstituted topless dancing despite the denial of a temporary restraining order.[43] Moreover, having resolved that the state should prosecute M & L Rest and since such prosecution might well dispose of the contentions of the two additional plaintiffs, the judge would have reversed the grant of injunctive relief as to all three complainants.[44]

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did not purport to bar nudity in "any public place" as did the North Hempstead ordinance. 501 F.2d at 20-21. *See* note 6 *supra*. The North Hempstead officials based the validity of the local enactment solely on the general police power of the municipality. Brief for Defendant at 18. There was no contention that the ordinance was within the scope of the power to regulate liquor sales.

Additionally, the majority did not find the ordinance susceptible of a narrow construction. 501 F.2d at 23 n.6. A state court decision had previously upheld the constitutionality of a similar ordinance without recognizing the existence of a serious first amendment issue. Brandon Shores, Inc. v. Incorporated Village of Greenwood Lake, 68 Misc. 2d 343, 346, 325 N.Y.S.2d 957, 960 (Sup. Ct. Orange County 1971). The failure of the state court to attempt to narrow the statute was a factor considered by the district court in *Salem Inn*. 364 F. Supp. at 481.

[41] *Id.* at 24. He indicated that this rule could lead to "unseemly races to the federal and state courthouses," thereby failing to preserve the "delicate balance" between federal and state courts. *Id.*

[42] *Id.*

[43] *Id.* Since the district judge had denied the temporary restraining order, the local authorities could believe that the federal court would not interfere with enforcement of the ordinance at least until the return date of the motion for a preliminary injunction. The state action was commenced before the return date. *Id.* Additionally, it might be argued that by denying the restraining order, the district court impliedly permitted the local officials to initiate charges.

[44] Both Salem Inn and Tim-Rob Bar were in the typical "parallel plaintiff" situation. The fact that a co-plaintiff faces pending prosecution will not defeat the right to federal relief. *See* note 26 *supra*. Therefore, it would have been improper to deny the requested relief simply because a state prosecution was pending against M & L Rest. The other two bars should not have been compelled to rely on someone else to defend their rights. Additionally, District Judge Bartels believed it unreasonable to require Salem Inn and Tim-Rob Bar to violate the local ordinance and submit to a criminal prosecution "in order to place themselves before the same judicial forum scheduled to decide the case of the other plaintiff, M & L Rest, Inc." 364 F. Supp. at 481.

Furthermore, the case against M & L Rest might have been disposed of without reaching the constitutional question, thus requiring Tim-Rob Bar and Salem Inn to renew their complaint from the beginning. If compelled to wait for the state court to act, they would be faced with great financial injury and possible bankruptcy. Judge Lumbard would obviate this problem by permitting the plaintiffs to seek relief in federal court at a later date by establishing that the state had failed to proceed with "appropriate speed." 501 F.2d at 25.

Although the injunction awarded to Salem Inn and Tim-Rob Bar might have had some effect on the state proceeding against M & L Rest, it would not technically have interfered with that prosecution. The state could have continued its proceedings and hoped

Notwithstanding the vigorous arguments set forth by the dissent, the majority's conclusion finds support in the recent decision of *Kennan v. Nichol.*[45] In *Kennan,* the plaintiff, like M & L Rest, filed his complaint in federal court one day before the state lodged criminal charges against him. The district court held *Younger* inapplicable and granted the requested relief.[46] The Supreme Court affirmed the judgment without opinion.[47]

Although the majority's "first forum" test appears, at first blush, to be simplistic and arbitrary,[48] its use will serve to prevent state prosecutors from unfairly exploiting *Younger.* In the absence of a "first forum" approach, a state could preclude the federal court from granting relief merely by commencing a prosecution.[49] If the state's case had a modicum of support, the defendant would be unable to demonstrate bad faith or harassment, and federal intervention would be barred. Even *Younger* conceded that federalism does not mandate such "blind deference to 'states rights' " at the expense of federal protection of individual rights.[50] Moreover, a "first forum" approach should save judicial time and effort by providing an exact and speedy means of determining the proper forum.[51] Finally, a different method would, in effect, require

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for a final favorable determination as to the ordinance's constitutionality. However, the state court presumably would be cognizant of how the federal court viewed the statute and a finding of unconstitutionality might have had a significant impact on the state court's handling of the case.

[45] 326 F. Supp. 613 (W.D. Wis. 1971).

[46] 326 F. Supp. at 615-16.

[47] 404 U.S. 1055 (1972) (mem.). The Court divided 5-4, with the minority contending that the appellant had failed to comply with one of the Supreme Court's own rules unrelated to the merits.

In Village of Belle Terre v. Boraas, 416 U.S. 1 (1974), Justice Douglas' opinion indicated that *Younger* would not apply if the federal suit antedated the state proceeding. *Id.* at 3 n.1. Justice Rehnquist, however, rejects this position. He argues that prosecutions brought after the filing of the federal complaint constitute pending actions requiring the application of *Younger. See* Steffel v. Thompson, 415 U.S. 452, 480 (1974) (Rehnquist, J., concurring). Justice Rehnquist's view is supported by the Court's statement in Fenner v. Boykin, 271 U.S. 240 (1926), that

> [a]n intolerable condition would arise if, whenever about to be charged with violating a state law, one were permitted freely to contest its validity by an original proceeding in some federal court . . . .

Id. at 244. The plaintiffs in *Fenner* were threatened with arrest and were not the subjects of a pending proceeding. It is submitted, however, that this approach runs counter to more recent expressions of the Court. *See* note 25 and accompanying text *supra.*

[48] In Kennan v. Nichol, 326 F. Supp. 613, 615-16 (W.D. Wis. 1971), *aff'd,* 404 U.S. 1055 (1972) (mem.), the district court noted that while reliance on the time element may appear to be "artificial," a majority of the Supreme Court found it to be dispositive.

[49] 501 F.2d at 22-23. If the state criminal proceedings were commenced first, the *Salem Inn* approach would work to protect the state court's jurisdiction. However, this protection was already ensured by *Younger.*

[50] 401 U.S. at 44.

[51] The use of this test should result in a more rapid disposition on the merits. 501 F.2d at 22-23. This is especially true in the specific case of M & L Rest. There is no indi-

exhaustion of state remedies before federal injunctive or declaratory relief could be obtained, a requirement which has been explicitly rejected in other circumstances.[52]

In *Salem Inn*, the Second Circuit resolved an issue left unanswered by the Supreme Court in *Younger*. By ruling that federal injunctive relief was proper where a state criminal proceeding was initiated subsequent to the commencement of the federal action, the court moved away from a strict interpretation of *Younger* and, instead, reaffirmed the important role federal courts should play in protecting constitutional rights. While the majority may have precipitated a race to the courthouses, far more importantly it insured that the federal courts will remain, in most instances, the prime protectors of federal rights.[53]

Stephen Fox

STANDARD ESTABLISHED FOR PRECLUDING PENDENT JURISDICTION

Kavit v. A. L. Stamm & Co.

Article III of the Constitution extends the subject matter jurisdiction of the federal courts to cases "arising under" the Constitution, laws or treaties of the United States.[1] Where a case presents a jurisdictionally sufficient federal question, access to the federal forum will also be available for all related claims, including those of a non-federal nature. This result is achieved through the doctrine of pendent jurisdiction, whereby the federal courts may assert judicial power over state law questions which must be determined in order to resolve the primary federal claim.[2] Pendent jurisdiction will attach where the state and

cation that the bar's management acted contrary to good faith. When the ordinance became effective, the dancers were immediately clothed. After a few weeks, finding itself threatened with financial ruin, M & L Rest instituted the federal action. It would be unjust to deny a speedy resolution by allowing the town to "oust" the federal court of its jurisdiction merely by bringing criminal proceedings.

[52] *See, e.g.*, McNeese v. Board of Educ., 373 U.S. 668, 671 (1963), which expressly rejected this approach in suits involving 42 U.S.C. § 1983 (1970).

[53] The Supreme Court has granted a writ of certiorari. 43 U.S.L.W. 3399 (U.S. Jan. 21, 1975) (No. 74-337). Hopefully, the Court will confirm the Second Circuit's interpretation of *Younger*.

[1] U.S. CONST. art. III, § 2. The constitutional provision has been implemented by § 1331(a) of the Federal Judicial Code. 28 U.S.C. § 1331(a) (1970). Congress has added a requirement that the amount in controversy must exceed $10,000. *Id.* For a thorough discussion of the difficulties in ascertaining whether or not a claim arises under federal law, see Cohen, *The Broken Compass: The Requirement That a Case Arise "Directly" Under Federal Law*, 115 U. PA. L. REV. 890 (1967).

[2] *See, e.g.*, United Mine Workers v. Gibbs, 383 U.S. 715, 725 (1966); Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738 (1824).

In *Osborn*, legislation creating the Bank of the United States authorized the Bank to sue or be sued in any federal circuit court. The statute, however, did not limit the authorization to suits involving federal questions. *Id.* at 817. It was contended that Con-