
ABSTENTION IN THE TIME OF FERGUSON

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

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

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

INTRODUCTION

Anyone who has ever struggled with poverty knows how extremely expensive it is to be poor; and if one is a member of a captive population,

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economically speaking, one's feet have simply been placed on the treadmill forever. One is victimized, economically, in a thousand ways . . .

— James Baldwin, *The Price of the Ticket*¹

In America, a person's economic status often dictates when she experiences freedom from the government's custody, control, and constant surveillance. Illegal practices that reinforce this reality have recently met a formidable foe: federal lawsuits. Over the past few years, in jurisdictions across the nation, impoverished Americans have filed federal class actions challenging systemic and structural federal constitutional violations resulting from state and local governments' administration of criminal justice.² In some suits, poor Americans have alleged that local actors centrally connected to the administration of criminal justice — including judges,³ private probation officers,⁴ and public defenders⁵ — have an improper financial interest in whether the residents are fined or jailed. In other cases, litigants have challenged various money bail systems, especially where bail is imposed without regard to a criminal defendant's ability to pay.⁶ In yet another set of cases, residents allege that infractions, such as traffic tickets, set into motion a vicious cycle of incarceration, probation, and debt.⁷ That is, the residents' inability to pay fines induces incarceration or probation; their incarceration or probation results in additional debt; and their inability to pay that debt results in more incarceration. These circular schemes have no discernable end when they ensnare an indigent person. When these practices are challenged in federal court, the initial briefing often has little to do with whether the plaintiffs have alleged a plausible constitutional violation. Instead, judge-made procedural and jurisdictional matters like abstention often take center stage.

The small town of Ferguson, Missouri, is likely the most notorious place where residents and federal officials have reported the existence

¹ JAMES BALDWIN, *Fifth Avenue, Uptown*, in *THE PRICE OF THE TICKET* 205, 208 (1985). Baldwin's essay was originally published in the July 1960 edition of *Esquire* magazine. *Id.* at 205.

² See, e.g., *Walker v. City of Calhoun*, 682 F. App'x 721 (11th Cir. 2017); *Bice v. La. Pub. Def. Bd.*, 677 F.3d 712 (5th Cir. 2012); *Buffin v. City of San Francisco*, No. 15-cv-04959, 2016 WL 6025486 (N.D. Cal. Oct. 14, 2016); *Cain v. City of New Orleans*, 184 F. Supp. 3d 349 (E.D. La. 2016); *Rodriguez v. Providence Cmty. Corr., Inc.*, 155 F. Supp. 3d 758 (M.D. Tenn. 2015); *Thompson v. Moss Point*, No. 15-cv-182, 2015 WL 10322003 (S.D. Miss. Nov. 6, 2015); *Burks v. Scott County*, No. 14-cv-00745 (S.D. Miss. Sept. 30, 2015); *Jones v. City of Clanton*, No. 15-cv-34, 2015 WL 5387219 (M.D. Ala. Sept. 14, 2015); *Pierce v. City of Velda City*, No. 15-cv-570, 2015 WL 10013006 (E.D. Mo. June 3, 2015); *Fant v. City of Ferguson*, 107 F. Supp. 3d 1016 (E.D. Mo. 2015).

³ *Cain*, 184 F. Supp. 3d at 350–52.

⁴ *Rodriguez*, 155 F. Supp. 3d at 761–64.

⁵ *Bice*, 677 F.3d at 714–15.

⁶ E.g., *Walker*, 682 F. App'x at 723; *Buffin*, 2016 WL 6025486, at *1; *Burks*, No. 14-cv-00745, slip op. at 3–13.

⁷ E.g., *Fant*, 107 F. Supp. 3d at 1021–24.

of unjust fees and collection schemes. That town catapulted into the nation's consciousness when its residents began protesting a police officer's killing of an unarmed teenager on a late summer day in 2014.⁸ Roughly eight months after the killing, the Department of Justice issued *The Ferguson Report*, detailing and criticizing the town's criminal justice policies, including onerous fees, fines, and collection practices.⁹ Still, while the Ferguson example is the most infamous, the town is far from unique with respect to allegations that cash-strapped residents are being used as ATMs for cash-strapped towns.¹⁰ Indigent residents have filed suit in a range of American cities and counties in and beyond Ferguson, including New Orleans, Louisiana; Rutherford County, Tennessee; and Clanton, Alabama.¹¹ They have also filed suit challenging rigid bail schedules in major American cities such as Houston¹² and San Francisco.¹³ Civil rights organizations have criticized similar practices in the strategic center of the Civil Rights Movement and capital of the Progressive South: Atlanta.¹⁴ Federalism doctrines such as abstention are an integral aspect of the briefing and legal decisionmaking in all of the suits that have been filed in this sphere.

⁸ Samuel P. Jordan, *Federalism, Democracy, and the Challenge of Ferguson*, 59 ST. LOUIS U. L.J. 1103, 1103–04 (2015); S. David Mitchell, *Ferguson: Footnote or Transformative Event?*, 80 MO. L. REV. 943, 950 (2015); Kyle J. Jacob, Note, *From Garner to Graham and Beyond: Police Liability for Use of Deadly Force — Ferguson Case Study*, 91 CHI.-KENT L. REV. 325, 325–26 (2016).

⁹ CIVIL RIGHTS DIV., U.S. DEP'T OF JUSTICE, INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 47–62 (2015) [hereinafter FERGUSON REPORT], https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf [<https://perma.cc/XYQ8-7TB4>]; see also Dorothy A. Brown, *Ferguson's Perfect Storm of Racism*, CNN (Mar. 5, 2015, 4:16 PM), <http://www.cnn.com/2015/03/05/opinions/brown-ferguson-report/> [<https://perma.cc/8NKA-KF8D>] (“If you were the member of a minority group and tried to create a system to control and oppress the majority, you could not have done a better job than the . . . leaders of Ferguson, Missouri.”).

¹⁰ See Note, *State Bans on Debtors' Prisons and Criminal Justice Debt*, 129 HARV. L. REV. 1024, 1030 (2016); see also *Developments in the Law — Policing*, 128 HARV. L. REV. 1706, 1727–33 (2015) (describing how municipalities “extract revenue from the poor,” *id.* at 1723, by means of (1) “impos[ing] fees” on arrestees and defendants for their arrest, adjudication, and incarceration,” *id.* at 1727; (2) “sell[ing] components of law enforcement to private businesses,” *id.* at 1729; and (3) “confiscat[ing] assets that [police] claim are linked to crime,” *id.* at 1730). For context as to the financial distress municipal governments sometimes experience, and the ways this leads to reduced governance, see Michelle Wilde Anderson, *The New Minimal Cities*, 123 YALE L.J. 1118 (2014): “Years, if not decades, of budget cuts and asset sales have left little beyond a stripped-down version of core service functions like irregular police and fire protection, rudimentary sanitation, and water supply.” *Id.* at 1122.

¹¹ See cases cited *supra* note 2.

¹² *O'Donnell v. Harris County*, 227 F. Supp. 3d 706 (S.D. Tex. 2016), *aff'd in part, rev'd in part*, 882 F.3d 528 (5th Cir. 2018).

¹³ *Buffin v. City of San Francisco*, No. 15-cv-04959, 2016 WL 6025486 (N.D. Cal. Oct. 14, 2016).

¹⁴ Lawton Sack, *Two Civil Rights Groups Call for End of Money Bail in Atlanta*, GEORGIAPOL.COM (Jan. 5, 2018, 1:40 PM), <https://www.georgiapol.com/2018/01/05/two-civil-rights-groups-call-end-money-bail-atlanta/> [<https://perma.cc/2GGS-WPHK>].

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

In the 1971 case of *Younger v. Harris*,¹⁵ the Supreme Court ruled that federal courts must generally abstain from enjoining state criminal proceedings, even where the plaintiff alleges that the state criminal charges are unconstitutional.¹⁶ The Court has clarified that this rule also at times applies to civil proceedings that are “akin” to criminal proceedings.¹⁷ Further, the Court has made clear that federal courts should also refuse to grant *declaratory* relief that interrupts an ongoing state criminal proceeding, even if injunctive relief is not sought.¹⁸ Perhaps predictably, then, when a plaintiff files suit alleging that a local or state government’s fines, fees, bail, or collection methods violate the Federal Constitution, some governmental defendants lean on *Younger* abstention as a means of ending the litigation without a judicial ruling on the underlying merits of the plaintiff’s claim.¹⁹

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

This Article has descriptive, normative, and prescriptive ambitions. Descriptively, this Article is the first extensive account of cases challenging the criminalization of poverty — one of the most pressing and prominent civil rights issues in the American legal system. Relatedly, this

¹⁵ 401 U.S. 37 (1971).

¹⁶ *Id.* at 53–54.

¹⁷ *Sprint Commc’ns, Inc. v. Jacobs*, 134 S. Ct. 584, 588 (2013).

¹⁸ *See Samuels v. Mackell*, 401 U.S. 66, 73 (1971).

¹⁹ *See infra* Part II, pp. 2305–22.

Article documents the ways this civil rights issue has the capacity to shape federal abstention doctrine by means of an emergent exception to *Younger* abstention for systemic or structural constitutional violations. This descriptive work is itself important. Local governments and private probation companies rely on fees, fines, and severe collection practices. Indeed, scholars, activists, nonprofits, jurists, and journalists alike have either studied or critiqued local governments' and private probation companies' roles in bulking up the carceral state on the backs of the poor.²⁰ But the jurisdictional barriers to ending these practices — especially *Younger* abstention — are less commonly studied. This Article begins to fill this gap.

Normatively, this Article assesses the important role courts have played in protecting against irreparable harm in the absence of other adequate remedies and contends that for *Younger* abstention to meet its best aspirations, it must not impede that core function of our federal judiciary. Courts should therefore not apply *Younger* abstention when the underlying state criminal forum is structurally or systemically ill-equipped to consider a constitutional objection. Abstaining under those circumstances serves neither the important function federal courts have played in abating irreparable harm since *Ex parte Young*²¹ nor legitimate federalism interests.²² This Article also brings a contemporary civil rights issue into dialogue with the decades-long debate about whether abstention is legitimate. If the doctrine permits systemic and structural irreparable constitutional harm to persist without intervention, then, absent a well-supported justification, *Younger* abstention is complicit in these practices, and its legitimacy is in a period of decline.

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

Part I provides the parameters of *Younger* abstention and traces ways that federal courts have historically ensured that the doctrine has allowed courts to correct irreparable harm in states' administration of criminal justice. Part II examines state and local schemes that criminalize poverty, lawsuits challenging those practices, and the role *Younger* abstention sometimes plays in impeding these suits. Part III explores

²⁰ See *infra* pp. 2306–08.

²¹ 209 U.S. 123 (1908).

²² See *infra* Part IV, pp. 2338–56.

two central guiding principles of federal courts: guarding against irreparable harm and protecting federalism. These principles are served, rather than undermined, when federal courts correct systemic or structural constitutional violations in the state criminal process. Part IV articulates, as a practical matter, how a “structural or systemic” exception to *Younger* would or should operate and the role federal district courts can play in actualizing it. Part IV also argues that if *Younger* is understood to prevent access to federal courts when people challenge systemic or structural constitutional violations, this conception undermines the doctrine’s legitimacy.

I. OUR FEDERALISM FROM *YOUNG* TO *YOUNGER*

This Part describes *Younger* abstention and how the Court has sought to ensure that the preservation of federal-state comity does not unduly come at the expense of access to justice. Courts and commentators alike have correctly observed that judicially recognized exceptions to *Younger* abstention help balance comity and equity.²³ This Part provides a more specific account of these exceptions’ connective tissue. Under the interpretative account offered here, one unifying feature of *Younger*’s exceptions is that they promote federal judicial remedies when a person will otherwise suffer harm that is irreparable, serious, and immediate because the underlying state process cannot be trusted to abate this harm. Given the centrality of criminal justice to state sovereignty and autonomy, this represents something of a compromise: trust and rely on state criminal processes to adjudicate constitutional claims during an ongoing criminal proceeding, *unless* there is reason to believe that the state process will not or cannot adequately abate the harm. In providing this interpretive account, this Part places a spotlight on the role that inferior court judges had in shaping exceptions to *Younger* abstention, especially civil rights–oriented judges in the American South. The Part also documents a new, relevant doctrinal development that is consistent with this interpretive account: an emerging exception to *Younger* for systemic violations of the Federal Constitution.

²³ See, e.g., *Spargo v. N.Y. State Comm’n on Judicial Conduct*, 351 F.3d 65, 74 (2d Cir. 2003) (“*Younger* is not . . . based on Article III requirements, but [is] instead a prudential limitation on the court’s exercise of jurisdiction grounded in equitable considerations of comity.”); *Benavidez v. Eu*, 34 F.3d 825, 829 (9th Cir. 1994) (“*Younger* abstention . . . reflects a court’s prudential decision not to exercise jurisdiction which it in fact possesses”); Steven G. Calabresi & Gary Lawson, Essay, *Equity and Hierarchy: Reflections on the Harris Execution*, 102 YALE L.J. 255, 256 (1992) (arguing that courts applying *Younger* should use equitable considerations of federalism as one factor in their analysis rather than as the only factor); cf. *Gomez v. U.S. Dist. Court*, 503 U.S. 653, 654 (1992) (per curiam) (“Equity must take into consideration the State’s strong interest in proceeding with its judgment and Harris’ obvious attempt at manipulation.”).

A. *Our Reconstructed Federalism*

The 1908 case of *Ex parte Young* is recognized as profoundly important because it facilitates the enforcement of the Federal Constitution when state actors act unlawfully.²⁴ Because a suit against a state official in her official capacity is technically a suit against a state,²⁵ and because states are generally inoculated from federal suits filed by private parties,²⁶ seeking to enjoin an unconstitutional state law technically creates a sovereign immunity problem. In *Ex parte Young*, the Court created an exception to sovereign immunity, permitting injunctions against state officials in order to vindicate federal constitutional rights.²⁷ This ruling has served as an indispensable pillar of constitutional litigation; it is how, for example, litigants in recent years were able to sue state officials for issues ranging from marriage equality to prison overcrowding without sovereign immunity obstacles.²⁸

Ex parte Young's importance to constitutional law is not limited to the field of sovereign immunity, however, even if that is the area of law for which the case is now most well known. The case is an early piece of the puzzle as to when and how a federal court may enjoin an ongoing state prosecution.²⁹ After all, the case endorsed an injunction sought by a person who potentially faced a state criminal prosecution and who wished to obtain federal judicial relief on the ground that the substantive law he was charged with violated the Constitution.³⁰ In the decades following *Ex parte Young*, the Court enjoined the enforcement of state laws in roughly three dozen cases.³¹

A federal injunction against a state criminal prosecution raises federalism concerns such as comity and respect for the traditional role of

²⁴ See Vicki C. Jackson, *Seminole Tribe, the Eleventh Amendment, and the Potential Evisceration of Ex Parte Young*, 72 N.Y.U. L. REV. 495, 495 (1997) ("The availability of such equitable relief, under the so-called *Ex parte Young* doctrine, has long been accepted as a necessary counterbalance to the states' Eleventh Amendment immunity from federal jurisdiction.")

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

²⁶ *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 54 (1996).

²⁷ 209 U.S. 123, 159–60 (1908).

²⁸ *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (suit against state official challenging a ban on same-sex marriage); *Brown v. Plata*, 563 U.S. 493 (2011) (suit against state official challenging overcrowded prisons).

²⁹ John Harrison, *Ex Parte Young*, 60 STAN. L. REV. 989, 990 (2008) (arguing that, while *Ex parte Young* has been important to sovereign immunity doctrine, it did not create an exception to sovereign immunity but rather "approved the use against a state officer of a standard tool of equity[:] an injunction to restrain proceedings at law").

³⁰ *Ex parte Young*, 209 U.S. at 129–30.

³¹ Douglas Laycock, *Federal Interference with State Prosecutions: The Cases Dombrowski Forgot*, 46 U. CHI. L. REV. 636, 642 & n.48 (1979).

the state on questions of criminal law.³² As such, it is perhaps no surprise that when the Supreme Court reviewed federal injunctions against state prosecutions in the decades that followed *Ex parte Young*, the Court engaged a key question: How should federal courts balance the vindication of federal constitutional rights with respect for states' ability to correct their own constitutional violations?

Among the cases in which the Court confronted this tension expressly were *Douglas v. City of Jeannette*,³³ *American Federation of Labor v. Watson*,³⁴ and, eventually, *Dombrowski v. Pfister*.³⁵ These cases explained that state prosecutions should not be enjoined absent a showing of irreparable, grave, and immediate harm.³⁶ They further made clear that harm is not irreparable if a litigant can raise the federal constitutional objection during an adequate, timely state proceeding. In *Douglas*, for example, the Court refused to enjoin a religious ordinance that was allegedly unconstitutional as applied to the plaintiff. The Court reasoned that the plaintiff could not demonstrate a likelihood of "irreparable injury" that was "both great and immediate"³⁷ because the case against the plaintiff was "brought lawfully and in good faith," and he could secure relief in a "prompt trial and appeal pursued to [the Supreme] Court."³⁸

By contrast, the Court issued injunctions in *Watson* and *Dombrowski* because the plaintiff's allegations could meet that standard. In *Watson*, the Court enjoined the enforcement of a state constitutional law that created a right for employers to hire nonunionized workers;³⁹ the State of Florida purportedly used the law as a basis to threaten unions with

³² See *Younger v. Harris*, 401 U.S. 37, 44 (1971) ("This underlying reason for restraining courts of equity from interfering with criminal prosecutions is reinforced by an even more vital consideration, the notion of 'comity,' that is, a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways.").

³³ 319 U.S. 157 (1943).

³⁴ 327 U.S. 582 (1946).

³⁵ 380 U.S. 479 (1965).

³⁶ *Id.* at 485–86; *Watson*, 327 U.S. at 593 ("Where a federal court of equity is asked to interfere with the enforcement of state laws, it should do so only 'to prevent irreparable injury which is clear and imminent . . .'" (quoting *Douglas*, 319 U.S. at 163)); *Douglas*, 319 U.S. at 163–64.

³⁷ *Douglas*, 319 U.S. at 164 (quoting *Spielman Motor Sales Co. v. Dodge*, 295 U.S. 89, 95 (1935)).

³⁸ *Id.*

³⁹ *Watson*, 327 U.S. at 585 ("The right of persons to work shall not be denied or abridged on account of membership or non-membership in any labor union, or labor organization; provided, that this clause shall not be construed to deny or abridge the right of employees by and through a labor organization or labor union to bargain collectively with their employer." (quoting FLA. CONST. art. 1, § 6 (revised 1968))).

criminal and civil fines.⁴⁰ The Supreme Court endorsed an injunction against these practices because it would prevent “immediate”⁴¹ and “irreparable injury which [was] clear and imminent.”⁴² And in the 1965 case of *Dombrowski*, “the allegations in [the] complaint depict[ed] a situation in which defense of the State’s criminal prosecution [would] not assure adequate vindication of constitutional rights.”⁴³ Because the prosecutions in that case allegedly stemmed from harassment and bad faith, one could not assume that the state courts would serve as adequate arbiters.⁴⁴ Instead, without federal judicial intervention, the plaintiffs would have to suffer “substantial loss or impairment of freedoms of expression” until the Supreme Court could reverse any improper state court determination.⁴⁵ “These allegations, if true, clearly show[ed] irreparable injury.”⁴⁶

Dombrowski received significant scholarly attention in the decade or so after it was decided. The initial dominant view was that the case boldly opened a new door for civil rights claims against unconstitutional state prosecutions.⁴⁷ However, the decision’s scholarly reception shifted as the Court later made clear in *Younger v. Harris* that, *Dombrowski* notwithstanding, federal challenges to state prosecutions are generally disallowed.⁴⁸ Most notably, Professors Owen Fiss and Douglas Laycock both wrote that *Dombrowski* sowed the seeds of its own demise. In a profoundly personal and incisive essay, Fiss offered his perspective on what led his former boss, Justice Brennan, to construct *Dombrowski* in

⁴⁰ *Id.* at 588 (“The bill further alleges that appellee Watson has threatened appellant unions and their officers and agents and the individual appellants with criminal prosecutions unless they give up the closed-shop agreements and refrain from renewing or entering into any such agreements.”).

⁴¹ *Id.* at 595 (“[T]he threat of irreparable injury is real not fanciful, immediate not remote.”).

⁴² *Id.* at 593 (quoting *Douglas*, 319 U.S. at 163).

⁴³ *Dombrowski v. Pfister*, 380 U.S. 479, 485 (1965).

⁴⁴ *See id.* at 490 (rejecting as inadequate a remedy that did not “alter the impropriety of [the State] invoking the statute in bad faith to impose continuing harassment in order to discourage appellants’ activities”).

⁴⁵ *Id.* at 486.

⁴⁶ *Id.*

⁴⁷ *See* Laycock, *supra* note 31, at 640 & n.27. The footnote identifies a range of pieces characterizing *Dombrowski* this way, including: D’Army Bailey, *Enjoining State Criminal Prosecutions Which Abridge First Amendment Freedoms*, 3 HARV. C.R.-C.L. L. REV. 67, 69–91 (1967); Spencer H. Boyer, *Federal Injunctive Relief: A Counterpoise Against the Use of State Criminal Prosecutions Designed to Deter the Exercise of Preferred Constitutional Rights*, 13 HOW. L.J. 51, 83–85 (1967); Bradley R. Brewer, *Dombrowski v. Pfister: Federal Injunctions Against State Prosecutions in Civil Rights Cases — A New Trend in Federal-State Judicial Relations*, 34 FORDHAM L. REV. 71, 72–73, 83–86 (1965); Robert Allen Sedler, *The Dombrowski-Type Suit as an Effective Weapon for Social Change: Reflections from Without and Within*, 18 U. KAN. L. REV. 237, 244–45, 253–58 (1970); Marc Stickgold, *Variations on the Theme of Dombrowski v. Pfister: Federal Intervention in State Criminal Proceedings Affecting First Amendment Rights*, 1968 WIS. L. REV. 369, 380–85; *The Supreme Court, 1970 Term*, 85 HARV. L. REV. 38, 301–02 (1971); and *The Supreme Court, 1964 Term*, 79 HARV. L. REV. 103, 170–74 (1965).

⁴⁸ *See generally infra* sections I.C–D, pp. 2296–305.

the way that he did.⁴⁹ Fiss contended that *Dombrowski* provided little in the way of controlling principles or rules that would make such injunctions available beyond a very small set of cases.⁵⁰ Laycock went further, persuasively arguing that in *Dombrowski*, the Justices overlooked or forgot the dozens of cases after *Ex parte Young* and even after *Douglas* in which the Court had enjoined the enforcement of state laws.⁵¹ By treating such injunctions as something novel, the *Dombrowski* decision arguably undermined the foundation of precedent on which the opinion should have stood, leading to the presumption against such injunctions that we generally associate with *Younger v. Harris*.

B. Our Reinvigorated Federalism

The most famous discussion of limits on state prosecutions came six years after *Dombrowski* in *Younger v. Harris*. The case purported to break little new ground. Citing “longstanding public policy,”⁵² *Younger* held (or perhaps reaffirmed) that federal courts should generally refrain from interfering with a state criminal proceeding unless that state proceeding provides an inadequate means of redress.⁵³ The decision also reaffirmed the corollary: federal courts may interfere with a state criminal proceeding when “great and immediate”⁵⁴ harm would otherwise follow, including when it is apparent that the state forum “would not afford adequate protection.”⁵⁵ After all, if there is no adequate state or federal forum in which to raise a federal constitutional violation, there is substantial risk of irreparable or serious harm.

The politico-legal environment that followed *Younger* and its development in the decade that followed may help explain its special place in the federal courts canon. Or, perhaps, it was the opinion’s soaring federalist rhetoric. In either event, the case developed during a decade that reflected significant shifts in the nation’s political and legal consciousness. Federal judicial intervention in the area of racial and criminal justice faced backlash and resistance in the form of a reimagined and reinvigorated dualist conception of federalism.⁵⁶ Moreover, the 1970s

⁴⁹ Owen M. Fiss, *Dombrowski*, 86 YALE L.J. 1103, 1104–05 (1977).

⁵⁰ See *id.* (writing that Justice Brennan wrote an opinion in *Dombrowski* that suffered from “indirection,” *id.* at 1105, and a borrowing of older conceptions of federalism).

⁵¹ Laycock, *supra* note 31, at 645–59.

⁵² *Younger v. Harris*, 401 U.S. 37, 43 (1971).

⁵³ *Id.* at 45 (quoting *Fenner v. Boykin*, 271 U.S. 240, 243–44 (1926)).

⁵⁴ *Id.* (quoting *Fenner*, 271 U.S. at 243).

⁵⁵ *Id.* (quoting *Fenner*, 271 U.S. at 244).

⁵⁶ See generally BOB WOODWARD & SCOTT ARMSTRONG, *THE BROTHERS: INSIDE THE SUPREME COURT* (1979); Fiss, *supra* note 49; David Mason, Note, *Slogan or Substance? Understanding “Our Federalism” and Younger Abstention*, 73 CORNELL L. REV. 852 (1988). What is more, Professor Bertrall Ross recently observed that a shift in the judicial conception of politics also began during this decade; minorities were not so much politically powerless actors deserving of special judicial solitude as they were passionate self-interested rent-seekers who distorted American

ushered in resistance to Warren-era expansions of what Professor Sean Farhang has called the “litigation state.”⁵⁷ The expansions came in the form of changes in civil procedure that facilitated aggregate litigation,⁵⁸ the incorporation of key rights into the Fourteenth Amendment,⁵⁹ new civil rights statutes,⁶⁰ and broader interpretations of 42 U.S.C. § 1983.⁶¹ Contemporaneously, the liberal Chief Justice Warren retired from the Court and, ultimately, newly elected President Richard Nixon replaced him with the more federalism-oriented Chief Justice Burger.⁶² Chief Justice Burger openly protested the expansion of the litigation state, most notably during his famous Pound Lecture in 1976.⁶³

In *Younger* itself, John Harris faced criminal prosecution under California’s Criminal Syndicalism Act for handing out far-left political pamphlets.⁶⁴ He filed suit in federal court, challenging the statute as facially unconstitutional under the First Amendment.⁶⁵ A three-judge district court panel agreed, enjoining enforcement of the statute.⁶⁶ The district court cited the Warren-era case of *Dombrowski* for the proposition that when a law “unconstitutionally abridge[s] free expression or tend[s] to discourage activities in which a person should be free to engage,” then “it becomes the duty of this court to undertake to resolve these questions.”⁶⁷

politics. See Bertrall L. Ross II, *Democracy and Renewed Distrust: Equal Protection and the Evolving Judicial Conception of Politics*, 101 CALIF. L. REV. 1565, 1567–76 (2013).

⁵⁷ SEAN FARHANG, *THE LITIGATION STATE: PUBLIC REGULATION AND PRIVATE LAWSUITS IN THE U.S.* 5 (2010) (describing how an increasing political polarization from the late 1960s to the early 1970s caused a “steep rise in private enforcement litigation”).

⁵⁸ See Brandon L. Garrett, *Aggregation and Constitutional Rights*, 88 NOTRE DAME L. REV. 593, 599–600 (2012).

⁵⁹ See, e.g., *Mapp v. Ohio*, 367 U.S. 643, 655–57 (1961) (incorporating the Fourth Amendment right against unreasonable searches and seizures); see also *Benton v. Maryland*, 395 U.S. 784, 795–96 (1969) (incorporating the Double Jeopardy Clause of the Fifth Amendment); *Klopfer v. North Carolina*, 386 U.S. 213, 223 (1967) (incorporating the Sixth Amendment right to a speedy trial); *Gideon v. Wainwright*, 372 U.S. 335, 344–45 (1963) (incorporating the Sixth Amendment right to counsel for criminal defendants).

⁶⁰ See, e.g., Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at 42 U.S.C. §§ 2000e to e-17 (2012)); Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended in scattered sections of 52 U.S.C.).

⁶¹ See, e.g., *Monroe v. Pape*, 365 U.S. 167, 183–87 (1961) (interpreting 42 U.S.C. § 1983).

⁶² EARL M. MALTZ, *THE CHIEF JUSTICESHIP OF WARREN BURGER, 1969–1986*, at 8 (2000).

⁶³ See Warren E. Burger, Chief Justice of the U.S., *Agenda for 2000 A.D. — A Need for Systematic Anticipation*, Keynote Address at the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice (Apr. 7, 1976), reprinted in *THE POUND CONFERENCE* (A. Leo Levin & R. Wheeler eds., 1979).

⁶⁴ *Harris v. Younger*, 281 F. Supp. 507, 508–09 (C.D. Cal. 1968), rev’d, 401 U.S. 37 (1971).

⁶⁵ *Id.*

⁶⁶ *Id.* at 517.

⁶⁷ *Id.* at 510 (citing *Dombrowski v. Pfister*, 380 U.S. 479 (1965)).

The Supreme Court reversed in a 1971 opinion, reaffirming that enjoining an ongoing state criminal proceeding is presumptively impermissible.⁶⁸ The Court distinguished *Dombrowski* on the grounds that in that case, there was substantial evidence of bad faith on the part of state officials, thus rendering the state forum inadequate.⁶⁹ And accordingly, *Dombrowski* could not compete with what the *Younger* Court perceived to be a broader tradition of judicial resistance to efforts to enjoin state judicial proceedings.⁷⁰ The Court acknowledged that “[t]he precise reasons for this longstanding public policy against federal court interference with state court proceedings have never been specifically identified.”⁷¹ Still, the Court reasoned, as an equitable remedy, an injunction against a criminal prosecution is improper where the plaintiff “has an adequate remedy at law and will not suffer irreparable injury if denied equitable relief.”⁷² The Court further rested its decision on “the notion of ‘comity,’ that is, a proper respect for state functions.”⁷³ The Court famously added: “‘Our Federalism,’ born in the early struggling days of our Union of States, occupies a highly important place in our Nation’s history and its future.”⁷⁴

Over the course of the next decade, *Younger* abstention expanded so precipitously that by 1977, two scholars expressed concern that federalism principles would lead to the overturning of the venerable *Ex parte Young*.⁷⁵ In *Samuels v. Mackell*,⁷⁶ a companion case to *Younger*, the Court extended the same presumption against federal court intervention to declaratory relief in ongoing state criminal proceedings.⁷⁷ In the 1975 case of *Hicks v. Miranda*,⁷⁸ the Court held that a federal claim for injunctive relief should be dismissed even where criminal charges are brought *after* a case has been filed, so long as the charges are filed “before any proceedings of substance on the merits have taken place in the federal court.”⁷⁹ That same year, in *Huffman v. Pursue, Ltd.*,⁸⁰ the Court held that *Younger* abstention standards apply when a person has not

⁶⁸ *Younger v. Harris*, 401 U.S. 37, 53–54 (1971).

⁶⁹ *Id.* at 48–49.

⁷⁰ *See id.* at 50–53.

⁷¹ *Id.* at 43.

⁷² *Id.* at 43–44.

⁷³ *Id.* at 44.

⁷⁴ *Id.* at 44–45.

⁷⁵ *See* Aviam Soifer & H.C. Macgill, *The Younger Doctrine: Reconstructing Reconstruction*, 55 TEX. L. REV. 1141, 1141–43 (1977).

⁷⁶ 401 U.S. 66 (1971).

⁷⁷ *Id.* at 73. *But see* *Steffel v. Thompson*, 415 U.S. 452, 475 (1974) (declining to extend the presumption against declaratory relief “when no state prosecution is pending and a federal plaintiff demonstrates a genuine threat of enforcement”).

⁷⁸ 422 U.S. 332 (1975).

⁷⁹ *Id.* at 349.

⁸⁰ 420 U.S. 592 (1975).

exhausted all state appeals that are a part of the same “unitary system.”⁸¹ And ultimately, the Court extended *Younger* to “civil proceedings that are akin to criminal prosecutions” and to other settings that implicate states’ fundamental sovereign interests.⁸²

C. Our Repairable Federalism: Younger’s Safety Valves

In the cases of *Younger*, *Samuels*, *Hicks*, and *Huffman*, the Court presumed a generally functioning state judicial system where an aggrieved person could raise federal constitutional objections. None of these cases involved claims that the state criminal processes themselves were complicit in furthering — or inherently incapable of repairing — constitutional violations. By contrast, federal actions challenging these types of structural or systemic procedural defects fared better during the same period. *Younger* itself acknowledged that irreparable harm or “extraordinary circumstances” would sometimes require federal intervention in state criminal proceedings.⁸³ And throughout the 1970s, the Court reaffirmed and refined these principles, holding that courts should not block a suit when state officials are acting in bad faith or engaging in harassment, when state adjudicators have a real or reasonable perceived financial stake in the outcome, when there is no timely forum in which to raise constitutional claims, and when state officials are attempting to wield a patently unconstitutional law.

Lower federal court judges in the American South had an outsized role in shaping these exceptions, giving practical content to the Supreme Court’s broader guiding principle that federal courts should redress grievances when necessary to prevent irreparable harm. This was particularly true of the legendary civil rights-oriented judges who came to be known as the “Fifth Circuit Four” because of their role in expanding civil rights for black Americans.⁸⁴ These judges were John Minor Wisdom of Louisiana; Richard Rives of Alabama; John Robert Brown of Texas; and Elbert Tuttle of Georgia.⁸⁵ Another important judicial actor was then-district court Judge Frank Johnson of Alabama who, like the Fifth Circuit Four, had earlier been a central figure in dismantling Jim Crow in Alabama.⁸⁶ The metes and bounds of *Younger*’s exceptions, animating principles, and rarely told origins all merit deeper discussion.

⁸¹ *Id.* at 604; *see id.* at 609.

⁸² *Sprint Commc’ns, Inc. v. Jacobs*, 134 S. Ct. 584, 588 (2013).

⁸³ 401 U.S. 37, 53 (1971).

⁸⁴ JACK BASS, *UNLIKELY HEROES* 23–26 (1981); *see also* DEBORAH J. BARROW & THOMAS G. WALKER, *A COURT DIVIDED: THE FIFTH CIRCUIT COURT OF APPEALS AND THE POLITICS OF JUDICIAL REFORM* 40–41, 55–61 (1988); J.W. PELTASON, *FIFTY-EIGHT LONELY MEN: SOUTHERN FEDERAL JUDGES AND SCHOOL DESEGREGATION* 25–28 (1961).

⁸⁵ BARROW & WALKER, *supra* note 84, at 11–24; BASS, *supra* note 84, at 23.

⁸⁶ BARROW & WALKER, *supra* note 84, at 35, 225.

I. Bad Faith. — In *Younger*, as the Court declined to award an injunction, it explained that the plaintiff in that case “failed to make any showing of bad faith, harassment, or any other unusual circumstance that would call for equitable relief.”⁸⁷ When there is bad faith, the likely harm is “irreparable,”⁸⁸ and a person is entitled to “equitable relief under the long-established standards.”⁸⁹ This irreparable harm standard has deep historical roots.⁹⁰ And the bad faith exception provides a way to apply that standard to end illegal state prosecutions.

An early adopter of the bad faith exception was Judge Wisdom, one of the Fifth Circuit Four. An Eisenhower appointee⁹¹ for whom the New Orleans Fifth Circuit Courthouse is now named,⁹² Judge Wisdom is known as one of four federal judges who became “unlikely heroes”⁹³ by facilitating racial integration in Alabama, Florida, Georgia, Louisiana, Mississippi, and Texas.⁹⁴ While the Fifth Circuit Four were appellate court judges, they often sat on three-judge district court panels with district judges such as Judge Frank Johnson;⁹⁵ at that time, federal jurisdictional statutes often permitted only such three-judge panels, rather than single district court judges, to enjoin certain civil rights violations.⁹⁶ A party could immediately appeal the panel’s decisions to the United States Supreme Court.⁹⁷ Sitting on such a panel in 1964, Judge Wisdom and two district court judges confronted whether to enjoin a prosecution against civil rights advocates under Louisiana’s Subversive Activities and Communist Control Law.⁹⁸

At issue was a state case against members of the Southern Conference Educational Fund, Inc. (SCEF),⁹⁹ a civil rights organization dedicated to ending state-sanctioned racial injustice in the South.¹⁰⁰ A minister

⁸⁷ *Younger*, 401 U.S. at 54.

⁸⁸ *Id.* at 48.

⁸⁹ *Id.* at 50.

⁹⁰ See Douglas Laycock, *The Death of the Irreparable Injury Rule*, 103 HARV. L. REV. 687, 699–700 (1990); John Leubsdorf, *The Standard for Preliminary Injunctions*, 91 HARV. L. REV. 525, 532–37 (1978).

⁹¹ David J. Garrow, Tribute, *Visionaries of the Law: John Minor Wisdom and Frank M. Johnson, Jr.*, 109 YALE L.J. 1219, 1219 (2000).

⁹² See Rhesa Hawkins Barksdale, *Tribute to John Minor Wisdom*, 20 MISS. C. L. REV. 235, 235 (2000).

⁹³ BASS, *supra* note 84.

⁹⁴ See generally BARROW & WALKER, *supra* note 84; BASS, *supra* note 84.

⁹⁵ See, e.g., *Lee v. Macon Cty. Bd. of Educ.*, 317 F. Supp. 103, 104 (M.D. Ala. 1970).

⁹⁶ Note, *Reviewing the Grant of a Three-Judge Court*, 69 COLUM. L. REV. 146, 146–47, 152 (1969); Note, *The Three-Judge District Court: Scope and Procedure Under Section 2281*, 77 HARV. L. REV. 299, 301 (1963).

⁹⁷ 17 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4040 (3d ed.), Westlaw (database updated Apr. 2017); see also 28 U.S.C. § 1253 (2012).

⁹⁸ *Dombrowski v. Pfister*, 227 F. Supp. 556, 558 (E.D. La. 1964), *rev'd*, 380 U.S. 479 (1965).

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 573 (Wisdom, J., dissenting).

named Dr. James Dombrowski ran the day-to-day operations,¹⁰¹ assisted by lawyers with a dedicated civil rights practice.¹⁰² Dombrowski and two SCEF attorneys were arrested in New Orleans for “racial agitation.”¹⁰³ As Judge Wisdom noted in dissent: “At gunpoint their homes and offices were raided and ransacked by police officers and trustees from the House of Detention acting under the direct supervision of the staff director and the counsel for the State Un-American Activities Committee.”¹⁰⁴ The civil rights leaders sought relief in federal court, alleging a serious and imminent threat to their fundamental constitutional rights.¹⁰⁵ Accordingly, the leaders sought declaratory and injunctive relief under 42 U.S.C. § 1983.¹⁰⁶

The three-judge panel denied the injunction,¹⁰⁷ relying on federalism concerns. A federal injunction, the majority reasoned, would threaten a state’s autonomy and, therefore, our federalist constitutional order.¹⁰⁸ The panel explained: “Can we deny the State the basic right of self-preservation; the right to protect itself? If so, truly this would be a massive emasculation of the last vestige of the dignity of sovereignty.”¹⁰⁹ The court also relied on cases wherein the Supreme Court had denied federal injunctions against state prosecutions.¹¹⁰

But in an opinion that ultimately carried the day and gained the force of law, Judge Wisdom dissented.¹¹¹ He disputed the view that the government’s legitimate federalism interests outweighed federal courts’ obligation to stop the irreparable harm that would befall the plaintiffs while they languished in jail facing felony charges for exercising fundamental constitutional rights. The plaintiffs had alleged, after all, that the State was “abusing its legislative power and criminal processes” by using “the pretext of protecting itself against subversion” to “harass[] and humiliate[] the plaintiffs.”¹¹² State-perpetrated abuse is not, without more, a constitutional value worth protecting.

¹⁰¹ FRANK T. ADAMS, JAMES A. DOMBROWSKI: AN AMERICAN HERETIC, 1897–1983, at 57 (1992); J. LEE ANNIS JR., BIG JIM EASTLAND: THE GODFATHER OF MISSISSIPPI 106 (2016).

¹⁰² ADAMS, *supra* note 101, at 262–63.

¹⁰³ *Dombrowski*, 227 F. Supp. at 573 (Wisdom, J., dissenting).

¹⁰⁴ *Id.*

¹⁰⁵ *Dombrowski v. Pfister*, 380 U.S. 479, 481–82 (1965).

¹⁰⁶ *Id.*

¹⁰⁷ *Dombrowski*, 227 F. Supp. at 564.

¹⁰⁸ *Id.* at 560 (“This Court should jealously guard these plaintiffs in their constitutional rights to equal protection of the laws, yet in our zeal to protect we should not consciously or unconsciously undermine the whole fabric of state and federal relationship as it struggles to survive its inherent constitutional posture.”).

¹⁰⁹ *Id.* at 559.

¹¹⁰ *See id.*

¹¹¹ *Id.* at 569 (Wisdom, J., dissenting).

¹¹² *Id.*

Judge Wisdom's reasoning was in part personal. He acknowledged that the words "States' Rights" were "mystical, emotion-laden words," and that for him "as for most Southerners, the words evoke visions of the hearth and defense of the homeland and carry the sound of bugles and the beat of drums."¹¹³ Still, he offered, "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."¹¹⁴ He later continued: "[E]very judge in this circuit knows . . . that in some cases, all too many cases, persons have been punished without any justifiable basis or punished cruelly beyond the bounds of just punishment for a minor offense, to serve as an object lesson to others . . ."¹¹⁵

Judge Wisdom's reasoning was also based upon the way that precedent, up until that point, had preserved a role for federal courts in stopping significant harm that would befall the plaintiff if a federal court failed to act. He observed that when the Supreme Court had refused to enjoin state proceedings, it had explicitly held that it was because a plaintiff had failed to show "exceptional circumstances" or "'great and immediate' danger."¹¹⁶ It makes little sense for a federal court to intervene in a typical case where a state court is equipped to hear a challenge as to the constitutionality of a criminal statute. Such interventions, among other problems, would allow piecemeal collateral federal attacks on state rulings. But such reasoning collapses when the state proceeding is a component of the harm. As Judge Wisdom articulated:

Under any rational concept of federalism the federal district court has the primary responsibility and the duty to determine whether a state court proceeding is or is not a disguised effort to maintain the State's unyielding policy of segregation at the expense of the individual citizen's federally [g]uaranteed rights and freedoms.¹¹⁷

The Supreme Court agreed with Judge Wisdom, adopting an exception to abstention for bad faith prosecutions.¹¹⁸ In doing so, the Court's reasoning confirmed that the exception is a subset of the broader question of whether state judicial processes are adequate to prevent irreparable injury. A bad faith prosecution necessarily means that a state's adversarial process is complicit in the deprivation of constitutionally protected interests. This complicity renders that adversarial process an

¹¹³ *Id.* at 570.

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 571.

¹¹⁶ *Id.* at 583 (quoting *Watson v. Buck*, 313 U.S. 387, 401 (1941)).

¹¹⁷ *Id.*

¹¹⁸ See *Dombrowski v. Pfister*, 380 U.S. 479, 489–90 (1965).

inadequate means to raise federal constitutional objections,¹¹⁹ often creating a risk of irreparable harm that only federal courts can prevent. In Dombrowski's case, given the harassing, bad faith nature of the state adversarial system, the State's processes could not "assure adequate vindication of constitutional rights."¹²⁰ This would result in the "substantial loss or impairment of freedoms of expression," a "clear[] . . . irreparable injury."¹²¹

2. *Bias*. — A second exception to *Younger* is that it does not apply when the underlying state forum is biased. This exception, too, was crafted in part by one of the Fifth Circuit Four. Judge Richard Rives, an Alabama appellate court judge appointed by President Truman,¹²² served on the three-judge district court panel that crafted the bias exception, along with Judge Frank Johnson and Judge Robert Varner, the author of the opinion.¹²³ Their reasoning, which was adopted by the United States Supreme Court, was that a biased forum provided an inadequate means of promptly stopping or preventing imminent irreparable harm.¹²⁴

In *Gibson v. Berryhill*,¹²⁵ the Alabama Optometric Association filed charges with the Alabama Board of Optometry, a "statutory body with authority to issue, suspend, and revoke licenses for the practice of optometry," against a group of optometrists for "unprofessional conduct."¹²⁶ All of the members of the Board were members of the Association.¹²⁷ Indeed, serving on the Board required membership in the Association.¹²⁸ Further, becoming a member of the Association required being an "independent practitioner[] . . . not employed by others."¹²⁹ The accused optometrists were all employed by the same large company, and therefore, because they were not independent practitioners, they could not be members of the Association.¹³⁰ Revoking their licenses would open up a lot of new business to the Board members but would cause significant harm to the aggrieved optometrists' livelihoods and reputations.¹³¹

¹¹⁹ See *id.* at 485 ("[T]he allegations in this complaint depict a situation in which defense of the State's criminal prosecution will not assure adequate vindication of constitutional rights.").

¹²⁰ *Id.*

¹²¹ *Id.* at 486.

¹²² Derrick A. Bell, Jr., *Civil Rights Lawyers on the Bench*, 91 YALE L.J. 814, 821 n.17 (1982) (reviewing BASS, *supra* note 84).

¹²³ *Berryhill v. Gibson*, 331 F. Supp. 122, 123 (M.D. Ala. 1971), *vacated on other grounds*, 411 U.S. 564 (1973).

¹²⁴ *Gibson v. Berryhill*, 411 U.S. 564, 578–79 (1973).

¹²⁵ 411 U.S. 564.

¹²⁶ *Id.* at 567.

¹²⁷ See *id.* at 571.

¹²⁸ *Id.*

¹²⁹ *Id.* at 567.

¹³⁰ See *id.* at 568–69.

¹³¹ See *id.* at 571–72.

Concerned about the Board's bias, the threatened optometrists filed federal suit, alleging that the Board's patent impartiality violated the Due Process Clause.¹³² The district court and Supreme Court both agreed, holding that *Younger* abstention did not require dismissing the suit.¹³³ After all, according to the allegations in the complaint, there were "deficiencies in the pending [state] proceedings";¹³⁴ most notably, the plaintiffs sufficiently alleged "that the Board was biased and could not provide the plaintiffs with a fair and impartial hearing in conformity with due process of law."¹³⁵ There was, then, no clearly untainted forum where the plaintiffs could object to the license-revocation proceedings, and therefore prevent "irreparable damage."¹³⁶

3. *Timeliness*. — Third, for *Younger* to apply, the state tribunal must provide a *timely* opportunity to avoid constitutional harm. For example, in *Gibson*, the fact that an eventual state appeal was available, one that would presumably be less infected with the same core deficiencies, was of no moment. *Younger* abstention "naturally presupposes the opportunity to raise and have timely decided by a competent state tribunal the federal issues involved."¹³⁷ *Younger* abstention is not "required simply because judicial review, *de novo* or otherwise, would be forthcoming at the conclusion of the administrative proceedings."¹³⁸ The opportunity for an adequate, unbiased hearing must be timely, given the unjustified damage that can be done to a person while she waits to raise her claim in an uninfected forum.¹³⁹

The immediacy requirement also facilitated the outcome in *Gerstein v. Pugh*,¹⁴⁰ yet another case in which the Court adopted the reasoning of Fifth Circuit judges confronting systemic constitutional violations.¹⁴¹ In that case, a Florida county was placing people in jail for long periods of time without any timely opportunity to see a judge for a preliminary hearing.¹⁴² The detained individuals filed a federal class action.¹⁴³

¹³² See *id.* at 569–70.

¹³³ *Id.* at 570, 575–79. The district court did, however, stay its proceedings on other grounds that the Supreme Court vacated. *Id.* at 579–81.

¹³⁴ *Id.* at 570.

¹³⁵ *Id.*

¹³⁶ *Berryhill v. Gibson*, 331 F. Supp. 122, 126 (M.D. Ala. 1971), *vacated on other grounds*, 411 U.S. 564 ("Revocation of the license of a professional man to practice his profession, together with the attendant publicity which would inevitably be associated therewith, would cause irreparable damage to the Plaintiffs. No method is provided under the state law to avoid this irreparable damage.")

¹³⁷ *Gibson*, 411 U.S. at 577.

¹³⁸ *Id.*

¹³⁹ See *id.* at 577 & n.16.

¹⁴⁰ 420 U.S. 103 (1975).

¹⁴¹ See *id.* at 108 n.9.

¹⁴² See *id.* at 105–06.

¹⁴³ *Id.* at 106–07.

Long periods in jail with no opportunity to see a judge, they argued, violated due process by creating an unacceptable risk that innocent people would lose their liberty and livelihoods while languishing in jail.¹⁴⁴ But before the federal court could reach that question, it first had to decide whether prospective relief was permitted under abstention doctrine.¹⁴⁵

The Fifth Circuit, in an opinion by Judge Tuttle, held that *Younger* was inapplicable and therefore did not bar the claim.¹⁴⁶ The very nature of the issue in this case was that arrestees could not get a preliminary hearing in front of a judicial officer in a timely manner.¹⁴⁷ And the mere fact that a future trial and appellate proceeding were available was insufficient, because by then, the irreparable damage would have already been done.¹⁴⁸ The Fifth Circuit panel asked:

If these plaintiffs were barred by *Younger* from this forum, what relief might they obtain in their state court trials? Since their pre-trial incarceration would have ended as of the time of trial, no remedy would exist. Their claims to pre-trial preliminary hearings would be mooted by conviction or exoneration.¹⁴⁹

The court cited an earlier Fifth Circuit decision, also authored by Judge Tuttle, standing for a similar proposition.¹⁵⁰

The Supreme Court agreed, stating in a footnote that the lower court “correctly” resolved the issue.¹⁵¹ The Court added that even if a federal court ordered timely preliminary hearings, such an order “could not prejudice the conduct of the trial on the merits.”¹⁵² After all, the requested injunction “was not directed at the state prosecutions *as such*, but only at the legality of pretrial detention without a judicial hearing, an issue that could not be raised in defense of the criminal prosecution.”¹⁵³

4. *Patent Unconstitutionality*. — A particularly enigmatic exception to *Younger* abstention is for “patently”¹⁵⁴ unconstitutional state law. That is, when a prosecution is based on a law that is unconstitutional in “every clause, sentence and paragraph,” federal courts are permitted to intervene.¹⁵⁵ The reason this exception creates a puzzle is that the Court

¹⁴⁴ See *Pugh v. Rainwater*, 332 F. Supp. 1107, 1109 (S.D. Fla. 1971), *aff'd in part, vacated in part*, 483 F.2d 778 (5th Cir. 1973), *aff'd in part, rev'd in part sub nom.* *Gerstein v. Pugh*, 420 U.S. 103.

¹⁴⁵ See *id.* at 1111–12.

¹⁴⁶ See *Pugh*, 483 F.2d at 781–83.

¹⁴⁷ *Id.* at 781–82.

¹⁴⁸ See *id.* at 782.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* (citing *Morgan v. Wofford*, 472 F.2d 822 (5th Cir. 1973) (Tuttle, J.)).

¹⁵¹ *Gerstein v. Pugh*, 420 U.S. 103, 108 n.9 (1975).

¹⁵² *Id.*

¹⁵³ *Id.* (emphasis added).

¹⁵⁴ *Younger v. Harris*, 401 U.S. 37, 53 (1971) (quoting *Watson v. Buck*, 313 U.S. 387, 402 (1941)).

¹⁵⁵ *Id.* at 53 (conceding that federal intervention would be warranted in the “conceivable” situation in which a statute was “flagrantly and patently violative of express constitutional prohibitions

has made clear time and again that the mere fact that a law is facially unconstitutional does not mean that this exception should apply.¹⁵⁶ And indeed, the Court has never actually found the exception applicable in any federal case.¹⁵⁷

Perhaps the best way to understand the exception, then, is to understand the principle that animates the other exceptions: avoiding the irreparable harm that attends a structurally corrupt proceeding in which one's constitutional interests are at stake. If a statute is not only facially invalid but also so flagrantly and indisputably unconstitutional that no reasonable person could possibly conclude otherwise, this raises the question: Why is the state wielding such a law against its populace? In extreme circumstances, perhaps the mere application of a hypothetical law that is so out of bounds stands as evidence of a problem in the adversarial process. It bears repeating, however, that the parameters of this exception are not only tightly circumscribed¹⁵⁸ but also unusually poorly defined.

D. Our Emerging "Systemic" Exception?

In recent years, some federal courts have found that *Younger* was inapplicable in class actions against certain systemic, widespread constitutional violations. Those courts have expressly reasoned that *Younger* is a bad fit for certain systemic harms that local courts have been unwilling or unable to abate. For this proposition, the leading case is the federal district court case of *M.D. v. Perry*.¹⁵⁹ In that case, children challenged the inadequacy of foster care proceedings in the State of Texas, alleging widespread patterns of harms that included "repeated placements, over-medication, abuse, neglect, and deprivation of familial relationships with siblings."¹⁶⁰ The State attempted to invoke *Younger*, but the district court rejected the State's position.¹⁶¹ In an opinion by Judge Janis Graham Jack, the court reasoned that because "[the] lawsuit focuses on systemic problems and seeks systemic solutions, it would not duplicate the individualized reviews that occur in the state courts."¹⁶²

in every clause, sentence and paragraph, and in whatever manner and against whomever an effort might be made to apply it," *id.* at 53–54 (quoting *Watson*, 313 U.S. at 402)).

¹⁵⁶ See, e.g., *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 602 (1975) ("[W]e unequivocally held [in *Younger*] that facial invalidity of a statute is not itself an exceptional circumstance justifying federal interference with state criminal proceedings."); see also *Middlesex Cty. Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 437 (1982) (affirming a lower court finding that state disciplinary rules did not satisfy the patent unconstitutionality exception).

¹⁵⁷ ERWIN CHEMERINSKY, *FEDERAL JURISDICTION* § 13.5, at 909 (7th ed. 2016).

¹⁵⁸ Fiss, *supra* note 49, at 1115 n.36, 1120 n.48.

¹⁵⁹ 799 F. Supp. 2d 712 (S.D. Tex. 2011), *vacated on other grounds*, 675 F.3d 832 (5th Cir. 2012).

¹⁶⁰ *Id.* at 714.

¹⁶¹ *Id.* at 726.

¹⁶² *Id.* at 720 (internal quotation marks omitted).

In later years, however, the Fifth Circuit limited the reach of this holding to (1) certified (rather than putative) class actions, and (2) foster care proceedings.¹⁶³

M.D. v. Perry has proven influential beyond the confines of the Fifth Circuit. In another case, involving a similar set of facts, an Arizona federal court rejected *Younger* in part because “the purpose of [federal] oversight is not to pinpoint individual cases of noncompliance for federal court intervention, but rather to implement system-wide remedial measures to help cure alleged chronic, widespread failures.”¹⁶⁴ The court cited *M.D. v. Perry* for the proposition that “federal oversight would not interfere with the functioning of the [state] courts,”¹⁶⁵ noting that the defendants had produced no “instances in which the juvenile courts have been involved with rooting out systemic causes of repeated agency failures.”¹⁶⁶

M.D. v. Perry has also gained influence in the academy. A recent amicus brief at the United States Supreme Court by leading federal courts scholars endorsed a similar proposition, relying on *M.D. v. Perry* for support.¹⁶⁷ In addition, Professor David Marcus has written an important article in *The Georgetown Law Journal* giving the case favorable discussion in a footnote.¹⁶⁸ History may well show that *M.D. v. Perry* is in the august tradition of federal lower court judges adopting new exceptions to *Younger* that give life to a venerable principle: federal courts need not remain supine in the face of constitutional violations that cannot be repaired by the relevant state processes.

* * *

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

¹⁶³ *Bice v. La. Pub. Def. Bd.*, 677 F.3d 712, 720 n.8 (5th Cir. 2012).

¹⁶⁴ *Tinsley v. McKay*, 156 F. Supp. 3d 1024, 1039 (D. Ariz. 2015).

¹⁶⁵ *Id.* (citing *Perry*, 799 F. Supp. at 720).

¹⁶⁶ *Id.*

¹⁶⁷ Brief of *Amici Curiae* Erwin Chemerinsky et al. in Support of the Petition for Writ of Certiorari at 8–9, *E.T. v. Cantil-Sakauye*, 568 U.S. 963 (2012) (No. 12-56) (citing *Perry*, 799 F. Supp. 2d 712).

¹⁶⁸ David Marcus, *The Public Interest Class Action*, 104 GEO. L.J. 777, 814 n.227 (2016). He observed: “The state proceedings do not involve the same interests as the federal class action, with the former centered on the individual child’s concerns and the latter on the group’s.” *Id.*

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

The time is ripe to assess whether these exceptions are working as intended. Scholars in the field of federal jurisdiction are already raising critical questions about how to ensure that federal courthouse doors are not slammed on plaintiffs more than necessary to achieve norms like federalism and preventing overdeterrence. Recent scholarship during the Ferguson era has given renewed attention to that important goal. Professor John Jeffries has challenged the notion of absolute immunity, noting that unreasonable violations of the Constitution deserve a remedy.¹⁶⁹ Professors James Pfander and Jessica Dwinell recently argued that federal courts should at least play a “declaratory” function when states violate the law, declaring that the plaintiffs’ rights have been violated even if there are limits on the plaintiffs’ ability to achieve a robust monetary award.¹⁷⁰ Professors William Baude and Joanna Schwartz have written groundbreaking articles questioning the logical underpinnings of qualified immunity.¹⁷¹ And I have argued that suits should be available against local governments under a theory of respondeat superior when no other remedy is available in light of individualized immunities.¹⁷²

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

II. OUR FERGUSON IN THE TIME OF OUR FEDERALISM

In our renewed, fraught national conversation about the role of race and poverty in the administration of America’s carceral apparatus, one wrong that has surfaced is the criminalization of poverty, notwithstanding a robust body of constitutional law banning such practices. After the killing of Michael Brown in Ferguson in the summer of 2014,¹⁷³ America learned that about 16,000 of the city’s 21,000 residents had

¹⁶⁹ John C. Jeffries, Jr., *The Liability Rule for Constitutional Torts*, 99 VA. L. REV. 207, 208–09 (2013).

¹⁷⁰ James E. Pfander & Jessica Dwinell, *A Declaratory Theory of State Accountability*, 102 VA. L. REV. 153, 159–60 (2016).

¹⁷¹ William Baude, *Is Qualified Immunity Unlawful?*, 106 CALIF. L. REV. 45 (2018); Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 YALE L.J. 2 (2017).

¹⁷² Fred Smith, *Local Sovereign Immunity*, 116 COLUM. L. REV. 409, 422 (2016).

¹⁷³ U.S. DEP’T OF JUSTICE, DEPARTMENT OF JUSTICE REPORT REGARDING THE CRIMINAL INVESTIGATION INTO THE SHOOTING DEATH OF MICHAEL BROWN BY FERGUSON, MISSOURI POLICE OFFICER DARREN WILSON 4 (2015).

outstanding warrants¹⁷⁴ and that many were trapped in a cycle of debt and incarceration.¹⁷⁵ After the killing of Walter Scott in South Carolina in the spring of 2015, the nation learned that the reason he was running away from the officer who shot him was because he owed money stemming from a court judgment for unpaid child support.¹⁷⁶ After Sandra Bland died suddenly in a Texas jail cell in the summer of 2015 following a traffic stop, the country learned that a judge had set her bail at \$5,000, an amount her family could not afford to pay.¹⁷⁷ After the killing of Philando Castile during a traffic stop outside of St. Paul, Minnesota, in the summer of 2016, we learned that, despite the absence of a serious criminal record, he had been pulled over forty-nine times in the years before the killing, sometimes because of his inability to pay the price of previous tickets.¹⁷⁸ An otherwise law-abiding citizen, he was, in life and death, nonetheless deeply enmeshed with the carceral state.¹⁷⁹

For decades, it has been well established that the Constitution prohibits criminalizing poverty. In *Bearden v. Georgia*,¹⁸⁰ the Supreme Court held that “if the State determines a fine or restitution to be the appropriate and adequate penalty for [a] crime, it may not thereafter imprison a person solely because he lacked the resources to pay it.”¹⁸¹ The Court reasoned that to “deprive [a] probationer of his conditional freedom simply because, through no fault of his own, he cannot pay . . . would be contrary to the fundamental fairness required by the Fourteenth Amendment.”¹⁸² As Judge Myron Thompson succinctly and eloquently explained in a recent opinion: “Criminal defendants, presumed innocent, must not be confined in jail merely because they are poor. Justice that

¹⁷⁴ FERGUSON REPORT, *supra* note 9, at 6, 47, 55; *see also* Utah v. Strieff, 136 S. Ct. 2056, 2068 (2016) (Sotomayor, J., dissenting) (quoting FERGUSON REPORT, *supra* note 9, at 49, 57) (using Ferguson as one example of the widespread police practice of using outstanding warrants to make stops without cause).

¹⁷⁵ *See* Ruth Marcus, *Policing by Fleecing, in Ferguson and Beyond*, WASH. POST (Mar. 6, 2015), <http://wapo.st/1Enyy5r> [<https://perma.cc/L5E4-J5UH>].

¹⁷⁶ Naomi Cahn & June Carbone, *Walter Scott and the Child Support System*, CONCURRING OPINIONS (Apr. 24, 2015), <http://concurringopinions.com/archives/2015/04/walter-scott-and-the-child-support-system.html> [<https://perma.cc/JDM7-723K>].

¹⁷⁷ Debbie Nathan, *The Real Reason Sandra Bland Got Locked Up*, THE NATION (Dec. 18, 2015), <https://www.thenation.com/article/the-real-reason-sandra-bland-got-locked-up> [<https://perma.cc/DQ54-2RJS>]; Leon Neyfakh, *Why Was Sandra Bland Still in Jail?*, SLATE (July 23, 2015, 8:17 PM), http://www.slate.com/articles/news_and_politics/crime/2015/07/sandra_bland_is_the_bail_system_that_kept_her_in_prison_unconstitutional.html [<https://perma.cc/E4DN-5KF3>].

¹⁷⁸ Brandon Stahl, *Philando Castile Was Caught Up in a Cycle of Traffic Stops, Fines*, STAR TRIB. (July 17, 2016, 3:34 PM), <http://www.startribune.com/castile-lived-in-a-cycle-of-traffic-stops-fines/387046341/> [<https://perma.cc/PLZ5-GE85>].

¹⁷⁹ *See id.*

¹⁸⁰ 461 U.S. 660 (1983).

¹⁸¹ *Id.* at 667–68.

¹⁸² *Id.* at 672–73.

is blind to poverty and indiscriminately forces defendants to pay for their physical liberty is no justice at all.”¹⁸³

Nonetheless, in recent years, journalists,¹⁸⁴ scholars,¹⁸⁵ civil rights lawyers,¹⁸⁶ and activists¹⁸⁷ have all documented the seemingly pervasive carceral regimes that appear to flatly contradict these principles. This Part documents recent lawsuits in which the core claim is that governments are incarcerating Americans for being poor. The suits described herein are divided into three categories: claims against (1) rigid bail schedules; (2) pecuniary-interest schemes; and (3) post-judgment debtors’ prisons. In the first set of suits, people allege that local or state courts impose rigid bail when the person is charged, without regard to the person’s ability to pay. In the second set, the claim is that someone intimately connected to the criminal justice process — a judge, prosecutor, public defender, or probation officer — has an economic interest in a criminal defendant’s sentencing or incarceration. In the third set, the

¹⁸³ Jones v. City of Clanton, No. 15-cv-34, 2015 WL 5387219, at *3 (M.D. Ala. Sept. 14, 2015).

¹⁸⁴ E.g., Shaila Dewan, *Court by Court, Lawyers Fight Policies that Fall Heavily on the Poor*, N.Y. TIMES (Oct. 23, 2015), <https://nyti.ms/1Kus9Tc> [<https://perma.cc/LYD2-5K3P>]; Campbell Robertson, *Suit Alleges “Scheme” in Criminal Costs Borne by New Orleans’s Poor*, N.Y. TIMES (Sept. 17, 2015), <https://nyti.ms/2pY9P4G> [<https://perma.cc/NE4T-4ZDG>]; Joseph Shapiro, *Measures Aimed at Keeping People Out of Jail Punish the Poor*, NPR (May 24, 2014, 4:58 PM), <https://n.pr/1pg1YYg> [<https://perma.cc/9LWJ-REQX>].

¹⁸⁵ E.g., Laura I Appleman, *Nickel and Dimed into Incarceration: Cash-Register Justice in the Criminal System*, 57 B.C. L. REV. 1483, 1483 (2016); Beth A. Colgan, *Reviving the Excessive Fines Clause*, 102 CALIF. L. REV. 277, 284–95 (2014); Jessica M. Eaglin, *Improving Economic Sanctions in the States*, 99 MINN. L. REV. 1837, 1837–42 (2015); Eisha Jain, *Prosecuting Collateral Consequences*, 104 GEO. L.J. 1197, 1207 (2016) (“Minor arrests can trigger fees (both civil and criminal), and if the defendant cannot pay, she can expect to face additional punishment.”); Neil L. Sobol, *Charging the Poor: Criminal Justice Debt & Modern-Day Debtors’ Prisons*, 75 MD. L. REV. 486, 540 (2016); Kathryn M. Young & Joan Petersilia, *Keeping Track: Surveillance, Control, and the Expansion of the Carceral State*, 129 HARV. L. REV. 1318, 1321–23 (2016) (book review); *Developments in the Law — Policing*, 128 HARV. L. REV. 1706, 1729 (2015) (describing how private probation companies have become “debt collector[s] backed by carceral power”); see also Devon W. Carbado, *From Stopping Black People to Killing Black People: The Fourth Amendment Pathways to Police Violence*, 105 CALIF. L. REV. 125, 145–46 (2017) (documenting the minimal Fourth Amendment protections for homeless people and welfare recipients).

¹⁸⁶ See Note, *State Bans on Debtors’ Prisons and Criminal Justice Debt*, 129 HARV. L. REV. 1024, 1030 (2016) (“Equal Justice Under Law and the Southern Poverty Law Center have also sued a handful of other municipalities, and the ACLU has pursued an awareness campaign in a number of states, sending letters to judges and mayors in Ohio and Colorado.” (footnotes omitted)). *But see* Alec Karakatsanis, *Policing, Mass Imprisonment, and the Failure of American Lawyers*, 128 HARV. L. REV. F. 253, 254 (2015) (“The failure of lawyers is a tragedy in two parts. First, there has been an intellectual failure of the profession to scrutinize the evidentiary and logical foundations of modern policing and mass incarceration. Second, the profession has failed in everyday practice to ensure that the contemporary criminal legal system functions consistently with our rights and values.”).

¹⁸⁷ E.g., RAM SUBRAMANIAN ET AL., VERA INST. OF JUSTICE, INCARCERATION’S FRONT DOOR: THE MISUSE OF JAILS IN AMERICA 15–17 (2015), https://storage.googleapis.com/vera-web-assets/downloads/Publications/incarcerations-front-door-the-misuse-of-jails-in-america/legacy_downloads/incarcerations-front-door-report_02.pdf [<https://perma.cc/RZ9W-6RFK>].

allegation is that a person is jailed for her inability to pay a fee or fine associated with a ticket of judgment.

Some of these suits have faced threshold barriers, including *Younger* abstention, that have caused federal courts not to reach the underlying merits. As described below, a number of district courts have rejected governments' invocation of *Younger* in each of the three sets of cases that are the focus of this Article. In those cases, courts have gone on to issue injunctive relief, declaratory relief, and consent decrees.¹⁸⁸ That relief has resulted in significant decreases in the jail populations of New Orleans and Harris County, Texas. This relief has also resulted in a ban on a range of coercive practices in Rutherford County, Tennessee. Still, other courts have embraced the governments' *Younger* arguments. While the latter cases were almost certainly wrong under current doctrine, that these federal courts thought they lacked the power to stop systemic and structural irreparable harm — harm that could not be adequately addressed by state courts — speaks to the need for a more explicit abstention exception in cases challenging systemic or structural failures in the state juridical process.

A. Rigid Post-Arrest Bail

In some jurisdictions, when a person is initially arrested, her bail has nothing to do with her individualized circumstances. Instead, documents and practices known as “bail schedules” outline precisely how much money people accused of specific crimes must pay in order to obtain freedom.¹⁸⁹ Each day, about 450,000 people are held in local jails while they await trial.¹⁹⁰ When they cannot afford to pay bail, people may plead guilty in order to obtain their freedom.¹⁹¹ Poor arrestees have filed a number of class actions in recent years challenging these systems as another means of incarcerating Americans for their inability to pay the government. In *Walker v. City of Calhoun*,¹⁹² for example, residents challenged a law that kept indigent persons accused of misdemeanors in jail for up to seven days while they awaited a hearing unless they

¹⁸⁸ See, e.g., *Rodriguez v. Providence Cmty. Corr., Inc.*, 155 F. Supp. 3d 758, 766–72 (M.D. Tenn. 2015); *Jones*, 2015 WL 5387219, at *1; *Mitchell v. City of Montgomery*, No. 14-cv-186, 2014 WL 11099432, at *1 (M.D. Ala. Nov. 17, 2014); see also Joint Motion to Dismiss Defendant City of Clanton Pursuant to Private Settlement Agreement Exhibit A at 1–4, *Reynolds v. Judicial Corr. Servs., Inc.*, No. 15-cv-00161 (M.D. Ala. Dec. 14, 2015), ECF No. 54 (Settlement Agreement).

¹⁸⁹ Lindsey Carlson, *Bail Schedules: A Violation of Judicial Discretion?*, CRIM. JUST., Spring 2011, at 12, 13–14.

¹⁹⁰ See TODD D. MINTON & ZHEN ZENG, BUREAU OF JUSTICE STATISTICS, JAIL INMATES AT MIDYEAR 2014, at 3 tbl.2 (2015).

¹⁹¹ See Paul Heaton, Sandra Mayson & Megan Stevenson, *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 STAN. L. REV. 711, 714 (2017).

¹⁹² No. 15-CV-0170, 2016 WL 361612 (N.D. Ga. Jan. 28, 2016), *vacated*, 628 F. App'x 721 (11th Cir. 2017).

could pay a one-size-fits-all bail amount.¹⁹³ That case has attracted national attention.¹⁹⁴ There is an ongoing suit against the much larger Harris County, Texas, home of the sprawling, diverse metropolis that is Houston.¹⁹⁵ In a remarkable moment in that suit, the newly elected Sheriff of Harris County testified for the plaintiffs: “When most of the people in my jail are there because they can’t afford to bond out, and when those people are disproportionately black and Hispanic, that’s not a rational system.”¹⁹⁶ Elected officials in a similar suit against San Francisco have also sided with the plaintiffs.¹⁹⁷

Some of these suits have been frustrated by *Younger* abstention arguments.¹⁹⁸ The bail-schedule case of *Burks v. Scott County*¹⁹⁹ includes one of the most extensive — and most troubling — discussions of *Younger*.²⁰⁰ The case illustrates that some federal courts wrongly defer to state judicial processes that are plausibly plagued by systemic or structural constitutional violations.

In 2015, detainees Octavious Burks and Joshua Bassett, who were accused of serious crimes in Scott County, Mississippi, filed federal suit on behalf of themselves and others similarly situated,²⁰¹ challenging the county’s practice of “setting bail in arbitrary amounts, without individualized consideration of,” among other things, “a defendant’s ability to afford bail.”²⁰² The complaint further alleged that during preliminary hearings, wherein a judge makes bail determinations, indigent criminal defendants do not receive an attorney.²⁰³ This lack of consideration of

¹⁹³ See *id.* at *1.

¹⁹⁴ See, e.g., David Savage, *Obama Administration Challenges the Money Bail System: Can People Be Kept in Jail Just Because They Are Poor?*, L.A. TIMES (Aug. 25, 2016, 9:55 AM), <http://www.latimes.com/nation/la-na-bail-poverty-court-20160825-snap-story.html> [https://perma.cc/6DCH-C8Y5].

¹⁹⁵ See *ODonnell v. Harris County*, 227 F. Supp. 3d 706 (S.D. Tex. 2016), *aff’d in part, rev’d in part*, 882 F.3d 528 (5th Cir. 2018).

¹⁹⁶ Michael Hardy, *In Fight Over Bail’s Fairness, a Sheriff Joins the Critics*, N.Y. TIMES (Mar. 9, 2017), <https://nyti.ms/2mpD4g9> [https://perma.cc/94V5-2XXR].

¹⁹⁷ *Id.*

¹⁹⁸ In addition to *Burks v. Scott County*, discussed *infra* pp. 2309–11, a federal district court recently invoked *Younger* to dismiss a petition for habeas corpus from a person challenging San Francisco’s bail schedule. *Arevalo v. Hennessy*, No. 17-cv-06676, 2017 WL 6558596, at *2–4 (N.D. Cal. Dec. 22, 2017). The Ninth Circuit reversed in relevant part, finding that *Younger* abstention was “not appropriate” for two reasons. *Arevalo v. Hennessy*, 882 F.3d 763, 766 (9th Cir. 2018). First, the question of bail was sufficiently disconnected from the merits so as not to interfere with the underlying proceeding. *Id.* Second, the court found that “irreparable harm” would result in the absence of federal intervention given that “the petitioner ha[d] been incarcerated for over six months without a constitutionally adequate bail hearing.” *Id.* at 767.

¹⁹⁹ No. 14-cv-00745 (S.D. Miss. Sept. 30, 2015).

²⁰⁰ *Burks*, slip op. at 15–27.

²⁰¹ Amended Class Action Complaint at 1, *Burks*, No. 14-cv-00745 (S.D. Miss. Sept. 30, 2015), ECF No. 39.

²⁰² *Id.* at 10.

²⁰³ *Id.* at 11–12.

inmates' ability to pay, combined with the absence of counsel at a critical phase of a criminal trial, warranted federal judicial intervention, the complaint alleged.²⁰⁴ The preliminary hearing is the only moment in the state's trial proceedings in which a person can challenge bail determinations.²⁰⁵ The detainees sought injunctive and declaratory relief that would require counsel at preliminary hearings as well as individualized bail determinations.²⁰⁶ The plaintiffs also sought money damages.²⁰⁷

The court dismissed the claims for prospective relief and stayed the claims for damages.²⁰⁸ The court acknowledged that under *Gerstein v. Pugh*, the Supreme Court rejected *Younger* arguments where plaintiffs had no timely opportunity to challenge long pretrial detentions.²⁰⁹ It distinguished this case, however, on the grounds that the pretrial detainees in that case did not receive a timely hearing at all.²¹⁰ By contrast, the detainees in *Burks* received hearings and merely contended that those hearings were constitutionally defective.²¹¹ The court explained that pretrial detainees could object to the absence of counsel during the course of a preliminary hearing; in particular, the court noted, poor pretrial detainees could cite binding precedent and tell state judges "that their right to counsel had attached, entitling them to representation at all critical stages."²¹² Further, the pretrial detainees could have requested new "individualized bail hearings and proceeded in *pro se* capacities."²¹³

This opinion helps to illustrate how current doctrine can sometimes lead federal courts to adopt an untenably circumscribed understanding of what constitutes an adequate forum in which to bring constitutional grievances. According to the plaintiffs, represented by the American Civil Liberties Union,²¹⁴ a constitutional right to counsel at an initial hearing was being systematically denied in Scott County. While the

²⁰⁴ *Id.* at 21–22.

²⁰⁵ *See id.* at 12–13.

²⁰⁶ *Id.* at 21–23.

²⁰⁷ *Id.* at 23.

²⁰⁸ *Burks*, slip op. at 27. When a federal court stays a damages claim during a state criminal trial, it cannot be presumed that the court will determine the merits of the suit later. Under *Heck v. Humphrey*, 512 U.S. 477 (1994), a litigant may not rely on § 1983 to file a suit that would undermine her conviction, the fact of her confinement, or the duration of her confinement. *Id.* at 486–87. This barrier would have almost certainly taken center stage in the briefing following the stay had the case not settled.

²⁰⁹ *Burks*, slip op. at 23–24 (quoting *Gerstein v. Pugh*, 420 U.S. 103, 108 n.9 (1975)).

²¹⁰ *Id.* at 23–26.

²¹¹ *Id.* at 26 ("Plaintiffs, though, were not denied a preliminary hearing, only threatened that they would not receive appointed counsel during the preliminary hearing.")

²¹² *Id.* (citing *Rothgery v. Gillespie County*, 554 U.S. 191, 194–95 (2008)).

²¹³ *Id.*

²¹⁴ Amended Class Action Complaint, *supra* note 201, at 23.

Supreme Court has held that the right to counsel “attach[es]” at the initial hearing in a criminal case,²¹⁵ thus entitling a defendant “to the presence of appointed counsel during any ‘critical stage’ of the postattachment proceedings,”²¹⁶ it has not yet decided whether the initial bail hearing itself is a “critical stage.”²¹⁷ The federal judge in *Burks* did not give an opinion as to the plaintiffs’ claim on that open question but nonetheless concluded that a hearing plagued by systemic, significant constitutional error was adequate for the purposes of *Younger* abstention.²¹⁸

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

When a federal judge *does* issue relief, by contrast, this can lead to injunctions or consent decrees that end systematically lawless, unconstitutional deprivation of poor Americans’ liberty.²¹⁹ This is not mere speculation. Federal district courts have rejected governments’ *Younger*-based arguments in class actions that have challenged the bail systems in San Francisco²²⁰ and Harris County, Texas.²²¹ And while both suits are ongoing, the U.S. District Court for the Southern District of Texas issued a preliminary injunction against the bail system in Harris County,²²² the third-largest jail system in the United States.²²³ Under the terms of that order, among other things, local officials in that county “are enjoined from detaining indigent misdemeanor defendants who are otherwise eligible for release but are unable because of their poverty to

²¹⁵ *Rothgery*, 554 U.S. at 213.

²¹⁶ *Id.* at 212.

²¹⁷ *See id.*

²¹⁸ *See Burks*, slip op. at 26.

²¹⁹ *See generally* OWEN M. FISS, *THE CIVIL RIGHTS INJUNCTION* (1978).

²²⁰ *Buffin v. City of San Francisco*, No. 15-cv-04959, slip op. at 3–8 (N.D. Cal. Feb. 1, 2016).

²²¹ *ODonnell v. Harris County*, 227 F. Supp. 3d 706, 723–37 (S.D. Tex. 2016), *aff’d in part, rev’d in part*, 882 F.3d 528 (5th Cir. 2018).

²²² *See ODonnell v. Harris County*, 251 F. Supp. 3d 1052, 1161–64 (S.D. Tex. 2017), *aff’d in part, rev’d in part*, 882 F.3d 528.

²²³ Jolie McCullough, *How Harris County’s Federal Bail Lawsuit Spreads Beyond Houston*, TEX. TRIB. (Oct. 2, 2017, 12:00 AM), <https://www.texastribune.org/2017/10/02/how-harris-countys-bail-lawsuit-spreads-beyond-houston/> [https://perma.cc/D6Y3-Y9Z2].

pay a secured money bail.”²²⁴ The Fifth Circuit recently affirmed the finding that the plaintiffs had sufficiently alleged that Harris County’s bail regime violated the Equal Protection Clause but simultaneously concluded that the injunction was overbroad.²²⁵ The Fifth Circuit instructed the district court to issue relief more tailored to the underlying constitutional violations.²²⁶

The Harris County injunction reverberated across the State of Texas, and across the nation. In the months following the suit, Dallas officials authorized a system of bail based exclusively on inmates’ risk rather than their wealth, and other locales across the state began exploring the same.²²⁷ Beyond Texas, other major cities eyed or implemented reforms in the months following the Harris County injunction. Faced with a pending federal lawsuit and community pressure, Cook County — home to Chicago — dramatically changed its jailing practices. In July 2017, three months after the injunction was issued in Harris County, Cook County’s Chief Judge issued a directive prohibiting local judges from setting bail at amounts that a defendant cannot afford to pay.²²⁸ By late December 2017, the jail population in Cook County had reached a record low.²²⁹ More recently, national and civil rights organizations have urged other cities, such as Atlanta, to reform their bailing practices, even in the absence of a formal lawsuit.²³⁰ A letter to Atlanta penned by

²²⁴ *ODonnell*, 251 F. Supp. 3d at 1161.

²²⁵ *ODonnell*, 882 F.3d at 535.

²²⁶ *Id.* at 546. The Fifth Circuit suggested that the district court consider adopting the following language: “Harris County is enjoined from imposing prescheduled bail amounts as a condition of release on arrestees who attest that they cannot afford such amounts without providing an adequate process for ensuring that there is individual consideration for each arrestee of whether another amount or condition provides sufficient sureties.” *Id.*

²²⁷ McCullough, *supra* note 223.

²²⁸ Richard A. Oppel Jr., *Defendants Can’t Be Jailed Solely Because of Inability to Post Bail, Judge Says*, N.Y. TIMES (July 17, 2017), <https://nyti.ms/2vwx86I> [<https://perma.cc/246V-7LUW>].

²²⁹ Bernie Tafoya, *Cook County Jail Population Sees a Record Low*, CBS CHI. (Dec. 22, 2017, 9:34 AM), <http://chicago.cbslocal.com/2017/12/22/cook-county-jail-population-record-low/> [<https://perma.cc/PBE5-R2VH>].

²³⁰ A number of other state and local governments have also sought to soften the nexus between bail and inmates’ economic status. In 1994, the District of Columbia changed its money-bail code such that it is now based on a person’s potential dangerousness and “serious risk that the person will flee.” D.C. CODE § 23-1322(b)(1) (2001). Later, the New Mexico Supreme Court ruled that “[n]either the New Mexico Constitution nor our rules of criminal procedure permit a judge to set high bail for the purpose of preventing a defendant’s pretrial release.” *State v. Brown*, 338 P.3d 1276, 1292 (N.M. 2014). Then in 2016, the State of New Jersey enacted bail reforms; under the New Jersey Constitution, “[p]retrial release may be denied to a person if the court finds that no amount of monetary bail, non-monetary conditions of pretrial release, or combination of monetary bail and non-monetary conditions would reasonably assure the person’s appearance in court when required, or protect the safety of any other person or the community, or prevent the person from obstructing or attempting to obstruct the criminal justice process.” N.J. CONST. art. 1, § 11. The State of Maryland adopted similar changes on February 17, 2017, in rules promulgated by the Maryland Court of Appeals. *ODonnell v. Harris County*, 251 F. Supp. 3d 1052, 1080–81 (S.D. Tex. 2017).

Civil Rights Corps and the Southern Center for Human Rights explicitly noted that previous suits against other municipalities, like Harris County, had been successful.²³¹ In February 2018, Atlanta ended money bail for nonviolent misdemeanor offenses by means of a unanimous vote by the Atlanta City Council.²³² The mayor of Atlanta cited the possibility of litigation as a reason for that change.²³³

B. Incentivized Incarceration

Among the other civil rights actions filed in recent years were two suits against government actors in the State of Louisiana. In the case of *Cain v. City of New Orleans*,²³⁴ litigants challenged the manner in which court fees imposed on convicted defendants incentivized findings of guilt because the fees were used to fund prosecutors, public defenders, and judges.²³⁵ They noted that, in the past, fees had been used to fund judges' expanded health care plans.²³⁶ The complaint alleges that "[t]he systemic financial conflicts of interest have not improved in the years since. The Court still uses the millions of dollars of revenues collected in this manner to fund its basic operations"²³⁷ The argument is predicated on *Ward v. Village of Monroeville*,²³⁸ in which the United States Supreme Court invalidated a conviction where a mayor, who also served as a judge, presided over cases in which convicted persons' fines funded the cities' operations.²³⁹ The *Ward* Court cited the mayor's "possible temptation" in light of his "executive responsibilities for village finances."²⁴⁰

²³¹ Letter from Alec Karakatsanis, Exec. Dir., Civil Rights Corps, and Sarah Geraghty, Managing Attorney, S. Ctr. for Human Rights, to Kasim Reed, Mayor, City of Atlanta (Nov. 10, 2017) (on file with the Harvard Law School Library) (noting that plaintiffs had "won federal class action relief in lawsuits against large jurisdictions like Harris County (Houston) and against municipal court money bail practices across the country, including in Alabama, Mississippi, Tennessee, Louisiana, Missouri, and elsewhere").

²³² Kathryn Tucker, *Atlanta City Council Votes to End Money Bail for Petty Crimes*, DAILY REP. ONLINE (Feb. 6, 2018, 1:22 PM), <https://www.law.com/dailyreportonline/sites/dailyreportonline/2018/02/06/atlanta-city-council-votes-to-end-money-bail-for-petty-crimes/> [https://perma.cc/N4B3-EV6N].

²³³ Rhonda Cook, *Atlanta Mayor Signs New Ordinance Changing Cash Bail System in a Nod to the Needy*, ATLANTA J.-CONST. (Feb. 6, 2018, 3:45 PM), <https://www.myajc.com/news/local/atlanta-council-oks-changes-cash-bail-system-nod-the-needy/SW5odABJAtWgBwpB4vtgBN/> [https://perma.cc/WC5K-T4KE].

²³⁴ 184 F. Supp. 3d 349 (E.D. La. 2016).

²³⁵ First Amended Class Action Complaint at 3–4, *Cain*, 184 F. Supp. 3d 349 (No. 15-cv-04479), ECF No. 7.

²³⁶ *Id.* at 24–25.

²³⁷ *Id.* at 25.

²³⁸ 409 U.S. 57 (1972); *see also* First Amended Class Action Complaint, *supra* note 235, at 41–42 (citing *Ward*, 409 U.S. at 60).

²³⁹ *See Ward*, 409 U.S. at 58–62.

²⁴⁰ *Id.* at 60 (quoting *Tumey v. Ohio*, 273 U.S. 510, 532 (1927)).

In *Cain*, governmental defendants argued that *Younger* abstention should block the suit, a contention that the district court rejected.²⁴¹ And in December 2017, that court granted partial summary judgment to the plaintiffs,²⁴² indicating that it would issue a declaratory judgment order that would make plain that the system used to fund judicial operations in New Orleans violated the Fourteenth Amendment's Due Process Clause.²⁴³ The court explained:

It is undisputed that [the state court] depends heavily on fines and fees revenue, that many criminal defendant[s] subject to these fines and fees are indigent, and that collection rates are only 40% to 50%. Based on these facts, it is clear the Judges' motive to maximize fines and fees revenue is strong enough reasonably to warrant fear of partisan influence on ability-to-pay determinations.²⁴⁴

A different fate, however, has met another suit challenging fees used to fund the criminal justice apparatus in the State of Louisiana. In *Bice v. Louisiana Public Defender Board*,²⁴⁵ plaintiffs alleged that their lawyers had an economic incentive to help incarcerate them.²⁴⁶ In that case, the Fifth Circuit Court of Appeals accepted the defendants' invitation to dismiss the suit on abstention grounds.²⁴⁷ The case helps further illustrate the limits of a body of abstention doctrine that circumscribes an exception for systemic or structural constitutional violations. The facts are as follows.

Under Louisiana law, the public defender board receives a significant portion of its funding from criminal defendants themselves.²⁴⁸ In particular, under Louisiana law, any time a defendant pleads guilty, pleads nolo contendere, or is convicted after a trial, the defendant is assessed a thirty-five dollar fee that goes to the fund that finances public defenders.²⁴⁹ The fee is not assessed if the defendant is found not guilty.²⁵⁰ And as the Fifth Circuit observed, without this fee, it is uncertain how the state would fund public defenders' salaries.²⁵¹

²⁴¹ *Cain v. City of New Orleans*, 186 F. Supp. 3d 536, 548–51 (E.D. La. 2016).

²⁴² *Cain v. City of New Orleans*, 281 F. Supp. 3d 624, 628 (E.D. La. 2017).

²⁴³ *See id.* at 659 (“[P]laintiffs are entitled summary judgment on Count Five to the extent they seek a declaration that the Judges’ institutional incentives create an impermissible conflict of interest when they determine, or are supposed to determine, plaintiffs’ ability to pay fines and fees.”).

²⁴⁴ *Id.* at 658.

²⁴⁵ 677 F.3d 712 (5th Cir. 2012).

²⁴⁶ *See id.* at 714–15.

²⁴⁷ *See id.* at 716–20.

²⁴⁸ *See id.* at 714.

²⁴⁹ *Id.* at 715.

²⁵⁰ *See id.*

²⁵¹ *See id.* at 718 (“That the Board thought it necessary to bring a lawsuit in 2010 compelling judges to assess the \$35 fee tends to show the fee’s importance to the Board’s operations.”).

Steve Bice is a poor person who was charged with public intoxication and a crime called “public inhabitation” in New Orleans; the State assigned him a public defender because he could not afford a lawyer.²⁵² Represented by a Tulane University Law School clinic appointed to him by the state court judge to litigate his constitutional claim, Bice filed a putative class action in federal court alleging that the manner in which public defender’s offices are funded creates skewed incentives for public defenders to, among other things, encourage poor defendants to accept guilty pleas.²⁵³

In Bice’s view, the system set up a conflict of interest that violates the Fourteenth and Sixth Amendment rights of all indigent defendants represented by public defenders. He sought two primary forms of relief. First, he sought a “declaratory judgment that collecting the statutory fee . . . violates the rights of Plaintiff Bice and all similarly situated criminal defendants represented by public defenders as conferred by the Sixth and Fourteenth Amendments of the United States Constitution and Article I Section 13 of the Louisiana Constitution.”²⁵⁴ Second, he sought to “[e]njoin the Louisiana Public Defender Board from accepting the statutory fee” at issue.²⁵⁵ He did not seek to enjoin the criminal proceedings or to prohibit the public defender service from representing him.

The public defender’s office filed a motion to dismiss the suit, arguing that *Younger* abstention barred federal courts from entertaining the contention that Louisiana law violated the Federal Constitution.²⁵⁶ Further, they contended that substantively, the fee did not constitute a conflict of interest under the Constitution and that they could continue to represent Bice and others in the putative class without constitutional trouble.²⁵⁷

The district court held a hearing, wherein it signaled it had concerns that “Big Brother Federal Government shouldn’t be the one sitting here at this point when [the case] is pending before the state judge.”²⁵⁸ Was not Bice “getting ahead of [himself],” the court asked, by filing in federal court first?²⁵⁹ The court noted that by seeking relief that would invite a federal court to “make an inquiry on a systemic basis on a statewide basis as to the constitutionality of [state law],” Bice was arguably exac-

²⁵² *Id.* at 714–15.

²⁵³ *Id.*

²⁵⁴ Complaint — Class Action at 9, *Bice*, 677 F.3d 712 (No. 11-cv-00477), ECF No. 1.

²⁵⁵ *Id.*

²⁵⁶ Louisiana Public Defender Board’s Rule 12(b) Motion to Dismiss at 1–2, *Bice*, 677 F.3d 712 (No. 11-cv-00477), ECF No. 16.

²⁵⁷ *See id.* at 2.

²⁵⁸ Transcript of Motion Hearing at 38, *Bice*, 677 F.3d 712 (No. 11-cv-00477), ECF No. 43.

²⁵⁹ *Id.*

erminating comity concerns by “taking away from the court of first impression” an opportunity to correct the problem first.²⁶⁰ At the conclusion of the hearing, the court accordingly dismissed the suit on *Younger* grounds from the bench without a written opinion.²⁶¹

The Fifth Circuit affirmed.²⁶² It found that halting the fee would also end or stall state court proceedings for Bice and others because state officials would have to scramble to resolve how to pay public defenders’ salaries in Louisiana in the absence of guilty plea fees and conviction fees.²⁶³ In the words of the court:

Bice’s proceedings would likely be halted until the Board determines a way to fill the funding gap that would be created by an injunction prohibiting the state from collecting the \$35 fee. The Board asserts unequivocally in its briefing that a ruling in favor of Bice would lead it to withdraw from Bice’s proceedings.²⁶⁴

Fees from defendants who plead guilty or are convicted are “important[t] to the Board’s operations,” the panel explained.²⁶⁵ Further, under state law, criminal defendants may raise constitutional defenses in municipal court, including due process challenges.²⁶⁶ Finally, in a footnote, the court rejected the notion that it should adopt or apply an exception to *Younger* for systemic harm, distinguishing the district court case of *M.D. v. Perry*.²⁶⁷ *M.D.* involved the foster care system and should be limited to those facts, the court concluded.²⁶⁸ In addition, *M.D.* involved a certified class action, not a putative one.²⁶⁹

Bice lays bare the limits of *Younger*’s current safety valves. While the Fifth Circuit acknowledged the importance of the availability of a state forum to raise claims, it looked solely to state jurisdictional law to answer that question, without regard for defects in the state judicial process.²⁷⁰ The notion that state courts could adequately address Bice’s constitutional concerns, simply because they had jurisdiction over such matters, depends on a rather restricted view of what it means to have an adequate forum to raise constitutional concerns. In cases where outside counsel is not appointed, the Fifth Circuit’s ruling depends on public defenders raising a defense that, on the ruling’s own terms, would

²⁶⁰ *Id.*

²⁶¹ *Id.* at 74.

²⁶² *Bice*, 677 F.3d at 720.

²⁶³ *See id.* at 718.

²⁶⁴ *Id.*

²⁶⁵ *Id.*

²⁶⁶ *Id.* at 719.

²⁶⁷ *Id.* at 720 n.8 (citing *M.D. v. Perry*, 799 F. Supp. 2d 712, 721–22 (S.D. Tex. 2011), *rev’d on other grounds*, 675 F.3d 832 (5th Cir. 2012)).

²⁶⁸ *Id.*

²⁶⁹ *Id.*

²⁷⁰ *See id.* at 718–19.

potentially cause their dockets and paychecks to dry up. Indeed, one of the most prominent efforts public defenders in Louisiana have made to improve indigent services was a writ of mandamus aimed at *increasing* fees assessed against persons convicted of a traffic offense.²⁷¹

C. *Post-Judgment Debtors' Prisons*

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

In American locales that include, but are not limited to, Ferguson, Missouri;²⁷² Jennings, Missouri;²⁷³ New Orleans, Louisiana;²⁷⁴ Rutherford County, Tennessee;²⁷⁵ Sherwood, Arkansas;²⁷⁶ Montgomery, Alabama;²⁷⁷ and Broward County, Florida,²⁷⁸ groups of poor Americans have filed suit alleging that they have faced detentions when they are unable to pay traffic tickets or other judgments and fees. These detentions are sometimes indefinite, with access to courts being sporadic or otherwise fundamentally compromised.²⁷⁹ Poor Americans who face these types of detentions maintain that they are sometimes told that the only way

²⁷¹ Twenty-Fourth Judicial Dist. Indigent Def. Bd. v. Molaison, 522 So. 2d 177, 181 (La. Ct. App. 1988). This is not to say that defendants in criminal proceedings never raise claims that challenge various funding structures, especially funding structures that render public defender's offices under-resourced. See, e.g., Phan v. State, 723 S.E.2d 876, 878 (Ga. 2012). Indigent defendants have also brought class actions in state court. See, e.g., Hurrell-Harring v. State, 930 N.E.2d 217, 219 (N.Y. 2010); Kuren v. Luzerne County, 146 A.3d 715, 718 (Pa. 2016). In one case, public defenders successfully moved to withdraw from nonfelony cases, citing a lack of resources. See Pub. Def., 11th Judicial Circuit v. State, 115 So. 3d 261, 264–66 (Fla. 2013). One of the most successful challenges to a public defender's funding regime, however, came in federal court. See Wilbur v. City of Mount Vernon, 989 F. Supp. 2d 1122, 1124 (W.D. Wash. 2013) ("Plaintiffs have shown, by a preponderance of the evidence, that indigent criminal defendants in Mount Vernon and Burlington are systematically deprived of the assistance of counsel at critical stages of the prosecution and that municipal policymakers have made deliberate choices regarding the funding, contracting, and monitoring of the public defense system that directly and predictably caused the deprivation.").

²⁷² Fant v. City of Ferguson, 107 F. Supp. 3d 1016 (E.D. Mo. 2015).

²⁷³ Jenkins v. City of Jennings, No. 15-cv-00252 (E.D. Mo. Feb. 13, 2017).

²⁷⁴ Cain v. City of New Orleans, 184 F. Supp. 3d 379 (E.D. La. 2016).

²⁷⁵ Rodriguez v. Providence Cmty. Corr., Inc., 155 F. Supp. 3d 758 (M.D. Tenn. 2015).

²⁷⁶ Dade v. City of Sherwood, No. 16-cv-602, 2017 WL 2486078 (E.D. Ark. June 8, 2017).

²⁷⁷ Mitchell v. City of Montgomery, No. 14-cv-186, 2014 WL 11099432 (M.D. Ala. Nov. 17, 2014).

²⁷⁸ Pompey v. Broward County, 95 F.3d 1543 (11th Cir. 1996).

²⁷⁹ See, e.g., Class Action Complaint at 1, Fant v. City of Ferguson, 107 F. Supp. 3d 1016 (E.D. Mo. 2015) (No. 15-cv-00253), ECF No. 1 ("Although the Plaintiffs pleaded that they were unable to pay due to their poverty, each was held in jail indefinitely and none was afforded a lawyer or the inquiry into their ability to pay that the United States Constitution requires.").

to achieve timely release is by making a large monetary payment or by performing work for the government.²⁸⁰ Sometimes indigent persons do not appear in court,²⁸¹ quite likely because they fear that appearing in court will result in arrest for failing to pay. This decision results in fresh arrest warrants and new fines.²⁸²

Of these locales, Rutherford County, Tennessee, deserves extended discussion.²⁸³ This is because Rutherford County's carceral apparatus involved more than alleged detentions for failure to pay fines and fees. Its system combined that feature with financial incentives to incarcerate poor Americans, to keep them on probation for as long as possible, and to saddle them with new fines or fees.

Cindy Rodriguez and other impoverished people convicted of misdemeanors in Rutherford County contended in a detailed seventy-four-page complaint that their local probation system was recently plagued by "systemic illegality" through constitutional violations and corruption.²⁸⁴ They argued that they were victimized by "an extortion scheme"²⁸⁵ in which the county contracted with a corporation to supervise misdemeanants who owed "court costs"²⁸⁶ and that the corporation then extorted money from these impoverished probationers by threatening them with new jail terms and fees.²⁸⁷ The unfortunate language that probation officers apparently often used when making these threats was that, absent a payment, they would "violate" the probationer by recommending arrest for failing to comply with terms of probation.²⁸⁸

Under the contract, the government did not pay that corporation.²⁸⁹ Instead, the company's revenue came entirely from the people supervised by means of a "user-funded model"²⁹⁰ wherein the corporation threatened arrest or revocation of probation absent the payment of fees, surcharges, and court costs.²⁹¹ Fees included, among other things,

²⁸⁰ See, e.g., Complaint at 1–2, *Mitchell*, 2014 WL 11099432 (No. 14-cv-186), ECF No. 1.

²⁸¹ See, e.g., FERGUSON REPORT, *supra* note 9, at 42; see also Torie Atkinson, Note, *A Fine Scheme: How Municipal Fines Become Crushing Debt in the Shadow of the New Debtors' Prisons*, 51 HARV. C.R.-C.L. L. REV. 189, 203–04 (2016).

²⁸² See, e.g., FERGUSON REPORT, *supra* note 9, at 42–43.

²⁸³ See *Rodriguez v. Providence Cmty. Corr., Inc.*, 155 F. Supp. 3d 758 (M.D. Tenn. 2015).

²⁸⁴ Class Action Complaint at 3, *Rodriguez*, 155 F. Supp. 3d 758 (No. 15-cv-01048), ECF No. 1; see also *id.* at 1.

²⁸⁵ *Id.* at 1.

²⁸⁶ *Id.* at 3.

²⁸⁷ *Id.* at 1–2, 15.

²⁸⁸ See *id.* at 26 ("On one occasion in which Ms. Rodriguez was not able to bring any money, a [Providence Community Corrections, Inc.] supervisor got mad at her for not bringing any money and told Ms. Rodriguez: 'one more time of this bullshit, and I'm gonna violate you. You'll spend 7 days in jail.'").

²⁸⁹ *Id.* at 17.

²⁹⁰ *Id.*

²⁹¹ *Id.* at 1–3, 15.

twenty-dollar charges for drug testing; the probation officers had the power to order such drug testing indiscriminately and frequently.²⁹²

Despite their financial stake in this model, probation officers had a substantial say in probationers' cases. They could initiate a probation revocation proceeding for failure to make a payment, act as witnesses at that proceeding, and make recommendations, including incarceration or further probation, to a judge.²⁹³ Judges generally followed these recommendations.²⁹⁴ Additionally, because probation officers had the discretion to impose new fees,²⁹⁵ and because the officers also had the discretion to use probationers' payments to fund their corporate employer before funding the court,²⁹⁶ many residents remained under supervision even after they had paid more money than they originally owed.²⁹⁷

Arrest warrants show that, once incarcerated for violations, probationers in the County were not released absent a "secured money bond," generally in the range of \$10,000.²⁹⁸ These bonds were issued without regard to the inmate's ability to pay; there were no inquiries into whether the inmates were indigent.²⁹⁹ Whether and when a person was released when failing to pay these money bonds was, according to the probationers, arbitrary.³⁰⁰

Impoverished probationers in Rutherford County filed federal suit seeking a preliminary injunction,³⁰¹ and the court conducted a hearing to determine whether to issue the injunction.³⁰² The evidence included declarations from impoverished people on probation who described their experiences in what they and the court guards purportedly referred to as "kangaroo court."³⁰³ These experiences included facing *weeks* in jail without seeing a judge for failure to pay³⁰⁴ and threats of jail when they were unable to pay.³⁰⁵

Among the other witnesses was Judge Benjamin McFarlin, Jr., an elected state judge in Rutherford County with an exclusively criminal docket.³⁰⁶ He testified that if probationers chose to contest a violation, and if they could not afford to pay for their release pending a violation

²⁹² *Id.* at 18.

²⁹³ *Id.* at 68.

²⁹⁴ *Id.*

²⁹⁵ *Id.* at 8, 15.

²⁹⁶ *Id.* at 10.

²⁹⁷ *See, e.g., id.* at 44.

²⁹⁸ *See, e.g., id.* at 35.

²⁹⁹ *See, e.g., id.*

³⁰⁰ *See id.* at 19.

³⁰¹ *Id.* at 1, 3.

³⁰² Transcript of Proceedings, *Rodriguez*, 155 F. Supp. 3d 758 (No. 15-cv-01048), ECF No. 70.

³⁰³ *Id.* at 14.

³⁰⁴ *See, e.g., id.* at 13–14.

³⁰⁵ *See, e.g., id.* at 17.

³⁰⁶ *Id.* at 62–64.

hearing, they could spend an additional thirty to sixty days in jail awaiting a court date.³⁰⁷ According to the judge, repeated violations for failure to pay could, after a violation hearing, result in sixty to ninety days in jail for probationers who did not “get the message” after an initial, shorter period in jail.³⁰⁸

Judge McFarlin’s testimony produced the following memorable exchange between him and the federal district court judge presiding over the case, Chief Judge Kevin H. Sharp of the Middle District of Tennessee.³⁰⁹ Chief Judge Sharp asked Judge McFarlin whether there was a way to “fix” the cycle of impoverished people violating probation due to their inability to pay fines or other costs associated with conditions of probation:

THE COURT: Okay. There’s got to be a way to fix that. I mean, that may be above your pay grade but —

THE WITNESS: Money makes the world go round —

THE COURT: It does, but we can’t base our justice system on, right, whether money makes somebody else’s world go round because we’ve got real people.³¹⁰

On December 17, 2015, impoverished people on probation received an early Christmas gift from Judge Sharp, who preliminarily enjoined the corporation and government from jailing any probationer if her only violation was nonpayment of fees, fines, or court costs.³¹¹ The court rejected the government’s *Younger* abstention argument, reasoning that, as in *Gerstein*, probationers do not receive a timely hearing upon being arrested; even if these detentions are challenged later at trial, the constitutional damage has already been done.³¹² And while the defendants initially appealed,³¹³ the case ultimately resulted in a class-wide settlement that ended private probation in the County and paid \$14.3 million to the victims.³¹⁴ The Rutherford County case, then, shows what is possible when victims and attorneys can navigate the byzantine set of

³⁰⁷ *Id.* at 87. Probationers whose only violation was failure to pay would not be held pending the violation hearing but instead would be released on their own recognizance. *Id.* at 81.

³⁰⁸ *Id.* at 78–79.

³⁰⁹ *Id.* at 1.

³¹⁰ *Id.* at 101.

³¹¹ *Rodriguez v. Providence Cmty. Corr., Inc.*, No. 15-cv-01048, slip op. at 1–2 (M.D. Tenn. Dec. 17, 2015).

³¹² *See Rodriguez*, 155 F. Supp. 3d at 765–66.

³¹³ *See* Brief of Appellant Rutherford County, Tennessee, *Rodriguez v. Providence Cmty. Corr., Inc.*, No. 16-5058 (6th Cir. Mar. 15, 2016), 2016 WL 1084870.

³¹⁴ *See* Adam Tamburin, *Probation Company, Rutherford County Paying \$14.3 Million to Settle Extortion Lawsuit*, THE TENNESSEAN (Sept. 20, 2017, 5:46 PM), <http://www.tennessean.com/story/news/local/rutherford/2017/09/19/probation-company-rutherford-county-paying-14-3-million-settle-extortion-lawsuit/682379001/> [<https://perma.cc/BUD3-V3LF>]; *see also* *Abusive Private Probation*, EQUAL JUST. UNDER L., <http://equaljusticeunderlaw.org/wp/media-center/abusive-private-probation-press/> [<https://perma.cc/R2K8-7F5J>].

procedural obstacles that lie in the way of criminal justice reform by means of litigation.

Not all individuals who have experienced debtors' prisons have been able to overcome barriers like *Younger* abstention, however. In September 2016, poor residents of Sherwood, Arkansas, filed suit against the town, alleging that government officials there routinely arrest and incarcerate individuals "who have been sentenced to pay court costs, fines, and fees without making any inquiry into whether they are able to pay and/or notwithstanding their inability to pay."³¹⁵ A magistrate judge recommended dismissing the suit on *Younger* grounds.³¹⁶ The district court accepted this recommendation in a terse order.³¹⁷

Further, in at least one case that predates the recent spate of cases challenging post-judgment debtors' prisons, the Eleventh Circuit accepted the government's *Younger* argument. In *Pompey v. Broward County*,³¹⁸ that court found that *Younger* abstention prevented a challenge to a post-judgment proceeding in which state courts determined whether to incarcerate men for failure to pay child support.³¹⁹ In reaching that conclusion, the Eleventh Circuit determined that attorneyless proceedings with no inquiries into indigence were adequate forums to raise constitutional objections.³²⁰ In future instances in which courts find that *Younger* attaches in the post-judgment debtors' prison context, then, even cases with factual settings highly similar to Rutherford County's are vulnerable to similar rulings in the absence of an exception for systemic or structural constitutional violations. This is especially true in the Eleventh Circuit, where the *Pompey* ruling remains binding.

* * *

During the federal court proceedings assessing the constitutionality of Louisiana's method of funding public defenders through convictions, the transcript of the district court hearing almost certainly misquotes the district court as saying: "[B]ecause of federalism, because of commodity, you don't want Big Brother Federal Court to come in and interfere with state court proceedings."³²¹ The court likely used the word "comity," not "commodity." But what happens when state courts *do* treat human beings as commodities in their state judicial apparatus rather

³¹⁵ First Amended Complaint — Class Action at 3, *Dade v. City of Sherwood*, No. 16-cv-00602 (E.D. Ark. Nov. 14, 2017), ECF No. 13.

³¹⁶ Proposed Findings and Recommendations at 5–8, *Dade*, No. 16-cv-00602, 2017 WL 2486087, at *2–4.

³¹⁷ See *Dade*, 2017 WL 2486078, at *1–2.

³¹⁸ 95 F.3d 1543 (11th Cir. 1996).

³¹⁹ *Id.* at 1544, 1546–51.

³²⁰ See *id.* at 1551.

³²¹ Transcript of Motion Hearing, *supra* note 258, at 16.

than as accused citizens in a democracy? What happens when a municipality's carceral apparatus is constructed as it is in part because "money makes the world go round"?³²² Part III makes the case that: (a) these types of harms are irreparable, and (b) allowing systemically and structurally unsound proceedings to persist does not further federalism in a principled or justifiable way.

III. OUR FEDERALISM IN THE TIME OF OUR FERGUSON

The events in Scott County, Mississippi, and Rutherford County, Tennessee, call to mind one of Walter Lee Younger's plaintive insights in the legendary play *A Raisin in the Sun*. "Mama," Walter Lee tells his mother Lena, "you know it's all divided up. Life is. Sure enough. Between the takers and the 'tooken.' . . . I've figured it out finally. . . . Some of us always getting 'tooken.'"³²³ Indeed, the state court judge's defense in the Rutherford County case — wherein he explained that "[m]oney makes the world go round"³²⁴ — calls to mind Lena Younger's equally poignant observation earlier in the play: "Once upon a time freedom used to be life — now it's money. I guess the world really do change . . ."³²⁵

As illustrated in Part II, litigants seeking to stop the criminalization of poverty often must navigate the barrier of *Younger* abstention.³²⁶ And because litigants continue to file similar cases across the nation, there is a nontrivial risk that abstention will end future suits as well. What is more, other suits may never be filed because of troubling authority in the Fifth³²⁷ and Eleventh³²⁸ Circuits. This Part aims to develop two related arguments. First, when *Younger* prevents Americans from challenging systemic or structural constitutional violations, the harm that follows is irreparable, serious, and immediate. Second, federalism interests asserted by the state are no match for the irreparable harm that would persist in the absence of independent judicial intervention. If "Our Federalism" is stopping us from fixing our Ferguson, it is time to revisit our federalism.

A. Irreparable Harm

One of the most illuminating articulations of irreparable harm comes from Laycock's oft-cited article *The Death of the Irreparable Injury*

³²² See *supra* note 310 and accompanying text.

³²³ LORRAINE HANSBERRY, *A RAISIN IN THE SUN* 141 (1959).

³²⁴ Transcript of Proceedings, *supra* note 302, at 101.

³²⁵ HANSBERRY, *supra* note 323, at 74 (ellipsis in original).

³²⁶ *Supra* Part II, pp. 2305–22.

³²⁷ See *Bice v. La. Pub. Def. Bd.*, 677 F.3d 712, 716–20 (5th Cir. 2012).

³²⁸ See *Pompey v. Broward County*, 95 F.3d 1543, 1546–51 (11th Cir. 1996).

Rule.³²⁹ According to Laycock, “what makes an injury irreparable is that no other remedy can repair it.”³³⁰ Accordingly, one’s understanding of irreparability is as broad or as narrow as one’s understanding of whether another remedy is adequate. This conception helps explain why irreplaceable losses and intangible harms — such as constitutional, procedural, and dignitary harms — are generally presumed to be irreparable. Compared to an injunction, a traditional monetary award cannot fully remedy a violation because money is designed to compensate or (perhaps) deter harm. It is not designed to prevent harm.

The doctrine of *Younger* abstention attempts to mediate this relationship between irreparability and the existence of an adequate remedy in the context of states’ criminal justice regimes. Beginning with *Ex parte Young*, the Court repeatedly affirmed that federal courts could intervene in state prosecutions where serious irreparable harm would otherwise result.³³¹ In *Younger*, it became particularly clear that this means, at least in part, that constitutional claims generally cannot be brought when an ongoing state criminal trial provides an immediate, adequate forum to end constitutional harm.³³² A state’s criminal justice apparatus is a particularly sensitive sphere that goes to the heart of a state’s ability to govern itself. And given that state criminal proceedings are capable of repairing most unconstitutional state prosecutions, deferring to that process generally provides a means of ending unconstitutional harm while respecting a state’s ability to manage its own police powers.

Exceptions to *Younger* are consistent with this conceptual framework. Sometimes a victim must have the option of appealing to a federal court, *even* in the criminal context, because the state system is sufficiently broken that another forum must be available to provide assurance that irreparable harm will discontinue. For example, the chief reason that plaintiffs have access to federal court when a state forum is biased is because a biased forum is not an adequate means of ending unconstitutional harms.³³³ Similarly, federal courts are open when the state criminal system provides no *timely* means to abate immediate harm because, in those circumstances, the state forum is similarly inadequate.³³⁴ Subjecting a plaintiff to a criminal justice system plagued by bad faith raises similar concerns. When core actors in the criminal justice system — such as prosecutors — are wielding the power of the state for illegitimate reasons, general deference to states to stop unconstitutional harm is an untenable proposition.³³⁵

³²⁹ Laycock, *supra* note 90.

³³⁰ *Id.* at 694.

³³¹ See *Ex parte Young*, 209 U.S. 123, 167–68 (1908).

³³² See *Younger v. Harris*, 401 U.S. 37, 43–44, 53–54 (1971).

³³³ See, e.g., *Gibson v. Berryhill*, 411 U.S. 564, 577 (1973); see also *supra* section I.C.2, pp. 2300–01.

³³⁴ See *supra* note 137 and accompanying text.

³³⁵ See *supra* section I.C.1, pp. 2297–300.

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

I. Irreparable Procedural Harm. — When an adversarial process denies a systemic or structural constitutional right, that denial is, in and of itself, irreparable harm. A systemic violation, as defined here, is one that happens as a matter of pattern, practice, policy, or custom.³³⁶ A structural violation, as defined by case law, is one that strikes at the heart of a proceeding's reliability, such that the resultant harm is both presumed and immeasurable.³³⁷ On the structural front, it *is* irreparably harmful to perpetuate a system that routinely denies persons lawyers at a critical stage or routinely gives financial incentives to government actors who are central in the adversarial process. These types of structural procedural constitutional rights are both intangible and difficult to quantify. Procedural constitutional violations are, and long have been, considered a prototypical example of irreparable harm.³³⁸ When violations are structural, such that they are presumed to infect the defendant's entire process, the harm surely heightens.

Systemic constitutional violations also (a) are difficult to measure and (b) inspire little trust that the state system could adequately resolve the issues. Insights from scholarship on procedural justice and legal cynicism help elucidate some of the ways in which it is irreparably harmful to subject a people to systemically unsound criminal procedures. It is well documented that when a person perceives that a process is unfair, that perception weakens confidence in the propriety of the outcome³³⁹ as well as the person's sense that the process is worthy of respect.³⁴⁰ Such findings have both deontological and consequentialist dimensions. It is intrinsically important that people perceive that they are being heard when the government deprives them of liberty or property. As Justice Sotomayor has explained, an unfair or abusive police

³³⁶ See *infra* pp. 2343–45.

³³⁷ See *infra* pp. 2339–40.

³³⁸ See Laycock, *supra* note 90, at 707–08.

³³⁹ See Tom R. Tyler, *Procedural Justice, Legitimacy, and the Effective Rule of Law*, 30 CRIME & JUST. 283, 350 (2003).

³⁴⁰ TOM R. TYLER & YUEN J. HUO, TRUST IN THE LAW 7 (2002).

state sends the message “that you are not a citizen of a democracy but the subject of a carceral state, just waiting to be cataloged.”³⁴¹ Professor Monica Bell has persuasively offered an amendment to this thesis that has particular force in the context of systemic harm, arguing that when *groups* perceive the state’s police power as routinely abusive, this encourages a sense of “legal cynicism” in which people feel entirely stateless and outside of the law.³⁴² Second-class citizenship and, worse, a sense of statelessness are both intrinsically troubling.³⁴³

Beyond that, there are downstream consequences when people perceive governmental power to be illegitimate. As Professors Jason Sunshine and Tom Tyler have demonstrated, perceptions of both benevolent motives and fairness foster compliance with future governmental directives.³⁴⁴ There is also evidence that an overly intrusive, arbitrary police state renders citizens less likely to vote or otherwise participate in civic life.³⁴⁵ A fundamentally broken criminal process is itself irreparable harm.

To be sure, whether criminal tribunals could ever be equipped to root out systemic harm is the subject of academic debate. One view expresses skepticism that criminal tribunals’ individualized nature and limited remedies³⁴⁶ could eradicate systemic constitutional violations.³⁴⁷ Professor Andrew Crespo has recently challenged that conventional account, arguing that improving criminal courts’ knowledge about systemic constitutional violations (“systemic facts”) can help open the door to more reforms that render courts better equipped to take on systemic harm.³⁴⁸ The outcome of this debate presents no significant challenge

³⁴¹ Utah v. Strieff, 136 S. Ct. 2056, 2071 (2016) (Sotomayor, J., dissenting). See generally CHARLES R. EPP ET AL., PULLED OVER: HOW POLICE STOPS DEFINE RACE AND CITIZENSHIP (2014) (documenting racially inflected “[i]nvestigatory stops,” *id.* at xv, and arguing that they undermine black Americans’ sense of citizenship).

³⁴² Monica C. Bell, Essay, *Police Reform and the Dismantling of Legal Estrangement*, 126 YALE L.J. 2054, 2066 (2017) (citing Robert J. Sampson & Dawn Jeglum Bartusch, *Legal Cynicism and (Subcultural?) Tolerance of Deviance: The Neighborhood Context of Racial Differences*, 32 LAW & SOC’Y REV. 777, 778 (1998)); see *id.* at 2066–67.

³⁴³ *Id.* at 2057.

³⁴⁴ Jason Sunshine & Tom Tyler, *The Role of Procedural Justice and Legitimacy in Shaping Public Support for Policing*, 37 LAW & SOC’Y REV. 513, 519 (2003); see also TYLER & HUO, *supra* note 340, at 7 (“There is considerable evidence that when people regard the particular agents of the legal system whom they personally encounter as acting in a way they perceive to be fair and guided by motives that they infer to be trustworthy, they are more willing to defer to their directives . . .”).

³⁴⁵ AMY E. LERMAN & VESLA M. WEAVER, *ARRESTING CITIZENSHIP* 7–13 (2014).

³⁴⁶ See Barry Friedman & Maria Ponomarenko, *Democratic Policing*, 90 N.Y.U. L. REV. 1827, 1832 (2015) (observing that courts find violations by police “mostly in the context of suppression motions”).

³⁴⁷ Tracey L. Meares, *Programming Errors: Understanding the Constitutionality of Stop-and-Frisk as a Program, Not an Incident*, 82 U. CHI. L. REV. 159, 164 (2015) (contending that individualized inquiries are “unsuitable for assessing the nature of violations” that are “carried out systematically”).

³⁴⁸ Andrew Manuel Crespo, *Systemic Facts: Toward Institutional Awareness in Criminal Courts*, 129 HARV. L. REV. 2049, 2050 (2016).

to my argument, however. Crespo's central claim is not that criminal trials *do* provide a reliable site to resolve irreparable harm, but that they can be so transformed.³⁴⁹ Indeed, he concedes that "improving criminal courts' capacity for institutional awareness will not alone transform them into fully competent systemic actors."³⁵⁰ Thus, even under his account, improving criminal courts' institutional knowledge *and* the remedial tool kit available to them is a necessary prerequisite to more systemically effective criminal courts.

2. *Irreparable Substantive Harm.* — When the state criminalizes poverty in the ways described in this Article, the irreparable harm also extends beyond the procedural realm. A structurally or systemically broken process cannot be trusted to correct other, more substantive constitutional harms, including indefinite deprivations of physical liberty. Like procedural harm, the deprivation of physical liberty is a rather axiomatic example of harm that is intangible and immeasurable. The logic of *Younger* is rooted in a compromise. Given the centrality of criminal justice to states' autonomy and sovereignty, "Our Federalism" defers to states to root out such harm when there is an ongoing criminal proceeding. The traditional criminal justice apparatus can end ongoing constitutional harm. This compromise falls apart when the state criminal justice system is unwilling to end the harm. When the state's process is characterized by systemic or structural violations, harms such as indefinite detention may well go unabated without a means of correction beyond equitable relief in another forum.

By way of a concrete example, recall the case of Cindy Rodriguez in Rutherford County, Tennessee.³⁵¹ She and others similarly situated lived in constant fear that if they missed a payment for arbitrary drug tests, a "probation officer" with the backing of state authority would command their arrest, determine when they got court hearings, and recommend (and thereby all but secure) their detention.³⁵² But the probation officers had a financial incentive to extract as much money from people like Ms. Rodriguez as possible.³⁵³ Should federal courts remain supine in the face of such facts, trusting that the state criminal system would end the perpetual threat of detention Ms. Rodriguez lived under? Should federal courts trust that she can or should raise her complaint to the very officials whose economic livelihood was tied to how much money they could extract from her? No.

The same is true in the case of Octavious Burks and Joshua Bassett in Scott County, Mississippi, wherein they alleged that they and others

³⁴⁹ See *id.*

³⁵⁰ *Id.* at 2053.

³⁵¹ See *supra* pp. 2318–20.

³⁵² See Class Action Complaint, *supra* note 284, at 1–5, 10–12.

³⁵³ See *id.* at 17–18.

like them were routinely denied lawyers and indigency determinations during bail hearings.³⁵⁴ If the right to a lawyer at a critical stage means anything, it cannot and should not be the law that federal courts presume that pro se defendants are readily equipped to argue their way out of unlawful detentions during lawyerless hearings. Languishing in jail without basic liberty is an intangible and immeasurable harm. Further, these detentions lead to other “downstream” harms such as “induc[ing] innocent defendants to plead guilty in order to exit jail, potentially creating widespread error in case adjudication.”³⁵⁵

B. Federalism(s)

The question that remains is whether the failure to stop this irreparable harm is justified on federalism grounds. As noted, this is an area of law that has long been marked by a compromise: given the importance of criminal justice to state governance, federal courts have relied on state criminal trials to end irreparable harm in this context. After all, federalism is or should be present in any discussion of criminal justice reform. While *Younger* emphasizes the importance of federal courts’ correcting irreparable harm when the state systems are inadequate, those are not the most memorable or cited passages. *Younger* is remembered as an ode to federalism: “It should never be forgotten that this slogan, ‘Our Federalism,’ born in the early struggling days of our Union of States, occupies a highly important place in our Nation’s history and its future.”³⁵⁶

In the decades after *Younger*, constitutional theorists have deepened our collective understanding of federalism’s dimensions. In addition to vigorously debating the proper role of courts in enforcing federalism,³⁵⁷

³⁵⁴ See *supra* pp. 2309–10.

³⁵⁵ Paul Heaton, Sandra Mayson & Megan Stevenson, *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 STAN. L. REV. 711, 711 (2017).

³⁵⁶ *Younger v. Harris*, 401 U.S. 37, 44–45 (1971).

³⁵⁷ Compare *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 550–52 (1985) (“State sovereign interests . . . are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power.” *Id.* at 552.), JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS 175–83 (1980) (describing the protection of state interests in the constitutional design and arguing that “[t]he federal judiciary should not decide constitutional questions respecting the ultimate power of the national government vis-à-vis the states,” *id.* at 175), and Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215, 215 (2000) (arguing that the partisan political system “has protected federalism and . . . renders the current Supreme Court’s aggressive foray into federalism as unnecessary as it is misguided”), with Saikrishna B. Prakash & John C. Yoo, *The Origins of Judicial Review*, 70 U. CHI. L. REV. 887, 890–92 (2003) (defending judicial review of federal statutes as constitutional), and Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 559 (1954) (describing how, in the drafting of the Constitution, “reliance on the courts was substituted . . . for the earlier proposal to give Congress a veto of state enactments deemed to trespass on the national domain”).

commentators have offered useful theoretical frameworks, taxonomies, and normative justifications for the role of federalism in American society.³⁵⁸ Do contemporary notions of federalism justify relying on state processes plagued by structural and systemic constitutional errors to correct their own errors? Navigating those theories, in my view, demonstrates that the answer is no.

I. Uncooperative Federalism. — In our federal system, state and local officials often work with federal officials to carry out national goals on issues ranging from health care to immigration. This model has been described as “cooperative federalism”³⁵⁹ and “cooperative localism.”³⁶⁰ Professor Robert Schapiro has explained that since at least the New Deal, the theory of cooperative federalism has “acknowledge[d] and endorse[d] the close relationships between the state and national governments in a variety of areas. . . . Cooperative federalism seeks to legitimate in theory the state-federal partnerships that in fact pervade governmental operations.”³⁶¹ About nine years ago, Professor Jessica Bulman-Pozen and now-Dean Heather Gerken made the case for “uncooperative federalism” as well.³⁶² That is, just as state and local governments can cooperate with federal officials, the corollary is that state

³⁵⁸ See MALCOLM M. FEELEY & EDWARD RUBIN, *FEDERALISM: POLITICAL IDENTITY AND TRAGIC COMPROMISE* (2008) (advancing a comprehensive theory of federalism and “analyz[ing] American constitutional doctrine regarding federalism,” *id.* at 3); ROBERT A. SCHAPIRO, *POLYPHONIC FEDERALISM* (2009) (seeking to “provide an account of contemporary federalism that accords with its real power . . . [and] with its organizational ingenuity rather than its nostalgia for lost community,” *id.* at 7); Robert B. Ahdieh, *From Federalism to Intersystemic Governance: The Changing Nature of Modern Jurisdiction*, 57 EMORY L.J. 1, 1–4 (2007) (outlining various approaches to understanding federalism); Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1466 (1987) (arguing that state sovereign immunity is “wholly antithetical to the Constitution’s organizing principle of popular sovereignty”); Heather K. Gerken, *Our Federalism(s)*, 53 WM. & MARY L. REV. 1549, 1550–52 (2012) (offering a framework for understanding different facets of federalism); Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1, 25–26 (1988) (arguing that the Guarantee Clause “forbids the federal government from interfering with state governments in a way that would destroy their republican character,” *id.* at 25); Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. REV. 903, 931–35 (1994) (critiquing a version of federalism that conflated decentralization with state sovereignty); Ernest A. Young, *The Rehnquist Court’s Two Federalisms*, 83 TEX. L. REV. 1, 13–18 (2004) (explaining three dimensions of federalism doctrine).

³⁵⁹ See, e.g., MORTON GRODZINS, *THE AMERICAN SYSTEM: A NEW VIEW OF GOVERNMENT IN THE UNITED STATES* 41 (Daniel J. Elazar ed., 1966); John Kincaid, *The Competitive Challenge to Cooperative Federalism: A Theory of Federal Democracy*, in *COMPETITION AMONG STATES AND LOCAL GOVERNMENTS* 87, 87 (Daphne A. Kenyon & John Kincaid eds., 1991); Susan Rose-Ackerman, *Cooperative Federalism and Co-optation*, 92 YALE L.J. 1344, 1344 (1983).

³⁶⁰ Nestor M. Davidson, *Cooperative Localism: Federal-Local Collaboration in an Era of State Sovereignty*, 93 VA. L. REV. 959, 960 (2007).

³⁶¹ SCHAPIRO, *supra* note 358, at 90.

³⁶² Jessica Bulman-Pozen & Heather K. Gerken, Essay, *Uncooperative Federalism*, 118 YALE L.J. 1256, 1271 (2009).

and local governments can decline to cooperate or resist.³⁶³ This offers room for what Gerken later called the “loyal opposition” to help govern.³⁶⁴ “[W]hile proponents of state resistance generally insist that autonomy is necessary for states to challenge the federal government, it may be that forcing states into the role of federal servants ultimately does more to foster state-centered dissent.”³⁶⁵ This dissent can range “from restrained disagreement to fighting words.”³⁶⁶

One could conceivably cast *Younger* as an opinion in the tradition of cooperative federalism. Typically, this concept is associated with state and local administrative and legislative officials helping implement federal statutory programs.³⁶⁷ Still, *Younger* abstention does give state courts an initial role in implementing federal constitutional norms, at least temporarily locking out federal courts. Under the dominant doctrinal model, the United States Supreme Court offers the authoritative word on matters of constitutional interpretation.³⁶⁸ But state courts and inferior federal courts take front stage in implementing these norms, often in dialogue with one another.³⁶⁹ Without a general presumption against enjoining state prosecutions, one might imagine that state courts could often get locked out of this shared role. *Younger* avoids that outcome.

If we can think of *Younger* as facilitating cooperative federalism, can we think of state regimes documented in this Article — debtors’ prisons, denial of counsel, and judicial-financial interest — as justifiable uncooperative resistance? To ask the question is almost to answer it. *Younger* may well promote cooperative federalism. And uncooperative

³⁶³ See *id.* at 1258–59.

³⁶⁴ Heather K. Gerken, *The Loyal Opposition*, 123 YALE L.J. 1958, 1978 (2014) (using the term “loyal opposition” as “one that captures the importance of building loyalty by making space for opposition and showing loyalty to the opposition” in relations between national and state actors, *id.* at 1964).

³⁶⁵ Bulman-Pozen & Gerken, *supra* note 362, at 1259.

³⁶⁶ *Id.* at 1271.

³⁶⁷ See *id.* at 1258 (describing cooperative federalism scholarship as a “vision[] of federal-state relations . . . in which states . . . carry out federal programs”).

³⁶⁸ See *Cooper v. Aaron*, 358 U.S. 1, 4, 17–20 (1958). For a scholarly defense of this view, see Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359 (1997). But see LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* 5–8 (2004) (providing a historical defense of the view that politically accountable bodies should engage in constitutional interpretation); MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* 33–52 (1999) (advocating for a robust role for elected officials in defining constitutional norms).

³⁶⁹ See SCHAPIRO, *supra* note 358, at 121–50; Fred O. Smith, Jr., *Undemocratic Restraint*, 70 VAND. L. REV. 845, 884–85 (2017) (describing how the federal courts doctrine of *Pullman* abstention facilitates such dialogue). See generally Shirin Sinnar, *Procedural Experimentation, National Security, and the Courts* (March 1, 2017) (unpublished manuscript) (on file with the Harvard Law School Library) (outlining the role federal trial courts play in shaping procedural mechanisms to facilitate the special concerns that arise in suits that implicate national security interests).

federalism may well have normatively desirable dimensions. Nonetheless, presumably few would defend the notion that state *courts* can resist the United States Supreme Court's explicit interpretations of the Federal *Constitution* by routinely failing to implement those interpretations on matters that go to the heart of procedural fairness in criminal cases. State judges are bound by federal law under the unambiguous terms of Article VI in the United States Constitution.³⁷⁰ Relatedly, since the days of *Martin v. Hunter's Lessee*³⁷¹ and *Cohens v. Virginia*,³⁷² it has been nearly axiomatic that state courts are bound by the United States Supreme Court's interpretation of federal constitutional law.³⁷³ Further, it has been settled for over a half century that state courts generally have an obligation to hear federal claims;³⁷⁴ they cannot unduly obstruct or discriminate against such claims.³⁷⁵

Indeed, when states offer such resistance through obstruction or discrimination against federal claims, federal courts can sometimes entertain cases that they otherwise could not. For example, the United States Supreme Court generally may not hear federal claims emanating from state supreme courts when there were alternative adequate and independent state grounds for state courts' final judgments.³⁷⁶ This "independent and adequate grounds" bar presents no barrier, however, when the state law grounds are obstructionist, discriminatory, or unconstitutional.³⁷⁷ The same is so with respect to federal collateral review of state criminal convictions. If a state court dismisses a criminal defendant's case on state procedural grounds, this generally presents a bar to federal collateral relief.³⁷⁸ This bar falls, however, when the state procedural ground is obstructionist, discriminatory, unconstitutional,³⁷⁹ or even when

³⁷⁰ U.S. CONST. art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." (emphasis added)).

³⁷¹ 14 U.S. (1 Wheat.) 304 (1816).

³⁷² 19 U.S. (6 Wheat.) 264 (1821).

³⁷³ See *id.* at 370 ("[T]hat this [Court's] appellate power is competent to control the State Courts, is also proved by [*Martin v. Hunter's Lessee*].").

³⁷⁴ See *Testa v. Katt*, 330 U.S. 386, 391–94 (1947).

³⁷⁵ See, e.g., *Haywood v. Drown*, 556 U.S. 729, 732–35 (2009); *Howlett v. Rose*, 496 U.S. 356, 371–72 (1990); *Felder v. Casey*, 487 U.S. 131, 141–45 (1988); see also Charlton C. Copeland, *Federal Law in State Court: Judicial Federalism Through a Relational Lens*, 19 WM. & MARY BILL RTS. J. 511, 514–15 (2011).

³⁷⁶ See *Murdock v. City of Memphis*, 87 U.S. (20 Wall.) 590, 591 (1875).

³⁷⁷ See CHEMERINSKY, *supra* note 157, § 10.5.2, at 765–66.

³⁷⁸ See RICHARD H. FALLON, JR., JOHN F. MANNING, DANIEL J. MELTZER & DAVID L. SHAPIRO, *HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 1335–38 (7th ed. 2015).

³⁷⁹ See *id.* at 1337–45.

this brand of deference to state procedure would result in a “miscarriage of justice.”³⁸⁰ In those cases, the state law ground is not “adequate.”

Furthermore, nothing about Bulman-Pozen and Gerken’s model itself leads to the inescapable conclusion that state courts can resist federal constitutional commands. In *Uncooperative Federalism*, the authors provide examples of state policymakers showing resistance to federal statutory and regulatory commands on matters of national security, the environment, and welfare reform.³⁸¹ It does not follow that state and local courts could upend centuries of settled law by ignoring federal constitutional commands while simultaneously neutering federal courts’ ability to stop resultant irreparable harm. The model of uncooperative federalism, while useful in many contexts, is a poor fit for instances of structural or systemic constitutional violations. Embracing “federalism all the way down”³⁸² need not mean accepting Ferguson all the way down.

2. *Process Federalism*. — In his ambitious 165-page article *The Rehnquist Court’s Two Federalisms*, Professor Ernest Young presented a defining and illuminating perspective on what has come to be known as the federalism revolution³⁸³ of the 1990s and early 2000s.³⁸⁴ In the 1980s, the Supreme Court initially purported to have retreated from aggressive federalism doctrines, especially doctrines that turned on whether an area of law was a “traditional state function.”³⁸⁵ The political process, the Court maintained, was better equipped to maintain those boundaries.³⁸⁶ Federalism came roaring back in several ways under the Rehnquist Court. The Court articulated an anticommandeering doctrine that prevents federal officials from forcing state and local officials to implement federal regulatory regimes.³⁸⁷ The Court also expanded the doctrine of “sovereign immunity,” announcing that (a) Congress cannot abrogate state sovereign immunity when enacting legislation under its Commerce Clause power³⁸⁸ and (b) sovereign immunity sometimes extends into state courts.³⁸⁹ Further, the Court placed new limits on Congress’s ability to pass legislation under the Commerce Clause, emphasizing the importance of distinguishing what is “truly national” from

³⁸⁰ *Coleman v. Thompson*, 501 U.S. 722, 748–51 (1991).

³⁸¹ Bulman-Pozen & Gerken, *supra* note 362, at 1274–81.

³⁸² Heather K. Gerken, *The Supreme Court, 2009 Term — Foreword: Federalism All the Way Down*, 124 HARV. L. REV. 4, 8 (2010); *id.* at 23–24 (advocating local autonomy as an important dimension of federalism).

³⁸³ Erwin Chemerinsky, *The Federalism Revolution*, 31 N.M. L. REV. 7, 30 (2001).

³⁸⁴ See Young, *supra* note 358.

³⁸⁵ *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 536 (1985); *id.* at 550–52.

³⁸⁶ *Id.* at 550–54.

³⁸⁷ See *Printz v. United States*, 521 U.S. 898, 925 (1997); *New York v. United States*, 505 U.S. 144, 161–66 (1992).

³⁸⁸ *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 60–66 (1996).

³⁸⁹ *Alden v. Maine*, 527 U.S. 706, 748–54 (1999).

what is “truly local.”³⁹⁰ The Court also placed restrictions on the scope of Congress’s ability to enforce the Fourteenth Amendment.³⁹¹ Nonetheless, the Court simultaneously (and perhaps curiously) remained open to broad claims that federal law preempted various state law torts.³⁹²

In assessing this revolution, Young articulated a multidimensional taxonomy. Some federalism opinions emphasize “sovereignty,” whereas others focus on “autonomy.”³⁹³ Some federalism opinions articulate “hard” rules that Congress cannot amend or breach, whereas others provide “soft” rules that Congress can overcome with either the right record or right set of magic words.³⁹⁴ And some federalism opinions rest on ideas about what belongs to the states as a matter of “substance” by placing certain regulatory areas out of Congress’s reach, whereas other federalism opinions are rooted in fostering procedural norms that aim to protect states from thoughtless or overly invasive intrusion.³⁹⁵ Young privileges autonomy over unadorned sovereignty.³⁹⁶ Sovereignty, he observes, suggests supremacy, and, as a result, the ability to flout federal norms without consequence.³⁹⁷ Autonomy, by contrast, “emphasizes the positive use of governmental authority, rather than the unaccountability of the government itself.”³⁹⁸ Young further contends that procedural rules offer a better approach than the dualist substantive approach.³⁹⁹

If we are to read *Younger* as a case about autonomy rather than above-the-law-style sovereignty, one of the most important words in the opinion’s soaring rhetoric about federalism becomes the word “legitimate.” Federal courts should avoid interfering with the “*legitimate* activities of the States” when aiming to protect federal rights.⁴⁰⁰ Structural and systemic constitutional violations of the sort at the heart of this project are not legitimate because they are, by definition, illegal, immea-

³⁹⁰ *United States v. Morrison*, 529 U.S. 598, 618 (2000); *see also* *United States v. Lopez*, 514 U.S. 549, 558–60, 567 (1995).

³⁹¹ *See Morrison*, 529 U.S. at 619–27; *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997); *cf.* Pamela S. Karlan, *Disarming the Private Attorney General*, 2003 U. ILL. L. REV. 183, 188–93 (noting that following *Seminole Tribe*, “a court that used to see the Fourteenth Amendment as a limitation on the Eleventh has come to see the Eleventh as a constraint on the Fourteenth,” *id.* at 189).

³⁹² *See* SCHAPIRO, *supra* note 358, at 113–14 (describing this paradox); *cf.* Jonathan Remy Nash, *Null Preemption*, 85 NOTRE DAME L. REV. 1015, 1015–16 (2010) (cautioning against preemption when Congress fails to affirmatively regulate).

³⁹³ Young, *supra* note 358, at 13.

³⁹⁴ *Id.* at 16–17.

³⁹⁵ *Id.* at 15.

³⁹⁶ *See id.* at 123.

³⁹⁷ *Id.* at 13–14.

³⁹⁸ *Id.* at 14.

³⁹⁹ *See id.* at 123.

⁴⁰⁰ *Younger v. Harris*, 401 U.S. 37, 44 (1971) (emphasis added).

surably harmful, and routine.⁴⁰¹ To hold that these activities are inherently legitimate merely because states condone them would be to fully take *Younger* across the sovereignty-autonomy threshold, into the territory of virtually unreviewable sovereignty. *Younger* does not have to be read as an opinion that blocks constitutional accountability. And it ought not be read that way under the process federalism model.

3. *Polyphonic Federalism*. — Another theoretical framework against which to test a new exception to *Younger* abstention is the notion of “interactive federalism”⁴⁰² or, more specifically, “polyphonic federalism.”⁴⁰³ Schapiro has written extensively about this framework over the past two decades, with the most extended treatment in a 2009 book.⁴⁰⁴ This approach is designed to counter what he calls dated, outmoded “dualist” conceptions of federalism.⁴⁰⁵ Schapiro cautions against notions of federalism that attempt to sort what is “truly national” and “truly local.”⁴⁰⁶ Schapiro instead emphasizes the value of multiple systems of government — state governments and the national government — speaking collectively and simultaneously.⁴⁰⁷ Federalism, best achieved, promotes “plurality, dialogue, and redundancy” without unduly undermining “uniformity, finality, and hierarchal accountability.”⁴⁰⁸

Schapiro’s approach, on its own terms, has direct implications in the field of federal jurisdiction generally, and federal abstention doctrine in particular. This is because Schapiro expressly promotes the view that federal and state courts both have a role in defining federal and state law, even if they sometimes disagree with one another.⁴⁰⁹ So long as the state and federal supreme courts have the ultimate say on state and federal law respectively, one need not worry about lower state courts deciding issues of federal law or about lower federal courts deciding issues of state law.⁴¹⁰

To the contrary, allowing multiple judicial voices on such matters may sometimes lead to the greater protection of individual rights. State courts’ jurisdictional norms are sometimes more hospitable to civil

⁴⁰¹ Cf. *Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658, 700 (1978) (“[M]unicipalities simply cannot ‘arrange their affairs’ on an assumption that they can violate constitutional rights indefinitely since injunctive suits against local officials under § 1983 would prohibit any such arrangement.”).

⁴⁰² See Robert A. Schapiro, *Toward a Theory of Interactive Federalism*, 91 IOWA L. REV. 243, 243–44 (2005).

⁴⁰³ See SCHAPIRO, *supra* note 358, at 9.

⁴⁰⁴ See *id.* at xii (describing prior work based on these themes).

⁴⁰⁵ *Id.* at 54–56.

⁴⁰⁶ *Id.* at 57.

⁴⁰⁷ See *id.* at 98–108.

⁴⁰⁸ *Id.* at 103.

⁴⁰⁹ See *id.* at 121–24.

⁴¹⁰ See *id.* at 127–30.

rights claims than those of the federal courts.⁴¹¹ And when a plaintiff chooses to bring state constitutional claims alongside federal constitutional claims in federal court through supplemental jurisdiction, this choice of forum is worthy of respect. Schapiro notes that federal courts sometimes abstain from answering civil rights questions, encouraging state courts to answer the state constitutional claims first.⁴¹² This, in his view, is a mistake, because it deprives civil rights jurisprudence of the dialogue and the protection that comes from multiple forums.⁴¹³ The availability of multiple judicial forums also has the advantage of potentially reducing the rights-remedies gap that pervades federal constitutional law.⁴¹⁴

Schapiro's book does not explicitly address *Younger* abstention. And there are aspects of his theory that could be used either to buttress *Younger* or to rebut it. On the one hand, he does emphasize the importance of protecting state and local governments' regulatory processes, even if we need not always defer to the outputs from those processes.⁴¹⁵ To the extent *Younger* is seen as allowing state judges (who are often elected) to decide matters of state and federal law in pending cases, it is potentially wholly consistent with a polyphonic approach. An injunction could deprive state courts of that role. On the other hand, to the extent *Younger* is seen as locking out federal courts from important civil rights claims, leaving the federal constitutional matters exclusively or predominantly to the states in the sphere of criminal justice, *Younger* abstention starts to look both dualist and monophonic.

For the purposes of this Article, however, one need not resolve whether *Younger* is ever supportable under the polyphonic framework. The more important question, really, is what polyphonic federalism can teach us specifically about preventing federal courts from hearing federal claims with respect to claims of structural or systemic violations in the state forum. On that score, in my view, closing the federal courthouse door on such claims undermines "plurality, dialogue, and redundancy."⁴¹⁶ This is especially true given that *Younger* abstention bars not only injunctive relief, but declaratory relief as well.⁴¹⁷ If abstention doctrine forces federal courts to remain silent in the face of well-pleaded, well-documented structural and systemic violations, not only does that deprive us of plural voices from state and federal courts, but it deprives

⁴¹¹ See Zachary D. Clopton, *Procedural Retrenchment and the States*, 106 CALIF. L. REV. 411 (2018) (noting that many Supreme Court decisions limiting federal court access do not bind, and have not been adopted by, state courts).

⁴¹² SCHAPIRO, *supra* note 358, at 131–32.

⁴¹³ *Id.* at 134, 137–38.

⁴¹⁴ See *id.* at 123–24.

⁴¹⁵ *Id.* at 96.

⁴¹⁶ See *supra* note 408 and accompanying text.

⁴¹⁷ See *supra* note 18 and accompanying text.

us all of any untainted voice at all. It also undermines hierarchical accountability, to the extent a setting is so tainted that any hope of an appeal is illusory. How does one “appeal” an indefinite detention wherein an inmate never (or belatedly) sees a judge? Even if an appeal were available, the damage has been done.⁴¹⁸ Denying federal jurisdiction in such cases would exacerbate the very rights-remedies gap that the theory of polyphonic federalism is designed to narrow.

4. *Reconstructed Federalism.* — Commentators have sometimes made efforts to reorient federalism in ways that privilege the special role the Civil War and Reconstruction Amendments played in altering the state-federal balance.⁴¹⁹ From time to time, this view makes its way into doctrine. It explains why, for example, Congress may still abrogate sovereign immunity when it is acting pursuant to its powers under section 5 of the Fourteenth Amendment, even though it can no longer abrogate when it is acting pursuant to the Commerce Clause.⁴²⁰ The Civil War, Reconstruction, and the language of the Fourteenth Amendment furnish a basis for this kind of accountability in a way that, according to the Court, other constitutional grants of congressional power do not.⁴²¹ But some jurists and scholars have gone further. Justice Marshall contended that through the Fourteenth Amendment, a new document was born:

While the Union survived the civil war, the Constitution did not. In its place arose a new, more promising basis for justice and equality, the fourteenth amendment, ensuring protection of the life, liberty, and property of *all* persons against deprivations without due process, and guaranteeing equal protection of the laws.⁴²²

Professor Norman Spaulding has pushed for an active role for Reconstruction in our understanding of federalism. In a solemn 2003

⁴¹⁸ Cf. *supra* note 149 and accompanying text.

⁴¹⁹ See Erwin Chemerinsky, *Rehabilitating Federalism*, 92 MICH. L. REV. 1333, 1340 (1994) (book review) (“[T]he Civil War and the constitutional amendments that followed it dramatically changed the conception of the relationship of the federal and state governments.”); Michael Stokes Paulsen, *The Civil War as Constitutional Interpretation*, 71 U. CHI. L. REV. 691, 691 (2004) (book review) (“The outcome of [Appomattox] resolved the most important issue of antebellum constitutional dispute — the nature of the Union — in favor of the nationalist view of sovereignty and against the South’s state-sovereignty view.”).

⁴²⁰ See *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 65–66 (1996).

⁴²¹ Compare *Fitzpatrick v. Bitzer*, 427 U.S. 445, 447–48 (1976) (permitting Congress to abrogate state sovereign immunity in a statute passed pursuant to the Fourteenth Amendment), with *Seminole Tribe*, 517 U.S. at 65–66 (disallowing abrogation in a statute passed pursuant to the Indian Commerce Clause and noting that decisions to the contrary were mistaken to “suggest[] that the bounds of Article III could be expanded by Congress operating pursuant to any constitutional provision other than the Fourteenth Amendment,” *id.* at 65).

⁴²² Thurgood Marshall, Commentary, *Reflections on the Bicentennial of the United States Constitution*, 101 HARV. L. REV. 1, 4 (1987).

award-winning article,⁴²³ Spaulding contends that the Supreme Court's federalism jurisprudence sometimes "turns on a chillingly amnesic reproduction of antebellum conceptions of state sovereignty."⁴²⁴ He argues that in our system of governance, courts have a special role in refusing to forget — or to allow others to forget — the past.⁴²⁵ "The Reconstruction Amendments . . . mark injustices that cannot be disowned, injustices opaquely but deliberately inscribed in the founding instrument itself, injustices that are unavoidably American — inseparable from the national body."⁴²⁶ Spaulding takes particular aim at decisions that restrict the scope of the Supreme Court's Fourteenth Amendment powers. He traces ways that the Rehnquist Court's sovereignty jurisprudence explicitly invoked "dual sovereignty"⁴²⁷ and states' "dignitary" interests⁴²⁸ in a manner that, in his view, is difficult to defend in a post-Fourteenth Amendment world.⁴²⁹

Spaulding's ask is at once simple and profoundly difficult. Simple because it demands no precise doctrinal outcomes, instead inviting us to simply remember. To never forget. And difficult still because of what he is asking America to remember: the brutality of the Middle Passage, when human beings were shipped to the United States in a manner worse than we treat animals or inanimate cargo; the institution of chattel slavery, in which the African race "had no rights which the white man was bound to respect";⁴³⁰ and the rape and whippings so central to that institution. This is difficult work. Even for myself as a descendent of American slaves, the temptation to censor the horror and to look away haunts. As I type this, I consider accessing a learned index of antiseptic language, and choke down the nation's failures as they form a lump in my throat.

So massive was the failure of democracy, so abhorrent the trauma to our national conscience, our 'constitutional faith,' so profound the desire for the 'savage fraternal conflict' to end, that we began to censor, to forget, the implications of slavery, fratricide, emancipation, and reconciliation before even the first shot at Fort Sumter.⁴³¹

⁴²³ Norman W. Spaulding, *Constitution as Countermonument: Federalism, Reconstruction, and the Problem of Collective Memory*, 103 COLUM. L. REV. 1992 (2003). The article won the Association of American Law Schools Scholarly Papers Competition in January 2004. *AALS Scholarly Paper Presentation*, 2004 ASS'N AM. L. SCHOOLS PROC. 57.

⁴²⁴ Spaulding, *supra* note 423, at 2015; cf. Denise C. Morgan & Rebecca E. Zietlow, *The New Parity Debate: Congress and Rights of Belonging*, 73 U. CIN. L. REV. 1347, 1349 (2005) ("Congress plays an irreplaceable role in the protection of individual rights, such that the inevitable result of a reduction in that institution's power will be a rollback in the protection of rights of belonging.")

⁴²⁵ See Spaulding, *supra* note 423, at 1998–2000.

⁴²⁶ *Id.* at 2000.

⁴²⁷ *Id.* at 2010.

⁴²⁸ *Id.* at 2014.

⁴²⁹ See *id.* at 2005–15.

⁴³⁰ *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 407 (1857).

⁴³¹ Spaulding, *supra* note 423, at 2030 (footnotes omitted).

The exception to *Younger* that I have proposed in this Article is consistent with Spaulding's reconstructed federalism. Due to the groundbreaking work of scholars like Professor Michelle Alexander, the link between America's abhorrent past and its troubling present is increasingly well documented and understood.⁴³² What is also understood is that the burden of America's mass incarceration and criminalization of poverty disproportionately falls on the backs of descendants of American chattel slavery.⁴³³ To offer access to federal courts when a state or local court is engaging in systemic or structural constitutional violations is consistent with an ethic of remembrance.⁴³⁴ This is all the more true given the pervasive concern the drafters of § 1983 had about the role of state court judges in perpetuating American apartheid in the years after slavery formally ended.⁴³⁵ As Professor Gene Nichol has observed: "The refusal of state courts to protect the fundamental human liberties of both Unionists and the newly freed slaves was a major focus of the legislative debates on both sections one and two of the Act."⁴³⁶

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

5. *Republican Federalism.* — A final federalism framework that merits discussion is one that emphasizes the relationship between federalism and republican principles like popular sovereignty and equality. Under this view, the only sovereignty that exists in our system of governance is *popular* sovereignty. Professor Akhil Reed Amar prominently

⁴³² See MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 1–19 (rev ed. 2012); James Forman, Jr., *Racial Critiques of Mass Incarceration: Beyond the New Jim Crow*, 87 N.Y.U. L. REV. 21, 64–69 (2012).

⁴³³ See ALEXANDER, *supra* note 432, at 16 (detailing "the control of African Americans through racial caste systems, such as slavery and Jim Crow, which appear to die but then are reborn in new form," a "pattern" that "has birthed yet another racial caste system in the United States: mass incarceration").

⁴³⁴ During a recent oral argument in a federal case challenging a rigid bail schedule, an attorney told Judge Rosenthal that many people in jail *want* to be there. Consistent with an ethos of remembrance, Judge Rosenthal replied that this was "a very dicey argument to make" and noted that "the idea was 'reminiscent of a historical argument that people enjoyed slavery because they were afraid of the alternative.'" Meagan Flynn, *Claiming Some People "Want to Be in Jail," County Loses Argument to Delay Bail Lawsuit*, HOUSTON PRESS (Feb. 9, 2017, 8:00 AM), <http://www.houstonpress.com/news/claiming-some-people-want-to-be-in-jail-county-loses-argument-to-delay-bail-lawsuit-9184266> [https://perma.cc/2QXU-EAGE].

⁴³⁵ See Gene R. Nichol, Jr., *Federalism, State Courts, and Section 1983*, 73 VA. L. REV. 959, 973–78 (1987).

⁴³⁶ *Id.* at 974.

advanced this view in the now-classic article *Of Sovereignty and Federalism*, where he sought “to counter the Supreme Court’s version of federalism and sovereignty with the framers’ version — to replace ‘Our Federalism’ with their federalism, and government sovereignty with popular sovereignty.”⁴³⁷ As my work makes plain, I am partial to that view. My work has also emphasized the role of “republican sovereignty” in American history and jurisprudence — a form of federalism in which self-government and egalitarianism are core principles.⁴³⁸

An exception to *Younger* abstention for systematic or structural constitutional violations does not undermine popular sovereignty or equality. It would provide a channel to flush out unconstitutional violations when the more common channel is clogged or corrupted. For *Younger* to close off the alternative channel would exalt a version of sovereignty that insulates the government from accountability for violating the nation’s highest republican charter. Blocking such suits would treat the State as an entity deserving of unchecked deference, rather than an entity with powers that are both conferred and limited by the people themselves. It would also undermine equality by placing a burden on the poor; recent research powerfully demonstrates this group has little political power relative to their counterparts.⁴³⁹ When this is layered with the racial dimensions of mass incarceration,⁴⁴⁰ it becomes all the more apparent that my proposed exception bolsters, rather than compromises, egalitarian values.

IV. IMPLEMENTATION AND IMPLICATIONS

This Part offers a practical account of how the proposed new exception to *Younger* would operate doctrinally, and makes the additional case that federal judges can implement the exception without any changes to existing Supreme Court doctrine. Like district court judges in the 1960s and 1970s, judges today are equipped to deem state court proceedings inadequate; and state proceedings are not adequate when a litigant is alleging a structural or systemic violation in the state process. After outlining the scope of the exception and the manner in which it could

⁴³⁷ Amar, *supra* note 358, at 1426–27.

⁴³⁸ See, e.g., Fred O. Smith, Jr., *Awakening the People’s Giant: Sovereign Immunity and the Constitution’s Republican Commitment*, 80 *FORDHAM L. REV.* 1941, 1954–57 (2012); Smith, *supra* note 172, at 443–65; see also Fred O. Smith, Jr., *Due Process, Republicanism, and Direct Democracy*, 89 *N.Y.U. L. REV.* 582, 582 (2014) (arguing that the Due Process Clause expresses principles of dignity and equality). A point of divergence between my work and Amar’s is whether republican governance privileges *representative* self-government, as I have argued, or whether other forms of self-government are sufficient as well.

⁴³⁹ See Bertrall L. Ross II & Su Li, *Measuring Political Power: Suspect Class Determinations and the Poor*, 104 *CALIF. L. REV.* 323, 367–74 (2016).

⁴⁴⁰ See generally DAVID COLE, *NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM* (1999).

and should be implemented, the Part then turns to some of the more theoretical implications of such an exception. By protecting against irreparable harm without unduly trampling legitimate federalism interests, the proposed exception would render *Younger* abstention itself more legitimate.

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

Under extant *Younger* doctrine, federal courts should generally decline to interfere with state criminal proceedings when that state forum provides an “adequate” means to address a litigant’s federal constitutional concerns.⁴⁴¹ This Article has developed the case that a structurally or systemically infirm forum is never “adequate,” both because such a forum *is* irreparable harm and because such a forum *facilitates* irreparable harm. By outlining in more rigorous detail the metes and bounds of the words “structural” and “systemic,” the aim now is to show that this exception is administrable and narrowly tailored to root out irreparable harm without unduly undermining federalism.

1. *Structural*. — Federal courts need not reinvent the wheel in determining what constitutes a structural constitutional violation. The concept has already been developed in the field of criminal procedure. In the 1991 case of *Arizona v. Fulminante*,⁴⁴² the Supreme Court considered what standard of review should govern appeals when a defendant argues that her confession was coerced unconstitutionally under the Fifth Amendment and, therefore, should not be admitted.⁴⁴³ Should courts apply the standard that typically applies to federal constitutional errors, in which appellate courts determine whether an error was harmless beyond a reasonable doubt? Or should courts overturn all verdicts marred by a coercive confession? The Court held that the harmless error standard applied.⁴⁴⁴ In doing so, the Court reasoned that automatic reversal is only appropriate with respect to “structural” errors, and, in its view, a coerced confession did not qualify.⁴⁴⁵ A structural error, the Court explained, is one that directly bears on “the framework within which the trial proceeds.”⁴⁴⁶

Notably, the types of constitutional errors the Court has determined to be structural rest at the heart of some of the above-discussed criminalization-of-poverty cases. For example, in *Burks v. Scott County*, a federal district court abstained under *Younger* even where one

⁴⁴¹ See *supra* text accompanying notes 52–55.

⁴⁴² 499 U.S. 279 (1991).

⁴⁴³ See *id.* at 306–12.

⁴⁴⁴ *Id.* at 295, 310.

⁴⁴⁵ *Id.* at 309–10.

⁴⁴⁶ *Id.* at 310.

of the key allegations was that indigent litigants were being denied attorneys at their initial bail hearings.⁴⁴⁷ If the Supreme Court were to declare an initial bail hearing to be a “critical stage,”⁴⁴⁸ this denial would be a structural violation.⁴⁴⁹ Deprivation of counsel affects a criminal proceeding’s framework in part because attorneys “affect whether and on what terms the defendant cooperates with the prosecution, plea bargains, or decides instead to go to trial.”⁴⁵⁰

Cases involving allegations that core government decisionmakers have a pecuniary interest in the outcome also raise the specter of structural error. It is well established that when a *judge* is demonstrably biased, this constitutes structural error.⁴⁵¹ *Younger* doctrine already has a response for that particular error: when the state decisionmaker is partial, the forum is not adequate.⁴⁵² What *Younger*’s judicial-bias exception does not explicitly account for, however, is when another key actor in the adversarial process has a pecuniary interest. The Supreme Court concluded in *Young v. United States ex rel. Vuitton et Fils S.A.*⁴⁵³ that this can constitute a structural error as well.⁴⁵⁴ As the Court reasoned when determining that a prosecutor’s pecuniary interest constituted structural error, “[a] concern for actual prejudice in such circumstances misses the point, for what is at stake is the public perception of the integrity of our criminal justice system.”⁴⁵⁵

The involvement of private probation officers in cases like *Rodriguez v. Providence Community Corrections, Inc.*⁴⁵⁶ make apparent that these types of concerns can infect the criminalization of poverty. A company with a direct financial interest had a substantial (and in some instances exclusive) role in determining when a probationer would have to take a costly and gratuitous drug test or would face incarceration.⁴⁵⁷ The company could pay itself from the probationers’ payments before paying the courts, meaning that a person could remain indebted to the government

⁴⁴⁷ *Burks v. Scott County*, No. 14-cv-00745, slip op. at 15–28 (S.D. Miss. Sept. 30, 2015).

⁴⁴⁸ See *supra* text accompanying notes 215–217.

⁴⁴⁹ See *United States v. Gonzalez-Lopez*, 548 U.S. 140, 148–49 (2006) (describing denial of counsel as a structural error not requiring a showing of prejudice for reversal). Indeed, even the denial of counsel of choice is automatically reversible error. *Id.* at 148–50.

⁴⁵⁰ *Id.* at 150.

⁴⁵¹ See *Edwards v. Balisok*, 520 U.S. 641, 647 (1997) (“A criminal defendant tried by a partial judge is entitled to have his conviction set aside, no matter how strong the evidence against him.”).

⁴⁵² See *supra* section I.C.2, pp. 2300–01.

⁴⁵³ 481 U.S. 787 (1987).

⁴⁵⁴ *Id.* at 809–12 (plurality opinion).

⁴⁵⁵ *Id.* at 811; cf. Janet Cooper Alexander, *Judges’ Self-Interest and Procedural Rules: Comment on Macey*, 23 J. LEGAL STUD. 647, 647 (1994) (noting that in the federal system, under 28 U.S.C. § 455(b)(4) (2012), “[e]ven a minuscule financial interest in a case is ground for disqualification”).

⁴⁵⁶ 155 F. Supp. 3d 758 (M.D. Tenn. 2015).

⁴⁵⁷ See *supra* pp. 2318–19, 2326.

in perpetuity even after paying more than their initial fine.⁴⁵⁸ The government had no interest in correcting this system because they paid the probation company nothing; the company funded itself using a “user-funded” model.⁴⁵⁹ These probation officers could reasonably be classified as either quasi-prosecutors or quasi-judges given their outsized role in determining the fates of Cindy Rodriguez and others like her.⁴⁶⁰ The harm wrought by such a system is difficult to quantify and arguably impacts the perceived legitimacy of the criminal justice system.

Taken together, then, an exception to *Younger* for structural violations has several advantages.⁴⁶¹ First, it would help abate the risk that federal courts would abstain from hearing cases of this kind, given that irreparable harm would otherwise continue. Second, there is already a body of law that provides guidance as to when an error is structural. Third, the notion of “structural” harm is not altogether unrelated to the concept of “irreparable” harm — a type of harm that *Younger*, by its own terms, is not supposed to stand in the way of addressing. Irreparable harm is sometimes classified as such when the harm is intangible or immeasurable, such that no other remedy (or in this case, forum) will adequately address the problem. The concept of structural harm is similarly designed to address serious harm that is difficult to measure, such that some other approach (like a harmless error standard) would not resolve the core issues. The Court has concluded that denial of counsel of choice, for example, is structural in part because “[i]t is impossible to know what different choices the rejected counsel would have made, and then to quantify the impact of those different choices on the outcome of the proceedings.”⁴⁶²

2. *Systemic*. — In *M.D. v. Perry*, a federal district court in the Southern District of Texas confronted youth in that state who alleged widespread

⁴⁵⁸ See *supra* text accompanying notes 295–297.

⁴⁵⁹ See *supra* text accompanying notes 289–297.

⁴⁶⁰ See *supra* section II.C, pp. 2317–21.

⁴⁶¹ Academic critiques of the structural vs. harmless-error dichotomy have been prominent and sharp. See, e.g., Charles J. Ogletree, Jr., *The Supreme Court, 1990 Term — Comment: Arizona v. Fulminante: The Harm of Applying Harmless Error to Coerced Confessions*, 105 HARV. L. REV. 152, 164 (1991) (“The opinion never clearly articulates the structure that the structural errors undermine. The structure, I assert, is *the fair trial*. Thus, the [decision’s] distinction can never be more than a distinction of degree.”); see also Jason S. Marks, *Postscript: Harmless Error, Habeas Corpus, and a Constitutional Eclipse*, 8 CRIM. JUST. 30, 72 (1993) (advocating for legislative habeas corpus reform to remedy the Supreme Court’s flawed harmless error jurisprudence); David McCord, *The “Trial”/“Structural” Error Dichotomy: Erroneous, and Not Harmless*, 45 U. KAN. L. REV. 1401, 1454–58 (1997) (arguing that the seriousness of the error should guide whether it results in reversal); Gregory Mitchell, Comment, *Against “Overwhelming” Appellate Activism: Constraining Harmless Error Review*, 82 CALIF. L. REV. 1335, 1365–66 (1994) (arguing that fair process, rather than fair result, should be the lodestar). The fact that the standard may be underinclusive, however, does nothing to undermine the idea that the small class of cases labeled structural *does* cause immeasurable, intangible harm.

⁴⁶² *United States v. Gonzalez-Lopez*, 548 U.S. 140, 150 (2006).

patterns of harms⁴⁶³ that included “repeated placements, over-medication, abuse, neglect, and deprivation of familial relationships with siblings.”⁴⁶⁴ Rejecting the State’s *Younger* argument,⁴⁶⁵ the district court reasoned that “[a]s [the] lawsuit focuses on systemic problems and seeks systemic solutions, it would not ‘duplicate’ the individualized reviews that occur in the state courts.”⁴⁶⁶

The Fifth Circuit has limited the reach of this holding to certified class actions and foster care proceedings.⁴⁶⁷ But those limitations present normative and practical challenges. First, if *Younger* blocks a suit at an early stage, then a case may never convert from a putative class to a certified class because proceedings cease. In *Burks v. Scott County*, for example, *Younger* partially blocked a suit where litigants challenged systemic violations in the county’s bail system even though class certification had been sought, but not yet certified.⁴⁶⁸ Given that all of the claims were either stayed or dismissed,⁴⁶⁹ there was no opportunity to determine whether a class *should* be certified given the common facts and issues that united the parties who had allegedly experienced systemic harm.⁴⁷⁰ If certified class actions are sufficient to overcome *Younger*, the better course is to rule on the class certification motion before adopting or rejecting *Younger*.

Second, the Supreme Court has never adopted divergent *Younger* abstention rules predicated on the precise type of state proceeding at issue. Under the Supreme Court’s jurisprudence, either a case triggers *Younger* in light of the nature of the proceeding and the importance of the State’s interest, or it does not. As this Article has shown, systemic irreparable harm can haunt criminal justice. And while one could argue that criminal law implicates federalism interests in a uniquely important way, structural or systemic constitutional violations cause these interests to diminish or perhaps even collapse.⁴⁷¹

The question remains, though, how precisely to define a “systemic” violation. *M.D. v. Perry* did not offer an express definition. In addition, unlike the word “structural,” the word “systemic” does not come with an established set of legal principles and case law. An error could be structural — that is, presumptively harmful because it infected a proceeding’s basic framework and fundamental fairness — without amounting

⁴⁶³ 799 F. Supp. 2d 712, 714–15 (S.D. Tex. 2011), *vacated on other grounds*, 675 F.3d 832 (5th Cir. 2012).

⁴⁶⁴ *Id.* at 714.

⁴⁶⁵ *Id.* at 716–21.

⁴⁶⁶ *Id.* at 720.

⁴⁶⁷ See *Bice v. La. Pub. Def. Bd.*, 677 F.3d 712, 720 n.8 (5th Cir. 2012).

⁴⁶⁸ *Burks v. Scott County*, No. 14-cv-00745, slip op. at 27–28 (S.D. Miss. Sept. 30, 2015).

⁴⁶⁹ *Id.*

⁴⁷⁰ See *id.* at 28 (dismissing the plaintiffs’ motions for class certification as moot).

⁴⁷¹ See *supra* section III.B, pp. 2327–38.

to a system-wide error.⁴⁷² For example, a prosecutor or judge could be demonstrably biased without triggering a system-wide error that applied to a broad class.⁴⁷³ Likewise, an error could be deeply rooted and pervasive, and cause irreparable harm without belonging to the narrow class of cases current law deems “structural.” Starkly put, a “structural error” framework alone could fail to capture cases where a state or local government has constructed a modern system of debtors’ prisons by routinely jailing people who cannot pay a fine or fee without inquiring into their indigence. When these errors are routine, however, the resultant irreparable harm is demonstrable and vast.⁴⁷⁴ This speaks to the need for litigants to demonstrate that a state forum is inadequate based on constitutional errors that are systemic, even when they are not structural.

How, then, does a court know whether a case presents a systemic violation? At least three legal models of systemic harm furnish administrable definitions that would improve the law of abstention. The first is the policy-or-custom approach outlined in *Monell v. Department of Social Services*⁴⁷⁵ and *Adickes v. S.H. Kress & Co.*⁴⁷⁶ The Court has interpreted § 1983 as requiring a “policy” or “custom” before a municipality can be sued.⁴⁷⁷ And a “policy” is generally required before a person can sue a state official in her official capacity for injunctive relief.⁴⁷⁸ The policy requirement for suits against cities, in particular, is a controversial one. It not only departs from the principle of respondeat superior⁴⁷⁹ but also inoculates local governments that act negligently,⁴⁸⁰ defines the list of actors who can make local policy very narrowly,⁴⁸¹ and sometimes leaves victims of lawless conduct with no one to hold accountable whatsoever.⁴⁸²

Despite its severe limitations in the context of municipal liability, the policy-or-custom approach nonetheless does provide a set of recognized legal principles aimed at determining when a government’s policy caused a violation, as distinguished from a rogue one-off. In particular, liability is permitted when: a city adopts an unconstitutional ordinance

⁴⁷² See, e.g., *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 790, 809–10 (1987) (plurality opinion) (finding structural error when an interested prosecutor was assigned to contempt charge).

⁴⁷³ See *id.* at 810–11.

⁴⁷⁴ See *supra* section III.A, pp. 2322–27.

⁴⁷⁵ 436 U.S. 658 (1978).

⁴⁷⁶ 398 U.S. 144 (1970).

⁴⁷⁷ *Monell*, 436 U.S. at 694.

⁴⁷⁸ *Id.* at 690.

⁴⁷⁹ *Id.* at 691 (“[W]e conclude that a municipality cannot be held liable *solely* because it employs a tortfeasor — or, in other words, a municipality cannot be held liable under § 1983 on a *respondeat superior* theory.”).

⁴⁸⁰ See Smith, *supra* note 172, at 424.

⁴⁸¹ See *id.* at 438–39.

⁴⁸² See *id.* at 464–65.

or regulation;⁴⁸³ a person with final policymaking authority commands or condones unconstitutional conduct;⁴⁸⁴ or a final policymaker exhibits deliberate indifference to known or highly probable constitutional violations.⁴⁸⁵ A custom also triggers liability; that is, an action so rooted in a government's practices that it can be said to be "permanent" and "well settled."⁴⁸⁶

A second approach to understanding when harm is systemic is the language of "pattern or practice" that pervades American statutory law.⁴⁸⁷ Under the Civil Rights Act of 1964,⁴⁸⁸ for example, the Attorney General may bring claims to end a "pattern or practice" of unlawful discrimination.⁴⁸⁹ The key cases implementing this provision understand the phrase to reference practices that are "regular," "systemwide," and "more than the mere occurrence of isolated or 'accidental' or sporadic discriminatory acts."⁴⁹⁰ This comports with Senator Hubert Humphrey's description of the provision during the congressional debates, where he explained that "a pattern or practice would be present only when the denial of rights consists of something more than an isolated, sporadic incident, but is repeated, routine, or of a generalized nature."⁴⁹¹ In the context of discrimination, to prove pattern or practice, a plaintiff must demonstrate "by a preponderance of the evidence that . . . discrimination was the . . . standard operating procedure."⁴⁹²

A third paradigm is the class action framework. Rule 23 of the Federal Rules of Civil Procedure outlines requirements for bringing a class action through what a leading treatise calls "an intricate formula."⁴⁹³ Under Rule 23(a), a class may only be certified where:

- (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of

⁴⁸³ See *Pembaur v. City of Cincinnati*, 475 U.S. 469, 480 (1986) ("[N]o one has ever doubted . . . that a municipality may be liable under § 1983 for a single decision by its properly constituted legislative body.").

⁴⁸⁴ See *id.* ("[I]t is plain that municipal liability may be imposed for a single decision by municipal policymakers under appropriate circumstances.").

⁴⁸⁵ See *City of Canton v. Harris*, 489 U.S. 378, 388 (1989).

⁴⁸⁶ *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 168 (1970); see also *id.* at 167–68.

⁴⁸⁷ See, e.g., Real Estate Settlement Procedures Act of 1974, 12 U.S.C. § 2605(f) (2012); Civil Rights Act of 1964, 42 U.S.C. § 2000e-6(a) (2012).

⁴⁸⁸ 42 U.S.C. §§ 2000e to e-17.

⁴⁸⁹ *Id.* § 2000e-6(a).

⁴⁹⁰ See, e.g., *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 336 (1977); see also *id.* at 334–36.

⁴⁹¹ 110 CONG. REC. 14,270 (1964).

⁴⁹² *Teamsters*, 431 U.S. at 336. One contested question is how much weight should be assigned to evidence of a pattern or practice when an individual sues (rather than the government or a class). David J. Bross, *The Use of Pattern-and-Practice by Individuals in Non-Class Claims*, 28 NOVA L. REV. 795, 804 (2004).

⁴⁹³ 1 WILLIAM B. RUBENSTEIN, NEWBERG ON CLASS ACTIONS § 3:1, at 151 (5th ed. 2016).

the class; and (4) the representative parties will fairly and adequately protect the interests of the class.⁴⁹⁴

As shorthand, these four requirements are often referred to as numerosity, commonality, typicality, and adequacy.⁴⁹⁵ In order for a class action to be maintained, it must also meet one of three conditions. First, a class action is appropriate if there is otherwise a risk of “inconsistent or varying adjudications with respect to individual class members” that would create conflicting obligations and rights for the parties.⁴⁹⁶ Second, if “the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole.”⁴⁹⁷ Or third, if “the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.”⁴⁹⁸

An adoption of any of these three paradigms — policy-or-custom; pattern-or-practice; or the class action paradigm(s) — would supply reasonable and administrable proxies for whether harm is “systemic” within the meaning of this Article. Unconstitutional policies, customs, patterns, and practices could undermine a system’s perceived legitimacy and perpetuate massive dignitary harms. Indeed, litigants in the leading cases challenging criminalization tend to plead all three paradigms. They allege unconstitutional “polic[ies],”⁴⁹⁹ “pattern[s] and practice[s],”⁵⁰⁰ and eligibility for class certification.⁵⁰¹

These three paradigms are not, however, identical with respect to the factual scenarios they cover. A “policy” under *Monell* could be a one-time incident, so long as it was a final policymaker that condoned it.⁵⁰² For example, it would constitute a “policy” for a city to pass an ordinance or regulation that purported to single out one resident and deny

⁴⁹⁴ FED. R. CIV. P. 23(a).

⁴⁹⁵ See *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 349 (2011); *id.* at 368 n.2 (Ginsburg, J., concurring in part and dissenting in part).

⁴⁹⁶ FED. R. CIV. P. 23(b)(1)(A).

⁴⁹⁷ *Id.* at 23(b)(2).

⁴⁹⁸ *Id.* at 23(b)(3).

⁴⁹⁹ See, e.g., First Amended Class Action Complaint, *supra* note 235, at 28 (“Pursuant to Collections Department policy and practice, no inquiry is ever made into a person’s ability to pay, even when former defendant debtors are known to be indigent.”).

⁵⁰⁰ See, e.g., *id.* at 21 (“The Plaintiffs and many other witnesses have, in recent months and years, observed numerous other indigent New Orleans residents jailed as a matter of pattern and practice by the Collections Department. These residents are kept in jail for non-payment of debts without an inquiry into their ability to pay . . .”).

⁵⁰¹ See, e.g., *id.* at 31 (“A class action is a superior means, and the only practicable means, by which Plaintiffs and unknown Class members can challenge the Defendants’ unlawful debt-collection scheme.”).

⁵⁰² See *Pembaur v. City of Cincinnati*, 475 U.S. 469, 480 (1986).

her, and her alone, a constitutionally mandated hearing of some sort.⁵⁰³ But such an ordinance would not arise to a “pattern or practice” of constitutional violations, nor would such a scenario satisfy the numerosity requirement under the class-action paradigm. In other ways, however, a “policy” is narrower than a “pattern or practice.” The civil rights workers in *Dombrowski*, who alleged that they were subjected to seizures and threats of prosecution as “part of a plan” by governmental actors,⁵⁰⁴ may well have been able to prove a pattern or practice. But in the absence of evidence of involvement or deliberate indifference from final policymakers, these actions would not rise to a municipal “policy.”

Beyond this divergent coverage, the three paradigms have received varied reception from commentators and jurists. As observed, the stringent policy-or-custom requirement has been oft-criticized by scholars in the context of governmental liability, including by me.⁵⁰⁵ Four Justices once suggested that the approach should be abandoned altogether.⁵⁰⁶ Further, the Court’s crabbed approach to understanding Rule 23 has also met a chilly reception from commentators.⁵⁰⁷ By contrast, while there is controversy related to the evidentiary burden-shifting value of patterns and practices when an individual (rather than group or government) sues her employer,⁵⁰⁸ there does not appear to be controversy about its scope.

Still, one advantage of the class action approach over the pattern-or-practice approach is that it already has a foothold in the Fifth Circuit, which has acknowledged that *Younger* abstention may potentially be inappropriate with respect to *certified* class actions.⁵⁰⁹ What is more,

⁵⁰³ See *Owen v. City of Independence*, 445 U.S. 622, 625–30, 657 (1980).

⁵⁰⁴ 380 U.S. 479, 482 (1965).

⁵⁰⁵ See Smith, *supra* note 172, at 418 nn.41–42 (collecting criticisms).

⁵⁰⁶ *Bd. of Cty. Comm’rs v. Brown*, 520 U.S. 397, 430–37 (1997) (Breyer, J., dissenting); *id.* at 416, 429–30 (Souter, J., dissenting).

⁵⁰⁷ See, e.g., Bernadette Bollas Genetin, *Back to Class: Lessons from the Roberts Court Class Action Jurisprudence*, 48 AKRON L. REV. 697, 702–03 (2015) (discussing the author’s and other scholars’ view of the Roberts Court’s “restrictive approach to class certification under Rule 23,” *id.* at 703); A. Benjamin Spencer, *Class Actions, Heightened Commonality, and Declining Access to Justice*, 93 B.U. L. REV. 441, 445 (2013) (“The result” of the Court’s approach to commonality questions under Rule 23 “is not an exercise in interpretation, but rather yet another demonstration of the Court’s willingness of late to place policy above principle in ways that restrict access to justice.”); see also Richard D. Freer, *Front-Loading, Avoidance, and Other Features of the Recent Supreme Court Class Action Jurisprudence*, 48 AKRON L. REV. 721, 723 (2015) (describing the non-plaintiff-friendly nature of recent Supreme Court class action jurisprudence). *But cf.* Robert H. Klonoff, *Class Actions Part II: A Respite from the Decline*, 92 N.Y.U. L. REV. 971, 972–73 (2017) (observing a decline in hostility toward class actions in recent years, and particularly in the eight-member Court of October Term 2015). See generally Robert H. Klonoff, *The Decline of Class Actions*, 90 WASH. U. L. REV. 729 (2013) (describing various courts’, including the Supreme Court’s, limitations on class action lawsuits).

⁵⁰⁸ Bross, *supra* note 492, at 804.

⁵⁰⁹ *Bice v. La. Pub. Def. Bd.*, 677 F.3d 712, 720 n.8 (5th Cir. 2012); see also *ODonnell v. Harris County*, 882 F.3d 528, 538–39 (2018). The class in *ODonnell* was granted certification by the district

“certified class actions” already enjoy a well-known exception in the world of federal courts; certified class actions can survive under Article III even where a lead plaintiff’s claims become moot.⁵¹⁰

Given the divergent scope and nature of these three approaches, perhaps the soundest understanding of systemic harm is one that captures all three. Systemic harm is present where a state’s process is characterized by: (1) unconstitutional policies, customs, patterns, or practices; or where (2) constitutional errors give rise to a properly certified class action. As observed, however, if certified class actions are an exception to *Younger*, it is important that judges consider class certification motions before dismissing or staying proceedings under *Younger* when no other exception to *Younger* is present (that is, bias; bad faith; patent unconstitutionality; structural violations; or systemic policies, customs, patterns, or practices). After all, a class certification proceeding and motion, in and of itself, represents no apparent, immediate interruption to an ongoing state criminal proceeding.

3. *Balancing-Test Alternative*. — Commentators have sometimes advocated a balancing approach to *Younger* abstention with less specificity than what this Article is advocating. Under this approach, courts should balance federalism interests and the plaintiffs’ interests in order to achieve equitable outcomes. Professors Steven Calabresi and Gary Lawson are among those who have argued for such (re)balancing.⁵¹¹ As an initial matter, they imply that federalism interests could sometimes weigh in favor of an injunction.⁵¹² “Federalism, after all, has both a localist and a nationalist dimension. Arguments for a state’s autonomy and ability to carry out judgments with certainty and finality can be countered by equally compelling arguments for national supremacy and the need for federal protection of federal statutory and constitutional rights.”⁵¹³ A careful balance of federalism and other equitable considerations “will undoubtedly be far narrower than the existing *Younger* doctrine.”⁵¹⁴ This is especially true, in their view, given that § 1983 authorizes injunctions against state actors.⁵¹⁵

Nothing in this Article is intended to suggest that, at a macro level, balancing federalism and equity could not lead to other exceptions beyond the narrow one articulated in this project. Further, at the micro level, courts retain the authority to decide that state court forums are not adequate, notwithstanding whether a case falls into one of the explicitly enumerated exceptions, including the one advocated for here.

court about ten months before the Fifth Circuit ruled on the abstention issue. See *ODonnell v. Harris County*, No. H-16-1414, 2017 WL 1542457, at *1 (S.D. Tex. Apr. 28, 2017).

⁵¹⁰ *Sosna v. Iowa*, 419 U.S. 393, 401–03 (1975).

⁵¹¹ See Calabresi & Lawson, *supra* note 23, at 256.

⁵¹² *Id.* at 264.

⁵¹³ *Id.* (footnote omitted).

⁵¹⁴ *Id.*

⁵¹⁵ *Mitchum v. Foster*, 407 U.S. 225, 226, 243 (1972); Calabresi & Lawson, *supra* note 23, at 265.

The point is that under current doctrine, courts are sometimes treating the *Younger* issue as a far more serious barrier than it ought to be in light of systemic and structural procedural errors, or worse, they are adopting *Younger* abstention notwithstanding these errors. A clear exception for systemic or structural errors reduces the likelihood of such outcomes.

4. *The Floodgates Objection.* — On the opposite end of the spectrum, a skeptic of this Article's proposal could argue that an exception for systemic or structural constitutional violations might either overburden federal courts, or result in so much liability that state courts would be routinely interrupted. One might broadly cite *O'Shea v. Littleton*⁵¹⁶ for such a principle. In that case, the Court declined to issue a broad injunction against municipal court judges who purportedly, on average, issued harsher terms to black defendants than white ones.⁵¹⁷ The Court noted its "reluctance to interfere with the normal operation of state administration of its criminal laws"⁵¹⁸ and emphasized the "need for a proper balance in the concurrent operation of federal and state courts,"⁵¹⁹ calling the plaintiffs' requested relief "an ongoing federal audit of state criminal proceedings which would indirectly accomplish the kind of interference that *Younger* . . . sought to prevent."⁵²⁰ Would an exception for systemic and structural violations undo *O'Shea* and place federal courts into the role of constantly superintending state courts based on nebulous and broad allegations? This outcome seems unlikely not only because the terms of my proposed exception are defined rather narrowly but also because in the post-*O'Shea* era, at least three doctrines have emerged that should abate that concern.

First, *O'Shea* was decided before *Monell* and its progeny. As observed, *Monell* makes plain that a plaintiff may not sue a local government unless a municipal policy has caused the violation.⁵²¹ Courts have defined the term "policy" so narrowly that the doctrine, especially when individualized immunities are taken into account, leaves some victims of lawless conduct with no one to hold accountable.⁵²² I have called this area of law "local sovereign immunity," in light of its ideological underpinnings and functional effects.⁵²³ Further, in *Los Angeles County v. Humphries*,⁵²⁴ the Court held that these rules apply not only to claims

⁵¹⁶ 414 U.S. 488 (1974).

⁵¹⁷ *Id.* at 491–93.

⁵¹⁸ *Id.* at 498.

⁵¹⁹ *Id.* at 499.

⁵²⁰ *Id.* at 500.

⁵²¹ 436 U.S. 658, 694 (1978).

⁵²² See *supra* text accompanying notes 475–482.

⁵²³ See Smith, *supra* note 172, at 409–10.

⁵²⁴ 562 U.S. 29 (2010).

for monetary damages but also to claims for injunctive relief.⁵²⁵ Given that these rules already make it exceptionally difficult to get relief against local governments (and local officials in their official capacity), the concern about floodgates of *unwarranted* liability seems misplaced.

Second, *O’Shea* was decided before the famous, albeit controversial, case of *City of Los Angeles v. Lyons*.⁵²⁶ In *Lyons*, the Court held for the first time that even where a plaintiff had a viable damages claim, Article III of the U.S. Constitution bars injunctive relief unless the plaintiff can show that she is highly likely to be injured in the future.⁵²⁷ This ruling alone would prevent prospective relief cases like *O’Shea* where the plaintiffs had *formerly* been in the criminal justice system, even if the *O’Shea* plaintiffs had been able to establish a damages claim.

Third, pleading requirements have become more onerous in recent years, in ways that are also famous and controversial.⁵²⁸ In *Bell Atlantic Corp. v. Twombly*,⁵²⁹ the Court held that under Rule 8(a) of the Federal Rules of Civil Procedure, litigants must plead facts that demonstrate *plausible* entitlement to relief.⁵³⁰ In *Ashcroft v. Iqbal*,⁵³¹ the Court reaffirmed this view of Rule 8(a) in a constitutional civil rights case.⁵³² A complaint must “state a claim to relief that is plausible on its face.”⁵³³ This means that to survive a motion to dismiss, a plaintiff must “plead[] factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.”⁵³⁴ “Where a complaint pleads facts that are ‘merely consistent with’ a defendant’s liability, it ‘stops short of the line between possibility and plausibility of ‘entitlement to relief.’”⁵³⁵

⁵²⁵ See *id.* at 30–31.

⁵²⁶ 461 U.S. 95 (1983).

⁵²⁷ See *id.* at 111.

⁵²⁸ See Arthur R. Miller, *From Conley to Twombly to Iqbal: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1, 15–16, 15 n.52 (2010) (identifying “observers [who] believe these two cases represent a major departure from the Court’s established pleading jurisprudence,” *id.* at 16); A. Benjamin Spencer, *Pleading and Access to Civil Justice: A Response to Twombly Apologists*, 60 UCLA L. REV. 1710, 1712 (2013) (describing the response to *Iqbal* and *Twombly* as an “uproar” and listing critics); Steve Subrin, *Ashcroft v. Iqbal: Contempt for Rules, Statutes, the Constitution, and Elemental Fairness*, 12 NEV. L.J. 571, 571 (2012) (calling *Iqbal* “an embarrassment to the American Judicial System”).

⁵²⁹ 550 U.S. 544 (2007).

⁵³⁰ *Id.* at 554–56, 560–61; see A. Benjamin Spencer, *Understanding Pleading Doctrine*, 108 MICH. L. REV. 1, 4 (2009) (“In *Twombly*, the Court reinterpreted Rule 8 as requiring allegations that show a plausible entitlement to relief, a feat accomplished by offering substantiating facts that move liability from a speculative possibility to something that discovery is reasonably likely to confirm.”).

⁵³¹ 556 U.S. 662 (2009).

⁵³² See *id.* at 667–80.

⁵³³ *Id.* at 678 (quoting *Twombly*, 550 U.S. at 570).

⁵³⁴ *Id.*

⁵³⁵ *Id.* (quoting *Twombly*, 550 U.S. at 557 (alteration omitted)).

To survive motions to dismiss, plaintiffs are necessarily alleging sufficient facts to render their claims of government abuse plausible. The litigants' complaint against New Orleans was forty-three pages;⁵³⁶ Ferguson, fifty-five pages;⁵³⁷ Jennings, Missouri, sixty-two pages;⁵³⁸ and so on. All of these complaints are replete with detail about the systemic and structural constitutional violations the plaintiffs suffered. If an express exception to *Younger* for systemic or structural constitutional violations opens the door to more cases, it is only because there are other places where people can plausibly allege that these schemes are causing them unconstitutional systemic or structural harm.

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

5. *Beyond Abstention: Revisiting Preiser's Dimensions.* — In *Preiser v. Rodriguez*,⁵³⁹ the United States Supreme Court articulated another judge-made barrier to liability: a person convicted of a crime may not seek an injunction under § 1983 that reduces the duration of her confinement.⁵⁴⁰ Such a person must instead rely on federal habeas for relief. The Court later expanded this rule to damages claims as well; a person may not seek § 1983 relief that necessarily implies the invalidity of her conviction or results in her speedier release.⁵⁴¹ The distinction between § 1983's cause of action and federal habeas's is important because while § 1983 does not require plaintiffs to exhaust state law remedies,⁵⁴² the federal habeas statute does.⁵⁴³ Under the *Preiser* rule, a plaintiff must rely on habeas and therefore exhaust state law remedies if she is a prisoner challenging the fact or duration of her confinement.⁵⁴⁴ The Court

⁵³⁶ First Amended Class Action Complaint, *supra* note 235.

⁵³⁷ Class Action Complaint, *supra* note 279.

⁵³⁸ Class Action Complaint, *Jenkins v. City of Jennings*, No. 15-cv-00252 (E.D. Mo. Feb. 13, 2017), ECF No. 1.

⁵³⁹ 411 U.S. 475 (1973).

⁵⁴⁰ *See id.* at 500. This exception has at least one implied statutory exception within it. A judge may order release as one of the terms of a prison-overcrowding injunction under limited circumstances. *See Brown v. Plata*, 563 U.S. 493, 510–11, 525–26, 545 (2011).

⁵⁴¹ *Heck v. Humphrey*, 512 U.S. 477, 486–87 (1994).

⁵⁴² *Monroe v. Pape*, 365 U.S. 167, 183 (1961).

⁵⁴³ 28 U.S.C. § 2254(b) (2012).

⁵⁴⁴ *See Preiser*, 411 U.S. at 500.

adopted this rule a mere two years after *Younger*, and it was born of the same concerns:

The rule of exhaustion in federal habeas corpus actions is rooted in considerations of federal-state comity. That principle was defined in *Younger v. Harris* as “a proper respect for state functions,” and it has as much relevance in areas of particular state administrative concern as it does where state judicial action is being attacked.⁵⁴⁵

Because judicially enforced conceptions of federalism and comity motivate *Younger* and *Preiser* alike, it bears serious consideration whether habeas’s exhaustion requirement, too, should be tempered with an exception for structural or systemic constitutional violations. That question is beyond the scope of this project, but to the extent appellate processes or collateral review procedures are themselves marred by structural or systemic constitutional violations, an exception in that context has surface-level appeal. This is especially true given *Preiser*’s statement that “[r]equiring exhaustion in situations like that before us means, of course, that a prisoner’s state remedy must be adequate and available, as indeed [the habeas statute] provides.”⁵⁴⁶ The word “adequate” — upon which *Younger* abstention’s exceptions generally stand — is at least nominally a safety valve in the context of *Preiser* as well. As complicated *Preiser* questions stalk cases seeking to redress the criminalization of poverty,⁵⁴⁷ the applicability of this exception in the context of exhaustion deserves further consideration from courts and commentators alike.

B. The Role of District Courts

Implementing this exception to *Younger* requires no change in doctrine from the Supreme Court. District courts may adopt this exception, and some have already done so either explicitly or implicitly to varying degrees.⁵⁴⁸ Unlike the days of the three-judge panels in civil rights cases that were immediately appealable to the Supreme Court,⁵⁴⁹ it will likely take some time for such an exception to make its way to consideration at One First Street. Judge Wisdom could argue for a bad faith exception

⁵⁴⁵ *Id.* at 491 (citation omitted) (quoting *Younger v. Harris*, 401 U.S. 37, 44 (1971)).

⁵⁴⁶ *Id.* at 493.

⁵⁴⁷ See, e.g., *Cain v. City of New Orleans*, 186 F. Supp. 3d 536, 547–48 (E.D. La. 2016); *Walker v. City of Calhoun*, No. 15-CV-0170, 2016 WL 361612, at *7 (N.D. Ga. Jan. 28, 2016) (“Defendant contends that Plaintiff’s suit, which challenged his continued custody in the Jail, should have been brought as a habeas petition under [the habeas statute], rather than as a § 1983 action, and that Plaintiff failed to exhaust his state remedies.”), *vacated and remanded*, 682 F. App’x 721 (11th Cir. 2017) (per curiam).

⁵⁴⁸ Cf. Pamela K. Bookman & David L. Noll, *Ad Hoc Procedure*, 92 N.Y.U. L. REV. 767, 796–823 (2017) (observing ways that courts and legislatures engage in innovative approaches to balancing access to courts and pragmatic docket-based concerns).

⁵⁴⁹ See *supra* text accompanying notes 95–97.

on a three-judge district court panel in 1964 and watch it become the national norm by 1965.⁵⁵⁰ Judges Rives, Johnson, and Varner could assert a bias exception in 1971 and watch it become nationally binding law in 1973.⁵⁵¹ Judge Tuttle could require timely hearings as a precondition to *Younger* in 1973 and see this rule adopted by the Supreme Court in 1975.⁵⁵²

Because three-judge panels were more common, and because the Supreme Court had direct so-called mandatory jurisdiction over these claims,⁵⁵³ there was swift, frequent dialogue between the United States Supreme Court and the courts on the front lines of civil rights in the American South. And when the Supreme Court adopted exceptions articulated by the judges on the front lines, it did so with an appreciation for the particular expertise possessed by district courts by virtue of their proximity to the unconstitutional schemes that were unfolding. In *Gibson*, the Supreme Court observed that “[a]s remote as we are from the local realities underlying this case,” it is “very likely that the District Court has a firmer grasp of the facts and of their significance to the issues presented.”⁵⁵⁴ Today’s interlevel dialogue is undoubtedly less frequent and more muted than it was under the old system. Nonetheless, district courts maintain their vital role in shaping the contours of *Younger*’s crucial safety valves when irreparable harm would otherwise erupt or persist.

Two district courts have served that role in articulating a “systemic” exception to *Younger*.⁵⁵⁵ Judge Rosenthal’s groundbreaking opinion on *Younger* abstention in a recent case in the Southern District of Texas stops short of that, but an exception for either systemic or structural violations is perhaps implicit in her reasoning as well. In that case, indigent men and women challenged their detention due to their inability to pay bail.⁵⁵⁶ Rejecting the government’s argument that the case should be dismissed on *Younger* grounds, she held that the “adequacy” requirement of *Younger* was not met.⁵⁵⁷ She observed that “the adequacy of a timely hearing . . . is precisely what the plaintiffs are challenging in this case,” and thus “[t]o find that the plaintiffs have an adequate hearing on their constitutional claim in state court would decide the merits.”⁵⁵⁸ This reasoning was reminiscent of the Supreme Court’s

⁵⁵⁰ See *supra* notes 91–121 and accompanying text.

⁵⁵¹ See *supra* notes 122–136 and accompanying text.

⁵⁵² See *supra* notes 140–153 and accompanying text.

⁵⁵³ See *supra* text accompanying notes 95–97.

⁵⁵⁴ *Gibson v. Berryhill*, 411 U.S. 564, 579 (1973).

⁵⁵⁵ See *Tinsley v. McKay*, 156 F. Supp. 3d 1024, 1039 (D. Ariz. 2015); *M.D. v. Perry*, 799 F. Supp. 2d 712, 720 (S.D. Tex. 2011); see also *supra* section I.D, pp. 2303–05.

⁵⁵⁶ *O'Donnell v. Harris County*, 227 F. Supp. 3d 706, 714–15 (S.D. Tex. 2016), *aff'd in part, rev'd in part*, 882 F.3d 528 (5th Cir. 2018).

⁵⁵⁷ *Id.* at 736.

⁵⁵⁸ *Id.*

opinion in *Gibson* when the Court adopted a bias exception to *Younger*: “The adequacy of the administrative remedy, an issue which under federal law the District Court was required to decide, was for all practical purposes identical with the merits of appellees’ lawsuit.”⁵⁵⁹ Indeed, the Fifth Circuit adopted Judge Rosenthal’s reasoning on appeal.⁵⁶⁰

Judge Rosenthal’s reasoning is a proverbial stone’s throw from the exception advanced in this Article and has laid the groundwork for relief that has been influential far beyond Houston.⁵⁶¹ The *Younger* doctrine should end a suit only when a state proceeding furnishes an adequate forum to raise the federal constitutional claims. Some forums are not adequate, in part for reasons like untimeliness. How do we *know* if a forum is adequate? What principle renders inadequate a system that provides for untimely hearings or a forum that is biased? This Article has advanced the view that an answer is the systemic and structural nature of these violations. The doctrine of *Younger* abstention would improve if it included an explicit recognition that a systemically or structurally infirm process *is* inadequate because it constitutes irreparable harm and perpetuates irreparable harm.

C. Theoretical Implications: Abstention’s Legitimacy

The themes, cases, and principles that animate this Article also have implications for one of the most prominent questions in the literature on federal jurisdiction: Is abstention legitimate? This final section outlines the contours of that academic discussion and offers preliminary thoughts as to how this Article interacts with that debate.

Just shy of two centuries ago, Chief Justice Marshall announced an oft-repeated conception of federal jurisdiction. In *Cohens v. Virginia*,⁵⁶² he declared for a unanimous Court that federal courts have “no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given.”⁵⁶³ As I have recently noted, this understanding

⁵⁵⁹ *Gibson*, 411 U.S. at 575.

⁵⁶⁰ *ODonnell*, 882 F.3d at 539 (“As the district court noted, the adequacy of the state court review of bail-setting procedures is essential to ODonnell’s federal cause of action. In short, “[t]o find that the plaintiffs have an adequate hearing on their constitutional claim in state court would decide [its] merits.” (alterations in original) (quoting *ODonnell*, 227 F. Supp. 3d at 736)).

⁵⁶¹ See *supra* text accompanying notes 227–233.

⁵⁶² 19 U.S. (6 Wheat.) 264 (1821).

⁵⁶³ *Id.* at 404; see also *New Orleans Pub. Serv., Inc. v. Council of New Orleans*, 491 U.S. 350, 358 (1989) (“Our cases have long supported the proposition that federal courts lack the authority to abstain from the exercise of jurisdiction that has been conferred.”); *Willcox v. Consol. Gas Co.*, 212 U.S. 19, 40 (1909) (“When a Federal court is properly appealed to in a case over which it has by law jurisdiction, it is its duty to take such jurisdiction The right of a party plaintiff to choose a Federal court where there is a choice cannot be properly denied.”); *Chicot County v. Sherwood*, 148 U.S. 529, 534 (1893) (“[T]he courts of the United States are bound to proceed to judgment and to afford redress to suitors before them in every case to which their jurisdiction extends. They cannot abdicate their authority or duty in any case in favor of another jurisdiction.”).

of federal jurisdiction has an uneasy relationship with self-imposed doctrines of judicial restraint.⁵⁶⁴ Such doctrines include those that courts label “abstention”; there are a set of circumstances in which federal courts abstain from hearing cases due to federalism principles. The role and parameters of *Younger* abstention have been established, but there are others. The doctrine of *Thibodaux*⁵⁶⁵ abstention, for example, guards against deciding cases sounding in diversity jurisdiction where the underlying state law implicates core aspects of state sovereignty.⁵⁶⁶ Under the doctrine of *Pullman*⁵⁶⁷ abstention, federal courts should abstain from deciding questions of federal constitutional law if the resolution of an ancillary state law question would obviate the need to reach the constitutional question.⁵⁶⁸

Because courts generally describe these doctrines as self-imposed doctrines of judicial restraint,⁵⁶⁹ the legitimacy of abstention doctrines has accordingly long faced academic scrutiny. Most prominently, in 1984, Professor Martin Redish argued that abstention is illegitimate.⁵⁷⁰ He reasoned that, absent an unconstitutional law, the American legal system equips elected representatives, not judges, with the decision to decide whether that law should take effect.⁵⁷¹ No one would argue that courts could declare a constitutionally sound grant of jurisdiction entirely void, he noted.⁵⁷² As such, refusing to exercise jurisdiction is tantamount to partially reversing a statute without warrant.⁵⁷³

Professor David Shapiro disagreed. He argued that courts regularly employ self-imposed limitations on judicial power in a wide range of circumstances for reasons of justiciability, exhaustion, and abstention.⁵⁷⁴ This type of restraint had “ancient and honorable roots at common law as well as in equity.”⁵⁷⁵ As such, “far from amounting to judicial usurpation, open acknowledgment of reasoned discretion is wholly consistent

⁵⁶⁴ See Smith, *supra* note 369, at 847–48.

⁵⁶⁵ La. Power & Light Co. v. City of Thibodaux, 360 U.S. 25 (1959).

⁵⁶⁶ See *id.* at 28–31.

⁵⁶⁷ R.R. Comm’n v. Pullman Co., 312 U.S. 496 (1941).

⁵⁶⁸ See *id.* at 498–502.

⁵⁶⁹ See, e.g., *id.* at 501 (describing “a doctrine of abstention appropriate to our federal system whereby the federal courts, ‘[e]xercising a wise discretion,’ restrain their authority because of ‘scrupulous regard for the rightful independence of the state governments’ and for the smooth working of the federal judiciary” (first quoting *Cavanaugh v. Looney*, 248 U.S. 453, 457 (1919); then quoting *Di Giovanni v. Camden Fire Ins. Ass’n*, 296 U.S. 64, 73 (1935))).

⁵⁷⁰ Martin H. Redish, *Abstention, Separation of Powers, and the Limits of the Judicial Function*, 94 YALE L.J. 71, 74–75 (1984).

⁵⁷¹ *Id.* at 74.

⁵⁷² See *id.*

⁵⁷³ See *id.* at 76–79.

⁵⁷⁴ David L. Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. REV. 543, 544–45, 550–51, 552, 557–58 (1985).

⁵⁷⁵ *Id.* at 545.

with the Anglo-American legal tradition.”⁵⁷⁶ Indeed, “a rush to judgment, in the absence of a sufficiently concrete and immediate controversy, may unduly shorten the time between enactment and adjudication or may unduly broaden the questions held appropriate for decision.”⁵⁷⁷

Among the more recent entrants in this debate is Professor Richard Fallon, who in 2013 contended in a short essay that abstention is legitimate because it has achieved general acceptance.⁵⁷⁸ Understanding this thesis in context requires consulting Fallon’s earlier work, which offers one of the leading accounts of constitutional legitimacy.⁵⁷⁹ He argues that questions of constitutional legitimacy take place on a range of axes and that it is important to disaggregate them.⁵⁸⁰ While “minimal legitimacy” turns on whether a constitution is sufficient to pass a certain threshold of acceptance or acceptability,⁵⁸¹ claims about “ideal” legitimacy turn on whether a constitution has achieved the best norms on matters such as democratic assent.⁵⁸² While “substantive legitimacy” turns on public perception that a judicial decision is substantively correct, “institutional legitimacy” rests on the public’s more general faith in an institution’s trustworthiness.⁵⁸³

The application of *Younger* abstention in civil rights cases like those described in this Article complicates the binary nature of poles like “procedural” and “substantive,” or even “minimal” and “ideal.” If *Younger* abstention unduly obstructs constitutional rights and facilitates irreparable harm, this raises questions about the substantive legitimacy of a procedural doctrine. As Professor Daniel Meltzer observed, “there is reason to doubt that ‘the central problems for constitutional law . . . are issues of the definition of rights rather than the creation of a machinery of jurisdiction and remedies that can transform rights proclaimed on paper into practical protections.’”⁵⁸⁴ Further, there is a continuum between the minimal and the ideal. Even if we cannot yet say that *Younger* abstention fails to meet a threshold of minimal legitimacy, the

⁵⁷⁶ *Id.*

⁵⁷⁷ *Id.* at 585.

⁵⁷⁸ See Richard H. Fallon, Jr., *Why Abstention Is Not Illegitimate: An Essay on the Distinction Between “Legitimate” and “Illegitimate” Statutory Interpretation and Judicial Lawmaking*, 107 NW. U. L. REV. 847, 870 (2013).

⁵⁷⁹ See Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787 (2005).

⁵⁸⁰ See *id.* at 1789–94.

⁵⁸¹ *Id.* at 1798.

⁵⁸² *Id.* at 1797 (emphasis omitted).

⁵⁸³ *Id.* at 1828 (emphases omitted).

⁵⁸⁴ Daniel J. Meltzer, *Deterring Constitutional Violations by Law Enforcement Officials: Plaintiffs and Defendants as Private Attorneys General*, 88 COLUM. L. REV. 247, 282 (1988) (omission in original) (quoting Benno C. Schmidt, Jr., *Juries, Jurisdiction, and Race Discrimination: The Lost Promise of Strauder v. West Virginia*, 61 TEX. L. REV. 1401, 1413 (1983)).

doctrine is sliding in that direction if it prevents plaintiffs from challenging systemic and structural constitutional violations in an adequate forum. A doctrine need not cross into illegitimacy overnight.

This Article raises questions about *Younger* abstention's *declining* legal and sociological legitimacy in the absence of the types of safety valves advanced in this Article. As a legal matter, the criminalization of poverty — that is, jailing or punishing someone because they cannot afford to pay a fine or fee — violates well-established law. In the set of cases discussed in this Article, when courts have addressed the merits (as opposed to jurisdictional hurdles), they have concluded that these practices are unconstitutional.⁵⁸⁵ Further, two of the leading institutional legal actors in the United States today — the American Bar Association and the Department of Justice — have filed amicus briefs challenging the legality of various schemes that jail or punish people for being poor.⁵⁸⁶ Relegating these claims to structurally infirm forums would create or widen a lacuna between the scope of *Younger* abstention and these leading institutional actors. Perhaps this would be justified in the presence of countervailing legal norms, such as federalism. But as observed, ignoring structural and systemic federal constitutional violations under these circumstances does not advance federalism.⁵⁸⁷ This restraint may well undermine federalism.

As a sociological matter, the continual criminalization of poverty through structurally or systemically unjust practices creates the risk that Americans — especially poor Americans of color — might lose faith in the nation's legal institutions in the absence of procedural justice. As documented in Part III, when a sense of procedural fairness is illusory, this fosters a sense of second-class citizenship, increases the likelihood people will fail to comply with legal directives, and induces anomie in some groups that leaves them with a sense of statelessness.⁵⁸⁸ Which of these three harms is more substantial is an ongoing debate among sociological and psychological experts. But none of these harms is a risk that crafters of legal doctrine should ignore if the architecture of constitutional practice is to remain sound. Surely the law cannot label as “adequate” the kinds of local courts that jail poor people for debts without inquiring into indigence,⁵⁸⁹ without providing counsel,⁵⁹⁰ and sometimes with no timely hearing at all.⁵⁹¹

⁵⁸⁵ See, e.g., *supra* text accompanying notes 219–226.

⁵⁸⁶ Brief for American Bar Association as Amicus Curiae in Support of Appellees and Affirmance at 5–6, *Walker v. City of Calhoun*, 682 F. App'x 721 (11th Cir. 2017) (No. 16-10521); Brief for the United States as Amicus Curiae Supporting Plaintiff-Appellee and Urging Affirmance on the Issue Addressed Herein at 12–13, *Walker*, 682 F. App'x 721 (No. 16-10521).

⁵⁸⁷ See *supra* section III.B, pp. 2327–38.

⁵⁸⁸ See *supra* text accompanying notes 339–345.

⁵⁸⁹ See, e.g., FERGUSON REPORT, *supra* note 9, at 52–53.

⁵⁹⁰ See, e.g., Amended Class Action Complaint, *supra* note 201, at 11–12.

⁵⁹¹ See, e.g., Transcript of Proceedings, *supra* note 302, at 78–79, 87.

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

CONCLUSION

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

— Maya Angelou, *Caged Bird*⁵⁹²

450,000. On any given day, about 450,000 people in America are in county and local jails awaiting trial.⁵⁹³ Some have economic means and can pay a small fixed bail amount for a misdemeanor, pay a fine, and go on with their lives, shaken by the experience of being behind bars, but not irrevocably pulled into a cycle of “cages”⁵⁹⁴ — both real and metaphorical. Others meet a different fate. Some remain in jail for days or weeks while waiting to see a judge. Away from their families. Away from their hourly wages. Away from their lives. Others remain there considerably longer, because even when they do see a judge, there is no attention paid to their indigence or to whether a bail amount is so high that they cannot afford to actually purchase their reentry into the free world. To plead guilty might mean freedom in the way of “time served.” But these convictions come with lifelong consequences. These convictions also sometimes come with fines and fees that poor people cannot afford to pay. Failure to pay sparks new arrests. And the cycle starts anew.

⁵⁹² MAYA ANGELOU, *Caged Bird*, in SHAKER, *WHY DON'T YOU SING?* 16, 17 (1983).

⁵⁹³ See MINTON & ZENG, *supra* note 190, at 3 tbl.2.

⁵⁹⁴ The language of “cages” is used in the litigants' complaints. See, e.g., Class Action Complaint, *supra* note 279, at 20 (“The City of Ferguson locked Mr. Morris in a cage because he failed to pay fines and costs associated with violations of a municipal ordinance that purports to prohibit people from having friends, relatives, or romantic partners stay overnight in their homes without naming the person on a written document in advance.”).

Americans who are in this cycle are lifting their voice and singing by way of the vociferous chants and marches that seem to erupt each summer in cities from Ferguson to Baltimore to Baton Rouge. Some are allegorically singing “redemption songs”⁵⁹⁵ by way of federal suit in the form of complaints and testimony. The question is whether “Our Federalism” is capacious enough to hear them. It should be. *Younger* abstention need not and should not block their access to federal court. When there are structural or systemic constitutional flaws built into a state’s procedural apparatus, federalism interests diminish. And the risk of irreparable harm is grave. The abstention doctrine has traditionally been flexible enough to correct this kind of irreparable harm. It is time to ensure that it remains so. No one should be in jail or punished because she is poor.

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

— Maya Angelou, *Caged Bird*⁵⁹⁶

⁵⁹⁵ Professor Lea VanderVelde employs this metaphor in a recent book about slaves suing for freedom in state courts before *Dred Scott*. LEA VANDERVELDE, REDEMPTION SONGS: SUING FOR FREEDOM BEFORE *DRED SCOTT* 1–8 (2014).

⁵⁹⁶ ANGELOU, *supra* note 592, at 16.