ARTICLES

Federal Court Reform of State Criminal Justice Systems: A Reassessment of the *Younger* Doctrine From a Modern Perspective

*Donald H. Zeigler**

The Supreme Court in its 1971 decision of Younger v. Harris *prohibited federal court intervention in pending state criminal proceedings in the absence of special circumstances. This Article examines the* Younger *doctrine from a modern perspective and argues for its abolition. The Article shows that abstention in cases seeking reform of state criminal justice systems is inconsistent with federal court activism in other areas. It argues that state judges are not entitled to greater deference by federal courts than other state officials. It then explains why federal injunctive relief is essential to achieve systemic reform of state criminal justice. Finally, the Article offers specific guidelines for litigants and courts in the handling of criminal justice reform cases.*

INTRODUCTION

Federal courts generally have refused to use their equitable powers to reform state criminal justice systems. This reticence is due in part to the Supreme Court's extension of the traditional nonintervention doctrine that forbids a federal court from enjoining a pending state crimi-

* Visiting Professor of Law, New York Law School; Professor of Law, Pace University. A.B. 1966, Amherst College; J.D. 1969, Columbia University. The author wishes to thank Donald L. Doernberg and Scott Westervelt for their helpful comments on drafts of this article. The author also gratefully acknowledges the research assistance of Kendra Golden, Sari Jaffe, Patrick Ovington, Debra Poole, Davida Scher, Scott Westervelt, and Carole Wilder.

nal proceeding in the absence of special circumstances.[1] In 1971 the Court in *Younger v. Harris* signaled the reemergence of this abstention doctrine.[2] The Court soon extended *Younger* to bar cases in which plaintiffs sought systemic reform of state criminal justice, even though the plaintiffs did not seek to enjoin any pending state court proceedings.[3] The lower federal courts followed this lead;[4] by the late 1970's, federal courts effectively abandoned their scrutiny of state administration of justice under the fourteenth amendment and 42 U.S.C. section 1983.[5]

A previous article by this author assessed *Younger* abstention from an historical perspective. It contended that the federal courts' refusal to use their equitable powers to reform state criminal justice systems directly contravenes the intent of the Reconstruction Congresses that adopted the fourteenth amendment and section 1983.[6] The present Article assesses the *Younger* doctrine from a modern perspective. It argues that the doctrine should be abandoned.[7] The principles of equity, federalism, and comity that underlie abstention should be recast as factors to

---

[1] This doctrine of self restraint is judicially developed and combines principles of comity, equity, and federalism. Zeigler, *An Accommodation of the* Younger *Doctrine and the Duty of the Federal Courts to Enforce Constitutional Safeguards in the State Criminal Process*, 125 U. PA. L. REV. 266, 269-70 (1976). For a review of the historical development of the doctrine, see *id.* at 269-82; Wechsler, *Federal Courts, State Criminal Law and the First Amendment*, 49 N.Y.U. L. REV. 740 (1974); Whitten, *Federal Declaratory and Injunctive Interference with State Court Proceedings: The Supreme Court and the Limits of Judicial Discretion*, 53 N.C.L. REV. 591 (1975).

[2] 401 U.S. 37 (1971). In *Younger*, the Court reversed a lower court decision enjoining plaintiff's prosecution under California's Criminal Syndicalism Act. *Id.* at 40-41. Samuels v. Mackell, 401 U.S. 66 (1971), decided the same day as *Younger*, refused to permit federal declaratory relief that has the same practical impact as an injunction. *Id.* at 72-73. The Court reasoned that declaring New York's criminal anarchy statute unconstitutional would halt the plaintiff's prosecution as effectively as an injunction; thus the court refused to make such a declaration.

[3] *See* Los Angeles v. Lyons, 461 U.S. 95, 112 (1983); Rizzo v. Goode, 423 U.S. 362, 377-80 (1976); O'Shea v. Littleton, 414 U.S. 488, 499-504 (1974).

[4] For a review of such cases, see Zeigler, *A Reassessment of the* Younger *Doctrine in Light of the Legislative History of Reconstruction*, 1983 DUKE L.J. 987, 1039-41.

[5] *Id.* at 988. *See also* Cover & Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 YALE L.J. 1035, 1038-41 (1977).

[6] *See* Zeigler, *supra* note 4.

[7] This Article reflects a substantial evolution in the author's views. In 1976 he advocated "a middle course" that would retain *Younger* abstention but construe the doctrine narrowly to allow the federal courts to play a substantial role in vindicating the constitutional rights of criminal defendants. *See* Zeigler, *supra* note 1, at 268-69, 283-306. He now believes that a middle course is inappropriate and that the *Younger* doctrine should not be retained.

consider in the wise exercise of equitable discretion.[8]

The first three sections of the Article present the case for direct federal court intervention to work systemic reform of state criminal justice.[9] Section I contends that abstention in criminal justice cases is wholly inconsistent with federal court activism in school desegregation, legislative reapportionment, and prisoners' rights suits.[10] State criminal justice exhibits many of the characteristics that made federal court intervention in the other areas both necessary and appropriate. Consequently, federal courts should not abstain in criminal justice reform cases. Section II examines whether the *Younger* doctrine can be justified by special principles of comity between federal and state judges. It concludes that state courts are not entitled to greater deference than the other branches of state government in actions alleging systemic violation of federal constitutional rights. Section III explores the inherent limitations of Supreme Court review of state court judgments and federal habeas corpus as remedial devices and explains why injunctive relief is

---

[8] Other commentators have advocated this approach, although for different reasons than are advanced here. *See, e.g.*, Redish, *Abstention, Separation of Powers, and the Limits of the Judicial Function*, 94 YALE L.J. 71 (1984) (contending that abstention doctrines ignore the dictates of valid jurisdictional and civil rights statutes and thus usurp legislative authority in violation of separation of powers principles); Shreve, *Federal Injunctions and the Public Interest*, 51 GEO. WASH. L. REV. 382, 405-19 (1983) (arguing that the Supreme Court has obscured and denigrated the meaning of federal equity doctrine and overstepped its authority to refuse injunctions); Soifer & Macgill, *The* Younger *Doctrine: Reconstructing Reconstruction*, 55 TEX. L. REV. 1141, 1143-44, 1185-88 (1977) (contending that the *Younger* doctrine has eliminated the discretionary balancing at the heart of equity and has distorted federalism and comity principles by requiring the federal courts always to give way); Weissman, *The Discriminatory Application of Penal Laws by State Judicial and Quasi-Judicial Officers: Playing the Shell Game of Rights and Remedies*, 69 NW. U.L. REV. 489, 492-94, 515-16 (1974) (asserting that federal injunctive relief must be available to curb racial discrimination in the application and enforcement of state penal laws by judicial and executive officers because administrative controls and the power of the ballot are inadequate).

[9] It may be helpful to note very briefly at the outset the sort of reform the author favors. At the risk of oversimplification, he is essentially an advocate of the "Due Process Model" of the criminal process. *See* H. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 163-71 (1968). In the author's view, the greatest shortcomings in American criminal justice are the lack of procedural due process and equal protection. *See infra* notes 45-54 and accompanying text. Accordingly, reform should seek to ensure procedural regularity and equality of treatment at all stages of the criminal process.

[10] Prisoners' rights cases might be classified as criminal justice reform cases. Corrections departments, which administer state prisons and pretrial detention facilities, are components of state criminal justice systems. For purposes of this Article, however, cases seeking systemic reform of state criminal justice systems are defined as cases seeking change in the investigative or adjudicative phases of criminal justice.

essential to achieve systemic reform of state criminal justice.

Section IV considers how the federal injunctive power can best be used. It applies the lessons learned in other institutional reform cases to litigation challenging criminal justice practices and procedures and suggests guidelines to assist litigants and courts in structuring and adjudicating such cases. Section IV also explains why abandoning *Younger* abstention will neither seriously disrupt the state criminal process nor overburden the federal courts.

I. Contrasting Intervention in Desegregation, Reapportionment, and Prisoners' Rights Suits With Abstention In Criminal Justice Reform Cases

A. Factors Making Federal Court Intervention in State Institutions Appropriate and Necessary

Common factors underlie the federal courts' willingness to use their equitable powers to desegregate schools, reapportion legislatures, and reform prisons. In each instance, the federal courts acted because state institutions denied fundamental constitutional rights. The offending practices were deep-rooted, systemic, and national in scope. The practices were highly resistant — indeed, virtually impervious — to change at the state level. Finally, reform was critical to the country as a whole.

State criminal justice systems exhibit the same characteristics that made intervention in the other areas appropriate and necessary. The administration of justice implicates fundamental rights. Criminal justice problems are systemic and nationwide. The states are unwilling or unable to administer criminal justice fairly and efficiently. Finally, improvement in state administration of criminal justice is vital to the health of the republic and long overdue. Therefore, abstention in cases seeking reform of state criminal justice systems cannot be harmonized with federal court intervention in desegregation, reapportionment, and prisoners' rights suits.

1. School Desegregation

In *Brown v. Board of Education (I)*,[11] Chief Justice Warren stated that education "is required in the performance of our most basic public responsibilities," and "it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an educa-

[11] 347 U.S. 483 (1954).

tion."[12] Because "[s]eparate educational facilities are inherently unequal,"[13] segregated schools deny black school children equal protection of the laws in violation of the fourteenth amendment.[14] When the Court decided *Brown*, seventeen states and the District of Columbia required racial segregation in schools and four other states permitted racial segregation.[15]

Public opposition to school desegregation was widespread, particularly in the deep South where segregation was a way of life.[16] Achieving change at the state level was unrealistic;[17] Southerners were fundamentally opposed to integration.[18] An outside influence was necessary to break this vested tradition. And change was essential because an in-

---

[12] *Id.* at 493. *See also* Milliken v. Bradley (I), 418 U.S. 717, 783 (1974) (Marshall, J., dissenting) ("We deal here with the right of all of our children, whatever their race, to an equal start in life and to an equal opportunity to reach their full potential as citizens."); Reynolds, *Individualism vs. Group Rights: The Legacy of* Brown, 93 YALE L.J. 995, 995 (1984) (noting that education is basic to the full exercise of first amendment rights and the right to vote).

[13] Brown v. Board of Educ. (I), 347 U.S. 483, 495 (1954).

[14] *Id.*

[15] See Leflar & Davis, *Segregation in the Public Schools — 1953*, 67 HARV. L. REV. 377, 378 n.3 (1954), for a listing of the pertinent state statutes. One year later during the oral argument in Brown v. Board of Educ. (II), 349 U.S. 294 (1955), the Attorney General of Virginia told the Court that school desegregation "involved the rights, the mode of life, the customs, the mores of 50 million people and 11 million school children." ARGUMENT: THE ORAL ARGUMENT BEFORE THE SUPREME COURT IN Brown v. Board of Education of Topeka, 1952-55, at 432 (L. Friedman ed. 1969) [hereafter ARGUMENT].

[16] Racial segregation in schools "was an integral element in the Southern State[s'] general program to restrict Negroes as a class from participation in the life of the community, the affairs of the State, and the mainstream of American life . . . ." United States v. Jefferson County Bd. of Educ., 372 F.2d 836, 866 (5th Cir. 1966) (Wisdom, J.). *See also* McKay, *"With All Deliberate Speed" — A Study of School Desegregation*, 31 N.Y.U. L. REV. 991, 992-97 (1956); Wilkinson, *The Supreme Court and Southern School Desegregation, 1955-70: A History and Analysis*, 64 VA. L. REV. 485, 494-505 (1978). *See generally* W. CASH, THE MIND OF THE SOUTH (1941).

[17] *See* Fletcher, *The Discretionary Constitution: Institutional Remedies and Judicial Legitimacy*, 91 YALE L.J. 635, 665 (1982) (asserting that the Supreme Court intervened in the school cases "to protect against a possibly uncorrectable bias in the political process").

[18] "The impulse of obstruction was too . . . deeply embedded politically, historically, socially, psychologically, economically, sexually, and in every other way." Wilkinson, *supra* note 16, at 501. Professor Wilkinson notes that fear of black domination was acute in states with large black populations. *Id.* at 496-97. "Even the tiniest tear in the fabric of segregation was certain to alarm . . . . [S]chooling, even more than voting, raised the spectre of black rule. The literate Negro was a demanding Negro, asking and getting who knows what." *Id.* at 494, 497. *See also* McKay, *supra* note 16, at 992-97.

tegrated society required integrated schools.[19]

2. Legislative Reapportionment

Reapportionment cases affirm the right to have one's vote weigh equally with the votes of others. *Reynolds v. Sims*[20] held that "[t]he right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government."[21] Historically, malapportionment was the rule rather than the exception.[22] In approximately two-thirds of the states, constitutional restrictions on legislative representation made equitable apportionment impossible in one or both state legislative houses.[23] In most other states, legislatures simply failed to reapportion.[24]

In *Colegrove v. Green*[25] Justice Frankfurter suggested that the remedy lay in the local electoral process.[26] As Professor Charles Black

---

[19] Segregated education "perpetuates the barriers between the races; stereotypes, misunderstandings, hatred, and inability to communicate are all intensified." Fiss, *Racial Imbalance in the Public Schools: The Constitutional Concepts*, 78 HARV. L. REV. 564, 570 (1965).

[20] 377 U.S. 533 (1964).

[21] *Id.* at 555. *See* Wesberry v. Sanders, 376 U.S. 1, 17 (1964) ("No right is more precious . . . . Other rights, even the most basic, are illusory if the right to vote is undermined."). *See also* Gray v. Sanders, 372 U.S. 368, 379-81 (1963).

[22] *See* Colegrove v. Green, 328 U.S. 549, 555 (1946) ("Throughout our history . . . the most glaring disparities have prevailed as to the contours and the population of [congressional] districts."). *See also* Goldberg, *The Statistics of Malapportionment*, 72 YALE L.J. 90, 90-92 (1962). In 1872, Congress enacted legislation requiring that House members be elected from districts "containing as nearly as practicable an equal number of inhabitants." Act of Feb. 2, 1872, ch. 11, 17 Stat. 28. But the law was not enforced, and Congress eliminated the requirement in 1929. Act of June 18, 1929, ch. 28, 46 Stat. 21. *See* McKay, *Reapportionment: the Success Story of the Warren Court*, 67 MICH. L. REV. 223, 225 (1968). *See also* Colegrove v. Green, 328 U.S. at 555-56.

[23] Sindler, Baker v. Carr: *How to "Sear the Conscience" of Legislators*, 72 YALE L.J. 23, 23 (1962).

[24] *Id.* at 24. Statistics showing the vast scope of malapportionment in federal congressional districts in the early 1960's can be found in Wesberry v. Sanders, 376 U.S. 1, 49-50 (1964) (appendix to opinion of Harlan, J., dissenting). Similar statistics for state legislative districts can be found in Goldberg, *supra* note 22, at 100-01 app. A. The pent-up frustration with the problem was revealed by the flood of litigation following Baker v. Carr, 369 U.S. 186 (1962), which held reapportionment claims to be justiciable in federal court. In Reynolds v. Sims, 377 U.S. 533, 556 n.30 (1964), the Court noted that litigation challenging state legislative apportionment schemes had begun in 34 states within nine months of the decision in *Baker v. Carr*.

[25] 328 U.S. 549 (1946).

[26] *Id.* at 554, 556.

asked, however, "is this a practicable suggestion, when the wrong complained of is the corruption of the electoral process?"[27] Politicians, whose seats were threatened by "one person, one vote"[28] principles, simply were not receptive to public demands for reapportionment.[29]

Since reapportionment required legislative action, reform efforts were stymied.[30] Reapportionment was particularly important in the early 1960's when the Court first ordered reform. State legislatures often were dominated by rural interests and were out of touch with growing urban problems.[31] Rural legislators generally were unwilling to attempt to solve urban social problems.[32] Reapportionment was a

---

[27] Black, *Inequities in Districting for Congress*: Baker v. Carr *and* Colegrove v. Green, 72 YALE L.J. 13, 14 (1962).

[28] Gray v. Sanders, 372 U.S. 368, 381 (1963).

[29] Lewis, *Legislative Apportionment and the Federal Courts*, 71 HARV. L. REV. 1057, 1091 (1958); Sindler, *supra* note 23, at 28; Swygert, *In Defense of Judicial Activism*, 16 VAL. U.L. REV. 439, 451 (1982).

[30] Emerson, *Malapportionment and Judicial Power*, 72 YALE L.J. 64, 79 (1962); Sindler, *supra* note 23, at 28. Baker v. Carr, 369 U.S. 186, provides a dramatic example of this phenomenon. The Tennessee constitution required equitable apportionment among counties based on a decennial census. *Id.* at 188-89. Since 1901, however, proposals for reapportionment had failed to pass either house of the state legislature despite substantial growth and redistribution of the state's population. *Id.* at 191-92. Reapportionment required legislative approval, as did constitutional amendments, and Tennessee had no popular initiative process. *Id.* at 193 n.14. The plaintiffs' claim that change was "difficult or impossible," *id.* at 193, plainly had merit. Reynolds v. Sims, 377 U.S. 533 (1964), presented a similar fact pattern. Alabama's constitution also required apportionment of representatives among the counties of the state in accordance with a census conducted every 10 years. *Id.* at 538-39. Reapportionment, however, had not occurred since 1900, despite population shifts. *Id.* at 540. Although the Alabama Supreme Court found that the state legislature had violated the state constitution, the court was unwilling to order change. *See id.* at 540-41 nn.4-5 and cases cited therein. The United States Supreme Court concluded: "Legislative inaction, coupled with the unavailability of any political or judicial remedy, had resulted, with the passage of years, in the perpetuated scheme becoming little more than an irrational anachronism." *Id.* at 570. Similar problems existed in Virginia. *See* Davis v. Mann, 377 U.S. 678, 689-90 (1964).

[31] *See* Harvey, *Reapportionments of State Legislatures — Legal Requirements*, 17 LAW & CONTEMP. PROBS. 364, 364 (1952); Schattschneider, *Urbanization and Reapportionment*, 72 YALE L.J. 7, 10-11 (1962).

[32] Note, Baker v. Carr *and Legislative Apportionments: A Problem of Standards*, 72 YALE L.J. 968, 979-80 (1963) [hereafter Note, *Problem of Standards*]. *See also* E. BANFIELD & M. GRODZINS, GOVERNMENT AND HOUSING IN METROPOLITAN AREAS 99 (1958) ("Almost everywhere city officials assert that indifference or ignorance on the part of rural representatives in state legislatures frustrates action on metropolitan problems by withholding essential powers from the cities."); Schattschneider, *supra* note 31, at 11.

precondition to addressing these unpopular urban issues.[33] As with segregated schools, malapportioned legislatures required a disinterested outside force to set them straight.

3. Prisoners' Rights

Federal courts have intervened in state prisons to vindicate a broad range of constitutional rights. The courts have redressed violations of prisoners' first amendment rights of free speech and religion, eighth amendment right to be free from cruel and unusual punishment, and fourteenth amendment rights to due process and equal protection of the laws.[34] The many lawsuits concerning prison conditions demonstrate the national scope of the problem.[35] By 1981, courts had held individual prisons or entire prison systems in twenty-four states to violate the Constitution, and litigation was pending in many other states.[36]

Federal court action has been necessary because citizens and local politicians often oppose prison reform. Increased alarm over crime makes the public unsympathetic.[37] Prisoners' lack of economic and political power and the low visibility of prisons make prison reform a low priority for legislative and executive officials.[38] When lawmakers at-

---

[33] In more immediate political terms, the rural dominance in state legislatures and in Congress threatened the Kennedy Administration's New Frontier programs. President Kennedy strongly favored reapportionment. *See Transcript of the President's News Conference on Domestic and World Affairs*, N.Y. Times, Mar. 30, 1962, at 12, cols. 3-4.

[34] *See* Comment, *Confronting the Conditions of Confinement: An Expanded Role for Courts in Prison Reform*, 12 HARV. C.R.-C.L. L. REV. 367, 368 (1977) [hereafter Comment, *Confinement*] and cases cited therein. *See generally* Project, *Criminal Procedure*, 69 GEO. L.J. 211, 591-614 (1980).

[35] Chief Justice Burger has called correctional institutions "the most neglected phase of our system of criminal justice . . . ." Burger, *Our Options Are Limited*, 18 VILL. L. REV. 165, 165 (1972). *See also* Burger, *Commencement Address*, 4 PACE L. REV. 1, 4 (1983). Justice Brennan believes lack of resources is the "core" problem in administering prisons. Rhodes v. Chapman, 452 U.S. 337, 357 (1981) (Brennan, J., concurring). *See also* D. SKOLER, ORGANIZING THE NON-SYSTEM 7 (1977) ("Resources and facilities have lagged behind accepted standards of adequacy . . . ."). Traditionally, only a small fraction of criminal justice dollars is allocated to prisons. *See* Comment, *The Role of the Eighth Amendment in Prison Reform*, 38 U. CHI. L. REV. 647, 649 (1971) [hereafter Comment, *Role of Eighth Amendment*] and sources cited therein. *See generally Symposium: Prison Crowding*, 1984 U. ILL. L.F. 203-422.

[36] Rhodes v. Chapman, 452 U.S. 337, 353-54 (1981) (Brennan, J., concurring).

[37] Comment, *Confinement*, *supra* note 34, at 386-87; Comment, *Role of Eighth Amendment*, *supra* note 35, at 650.

[38] Comment, *Role of Eighth Amendment*, *supra* note 35, at 650, 653-54 ("[C]orrectional reform is often considered by public officials to be a secondary respon-

tempt prison reform, the responses have ranged from outright resistance[39] to an unenthusiastic, grudging acquiescence that leads to little actual improvement.[40] An additional impediment to reform is that some states fragment responsibility for prisons among many different agencies.[41]

Notwithstanding the difficulty of prison reform, it is critical to the quality of American life. Approximately ninety-five percent of prisoners return to the community after an average prison stay of twenty-one

---

sibility."); Comment, *Confinement*, *supra* note 34, at 386-87. *See also* Rhem v. Malcolm, 507 F.2d 333, 342 (2d Cir. 1974); Taylor v. Sterrett, 344 F. Supp. 411, 421 (N.D. Tex. 1972); Note, *Decency and Fairness: An Emerging Judicial Role in Prison Reform*, 57 VA. L. REV. 841, 844 (1971). State officials routinely ignore calls for reform from professional and civic groups. *See, e.g.*, Pugh v. Locke, 406 F. Supp. 318, 324, 330 (M.D. Ala. 1976) (The court noted that none of the standards recommended by a 1972 study had been implemented and concluded: "The Alabama legislature has had ample opportunity to make provision for the state to meet its constitutional responsibilities in this area, and it has failed to do so."); Inmates of Suffolk County Jail v. Eisenstadt, 360 F. Supp. 676, 681 (D. Mass. 1973) (In ordering Boston's Charles Street Jail closed, the court noted that "[d]uring the past quarter century, seven separate governmental commissions studied Charles Street and condemned it. Most of them recommended that it be abandoned and a new facility constructed."), *aff'd*, 494 F.2d 1196 (lst Cir.), *cert. denied*, 419 U.S. 977 (1974); Jones v. Wittenberg, 323 F. Supp. 93, 97 (N.D. Ohio 1971), *aff'd sub nom.* Jones v. Metzger, 456 F.2d 854 (6th Cir. 1972).

[39] *See, e.g.*, Battle v. Anderson, 376 F. Supp. 402, 410-11, 414-15 (E.D. Okla. 1974) (warden ignored Department of Corrections directives to integrate prison facilities and to cease using chemical agents for punitive purposes); Holt v. Sarver, 309 F. Supp. 362, 369 (E.D. Ark. 1970) ("The legislation adopted in 1967 and 1968 and Act 377 of 1969 establishing the Tucker Intermediate Reformatory are forward looking; but at least as yet they have not had any significant impact on the distinctive characteristics of the Arkansas penal system . . . ."), *aff'd*, 442 F.2d 304 (8th Cir. 1971).

[40] *See, e.g.*, Rodriguez v. Jimenez, 409 F. Supp. 582, 592 (D.P.R. 1976) ("The conditions described in these findings have been known to defendants for some time. The minimal corrective measures have been very recent and have not addressed the basic inadequacies of La Princesa."); Jones v. Wittenberg, 330 F. Supp. 707, 714 (N.D. Ohio 1971) ("The sad reality is that much of the present difficulty stems from a defensive clinging to outmoded usages, and the failure to use some ingenuity or imagination toward making the best use of what is already at hand."), *aff'd sub nom.* Jones v. Metzger, 456 F.2d 854 (6th Cir. 1972).

[41] *See, e.g.*, Jones v. Wittenberg, 323 F. Supp. at 98 ("The evidence makes it abundantly clear that with the fragmentation of authority among all three branches of the state government, it would be a tremendous triumph of hope over reality to think that what has been developed in more than a century by conflicting political interests and by public indifference and hostility will be changed by those who are completely embroiled in the resultant mess."). *See generally* D. SKOLER, *supra* note 35, at 212-13.

months.[42] If, as is often contended, prisons not only fail to rehabilitate but instead make inmates more destructive than when they entered prison,[43] crime will continue to plague America.[44] The federal courts have deemed it a sufficiently critical problem to justify intervention.

4. Criminal Justice

State criminal justice systems require reform by the federal courts for essentially the same reasons that segregated schools, malapportioned legislatures, and inhumane prisons have required federal court intervention. Criminal justice practices and procedures implicate a host of constitutional rights. The due process and equal protection clauses of the fourteenth amendment require that indigent defendants be accorded the same resources as wealthy defendants to mount a defense.[45] No one, however, would seriously assert that rich and poor "stand on an equality before the bar of justice in every American court."[46] Due process requires that the important decisions affecting an accused's personal freedom be made only after full consideration of all relevant facts at an

---

[42] Fox, *Institutional Confinement: Countdown To Explosion*, in D. SHANAHAN, THE ADMINISTRATION OF JUSTICE SYSTEM: AN INTRODUCTION 316, 318 (1977); Turner, *Establishing the Rule of Law in Prisons: A Manual for Prisoners' Rights Litigation*, 23 STAN. L. REV. 473, 473 (1971).

[43] *See, e.g.*, PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: CORRECTIONS 11 (1967); Fox, *supra* note 42, at 318; Comment, *Role of Eighth Amendment*, *supra* note 35, at 647-48.

[44] According to one study, 67% of released prisoners were rearrested within three years of their release; of these, 40 to 50% were ultimately convicted. *See* D. SKOLER, *supra* note 35, at 13. *See generally* PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 45-46 (1967) [hereafter THE CHALLENGE OF CRIME]. Fear of crime has continued to increase in recent years. *See* R. RHODES, THE INSOLUBLE PROBLEMS OF CRIME 17 (1977).

[45] Indigent defendants must be granted equal access to the instruments needed to vindicate legal rights. Argersinger v. Hamlin, 407 U.S. 25 (1972); Griffin v. Illinois, 351 U.S. 12 (1956). The outcome of criminal cases may not hinge on an accused's lack of wealth. Williams v. Illinois, 399 U.S. 235 (1970); United States v. Gaines, 449 F.2d 143 (2d Cir. 1971); White v. Gilligan, 351 F. Supp. 1012 (S.D. Ohio 1972).

[46] Griffin v. Illinois, 351 U.S. 12, 17 (1956) (quoting Chambers v. Florida, 309 U.S. 227, 241 (1940)). For discussions of the different treatment accorded rich and poor defendants, see generally L. KATZ, L. LITWIN, & R. BAMBERGER, JUSTICE IS THE CRIME, PRETRIAL DELAY IN FELONY CASES (1972); PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE COURTS 50-51 (1967) [hereafter TASK FORCE REPORT: THE COURTS]; P. WICE, FREEDOM FOR SALE (1974); Rankin, *The Effect of Pretrial Detention*, 39 N.Y.U. L. REV. 641 (1964).

on-the-record hearing in which the defendant is represented by counsel before an impartial magistrate.[47] The system often omits these safeguards.[48]

Procedural safeguards and adequate fact-finding are necessary to effectuate the eighth amendment right to nonexcessive bail, the sixth amendment right to effective assistance of counsel, and the fourth amendment right to be arrested and detained only upon probable cause.[49] Moreover, incarceration involves one of the most basic rights, "the freedom to be free."[50] Plainly, then, abstention in criminal justice cases cannot be justified on the ground that the rights involved are less fundamental than in the other areas in which federal courts have

---

[47] When a person faces potential adverse governmental action, deciding what process is due involves measuring "the extent to which [the person] may be 'condemned to suffer grievous loss,' " and determining "whether [the person's] interest in avoiding that loss outweighs the governmental interest in summary adjudication." Goldberg v. Kelly, 397 U.S. 254, 263 (1970). Criminal defendants face loss of freedom, while the governmental interest in summary adjudication is merely monetary. Assembly line justice exists because the states have allocated their resources elsewhere. *See* NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS, REPORT ON COURTS (1973) [hereafter REPORT ON COURTS]; TASK FORCE REPORT: THE COURTS, *supra* note 46, at 31-32. In the correctional context, the courts have consistently held that lack of resources cannot justify denial of constitutional rights. *See, e.g.*, Rhem v. Malcolm, 371 F. Supp. 594, 622-23 (S.D.N.Y. 1974); Inmates of Suffolk County Jail v. Eisenstadt, 360 F. Supp. 676, 687 (D. Mass. 1973); Brenneman v. Madigan, 343 F. Supp. 128, 139 (N.D. Cal. 1972); Hamilton v. Love, 328 F. Supp. 1182, 1194 (E.D. Ark. 1971).

[48] *See infra* notes 55-61 and accompanying text.

[49] As Justice Frankfurter observed, "[t]he history of liberty has largely been the history of observance of procedural safeguards." McNabb v. United States, 318 U.S. 332, 347 (1943).

[50] United States v. Thompson, 452 F.2d 1333, 1340 (D.C. Cir. 1971), *cert. denied*, 405 U.S. 998 (1972). Subsumed under that basic right are the freedom to walk and drive about, Papachristou v. City of Jacksonville, 405 U.S. 156 (1972), to travel interstate, Memorial Hospital v. Maricopa County, 415 U.S. 250 (1974); Shapiro v. Thompson, 394 U.S. 618 (1969), and the right to associate with persons of one's own choice, Kusper v. Pontikes, 414 U.S. 51 (1973); William v. Rhodes, 393 U.S. 23 (1968).

Persons incarcerated through the criminal process also lose "the right to be let alone," which Justice Brandeis viewed as the "most comprehensive of rights and the right most valued by civilized men." Olmstead v. United States, 277 U.S. 438, 478 (1928) (dissenting opinion). Privacy, as the Supreme Court has recognized, is a fundamental right protected by the Bill of Rights. Roe v. Wade, 410 U.S. 113, 152-53 (1973); Stanley v. Illinois, 405 U.S. 645, 651-52 (1972). Prisoners, however, have no reasonable expectation of privacy in their prison cells, and thus are not entitled to the protection of the fourth amendment against unreasonable searches and seizures. Hudson v. Palmer, 104 S. Ct. 3194, 3199-3201 (1984).

intervened.

The problems with the administration of justice are deep-rooted, systemic, and national in scope.[51] They stem from resources insufficient to handle the heavy flow of cases. The President's Commission on Law Enforcement and Administration of Justice concluded: "America's system of criminal justice is . . . overworked, undermanned, [and] underfinanced . . . ."[52] The system also lacks coordination, both within each component (such as the prosecution or the police) and among components.[53] Thus, the criminal justice system can be fragmented and decentralized.[54]

These underlying problems badly distort the criminal process. They cause chronic delay at virtually all points in the system.[55] They also

---

[51] The problems have been studied in recent years by a succession of national commissions and professional groups. For example, The President's Commission on Law Enforcement and Administration of Justice issued a ten volume study in 1967, and The National Advisory Commission on Criminal Justice Standards and Goals produced six volumes in 1973. In addition, the Advisory Commission on Intergovernmental Relations issued a series of reports on criminal justice problems, including MAKING THE SAFE STREETS ACT WORK (1970); SAFE STREETS RECONSIDERED: THE BLOCK GRANT EXPERIENCE 1968-1975 (1977); STATE-LOCAL RELATIONS IN THE CRIMINAL JUSTICE SYSTEM (1971); and The American Bar Association's Project on Minimum Standards in the Administration of Justice also issued reports.

[52] *See* THE CHALLENGE OF CRIME, *supra* note 44, at 12. The President's Commission stated: "It is not only judges who are in short supply. There are not enough prosecutors, defense counsel, and probation officers . . . . The deluge of cases is reflected in every aspect of the courts' work, from overcrowded corridors and courtrooms to the long calendars . . . ." *See* TASK FORCE REPORT: THE COURTS, *supra* note 46, at 31. *See also* AMERICAN BAR ASSOCIATION PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO SPEEDY TRIAL 1 (1967); REPORT ON COURTS, *supra* note 47, at 1. The problem of insufficient resources has, if anything, worsened in the years since these reports were issued. *See* M. FEELEY, COURT REFORM ON TRIAL xi (1983); Kaufman, *The Judicial System, Ailing, Needs Help*, N.Y. Times, June 11, 1984, at A19, col. 1; N.Y. ST. B.A., *Courts Need More Resources*, 26 STATE B. NEWS 1 (1984); *City's Courts Clogged by Increase in Cases and Lack of Judges*, N.Y. Times, Nov. 27, 1982, at A1, col. 1; *Justice System in State Found Nearing Chaos, Study Panel Asserts It Is "Choking on Numbers,"* N.Y. Times, Dec. 18, 1981, at B1, col. 6; *The Crime-Without-Punishment Crisis*, N.Y. Times, Aug. 10, 1981, at B1, col. 4.

[53] UNITED STATES ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, STATE-LOCAL RELATIONS IN THE CRIMINAL JUSTICE SYSTEM 138 (1971); *see also* THE CHALLENGE OF CRIME, *supra* note 44, at 7-12. *See infra* notes 65-67 and accompanying text.

[54] *See* THE CHALLENGE OF CRIME, *supra* note 44, at 7, 10-12.

[55] *See* L. KATZ, L. LITWIN, & R. BAMBERGER, *supra* note 46, at 2, 4 ("The courts are filled with criminal cases that never seem to end . . . . Delay has become the byword of the justice system."). *See also* REPORT ON COURTS, *supra* note 47, at 1, 16,

create enormous pressure to dispose of cases quickly in the early stages of the proceedings.[56] Consequently, the traditional criminal process characterized by formal procedures and culminating in a public trial has been replaced by an informal, largely invisible process of administrative plea and sentence bargaining.[57] Often without adequate information or basic procedural protection for the defendant, courts make decisions concerning such matters as whether there is probable cause to believe a crime has been committed,[58] what bail should be imposed,[59]

---

66 ("Backlogs are enormous . . . . Delay in the formal processing of accused persons is a chronic problem for the judicial system."). Reformers have urged that the period from arrest to trial in felony cases should be as little as 60 days, *id.* at 68; however, it is common for 10 to 12 months to elapse between the apprehension of an accused and the disposition of her case. *Id.* at 66.

[56] THE CHALLENGE OF CRIME, *supra* note 44, at 128 ("An inevitable consequence of volume . . . is the almost total preoccupation . . . with the movement of cases."); TASK FORCE REPORT: THE COURTS, *supra* note 46, at 31 ("[T]he agencies administering criminal justice sometimes become preoccupied simply with moving the cases. Clearing the dockets becomes a primary objective of all concerned, and cases are dismissed, guilty pleas are entered, and bargains are struck with that end as the dominant consideration.").

[57] TASK FORCE REPORT: THE COURTS, *supra* note 46, at 4. *See also* REPORT ON COURTS, *supra* note 47, at 15-16. A "plea of guilty is probably the most frequent method of conviction in all jurisdictions; in some localities as many as 95% of the criminal cases are disposed of in this way." AMERICAN BAR ASSOCIATION PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO PLEAS OF GUILTY 1-2 (1968).

[58] In most jurisdictions in the United States the preliminary hearing is not a useful factfinding device . . . . In many places testimony at the hearing is not recorded or otherwise perpetuated. In some jurisdictions the defense does not have the right to subpoena witnesses, and quite often counsel is not appointed for the accused until the time for the preliminary hearing has passed.

TASK FORCE REPORT: THE COURTS, *supra* note 46, at 43.

[59] Pretrial release conditions must be set in cases that cannot be disposed of at the initial court appearance. Although the defendant's freedom is at stake, bail decisions are usually made in a matter of minutes, or even seconds, solely on the basis of the seriousness of the charge and the defendant's prior record, but without consideration of the accused's roots in the community, her financial status, or the weight of the evidence against her. *See* McCree, *Bail and the Indigent Defendant*, 1965 U. ILL. L.F. 1, 4. *See also* THE CHALLENGE OF CRIME, *supra* note 44, at 131-33; TASK FORCE REPORT: THE COURTS, *supra* note 46, at 30. The shortcomings in the administration of the money bail system in America have been widely documented. *See generally* D. FREED & P. WALD, BAIL IN THE UNITED STATES: 1964 (1964); P. WICE, *supra* note 46; Comment, *Administration of Pretrial Release and Detention: A Proposal for Unification,* 83 YALE L.J. 153 (1973).

whether a plea of guilty should be entered,[60] and what sentence is appropriate.[61] These deficiencies in criminal justice practices and procedures are as broad as the problems in other areas in which the federal courts have intervened.

Criminal justice systems have proved to be as resistant to change at the state level as segregated schools, malapportioned legislatures, and inhumane prisons. Despite many proposals for reform, remarkably little change has occurred in the day-to-day operation of state criminal justice systems in the last twenty years.[62] Public pressure has not been an effective catalyst for reform.[63] The public also sends conflicting signals: one segment demands greater emphasis on crime control while another segment demands procedural fairness and greater equality in the treatment of offenders.[64]

Resistance to change may be inherent in the structure of the criminal justice system. Because power is fragmented among the major compo-

---

[60] Few practices in the criminal justice system create more unease and suspicion among both defendants and the public than the negotiated guilty plea, particularly when the plea is entered in the early stages of a prosecution. TASK FORCE REPORT: THE COURTS, *supra* note 46, at 9. *See Plea Bargaining — The Tough Choices Prosecutors Must Make*, LIFE, Oct., 1983, at 33. *See generally* AMERICAN BAR ASSOCIATION PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, *supra* note 57; D. NEWMAN, CONVICTION: THE DETERMINATION OF GUILT OR INNOCENCE WITHOUT TRIAL (1966); Alschuler, *The Defense Attorney's Role in Plea Bargaining*, 84 YALE L.J. 1179 (1975); Enker, *Perspectives on Plea Bargaining*, in TASK FORCE REPORT: THE COURTS, *supra* note 46, at 108 app. A; Comment, *Judicial Supervision over California Plea Bargaining: Regulating the Trade*, 59 CALIF. L. REV. 962 (1971). Guilty pleas may be coerced by threatening lengthy incarceration or high bail if a defendant asserts her innocence, while offering a short sentence or even probation if the defendant pleads promptly. *See* TASK FORCE REPORT: THE COURTS, *supra* note 46, at 30. *See also* ATTICA: THE OFFICIAL REPORT OF THE NEW YORK STATE SPECIAL COMMISSION ON ATTICA 30-31 (1972).

[61] Defendants convicted at an early court appearance, whether by plea of guilty or trial, are often sentenced on the spot, without presentence reports or investigations, on the basis of the charges, their demeanor, and their prior record. TASK FORCE REPORT: THE COURTS, *supra* note 46, at 31.

[62] *See* Murphy, *Foreword*, in D. SKOLER, *supra* note 35, at xvii. Reformers have proposed change in virtually all phases of the criminal justice system. For extensive discussion of reform proposals, see sources cited *supra* note 51.

[63] *See* Allen, *Central Problems of American Criminal Justice*, 75 MICH. L. REV. 813, 814 (1977) (Public discussion of criminal justice issues often "is characterized by a partisanship that frequently trivializes the issues presented and denies depth and balance to our consideration.").

[64] S. WALKER, POPULAR JUSTICE 251 (1980). *See* J. Wilson, N.Y. Times, July 17, 1983, § 4 (The Week in Review) at 6, col. 5 (noting that in many cities there is no organized constituency for improvement in the criminal justice system).

nents,[65] central administration is impossible. In most states the prosecutor is a virtually autonomous elected official serving at the district or county level.[66] Separation of powers precludes both executive control of the courts and court control of police and other executive agencies.[67] In addition, state legislatures often are reluctant to increase the size of the coordinate judicial branch.[68] Because no single state agency has the power to order the components to coordinate their actions, broad reform is difficult to achieve.[69]

The conflict between prosecution and defense inherent in the adversary system also frustrates reform efforts.[70] The fifth amendment and the attorney-client privilege isolate the defendant and defense counsel from the other parts of the system. Thus, interested parties view with suspicion attempts to combine the prosecution and defense functions in one agency.[71] In addition, sharing of resources such as computers is fraught with danger.[72]

Power fragmentation and administrative decentralization magnify and reinforce the already substantial differences in outlook, values, and goals of the people working in different parts of the criminal justice system. Police, prosecutors, defense counsel, judges, and other participants in the criminal process all play different roles and have different

---

[65] *See supra* notes 53-54 and accompanying text.

[66] A. GOLDSTEIN, THE PASSIVE JUDICIARY 4 (1981); D. SKOLER, *supra* note 35, at 138; THE CHALLENGE OF CRIME, *supra* note 44, at 148.

[67] M. FEELEY, *supra* note 52, at 12-13; R. RHODES, *supra* note 44, at 50; D. SKOLER *supra* note 35, at 31; Misner, *Criminal Justice Education: The Unifying Force?* in D. SHANAHAN, *supra* note 42, at 20, 26.

[68] *See, e.g.*, Inmates of Suffolk County Jail v. Eisenstadt, 360 F. Supp. 676, 685 (D. Mass. 1973):

> During the past five years, chief justices of the Superior Court and bar association officers have made annual pilgrimages to legislative committees, seeking increases in the number of Superior Court judges and staff, justifiable by every national standard of judicial administration. The total annual cost . . . would be less than the cost of constructing a single mile of superhighway. Yet since 1967 the legislators have turned a deaf ear.

[69] Reform within particular components also is frustrated by decentralization and by autonomy of individual units. D. SKOLER, *supra* note 35, at 143; THE CHALLENGE OF CRIME, *supra* note 44, at 148-49.

[70] M. FEELEY, *supra* note 52, at 11-12; D. SKOLER, *supra* note 35, at 34; Dawson, *The Need For a Systems Approach to Justice Administration*, in D. SHANAHAN, *supra* note 42, at 6, 8-9.

[71] D. SKOLER, *supra* note 35, at 34.

[72] The prospect of prosecutors and defense attorneys rummaging around in each other's data bases would doubtless alarm members of both agencies.

interests.[73] Consequently, each agency develops a unique structure and operating approach.[74] Also, because the concept of progress is subjective,[75] what one group sees as progress another may see as a step in the wrong direction.[76] Finally, the substantial discretion granted the personnel of each component makes coordination difficult.[77] Discretionary authority also tends to be jealously guarded. Criticism of one component by representatives of others typically causes members of the criticized agency to close ranks instead of undertaking an honest self-examination.[78]

State courts are unwilling or unable to order systemic reform of state criminal justice systems. They are ill-suited to the task. The judicial selection process in most states does not produce uniformly well-qualified judges.[79] In addition, state judges often lack expertise in the subtleties of federal and constitutional law. State judges tend to focus on state

---

[73] R. NIMMER, THE NATURE OF SYSTEMS CHANGE: REFORM IMPACT IN THE CRIMINAL COURTS 17-18 (1978); R. RHODES, *supra* note 44, at 7; Dawson, *supra* note 70, at 11; Misner, *supra* note 67, at 26.

[74] H. MORE & R. CHANG, CONTEMPORARY CRIMINAL JUSTICE 35 (1974).

[75] M. FEELEY, *supra* note 52, at 19.

[76] R. NIMMER, *supra* note 73, at 17-18.

[77] *Id.* at 27-29; D. SKOLER, *supra* note 35, at 48-50; Dawson, *supra* note 70, at 11. *See* George, *Screening, Diversion and Mediation in the United States*, 29 N.Y.L. SCH. L. REV. 1, 2-8 (1984) (describing the exercise of discretion by police and prosecutors); Lezak & Leonard, *The Prosecutor's Discretion: Out of the Closet — Not Out of Control*, 63 OR. L. REV. 247 (1984) (describing the exercises of discretion by prosecutors).

[78] Dawson, *supra* note 70, at 10-11. Consider, for example, the reaction of Phil Caruso, President of the New York City Patrolmen's Benevolent Association, to the Congressional hearing on police brutality held in Harlem in September, 1983: "The entire Congressional inquisition was a contrived, transparent political sham, well-orchestrated to achieve a self-serving end. A further pall was cast over the proceedings by the fact that the 'Grand Inquisitor' himself, Representative John Conyers, is an acknowledged anti-police advocate." Letter of Phil Caruso, editorial page, N.Y. Times, Sept. 30, 1983, at A30, col. 3. Mr. Caruso's letter continued with sarcastic rather than constructive suggestions to address alleged weaknesses in New York City's Civilian Complaint Review Board. For example, Mr. Caruso suggested that Mayor Koch and Police Commissioner McGuire should "regularly traverse the streets of minority communities equipped with bullhorns so that they may motivate, exhort and solicit complaints." *Id.* at col. 5.

[79] Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105, 1122 (1977) ("Neither elections nor an appointment process based largely on political patronage is calculated to make refined judgments on technical competence."). *See also* M. FEELEY, THE PROCESS IS THE PUNISHMENT 63-65 (1979); M. LEVIN, URBAN POLITICS AND THE CRIMINAL COURTS 13-14 (1977). The patronage system also adversely affects the quality of other court personnel. *See* M. FEELEY, *supra*, at 281-82; Neuborne, *supra*, at 1122.

law issues. Their decisions on federal issues rarely are reviewed by the United States Supreme Court.[80] State judges also are susceptible to majoritarian or political pressures when deciding constitutional cases because they are elected or appointed for fixed terms.[81] In addition, state judges may be biased in reviewing the actions of other state officials.[82]

State trial judges, particularly in the lower criminal courts, often are too close to the problems. They frequently handle troubling fact patterns that make for a jaded approach to constitutional rights.[83] Lower court judges typically are preoccupied with rapid evaluation and disposition of individual cases and usually cannot afford time to consider broad constitutional challenges.[84] Similar considerations make state habeas corpus proceedings and individual appeals ineffective in reforming state criminal justice.[85]

Moreover, many of the deficiencies in state criminal justice are centered in the courts. It is unrealistic to expect state judges to be receptive to constitutional challenges to their own practices and procedures, just

---

[80] M. REDISH, FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER 2 (1980); Chevigny, *Section 1983 Jurisdiction: A Reply*, 83 HARV. L. REV. 1352, 1356-57 (1970). Moreover, many state judges "appear to acknowledge only an obligation not to disobey clearly established [federal] law." Neuborne, *supra* note 79, at 1125. *See, e.g.*, Cleaver v. Wilcox, 499 F.2d 940 (9th Cir. 1974). In *Cleaver*, plaintiffs challenged the California practice of conducting child dependency proceedings without assigning counsel to indigent parents. The Ninth Circuit held that the plaintiffs' claim would "not receive an effective hearing and vindication in a state proceeding" because "[t]he California courts have repeatedly denied or refused to hear these claims in the past." *Id.* at 943-44.

[81] M. REDISH, *supra* note 80, at 2-3; Neuborne, *supra* note 79, at 1127-28. *See also* M. LEVIN, *supra* note 79, at 13; McMillan, *Abstention — The Judiciary's Self-Inflicted Wound*, 56 N.C.L. REV. 527, 544 (1978); Mishkin, *The Federal "Question" in the District Courts*, 53 COLUM. L. REV. 157, 158 (1953).

[82] Chevigny, *supra* note 80, at 1358 ("[T]here is an inherent potential for bias when a state judge . . . reviews actions of other state officials."). *See also* Comment, *Protecting Fundamental Rights in State Courts: Fitting a State Peg to a Federal Hole*, 12 HARV. C.R.-C.L. L. REV. 63, 86 (1977). *Cf.* Gibson v. Berryhill, 411 U.S. 564, 577 (1973) (Supreme Court found Alabama State Board of Optometry "incompetent by reason of bias to adjudicate the issues pending before it").

[83] Neuborne, *supra* note 79, at 1125.

[84] *See* M. FEELEY, *supra* note 52, at 38-39; Zeigler, *supra* note 1, at 305.

[85] Neither individual appeals nor individual state habeas corpus proceedings can achieve systemic reform. The reviewing court can only reverse a conviction or order the petitioner's release from illegal detention; it cannot grant prospective injunctive relief requiring changes in state practices and procedures. The inherent shortcomings of Supreme Court review of state court decisions and of *federal* habeas corpus as a remedial device for achieving systemic reform are examined in detail *infra* Section III.

as it was unrealistic to expect state legislators to be receptive to calls for reapportionment.[86] In *Rose v. Mitchell*,[87] the Supreme Court recognized that state courts should not be solely responsible for reviewing their own conduct. *Rose* refused to extend the rule of *Stone v. Powell*[88] to preclude federal habeas corpus review of racial discrimination claims in state grand jury selection procedures. The Court doubted that "claims that the state judiciary itself has purposely violated the Equal Protection Clause . . . in general will receive the type of full and fair hearing deemed essential to the holding of *Stone*."[89] The Court concluded that "[f]ederal habeas review is necessary to ensure that constitutional defects in the state judiciary's grand jury selection procedure are not overlooked by the very state judges who operate that system."[90]

Finally, the procedure codes of many states discourage institutional reform litigation. For example, many states still follow class action rules based on the Field Code that require a near identity of interest among class members.[91] Members of a class of criminal defendants, however, have separate and distinct rather than common and undivided interests.[92] Thus, the class action device is of little use in states still

---

[86] *See* Weissman, *supra* note 8, at 542 (asserting that when a state trial judge herself is the subject of the challenge, it is not reasonable to assume the judge will adequately protect constitutional rights).

[87] 443 U.S. 545 (1979).

[88] 428 U.S. 465 (1976). In *Stone*, the Court held that federal courts could no longer entertain habeas petitions claiming fourth amendment violations if the state courts had provided an opportunity for a full and fair hearing of the claim because state trial and appellate courts are as capable of reviewing police actions as federal habeas courts. *Id.* at 481-82, 493-95.

[89] 443 U.S. at 561.

[90] *Id.* at 563.

[91] *See* Homburger, *State Class Actions and the Federal Rule*, 71 COLUM. L. REV. 609, 612-19 (1971).

[92] Early American cases followed English practice in requiring that class members have indivisible interests; that is, "if they sued separately, each [would] assert the *same* interest in whatever property or other entitlement was at issue." *Developments in the Law — Class Actions*, 89 HARV. L. REV. 1318, 1332 (1976) (emphasis in original). *See, e.g.*, Ayres v. Carver, 58 U.S. (17 How.) 591, 594 (1855); Smith v. Swormstedt, 57 U.S. (16 How.) 288, 302 (1853); New London Bank v. Lee, 11 Conn. 112, 120 (1835); Louisville & Old Topeka R.R. v. Ballard, 59 Ky. (2 Metc.) 165, 171 (1859). *See also* Z. CHAFEE, JR., SOME PROBLEMS OF EQUITY, 200-03 (1950). Until recently, New York's class action statute required "a question of common or general interest." N.Y. CIV. PRAC. R. 1005(a) (McKinney) (repealed 1975). New York courts construed that phrase to require privity between class members. Homburger, *The 1975 New York Judical Conference Package: Class Actions and Comparative Negligence*, 25 BUFFALO L. REV. 415, 421-22 (1976). As the Court of Appeals stated in Society Milion Athena, Inc. v. National Bank of Greece, 281 N.Y. 282, 292, 22 N.E.2d 374, 377 (1939):

clinging to the old usages. Even in states with modern rules that require only "questions of law or fact common to the class,"[93] judicial hostility has severely limited use of class actions.[94]

Reform of American criminal justice is critical to the quality of life. The costs of crime are enormous. The total annual crime bill has been estimated in excess of sixty billion dollars.[95] The National Advisory Commission on Criminal Justice Standards and Goals concluded that "crime in America is seriously interfering with the Nation's ability to attain economic, political, and social well-being for all its citizens."[96] Crime causes trauma, both physical and psychological.[97] It also causes a breakdown in the sense of community by making people wary of their neighbors and reluctant to venture beyond their locked doors.[98] In addition, as Judge John J. Gibbons asserts: "No federal guaranty of minimum levels of equality [can] be viable [if] the state criminal justice systems, so riddled with inequality . . . remain unscrutinized."[99] Finally,

---

"Separate wrongs to separate persons, though committed by similar means and even pursuant to a single plan, do not alone create a common or general interest in those who are wronged." *See also* Hall v. Coburn Corp. of America, 26 N.Y.2d 396, 402, 259 N.E.2d 720, 722, 311 N.Y.S. 2d 281, 284 (1970).

[93] *See, e.g.*, 16 ARIZ. REV. STAT. ANN. § 23(a)(2) (1973); 7A COLO. REV. STAT. § 23(a)(2) (1977).

[94] New York, for example, enacted a modern class action statute with some fanfare in 1975. Professor David Siegel described the statute as "an enlightened and powerful one, in some respects more ambitious than Federal Rule 23, on which it is largely (but not entirely) based." D. SIEGEL, NEW YORK PRACTICE 174 (1978). Governor Carey described the legislation as an "historic advance for the people of New York," and stated that "[t]he present law and its precursors have caused extraordinary judicial confusion extending over the past 125 years and have resulted in needlessly restricting meaningful access to state courts for countless people." *Governor's Memorandum*, June 17, 1975, *filed with* A. 1252-B, 198th Sess., Reg. Sess. (1975), in N.Y. Sess. Laws 1975, at 1748. Yet despite initial hopes for liberal construction of the new rule, D. SIEGEL, *supra*, at 173-76, the state courts construed it narrowly. *See* discussion and cases cited in Friar v. Vanguard Holding Corp., 78 A.D.2d 83, 434 N.Y.S.2d 698 (2d Dept. 1980) (reviewing negative judicial attitude towards class actions). *Accord* Martin v. Lavine, 39 N.Y.2d 72, 346 N.E.2d 794, 382 N.Y.S.2d 956 (1976); Jackson v. Blum, 79 A.D.2d 1076, 436 N.Y.S.2d 358 (3d Dept. 1981).

[95] D. SKOLER, *supra* note 35, at 12.

[96] REPORT ON COURTS, *supra* note 47, at 1.

[97] D. SKOLER, *supra* note 35, at 13.

[98] *Id. See also* J. WILSON, THINKING ABOUT CRIME 26 (1983); Gray, *The Costs of Crime: Review and Overview*, in THE COSTS OF CRIME 13, 20-22 (C. Gray ed. 1979); Skogan, *On Attitudes and Behaviors*, in REACTIONS TO CRIME (D. Lewis ed.) 19, 29 (1981). Research suggests that crime has a greater impact on women than on men. Riger, *On Women*, in REACTIONS TO CRIME, *supra*, at 47.

[99] Gibbons, *Our Federalism*, 12 SUFFOLK U.L. REV. 1087, 1098 (1978).

when a system performs as badly as the American criminal justice system, eventually the citizenry must begin to question the integrity and credibility of the entire legal system.[100]

Reform of state criminal justice systems therefore is no less important to the basic health of the republic than was reform of other state institutions. Given the states' continuing inaction, the federal courts should act as they have in the other areas to bring about needed change.

B. Inconsistent Federal Court Responses to Calls for Intervention in State Institutions

Even though state criminal justice systems merit intervention in the same way that schools, state legislatures and state prisons do, the federal court response to calls for aid has been radically different. In desegregation, reapportionment, and prisoners' rights cases, the federal courts intervened, notwithstanding the strong traditions of local control and the probable political and practical difficulties in achieving reform. In each area the courts reversed traditions of noninvolvement. The separate-but-equal doctrine was abandoned in school desegregation cases, and well-entrenched abstention doctrines were abrogated in reapportionment and prisoners' rights cases. Concerns that previously had supported abstention became matters to be weighed in the wise exercise of equitable discretion. In the criminal justice area, on the other hand, *Younger* abstention has flourished. The federal courts generally have refused to intervene directly in suits seeking systemic reform of state criminal justice systems. The divergence in approach is striking, and ultimately irrational.

1. School Desegregation

Justice Powell explained the strength of the policies underlying local control of schools in *Milliken v. Bradley (I)*: "No single tradition in public education is more deeply rooted than local control over the operation of schools; local autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to quality of the educational process."[101] During the oral argument in *Brown v. Board of Education (II)*, local school representatives told the Supreme Court in graphic detail that court-ordered desegregation

---

[100] Allen, *supra* note 63, at 819.

[101] 418 U.S. 717, 741-42 (1974). *See also* San Antonio School Dist. v. Rodriquez, 411 U.S. 1, 50 (1973); Wilkinson, *supra* note 16, at 486.

would be resisted[102] and that attempts to force compliance would cause violence and chaos.[103] Nonetheless, the Supreme Court ordered integration.[104] Prior to the *Brown* litigation, federal court involvement in school desegregation was stymied by the separate-but-equal doctrine. By declaring that "[s]eparate educational facilities are inherently unequal,"[105] the Court opened the doors of the lower federal courts to desegregation actions.[106]

The Court remained sensitive to concerns of federalism and comity

---

[102] *See, e.g.*, Argument of S.E. Rogers, Counsel for Clarendon County, South Carolina school district, *reprinted in* ARGUMENT, *supra* note 15, at 414 (contending white citizens would refuse to send white children to black schools); Argument of Archibald G. Robertson, Counsel for Prince Edward County, Virginia school system, *reprinted in id.* at 430 (suggesting localities might refuse to vote money for schools, refuse to support necessary laws, and repeal usual public attendance laws).

[103] *See, e.g.*, Argument of Robert McC. Figg, Counsel for Clarendon County, South Carolina school district, *reprinted in id.* at 423; Argument of Archibald G. Robertson, Counsel for Prince Edward County, Virginia school system, *reprinted in id.* at 424-25; Argument of I. Beverly Lake, North Carolina Assistant Attorney General, *reprinted in id.* at 460 (asserting that ordering immediate compliance would destroy the public school system in their locales); and Argument of Richard Ervin, Florida Attorney General, *reprinted in id.* at 441 (warning of serious violence if immediate integration ordered).

Counsel in *Brown (II)* explained other practical difficulties in administering change. *See, e.g.*, Argument of Ralph E. Odum, Florida Assistant Attorney General, *reprinted in id.* at 445-47. The opinion in *Brown II* recognized the need for ongoing district court supervision to consider "problems related to administration, arising from the physical condition of the school plant, the school transportation system, personnel, revision of school districts . . . and revision of local laws and regulations which may be necessary in solving the foregoing problems." Brown v. Board of Educ. (II), 349 U.S. 294, 300-01 (1955).

[104] 349 U.S. at 301.

[105] Brown v. Board of Educ. (I), 347 U.S. 483, 495 (1954).

[106] The federal courts also refused opportunities to abstain in school desegregation cases. One of the cases consolidated in *Brown (I)* challenged provisions of South Carolina law making it a crime to integrate a public school. *Id.* at 486-87. The plaintiffs' request for prospective injunctive relief against enforcement of a state criminal statute might have been denied under earlier cases in the *Younger* line, such as Douglas v. City of Jeannette, 319 U.S. 157 (1943), and Fenner v. Boykin, 271 U.S. 240 (1926), but the Supreme Court did not discuss the issue. Subsequently, the Court affirmed a lower court decision enjoining the operation of a Louisiana criminal statute designed to enforce segregation in the public schools. *See* Bush v. Orleans Parish School Bd., 194 F. Supp. 182 (E.D. La. 1961) (three-judge court), *aff'd per curiam sub nom.* Gremillion v. United States, 368 U.S. 11 (1961). *Cf.* Morrison v. Davis, 252 F.2d 102, 103 (5th Cir.), *cert. denied*, 356 U.S. 968 (1958) (rejecting abstention, courts enjoined enforcement of state statutes and municipal ordinances containing criminal sanctions designed to maintain segregated public carriers); Browder v. Gayle, 142 F. Supp. 707, 713 (M.D. Ala.) (three-judge court), *aff'd per curiam*, 352 U.S. 903 (1956).

that counseled restraint in addressing the problem of racial segregation in schools. *Brown (I)* took the unusual step of ordering further argument the following term on the question of remedy.[107] Ultimately, the Court remanded the cases consolidated in *Brown (I)* to the district courts to administer relief[108] and specifically counseled the lower courts to be flexible and to consider local circumstances:

> In fashioning and effectuating the decrees, the courts will be guided by equitable principles. Traditionally, equity has been characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs. These cases call for the exercise of these traditional attributes of equity power.[109]

Thus, courts did not ignore the principles of federalism and comity that previously had precluded intervention in local school systems. Instead courts recast these principles as factors to be weighed in framing appropriate equitable remedies.

In recent years the Supreme Court has retreated from its aggressive stance on school desegregation cases. Plaintiffs have difficulty challenging *de facto* discrimination because the Court requires a very clear showing that racial imbalance directly results from intentional discrimination by school officials.[110] School segregation caused by residential housing patterns is more difficult to redress because the Court has limited the use of busing as a remedial tool.[111] The Burger Court plainly casts the balance differently than the Warren Court.[112] The Supreme

---

[107] 347 U.S. at 495-96.

[108] Brown v. Board of Educ. (II), 349 U.S. 294, 301 (1955).

[109] *Id.* at 300. The Court elaborated on the proper exercise of equitable power in school desegregation cases 16 years later in Swann v. Board of Educ., 402 U.S. 1, 15-16 (1971):

> Once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies . . . . [A] school desegregation case does not differ fundamentally from other cases involving the framing of equitable remedies to repair the denial of a constitutional right. The task is to correct, by a balancing of the individual and collective interests, the condition that offends the Constitution.

[110] *See, e.g.*, Dayton Board of Educ. v. Brinkman, 433 U.S. 406 (1977) (holding plaintiffs had failed to show that the racial imbalance in the Dayton, Ohio schools was the result of intentionally segregative actions); Pasadena City Bd. of Educ. v. Spangler, 427 U.S. 424 (1976) (holding lower court may not order desegregation in school district subject to earlier desegregation order without fresh proof of discriminatory intent).

[111] *See, e.g.*, Metropolitan School Dist. v. Buckley, 429 U.S. 1068 (1977) (lower court decision ordering interdistrict busing vacated); Milliken v. Bradley (I), 418 U.S. 717 (1974) (same).

[112] *See generally* Jones, *The Desegregation of Urban Schools Thirty Years After*

Court has not, however, ordered abstention in school cases or shown any inclination to reinstate the separate-but-equal doctrine.

2. Reapportionment

Legislative apportionment also was traditionally a matter of exclusive state concern.[113] Given widespread malapportionment,[114] the decision in *Baker v. Carr*[115] making apportionment challenges justiciable in federal courts was bound to have a broad impact.[116] In addition, the decision was almost certain to generate a flood of litigation because of the political stakes involved.[117] In a forceful dissent, Justice Frankfurter stressed the practical difficulties the lower courts would face in entertaining these suits. He accused the majority of "catapult[ing] the lower courts" into a "mathematical quagmire" without sufficient guidance or standards.[118] Yet despite the problems, the federal courts entered the political thicket and began reapportioning America's legislative bodies.[119]

Brown, 55 U. COLO. L. REV. 515 (1984).

[113] Baker v. Carr, 369 U.S. 186, 277-80 (1962) (Frankfurter, J., dissenting); MacDougall v. Green, 335 U.S. 281, 284 (1948); Colegrove v. Green, 328 U.S. 549, 552-53 (1946). Early federal legislation requiring equitable apportionment of congressional districts was not enforced and eventually was repealed. *See id.* at 555-56; *supra* note 22.

[114] *See infra* notes 117-19 and accompanying text.

[115] 369 U.S. 186 (1962).

[116] Professor McCloskey observed of *Baker:* "[I]t is hard to recall a decision in modern history which has had such an immediate and significant effect on the practical course of events, or . . . which seems to contain such a potential for influencing that course in the future." McCloskey, *Foreword: The Reapportionment Case*, 76 HARV. L. REV. 54, 56 (1962).

[117] *See infra* note 118 and accompanying text. The Court was aware of the political implications of its decision because nearly all of the *amicus* briefs described how malapportionment affected urban areas. Note, *Problem of Standards*, *supra* note 32, at 980 n.60.

[118] 369 U.S at 268 (Frankfurter, J., dissenting). Justice Frankfurter continued:

> Room continues to be allowed for weighting. This of course implies that geography, economics, urban-rural conflict, and all the other non-legal factors which have throughout our history entered into political districting are to some extent not to be ruled out in the undefined vista now opened up by review in the federal courts of state reapportionments. To some extent — aye, there's the rub.

Id. at 269. *See also* Emerson, *supra* note 30, at 65-66 (The Court acted despite "the violently partisan nature of the problem, the elusiveness of standards, the possible repudiation of judicial efforts to frame a remedy, the long line of contrary decisions behind which it could have hidden and much scholarly advice to stick to the 'passive' virtues.").

[119] *Baker* was handed down on March 26, 1962. 369 U.S. 186. Within seven weeks

Before *Baker v. Carr*, the federal courts had consistently abstained in reapportionment cases, relying on the political question doctrine.[120] Courts treated reapportionment cases as nonjusticiable because they threatened to enmesh the federal judiciary in the political process.[121] *Baker v. Carr* abruptly rejected abstention in reapportionment cases. *Baker* held the political question doctrine inapplicable to the federal judiciary's relationship with the states.[122] Moreover, the Court stated that "judicially manageable standards" for enforcing the equal protection clause of the fourteenth amendment were "well developed and familiar."[123] Therefore, it directed the district court to hear the plaintiffs' claims.[124]

As in the desegregation cases, the Supreme Court was sensitive to federalism concerns and to the practical difficulties involved in reapportionment. The factors that had previously justified abstention were now matters to be considered in tailoring appropriate remedies. In *Reynolds v. Sims*,[125] decided two years after *Baker v. Carr*, the Court noted that "[r]emedial techniques in this new and developing area of law will

---

of the decision, litigation was underway in 22 states. Sindler, *supra* note 23, at 31. Within six months, suits had been instituted in at least 31 states. Goldberg, *supra* note 22, at 96-97. Before the end of the year, more than 60 lawsuits had begun in at least 35 states. McKay, *Political Thickets and Crazy Quilts: Reapportionment and Equal Protection*, 61 MICH. L. REV. 645, 646 (1963).

[120] *See, e.g.*, Colegrove v. Green, 328 U.S. 549, 552-54 (1946). For citations of subsequent cases reaffirming *Colegrove*, see Baker v. Carr, 369 U.S. at 208 n.29 (1962).

[121] As Justice Frankfurter explained in the majority opinion in *Colegrove v. Green*:

> [T]his Court, from time to time, has refused to intervene in controversies. It has refused to do so because due regard for the effective working of our Government revealed this issue to be of a peculiarly political nature and therefore not meet for judicial determination . . . . Nothing is clearer than that this controversy concerns matters that bring courts into immediate and active relations with party contests. From the determination of such issues this Court has traditionally held aloof. It is hostile to a democratic system to involve the judiciary in the politics of the people.

328 U.S. at 552-54 (1946).

Although the Court cast its refusal to intervene in terms of justiciability and political questions, it abstained in the sense that federal courts were directed not to entertain actions that were otherwise within their subject matter jurisdiction. Justice Frankfurter explicitly labelled nonintervention in apportionment cases "abstention" in Baker v. Carr, 369 U.S. at 267 (Frankfurter, J., dissenting). Commentators likewise referred to the Court's inaction as abstention. *See, e.g.*, Pollak, *Judicial Power and "The Politics of the People,"* 72 YALE L.J. 81, 83 (1962).

[122] 369 U.S. at 210.

[123] *Id.* at 226.

[124] *Id.* at 237.

[125] 377 U.S. 533 (1964).

probably often differ with the circumstances of the challenged apportionment and a variety of local conditions."[126] The Court suggested to lower courts ways to implement relief that would entail minimal disruption of state elections.[127]

In recent years the Supreme Court has relaxed apportionment standards. Apportionment plans with deviations from mathematical equality of less than ten percent no longer constitute the basis for a *prima facie* case of invidious discrimination.[128] In addition, legitimate state interests, such as maintaining the integrity of political subdivisions, may justify deviation from numerical equality.[129] The current Court has not, however, returned to the view that reapportionment cases are nonjusticiable.

3. Prisoners' Rights

Administration of state penal systems also was traditionally a matter of exclusive state competence. Regulation of state prisons directly implicates state laws, regulations, and procedures.[130] The federal courts were aware of the difficulties involved in judicially-imposed prison reform.[131] Justice Powell reflected on these difficulties in *Procunier v. Martinez*:

> [T]he problems of prisons in America are complex and intractable, and . . . they are not readily susceptible of resolution by decree. Most require expertise, comprehensive planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government. For all of those reasons, courts are ill equipped to deal with the increasingly urgent problems of prison administration and reform.[132]

---

[126] *Id.* at 585.

[127] *See id.* at 585-87.

[128] *See, e.g.*, Connor v. Finch, 462 U.S. 835, 843 (1983); White v. Regester, 412 U.S. 755, 764 (1973).

[129] *See, e.g.*, Brown v. Thompson, 103 S. Ct. 2690, 2696 (1983); Abate v. Mundt, 403 U.S. 182, 185 (1971). Other legislative policies justifying some variance include "making districts compact, . . . preserving the cores of prior districts, and avoiding contests between incumbent Representatives." Karcher v. Daggett, 462 U.S. 725, 740 (1983).

[130] Preiser v. Rodriguez, 462 U.S. 835, 842 (1973) ("It is difficult to imagine an activity in which a state has a stronger interest, or one that is more intricately bound up with state laws, regulations, and procedures, than the administration of its prisons."). *See also* Procunier v. Martinez, 416 U.S. 396, 404-05 (1974).

[131] *See* Smolla, *Prison Overcrowding and the Courts: A Roadmap for the 1980s*, 1984 U. ILL. L.F. 389, 390.

[132] 416 U.S. at 404-05. Despite these difficulties, *Procunier* invalidated California regulations restricting inmate correspondence and required minimum procedural safeguards before prison officials could censor or withhold a letter. *Id.* at 415-19. The

Nonetheless, the federal courts have intervened.

As in reapportionment cases, the federal courts abruptly abandoned an abstention doctrine to hear prisoner cases. During the 1940's and 1950's, lower federal courts routinely applied the so-called "hands-off" doctrine to dismiss prisoner complaints.[133] Some courts held that they lacked jurisdiction;[134] others held that their hearing prison cases would improperly interfere with the internal administration of state prisons.[135] In 1964 *Cooper v. Pate* marked the end of this hands-off position by holding that a prisoner complaint stated a cause of action cognizable in federal court.[136] Federal intervention was limited at first to specific constitutional deprivations, such as denial of the right to practice religion,[137] to obtain reading materials,[138] to have adequate legal materials

---

Court held that "When a prison regulation or practice offends a fundamental constitutional guarantee, federal courts will discharge their duty to protect constitutional rights." *Id.* at 405-06.

[133] Commentators have traced the origin of the hands-off doctrine to Ruffin v. Commonwealth, 62 Va. (21 Gratt.) 790 (1871). *See* Goldfarb & Singer, *Redressing Prisoners' Grievances*, 39 GEO. WASH. L. REV. 175, 178-79 (1970) ("[T]here have been few . . . routes through which inmates could complain about their treatment . . . ."); Note, *Constitutional Rights of Prisoners: The Developing Law*, 110 U. PA. L. REV. 985, 985 (1962). *Ruffin* held that

> [a] convicted felon [is one] whom the law in its humanity punishes by confinement in the penitentiary instead of with death . . . . For the time being, during his term of service in the penitentiary, he is in a state of penal servitude to the State. He has, as a consequence of his crime, not only forfeited his liberty, but all his personal rights except those which the law in its humanity accords to him. He is for the time being the slave of the State.

62 Va. at 795-96.

[134] *See, e.g.*, State v. Gladden, 240 F.2d 910, 911 (9th Cir. 1957).

[135] *See, e.g.*, Ortega v. Ragen, 216 F.2d 561, 562 (7th Cir. 1954) ("This Court has been hesitant to interfere with the administration of state penal institutions."); United States *ex rel.* Morris v. Radio Station WENR, 209 F.2d 105, 107 (7th Cir. 1953) ("Inmates of State penitentiaries should realize that prison officials are vested with wide discretion in safe-guarding prisoners committed to their custody. Discipline reasonably maintained in State prisons is not under the supervisory direction of federal courts."); Nichols v. McGee, 169 F. Supp. 721, 724 (N.D. Cal. 1959) ("Federal courts have long been loath to interfere in the administration of State prisons . . . ."). For extensive citation of cases applying the hands-off doctrine, see Comment, *Beyond the Ken of the Courts: A Critique of Judicial Refusal to Review the Complaints of Convicts*, 72 YALE L.J. 506, 508 n.12 (1963).

[136] 378 U.S. 546 (1964). Cooper filed a complaint challenging Warden Pate's refusal to allow him to receive religious materials. The district court dismissed the complaint, and the Seventh Circuit affirmed. The Supreme Court reversed. *Id.*

[137] *Id.*

[138] *See, e.g.*, Jackson v. Godwin, 400 F.2d 529 (5th Cir. 1968) (right to receive

to petition the courts,[139] and to be free from harsh corporal punishment.[140] As federal judges confronted the shortcomings of American prisons, however, they soon instigated comprehensive institutional reform touching on virtually all aspects of prison life.[141] Federal court intervention in prison life to enforce constitutional rights has continued unabated in recent years.[142]

The hands-off doctrine sprang from federal courts' intention not to interfere with the internal functioning of state penal institutions. With the demise of the doctrine, courts acted on this concern by exercising equitable discretion. The Supreme Court has acknowledged that incarceration necessarily involves the curtailment of many rights.[143] Federal courts therefore are to remedy only serious constitutional violations.[144] They are not to impose their own ideas about the best way to operate a prison.[145] Prison officials have broad administrative authority over their institutions,[146] particularly in implementing practices that are necessary to preserve order, discipline, and institutional security.[147] But when ongoing federal supervision of a state prison system is required to vindicate constitutional rights, a district court has "ample authority" to

---

black-oriented publications); Sostre v. Otis, 330 F. Supp. 941 (S.D.N.Y. 1971) (right to receive and read books and periodicals); Payne v. Whitmore, 325 F. Supp. 1191 (N.D. Cal. 1971) (same); Fortune Soc'y v. McGinnis, 319 F. Supp. 901 (S.D.N.Y. 1970) (right to receive newsletter).

[139] *See, e.g.*, Johnson v. Avery, 393 U.S. 483 (1969); Houghton v. Shafer, 392 U.S. 639 (1968).

[140] *See, e.g.*, Jackson v. Bishop, 404 F.2d 571 (8th Cir. 1968); Talley v. Stephens, 247 F. Supp. 683 (E.D. Ark. 1965).

[141] *See, e.g.*, Inmates of Suffolk County Jail v. Eisenstadt, 360 F. Supp. 676 (D. Mass. 1973), *aff'd*, 494 F.2d 1196 (1st Cir.), *cert. denied*, 419 U.S. 977 (1974); Jones v. Wittenberg, 330 F. Supp. 707 (N.D. Ohio 1971), *aff'd sub nom.* Jones v. Metzger, 456 F.2d 854 (6th Cir. 1972); Holt v. Sarver, 309 F. Supp. 362 (E.D. Ark. 1970), *aff'd*, 442 F.2d 304 (8th Cir. 1971).

[142] *See supra* note 36 and accompanying text.

[143] Hudson v. Palmer, 104 S. Ct. 3194, 3199 (1984); Bell v. Wolfish, 441 U.S. 520, 545 (1979); Wolff v. McDonnell, 418 U.S. 539, 555 (1974).

[144] *See* Cruz v. Beto, 405 U.S. 319, 321 (1972) ("Federal courts do not sit to supervise prisons but to enforce the constitutional rights of all 'persons,' including prisoners."). *See also* Johnson v. Avery, 393 U.S. 483, 486 (1969) ("[D]iscipline and administration of state detention facilities . . . are subject to federal authority only where paramount federal constitutional or statutory rights supervene.").

[145] Bell v. Wolfish, 441 U.S. at 539. *Accord* Rhodes v. Chapman, 452 U.S. 337, 351 (1981).

[146] *See* Hewitt v. Helms, 459 U.S. 460, 467 (1983); Cruz v. Beto, 405 U.S. 319, 321 (1972).

[147] *See* Hewitt v. Helms, 459 U.S. at 473 (quoting Bell v. Wolfish, 441 U.S. at 547); *see also* Block v. Rutherford, 104 S. Ct. 3227, 3232 (1984).

proceed.[148] As *Wolff v. McDonnell*[149] states, "there must be mutual accommodation between institutional needs and objectives and the provisions of the Constitution that are of general application."[150] Federal court intervention achieved this accommodation.

4. Criminal Justice

Federal court intervention in desegregation, reapportionment, and prisoners' rights suits stands in stark contrast to federal court inaction in suits seeking systemic reform of state criminal justice systems. In the first three areas, the courts have abandoned abstention and actively intervened; in the criminal justice area, they have raised and strengthened barriers to federal relief. Following the Supreme Court's lead in *Rizzo v. Goode*[151] and *O'Shea v. Littleton*,[152] the lower federal courts have abstained in a wide range of cases alleging constitutional violations in state criminal practices and procedures.[153]

---

[148] *See* Hutto v. Finney, 437 U.S. 678, 687 (1978) ("In fashioning a remedy, the District Court had ample authority to go beyond earlier orders and to address each element contributing to the violation . . . . [T]aking the long and unhappy history of the litigation into account, the court was justified in entering a comprehensive order to insure against the risk of inadequate compliance.").

[149] 418 U.S. 539 (1974).

[150] *Id.* at 556.

[151] 423 U.S. 362 (1976). *Rizzo* held that abstention principles developed in Younger v. Harris, 401 U.S. 37 (1971), forbade the district court from ordering the Philadelphia Police Department to submit a plan to establish new procedures for receiving, investigating, and adjudicating civilian complaints against the police. *Id.* at 380.

[152] 414 U.S. 488 (1974). *O'Shea* held that the *Younger* doctrine precluded a suit against the Cairo, Illinois, Police Commissioner and two judges of the Alexander County Circuit Court alleging that the defendants were intentionally engaged in a systematic and continuing program of racial discrimination in the administration of criminal justice. *Id.* at 499-504.

[153] *See, e.g.*, Dommer v. Crawford, 638 F.2d 1031, 1036 (7th Cir. 1980) (abstention in class action seeking injunction ordering state officials to comply with state law requiring arraignment before magistrate within 24 hours of arrest), *withdrawn and amended opinion issued*, 653 F.2d 289, 291 (7th Cir. 1981); Bonner v. Circuit Court, 526 F.2d 1331, 1335-38 (8th Cir. 1975) (en banc) (abstention in suit by black state criminal defendants alleging that judges, prosecutors, and defense lawyers had joined in a systematic, racially-motivated conspiracy to coerce guilty pleas), *cert. denied*, 424 U.S. 946 (1976); Wallace v. Kern (II), 499 F.2d 1345, 1351 (2d Cir. 1974) (abstention in suit seeking time limits for commencement of state trials and requiring release of defendants on recognizance for noncompliance), *cert. denied*, 420 U.S. 947 (1975); Leslie v. Matzkin, 450 F.2d 310, 312 (2d Cir. 1971) (abstention required in suit seeking to compel Connecticut officals to provide indigent defendants with copies of preliminary hearing transcripts in advance of trial), *cert. denied*, 406 U.S. 932 (1972). For extensive citations to similar cases, see Zeigler, *supra* note 4, at 1039-41.

This inconsistency in approach is perhaps most evident in the contrast between cases forbidding federal court review of state police or judicial procedures and cases approving federal court review of similar procedures in prisons and jails. Police departments, courts, and corrections departments are all parts of state criminal justice systems. The federal courts have never explained why the former two components of these systems should be immune from direct federal court scrutiny while the corrections component is subject to massive federal court intervention. Why, for example, should federal courts abstain in cases seeking injunctive relief against systematic police brutality or the mistreatment of persons in police custody,[154] while entertaining identical actions against corrections officials?[155] It is irrational to bar prisoners in police custody from seeking relief when the same prisoners can seek relief the instant they are turned over to the corrections department and become pretrial detainees. Similarly, why should federal courts abstain in cases alleging denial of minimum procedural safeguards in state judicial proceedings while entertaining cases making similar complaints about prison disciplinary proceedings? The anomalous result of this dichotomy is that persons charged with crimes may not seek federal court review, for example, of systemic procedural unfairness in the administration of the money bail system.[156] However, when they are sent from criminal court to a detention facility, they can ask a federal court to impose procedural safeguards before they are placed in administrative segregation or made to suffer other grievous loss.[157]

---

[154] For examples of federal court abstention in such cases, see Los Angeles v. Lyons, 457 U.S. 1115 (1983); Rizzo v. Goode, 423 U.S. 362 (1976); Robinson v. Stovall, 473 F. Supp. 135, 143-47 (N.D. Miss. 1979), *aff'd in part and rev'd in part*, 646 F.2d 1087 (5th Cir. 1981).

[155] For examples of cases entertaining such claims, see Hodges v. Stanley, 712 F.2d 34, 36 (2d Cir. 1983); Rhem v. Malcolm, 371 F. Supp. 594, 628 (S.D.N.Y.), *aff'd*, 507 F.2d 333 (2d Cir. 1974); Collins v. Schoonfield, 363 F. Supp. 1152, 1165 (D. Md. 1973).

[156] For examples of federal court abstention in cases raising such claims, see Tarter v. Hury, 646 F.2d 1010, 1013 (5th Cir. 1981) (abstention in suit by defendants in state criminal proceedings claiming imposition of excessive bail); Wallace v. Kern (III), 520 F.2d 400, 405-08 (2d Cir. 1975), *cert. denied*, 424 U.S. 912 (1976) (abstention in suit challenging bail practices in the courts of Brooklyn, New York); Rivera v. Freeman, 469 F.2d 1159, 1164 (9th Cir. 1972) (abstention in case challenging California statute governing detention of juveniles).

[157] For examples of cases entertaining such claims, see Hewitt v. Helms, 459 U.S. 460 (1983) (restricting *Wolff* safeguards, but nonetheless hearing the case on the merits); Wolff v. McDonnell, 418 U.S. 539, 560-74 (1974) (setting minimum procedural requirements in prison disciplinary proceedings). *See also* Giampetruzzi v. Malcolm, 406 F. Supp. 836, 848-49 (S.D.N.Y. 1975) (setting minimum safeguards); Berch v.

Section I has demonstrated that state criminal justice systems exhibit many of the characteristics that made federal court intervention in other state institutions appropriate and necessary and that abstention in criminal justice cases is inconsistent with intervention in desegregation, reapportionment, and prisoners' rights suits. It might be contended that special principles of comity between federal and state judges serve to explain and justify the divergent approaches. The next section addresses this hypothesis and shows that state courts do not require greater deference by federal judges than the other branches of state government.

II. The Inappropriateness of Heightened Deference for State Courts

Desegregation, reapportionment, and prisoners' rights cases usually are directed against executive or legislative officials, while criminal justice reform cases very often are directed at judges. By abstaining in criminal justice cases and intervening in the other areas, federal courts accord a special deference to state judges that does not extend to other state officials.[158] Federal courts leave state judges free to hear their cases and administer their affairs without direct federal court scrutiny, while subjecting legislative and executive officials to direct supervision and review.[159]

Neither history nor logic support heightened deference for state courts in actions alleging systemic violation of federal constitutional rights. Most federal actions seeking reform of state criminal justice systems rely upon the fourteenth amendment, 42 U.S.C. section 1983, and 28 U.S.C. section 1343(3).[160] The legislative history of these Reconstruction Era measures clearly shows that Congress intended to accomplish a systemic reform of southern justice systems, including the courts. In addition, there is no logical reason why the federal courts should grant the judicial branch of state government a greater respect than they accord the other branches. Principles of federalism and com-

---

Stahl, 373 F. Supp. 412, 422 (W.D.N.C. 1974) (same); Inmates of Milwaukee County Jail v. Petersen, 353 F. Supp. 1157, 1166-67 (E.D. Wis. 1973) (same).

[158] *Younger* abstention is most often invoked in cases in which the plaintiff seeks to interfere, directly or indirectly, with the operation of state courts. *See, e.g.*, Moore v. Sims, 442 U.S. 415; Juidice v. Vail, 430 U.S. 327; O'Shea v. Littleton, 414 U.S. 488; Younger v. Harris, 401 U.S. 37. ***But see*** Rizzo v. Goode, 423 U.S. 362 (abstention doctrine bars interference with executive agency).

[159] *See supra* Section I.

[160] *See* Zeigler, *supra* note 4, at 1022-36, 1039-41.

ity entitle each branch of state government to the same deference and respect. Finally, federal judges' expertise in judicial administration makes them particularly well qualified to assist in reforming the state courts.

A. The Special Deference Accorded to State Courts

The special deference accorded to state courts in *Younger* abstention cases is based on several rationales. Traditional considerations of comity dictate that a court not attempt to wrest a case from another judicial system that has assumed jurisdiction.[161] Federalism principles augment comity concerns. As the *Younger* Court stated, federalism requires

> 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.[162]

According to this view, the federal courts should respect a state's interest "in not having its judicial process grind to a halt while the federal courts decide constitutional questions."[163]

Special deference to state courts also reflects a desire to avoid duplicative proceedings.[164] If two court systems hear the same case at the same time, confusion and inefficiency may result. In addition, intervention in pending state proceedings reflects negatively upon a state court's ability to enforce constitutional rights.[165] State courts, like federal

---

[161] *See* Chittenden v. Brewster, 69 U.S. (2 Wall.) 191 (1864); Peck v. Jenness, 48 U.S. (7 How.) 612, 624-25 (1849); Hagan v. Lucas, 35 U.S. (10 Pet.) 400 (1836); M'kim v. Voorhies, 11 U.S. (7 Cranch) 279 (1812); Diggs & Keith v. Wolcott, 8 U.S. (4 Cranch) 179 (1807); McCormack, *Federalism and Section 1983: Limitations on Judicial Enforcement of Constitutional Protections, Part I*, 60 VA. L. REV. 1, 45 (1974); Warren, *Federal and State Court Interference*, 43 HARV. L. REV. 345, 349 (1930). *See generally* Theis, Younger v. Harris: *Federalism in Context*, 33 HASTINGS L.J. 103, 113-18 (1981).

[162] Younger v. Harris, 401 U.S. at 44. *See also* Trainor v. Hernandez, 431 U.S. 434, 441 (1977); Juidice v. Vail, 430 U.S. at 334-35; Huffman v. Pursue, Ltd., 420 U.S. 592, 601 (1975).

[163] Redish, *The Doctrine of* Younger v. Harris: *Deference in Search of a Rationale*, 63 CORNELL L. REV. 463, 472 (1978). *See* Juidice v. Vail, 430 U.S. at 335 ("A State's interest in the contempt process, through which it vindicates the regular operation of its judicial system . . . [is] surely an important interest.").

[164] Trainor v. Hernandez, 431 U.S. at 445; Steffel v. Thompson, 415 U.S. 452, 462 (1974); Younger v. Harris, 401 U.S. at 44.

[165] Trainor v. Hernandez, 431 U.S. at 446; Huffman v. Pursue, Ltd., 420 U.S. at 603; Steffel v. Thompson, 415 U.S. at 462.

courts, "have the solemn responsibility . . . 'to guard, enforce, and protect every right granted or secured by the Constitution.' "[166]

B. The Legislative History of Reconstruction

These rationales for according a special deference to state courts find little support in the legislative history of Reconstruction. The legislative debates of that era manifest a pervasive distrust of southern state courts, and Congress repeatedly directed the federal courts to intervene in state judicial proceedings when necessary to protect paramount federal rights.

Following the end of the Civil War, newly elected southern legislators enacted comprehensive laws effectively reenslaving the freedmen.[167] The framers of these "Black Codes" envisioned that the southern criminal justice system would be the primary enforcement mechanism, and the Codes contained harsh criminal sanctions.[168] The Thirty-Ninth Congress was greatly upset by the Codes and by the maladministration of southern justice.[169] The removal provisions of the Civil Rights Act of 1866[170] sought to interfere with enforcement of the Codes in southern state courts. The Act authorized the federal courts to divest the state courts of jurisdiction in all cases in which the defendant was unable to enforce any of the broad range of civil rights secured by the Act.[171] Other legislation addressed procedural impediments to removal imposed by the state courts and eased the way for removal of thousands of cases from state to federal court.[172]

---

[166] Steffel v. Thompson, 415 U.S. at 460-61 (quoting Robb v. Connolly, 111 U.S. 624, 637 (1884)). *See* Douglas v. City of Jeannette, 319 U.S. 157, 163 (1943) (The "lawfulness or constitutionality of the statute or ordinance on which the prosecution is based may be determined as readily in the [state] criminal case as in a suit for an injunction.").

[167] For a compilation of these laws, see Howard, *Laws in Relation to Freedmen*, S. EXEC. DOC. NO. 6, 39th Cong., 2d Sess. 170-230 (1867). *See generally* D. NOVAK, THE WHEEL OF SERVITUDE: BLACK FORCED LABOR AFTER SLAVERY (1978); T. WILSON, THE BLACK CODES OF THE SOUTH (1965).

[168] *See* Zeigler, *supra* note 4, at 994.

[169] *See generally id.* at 995-1007; Amsterdam, *Criminal Prosecutions Affecting Federally Guaranteed Civil Rights: Federal Removal and Habeas Corpus Jurisdiction To Abort State Court Trials*, 113 U. PA. L. REV. 793, 809-25 (1965).

[170] Ch. 31, 14 Stat. 27 (1866).

[171] *Id.* § 3.

[172] *See, e.g.*, ACT OF MAY 11, 1866, ch. 80, 14 Stat. 46 (1866) (clarified and expanded the provisions of the 1863 Habeas Corpus and Removal Act); THE SEPARABLE CONTROVERSIES ACT, ch. 288, 14 Stat. 306 (1866) (allowed a nonresident defendant to remove his portion of a case to federal court, leaving claims against nondiverse, resident

The Thirty-Ninth Congress also passed the fourteenth amendment[173] to correct problems caused by the Black Codes and the maladministration of southern justice.[174] The legislators believed that section 1 of the amendment[175] would abolish the Black Codes[176] and enable Congress to pass legislation requiring states to administer justice fairly.[177]

The Civil Rights Act of 1871[178] was enacted under the enforcement power of section 5 of the fourteenth amendment[179] in response to Ku Klux Klan violence and the continued systemic breakdown in the administration of justice in the South.[180] During the debates on the measure, legislators complained about virtually all components of the southern justice system,[181] including the courts.[182] The debates on sec-

---

defendant for adjudication in state court). *See generally* Amsterdam, *supra* note 169, at 820-25; Zeigler, *supra* note 4, at 1002-04, 1007 n.137.

[173] CONG. GLOBE, 39th Cong., 1st Sess. 3149 (1866).

[174] *See* Zeigler, *supra* note 4, at 1004-06.

[175] Section 1 reads:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

[176] *See* CONG. GLOBE, 39th Cong., 1st Sess. 1090 (remarks of Rep. Bingham), 2459 (Rep. Stevens), 2766 (Sen. Howard), 2961 (Sen. Poland), 3034 (Sen. Henderson) (1866).

[177] *See id.* at 1064, 1090, 1094 (remarks of Rep. Bingham), 2961 (Sen. Poland), 2082-83 (Rep. Perham), 2510-11 (Rep. Miller). Many members of Congress believed that § 1 would "incorporate the guaranties of the Civil Rights Act of 1866 in the organic law of the land." Hurd v. Hodge, 334 U.S. 24, 32 (1948). *See, e.g.*, CONG. GLOBE, 39th Cong., 1st Sess. 2465 (remarks of Rep. Thayer), 2498 (Rep. Broomall), 2283 (Rep. Latham) (1866).

[178] Ch. 22, 17 Stat. 13 (1871).

[179] "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." U.S. CONST. amend. XIV, § 5. Legislators specifically viewed the first and fifth sections of the fourteenth amendment as conferring power to enforce federal rights against misconduct by state officials. *See, e.g.*, CONG. GLOBE, 42d Cong., 1st Sess. 332 (1871) (remarks of Rep. Stoughton), app. 83 (Rep. Bingham), 375 (Rep. Lowe), 504-06 (Sen. Pratt), 608-09 (Sen. Pool), app. 256 (Sen. Wilson).

[180] Patsy v. Board of Regents, 457 U.S. 496, 502-07 (1982); Monroe v. Pape, 365 U.S. 167, 171-80 (1961). *See generally* Zeigler, *supra* note 4, at 1011-20.

[181] For complaints about southern sheriffs, see CONG. GLOBE, 42d Cong., 1st Sess. app. 78 (1871) (remarks of Rep. Perry), 334 (Rep. Hoar), 459 (Rep. Coburn), app. 185 (Rep. Platt). Specific complaints of juror misconduct can be found in *id.* at 155,

tion 1 of the Act[183] make clear that the remedies prescribed therein should be used to redress state court denial of federal rights.[184] In addi-

---

157-58, 201, 334, 429, 458, 481, 487, and 502. Witnesses were criticized as well. *See, e.g., id.* at 201, 437, 458, 481, 502, 571, and 653.

[182] *See, e.g., id.* at 394 (remarks of Rep. Rainey) (The "courts are in many instances under the control of those who are wholly inimical to the impartial administration of law and equity."), app. 185 (Rep. Platt) ("[N]o Republican, white or black, especially if he is a citizen who has come here from another State or is at all prominent, can secure as plaintiff or defendant anything like equal justice before the courts of [Virginia]."); *see also id.* at 201 (Sen. Nye), 321 (Rep. Stoughton), 482 (Rep. Wilson), 487 (Rep. Lansing), 653 (Sen. Osborn), app. 78 (Rep. Perry), app. 251 (Sen. Morton), 429 (Rep. Beatty).

[183] The provisions of § 1 as presently codified read in pertinent part:

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

42 U.S.C. § 1983 (1982).

> The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person: . . . 3)To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States . . . .

28 U.S.C. § 1343(a)(3) (1982).

[184] *See, e.g.*, CONG. GLOBE, 42d Cong., 1st Sess. 501 (1871) (remarks of Sen. Frelinghuysen). During the hearings, Senator Frelinghuysen stated:

> As to . . . civil remedies, for a violation of [constitutional guarantees], we know that when the courts of a State violate the provisions of the Constitution or law of the United States there is now relief afforded by a review in the Federal courts. And since the fourteenth amendment forbids any State from making or enforcing any law abridging these privileges and immunities . . . the injured party should have an original action in our Federal courts, so that by injunction or by the recovery of damages he could have relief against the party who under color of . . . law is guilty of infringing his rights. As to the civil remedy no one, I think, can object.

Id.

The Supreme Court recently reaffirmed that proponents of § 1 intended it to apply to state courts. *See* Pulliam v. Allen, 104 S. Ct. 1970, 1980 (1984) ("[N]othing in the legislative history of § 1983 or in this Court's subsequent interpretations of that statute supports a conclusion that Congress intended to insulate judges from prospective collateral injunctive relief."). *See also* Mitchum v. Foster, 407 U.S. 225, 240 (1972) (Proponents thought the legislation necessary because "state courts were being used to harass and injure individuals, either because the state courts were powerless to stop depriva-

tion, the legislators did not want the federal courts to abstain if complainants could seek relief in the state courts because the state courts routinely failed to enforce federal rights.[185] Instead, section 1 of the Act authorized "the assertion of immediate jurisdiction through [the federal courts], without the appeal or agency of the State in which the citizen is domiciled"[186] to protect fundamental rights.[187]

The legislative history of Reconstruction thus does not support the position that federal courts owe a greater deference to state judges than to state legislative or executive officials. Instead, Congress intended that the federal courts intervene when necessary to restrain unconstitutional action by any branch of state government. The principles of federalism and comity cited as supporting a special deference to state courts[188] must be read in light of the legislative history and modified accordingly. History plainly teaches that no branch of state government is entitled to the blind deference accorded state courts by *Younger v. Harris* and its progeny.

---

tions or were in league with those who were bent upon abrogation of federally protected rights.").

[185] *See, e.g.*, CONG. GLOBE, 42d Cong., 1st Sess. app. 252 (1871) (remarks of Sen. Morton) ("But it is said . . . the matter should be left with the States. The answer to that is, that . . . the States do not protect the rights of the people; the State courts are powerless to redress these wrongs. The great fact remains that large classes of people . . . are without legal remedy in the courts of the States."); *see also id.* at 201 (Sen. Nye), 505 (Sen. Pratt), app. 262 (Rep. Dunnell), 394 (Rep. Rainey), 346 (Sen. Sherman), app. 271 (Rep. Havens), app. 311 (Rep. Maynard), app. 183 (Rep. Platt).

[186] *Id.* at 389 (remarks of Rep. Elliott); *see also id.* at 692 (Sen. Edmunds). Many legislators expressed their belief that the prohibitions of the fourteenth amendment reach broadly to all branches of state government. *See, e.g., id.* at 482 (remarks of Rep. Wilson) ("Obviously the word [State] is used in its largest and most comprehensive sense. It means the government of the State . . . . [A] State . . . is a trinity: the legislative, the judicial, and the executive; these three are one, the State."); *see also id.* at 506 (remarks of Sen. Pratt), app. 182 (Rep. Mercur), 607-08 (Sen. Pool), app. 315 (Rep. Burchard), 696 (Sen. Edmunds).

[187] In Mitchum v. Foster, 407 U.S. 225 (1972), the Supreme Court relied on the legislative history of § 1 in determining that the equitable relief authorized there came within the "expressly authorized by Act of Congress" exception to the Anti-Injunction Act, 28 U.S.C. § 2283. The Court summed up the history as follows:

> This legislative history makes evident that Congress clearly conceived that it was altering the relationship between the States and the Nation with respect to the protection of federally created rights; it was concerned that state instrumentalities could not protect those rights; it realized that state officers might, in fact, be antipathetic to the vindication of those rights; and it believed that these failings extended to the state courts.

Mitchum v. Foster, 407 U.S. 225, 242 (1972).

[188] *See supra* Section II A.

C. The Illogic of Granting State Courts Special Deference

No logical reason supports federal courts according greater deference to state courts than to other branches of state government in cases involving vindication of fundamental rights. The principles of federalism and comity cited in the *Younger* abstention cases to justify special treatment for state courts could as reasonably be offered to support abstention in cases seeking intervention in state legislative or executive affairs. But the federal courts do not abstain in such cases. Instead, courts treat principles of federalism and comity as factors to weigh in the wise exercise of equitable discretion in fashioning appropriate relief.[189] It would be much more reasonable to apply these principles similarly in cases seeking to correct constitutional abuses in state courts.

Federalism requires that all state institutions be "left free to perform their separate functions in their separate ways"[190] so long as they do not violate the federal Constitution. But federal court interference with the state judiciary imposes no greater strain on federal-state relations than does interference with the other branches.[191] Intervention in state school systems, legislatures, and prisons to enforce constitutional safeguards often substantially modifies those institutions. A state has an interest in not having any of its institutions "grind to a halt while the federal courts decide constitutional questions."[192]

Special deference to state courts is based in part on the desire to avoid the confusion and inefficiency of duplicative proceedings.[193] But these practical problems are not intrinsically more complex than those that arise from intervention in legislative and executive affairs. Orders directing legislative reapportionment, school desegregation, and prison reform often cause delay and confusion as federal judges and local officials grapple with change, and sometimes act at cross-purposes. In addition, such orders reflect every bit as negatively upon the ability of state legislative and executive officials to enforce constitutional rights as similar orders directed at state judges would reflect upon their ability to enforce constitutional rights. State executive and legislative officials have the same responsibility as state judges to enforce and protect fed-

---

[189] *See supra* Section I B 1-3. *But see* Los Angeles v. Lyons, 461 U.S. 95 (1983); Rizzo v. Goode, 423 U.S. 362.

[190] Younger v. Harris, 401 U.S. at 44.

[191] *See* Pulliam v. Allen, 104 S. Ct. 1970, 1979 (1984) ("The intrusion into the state process would result whether the action enjoined were that of a state judge or of another state official.").

[192] *See* Redish, *supra* note 163, at 472.

[193] *See supra* note 164 and accompanying text.

eral constitutional rights.[194]

One danger in arguing for parity of treatment by the federal courts for all branches of state government is that consistency could also be achieved by abstention in cases aimed at state executive or legislative misconduct. Unfortunately, the Supreme Court has suggested this approach. In *Rizzo v. Goode*,[195] the Court relied upon the *Younger* doctrine in reversing a lower court order requiring Philadelphia officials to submit a plan for receiving, investigating, and adjudicating civilian complaints against the police. The Court held:

> [T]he principles of federalism which play such an important part in governing the relationship between federal courts and state governments . . . likewise have applicablility where injunctive relief is sought, not against the judicial branch of the state government, but against those in charge of an executive branch of an agency of state or local governments such as petitioners here.[196]

---

[194] The United States Constitution commands that "[t]he Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution . . . ." U.S. CONST. art. VI, cl. 3. For examples of state constitutions with similar provisions, see CAL. CONST. art. 20 § 3 (requiring officials of all branches of state government to take an oath to uphold the United States Constitution); MICH. CONST. art. 11, § 1 (same); N.Y. CONST. art. 13, § 1 (same). *See* Montgomery v. State, 55 Fla. 97, 99, 45 So. 879, 881 (1908) ("The Constitution of the United States, within its limited sphere, is the supreme law of the land; and it is the duty of all officials, whether legislative, judicial, executive, administrative, or ministerial, to so perform every official act as not to violate the constitutional provisions."). *See also* Henderson v. United States, 237 F.2d 169, 175 (5th Cir. 1956) ("[A]ll executive officers of the several states are bound by oath or affirmation to support the Constitution of the United States.").

[195] 423 U.S. 362 (1976).

[196] *Id.* at 380. *See also* Los Angeles v. Lyons, 461 U.S. 95, 112 (1983). *Rizzo* alarmed commentators and the public interest bar. *See, e.g.*, Eisenberg & Yeazell, *The Ordinary and the Extraordinary in Institutional Litigation*, 93 HARV. L. REV. 465, 504-05 (1980) (attempting to distinguish *Rizzo* from the mainstream of institutional reform litigation); Fiss, *Dombrowski*, 86 YALE L.J. 1103, 1154-60 (1977) (suggesting that *Rizzo* reveals a desire to insulate the status quo from judicial interference); Gibbons, *supra* note 99, at 1109 (contending that *Rizzo* and other abstention cases may portend "a drastic curtailment of the federal injunctive remedy against state violations of individual civil rights"); Weinberg, *The New Judicial Federalism*, 29 STAN. L. REV. 1191, 1194-95 (1977) (accusing Supreme Court of fashioning a "crude weapon" in *Rizzo v. Goode*, and "one capable of an unacceptable degree of destruction"); Zeigler, *supra* note 4, at 1031-36 (arguing that abstention in *Rizzo* is wholly inappropriate in light of the legislative history of Reconstruction). Shortly after *Rizzo* was decided, a coalition of civil liberties and public interest law groups addressed a letter of protest to the lawyers and judges attending a national conference on law reform entitled "The National Conference on the Causes of Popular Dissatisfaction with the Administration

Although *Rizzo* is correct in its conclusion that courts should defer equally to the executive and judicial branches of state government, the Court was wrong to abstain.[197] Courts should instead achieve parity of

---

of Justice." N.Y. Times, Apr. 7, 1976, at 11, col. 3. The letter charged that "*Rizzo v. Goode* . . . galvanized our view that the Supreme Court is embarked on a dangerous and destructive journey designed to dilute the power of the federal judiciary to serve as guardian of federal constitutional rights." Letter from Aryeh Neier, *et al.*, to participants in the "Pound Revisited" Conference, Apr. 7, 1976, at 2. Alarm over *Rizzo* plainly is justified, for if carried to its logical conclusion, it could result in the de facto repeal of 42 U.S.C. § 1983 and 28 U.S.C. § 1343(3) by imposing a ban on all federal suits brought against state officials for violation of federal constitutional rights. Redish, *supra* note 163, at 471; Weinberg, *supra*, at 1195; Zeigler, *supra* note 1, at 291-92 n.111.

[197] In response to *Rizzo*, some commentators attempted to distinguish federal court intervention in state judicial proceedings from intervention in the workings of the other branches to provide a basis for limiting abstention to suits affecting judicial proceedings. Such attempts are well-motivated but do not withstand close analysis. The more persuasive argument is that abstention is unjustified in suits against any branch of state government.

Robert D. Goldstein asserts that there are "differing relationships between a federal court and state court, state legislature, and state executive." Goldstein, *A* Swann *Song for Remedies: Equitable Relief in the Burger Court*, 13 HARV. C.R.-C.L. L. REV. 1, 19 (1978). In his view, greater deference to state courts is warranted because they have "the same duty and presumably the same competence as a federal court; moreover, an appeal to the Supreme Court and federal habeas corpus in a criminal case permit a check on state court competence." *Id.* Thus, Mr. Goldstein concludes that abstention in § 1983 cases against state judges merely alters "the timing of review," while abstention in cases against state executive officials "shields the state executive from an effective remedy." *Id.*

Mr. Goldstein makes several faulty assumptions. First, he implies that courts, whether state or federal, have a greater duty to observe federal constitutional requirements than do other governmental officials. This is simply incorrect. *See supra* note 194. Second, he presumes that state courts are as able as federal courts to entertain challenges to state judicial practices and procedures. This presumption is unwarranted, however, because state courts are both unwilling and unable to put their own houses in order. *See supra* notes 78-79 and accompanying text. Finally, Mr. Goldstein assumes that direct Supreme Court review and federal habeas corpus are effective devices to monitor state court performance. Although these devices can sometimes correct injustice in an individual case, inherent limitations restrict their utility in achieving systemic reform in the day-to-day workings of the lower criminal courts. *See infra* Section III. Thus, abstention in cases challenging state judicial behavior does not merely delay review of most federal claims. Rather, it shields state judicial action from effective federal review just as abstention in cases against executive or legislative officials would shield their actions from review.

Louise Weinberg also attempts to distinguish suits against the judicial branch of state government from suits against other branches, although in somewhat different terms than Mr. Goldstein. Weinberg, *supra* note 196, at 1224-27. Professor Weinberg points to two differences between "proceedings" cases directed against judicial proceedings and

treatment by abandoning the abstention doctrine in suits directed against state judicial proceedings and following the approach taken in desegregation, reapportionment, and prisoners' rights suits.

D. Federal Court Expertise in Judicial Reform

Federal judges often cite their lack of expertise as a reason for caution and restraint when intervening in state institutions.[198] They can-

---

"officials" cases directed against state executive officials that might justify abstention in the former cases while allowing federal courts to act in the latter cases. First, she asserts that in proceedings cases, the state court presumably is competent to hear the federal plaintiff's constitutional defenses, while in officials cases, "by hypothesis there is no particular forum, only some vague possibility of state remedies." *Id.* at 1224. Second, she asserts that officials cases "in the task of formulation and administration of remedies . . . present problems and opportunities wholly absent from 'proceedings' cases." *Id.* at 1225. Thus, in an officials case like Rizzo v. Goode, 423 U.S. 362, the trial court was able to structure relatively unobtrusive relief that accorded proper deference to state concerns. Weinberg, *supra* note 196, at 1224-27. In a proceedings case such as Younger v. Harris, 401 U.S. 37, granting relief would enjoin a state prosecution and thus cause a correspondingly greater intrusion into state affairs.

Professor Weinberg's analysis may provide colorable grounds for distinguishing *Rizzo v. Goode* and *Younger v. Harris* on their facts. When her distinctions between proceedings and officials cases are viewed in a broader context, however, they quickly lose their vitality. Preliminarily, the distinction between proceedings and officials cases is itself somewhat artificial. Suits directed at state judicial proceedings also are directed at the state *official* who is conducting the proceedings. Other state officials such as prosecutors and police who are participating in the proceedings may also be affected. Conversely, suits directed at state executive officials typically concern their practices and procedures — in short, their *proceedings*. In addition, as noted above, state judges in most instances will not enforce federal constitutional rights any more vigorously than state executive or legislative officials. *See supra* notes 85-89 and accompanying text. Finally, many suits challenging state judicial practices do not seek to enjoin pending criminal cases. Rather, they seek prospective injunctive relief making the practices conform to constitutional requirements. Relief can be tailored narrowly to redress only the specific constitutional violation involved. Thus, proceedings cases often present essentially the same "problems and opportunities" in the "formulation and administration of remedies," Weinberg, *supra* note 196, at 1225, as officials cases.

Professors Eisenberg and Yeazell also attempt to limit *Younger*'s scope by distinguishing between cases interfering with state judicial proceedings and suits directed against state institutions. They assert that "federal actions contemporaneous with pending or threatened state proceedings are considered to interfere to a much greater degree with state functions . . . than are federal suits in the absence of such proceedings." Eisenberg & Yeazell, *supra* note 196, at 503. Suits reforming state institutions, however, can cause just as much interference with state functions as suits affecting state proceedings. *See supra* notes 191-94 and accompanying text.

[198] *See, e.g.*, United States v. Jefferson County Bd. of Educ., 372 F.2d 836, 855 (5th Cir. 1966) ("[M]ost judges do not have sufficient competence — they are not educators

not, however, claim lack of expertise in cases seeking systemic reform of state criminal justice systems. Over the past twenty years, federal courts have struggled with and solved many of the same problems that plague state courts. Federal judges have gained substantial expertise in court administration; they are uniquely qualified to assist their state counterparts in reform.

Federal court caseloads have increased dramatically in the last twenty-five years at both the trial[199] and appellate levels.[200] In response, the federal judiciary has struggled to keep its dockets reasona-

---

or school administrators — to know the right questions, must [sic] less the right answers."); Milliken v. Bradley (I), 418 U.S. 717, 743-44 (1974) (same); Procunier v. Martinez, 416 U.S. 396, 404-05 (1974) (Solving the problems of prisons "require[s] expertise, comprehensive planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government."); Sostre v. McGinnis, 442 F.2d 178, 205 (2d Cir. 1971), *cert. denied*, 405 U.S. 978 (1972) (same); Baker v. Carr, 369 U.S. 186, 268 (1962) (Frankfurter, J., dissenting) (Federal judges in reapportionment cases "do not have accepted legal standards or criteria or even reliable analogies to draw upon for making judicial judgments. To charge courts with the task of accommodating the incommensurable factors of policy that underlie these mathematical puzzles is to attribute, however flatteringly, omnicompetence to judges."). *See also* Coffin, *The Frontier of Remedies: A Call for Exploration*, 67 CALIF. L. REV. 983, 990 (1979) ("[I]t is quite a different enterprise to send a solitary trial judge to hear a choir of experts, review voluminous data, step into the shoes of a social planner and public executive, and devise a long-range, multifaceted public impact program without any guidance or support from an organization."). *But see* Cox, *The New Dimensions of Constitutional Adjudication,* 51 WASH. L. REV. 791, 822-23 (1976) (suggesting that lawyers have always been regarded as jacks-of-all trades, and that reapportioning legislatures or desegregating schools is "hardly more foreign to the general run of judicial duties than restructuring businesses under the antitrust laws . . . .").

[199] Civil case filings in United States district courts increased from 59,284 in 1960 to 241,842 in 1983. ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, AN ANALYSIS OF THE WORKLOAD OF THE FEDERAL COURTS FOR THE TWELVE MONTH PERIOD ENDED JUNE 30, 1983, at 114 (1983). Criminal filings increased more modestly, from 28,137 in 1960 to 34,681 in 1983. *Id.* at 160. The number of judges increased during this period, but not in proportion to the increased caseload. *Id.* at 119. Total annual new filings per judge increased from 357 in 1960 to 537 in 1983. *Id.* at 114, 119, 160.

[200] Appeals filed increased from 3,899 in 1960 to 29,630 in 1983. *Id.* at 97. The number of Court of Appeals judges grew from 68 to 132 during this period. *Id.* Consequently, annual new filings per judge increased from 57 in 1960 to 224 in 1983. For discussions of the growing caseloads in the federal courts, see generally W. MCLAUCHLAN, FEDERAL COURT CASELOADS (1984); Clark, *A Commentary on Congestion in the Federal Court*, 8 ST. MARY'S L.J. 407 (1976); Lasker, *The Court Crunch: A View from the Bench*, 76 F.R.D. 245 (1978).

bly current and to prevent the erosion of constitutional safeguards.[201] Federal judges were instrumental in bringing about legislative reform of the federal criminal process[202] and played a substantial role in planning and implementing reforms.[203]

After many years of lobbying by the Judicial Conference[204] and others, Congress enacted the Criminal Justice Act of 1964[205] to provide for assignment of counsel to all defendants who could not afford to retain counsel in federal criminal cases.[206] Senator Hruska, one of the sponsors of the measure, explained its purpose as follows:

> [W]e are a nation dedicated to the precept of equal justice for all. Experience has abundantly demonstrated that, if this rule of law will hold out more than an illusion of justice for the indigent, we must have the means to insure adequate representation that the bill before us provides.[207]

Congress gave primary responsibility for implementation of the Act to the federal courts.[208] A subsequent study of the Act's administration

---

[201] Chief Justice Burger has explained the link between efficient court operation and justice as follows: "Why are we concerned about productivity? A more productive judicial system is essential for justice . . . giving litigants their relief promptly, rather than forcing them to wait endlessly while memories grow dim and witnesses move or die. . . ." Press Release by Warren E. Burger, *Thirty Percent Increase in Case Handling per Federal Judgeship* (Oct. 1973), *quoted in* Tamm & Reardon, *Warren E. Burger and the Administration of Justice*, 1981 B.Y.U. L. REV. 447, 454.

[202] *See infra* notes 204-41 and accompanying text.

[203] Kerwin, *Judicial Implementation of Public Policy: The Courts and Legislation for the Judiciary*, 16 HARV. J. ON LEGIS. 415, 415-17 (1979); Remington, *Circuit Council Reform, A Boat Hook for Judges and Court Administrators*, 1981 B.Y.U. L. REV. 695, 720.

[204] The Judicial Conference consists of the Chief Justice of the United States, the chief judge of each judicial circuit, one district judge from each circuit, and two bankruptcy judges. 28 U.S.C. § 331 (1982). The Conference often plays a major role in formulating and implementing legislation affecting the federal courts. Kerwin, *supra* note 203, at 418-19.

[205] Pub. L. No. 88-455, § 2, 78 Stat. 552 (1964) (current version at 18 U.S.C. § 3006(a) (1982)).

[206] *Id.* Prior to the Act, representation of the poor in federal court was haphazard and of uneven quality. *See generally* Note, *The Representation of Indigent Criminal Defendants in the Federal District Courts*, 76 HARV. L. REV. 579 (1963). *See also* Kerwin, *supra* note 203, at 427-28; Kutak, *The Criminal Justice Act of 1964*, 44 NEB. L. REV. 703, 704-06 (1965). The Judicial Conference urged enactment of a public defender system in busy federal districts as early as 1937. Report of the Judicial Conference of the United States, 8-9 (Sept. Sess. 1937). Legislative efforts to create such a system in the 1940's and 1950's are reviewed in Kutak, *supra*, at 711-14. For a detailed account of the 1964 Act's passage by Congress, see *id.* at 717-25.

[207] 110 CONG. REC. 18,521 (1964).

[208] 18 U.S.C. § 3006(a) (1982) reads: "Each United States district court, with the

found that "[t]he judiciary moved with dispatch in promulgating plans for furnishing representation," and that "[i]ndividual district judges, [who bear] most of the administrative responsibility, have been generally conscientious in carrying out the letter and spirit of the Act."[209]

The federal judiciary also was instrumental in devising and implementing the Jury Selection and Service Act of 1968.[210] In 1966, Chief Justice Warren reactivated the Judicial Conference Committee on the

---

approval of the judicial council of the circuit, shall place in operation throughout the district a plan for furnishing representation for any person financially unable to obtain adequate representation . . . ." Subsection (a) also lists alternatives that individual districts might choose. These provisions recognized "the wide variety of conditions and requirements existing among the federal district courts," Kutak, *supra* note 206, at 727, and contemplated that the federal courts would use their discretion to construct a plan that best suited their individual needs.

[209] Oaks, *The Criminal Justice Act in the Federal District Courts — A Summary and Postscript*, 7 AM. CRIM. L.Q. 210, 210-11 (1969). The study also found that "[d]ifficulties of . . . administration, to be expected in initial operation under such novel legislation, have been minimized by . . . the careful supervision and administrative guidance of the Judicial Conference Committee to Implement the Criminal Justice Act." *Id.* The implementation process is described in Kerwin, *supra* note 203, at 427-30. The Act was amended in 1970 to expand the categories of eligible defendants, to increase rates of compensation, and to allow each district to establish a public defender organization to carry out the purposes of the Act. Criminal Justice Act Amendments of 1970, Pub. L. No. 91-447, § 1, 84 Stat. 916 (amending 18 U.S.C. § 3006(a) (1968)). *See* Kerwin, *supra* note 203, at 430.

[210] Pub. L. No. 90-274, § 101, 82 Stat. 53 (codified at 28 U.S.C. §§ 1861-69 (1982)). Prior to passage of the Act, the juror selection process was "governed by . . . the vagaries of local custom and practice," S. Rep. No. 891, 90th Cong., 1st Sess. 10 (1967), and lacked adequate judicial supervision. *Id. See also* Kaufman, *The Judges and Jurors: Recent Developments in Selection of Jurors and Fair Trial — Free Press*, 41 U. COLO. L. REV. 179, 179-80 (1969). In addition, selection procedures generally were not designed to place a representative cross-section of the community on the jury rolls. *Id.* at 180. For example, many districts used a "key-man" selection system. Designated local citizens supplied jury commissioners with names of persons suitable for jury service. Ashby, *Juror Selection and the Sixth Amendment Right to an Impartial Jury*, 11 CREIGHTON L. REV. 1137, 1141-43 (1978); Gewin, *The Jury Selection and Service Act of 1968: Implementation in the Fifth Circuit Court of Appeals*, 20 MERCER L. REV. 349, 354-55 (1969). The key-man system resulted in underrepresentation of lower socio-economic groups, minorities, and the young. *See* Imlay, *Federal Jury Reformation: Saving a Democratic Institution*, 6 LOY. L.A.L. REV. 247, 250 (1973) ("The 'Main Street town booster,' a middle-aged male in the middle income bracket, remained the prototype of our federal juror."); Mills, *A Statistical Study of Occupations of Jurors in a United States District Court*, 22 MD. L. REV. 205, 212 (1962); Note, *Underrepresentation of Economic Groups on Federal Juries*, 57 B.U.L. REV. 198, 200 (1977). For brief historical reviews of federal jury selection procedures, see Gewin, *supra*, at 351-56; Stanley, *Federal Jury Selection and Service Before and After 1968*, 66 F.R.D. 375, 375-80 (1975).

Operation of the Jury System.[211] The Committee studied the jury system's problems and issued a report[212] that served as a basis for the 1968 Act.[213] The Act declared as federal policy "that all litigants in Federal courts entitled to trial by jury shall have the right to grand and petit juries selected at random from a fair cross section of the community . . . ."[214] It prohibited exclusion from jury service "on account of race, color, religion, sex, national origin, or economic status."[215] To achieve these objectives, the legislature instructed each federal district court to devise a written plan for juror qualification and selection[216] in accordance with general statutory guidelines.[217] The federal courts implemented the new procedures in due course,[218] and gave the jury system new life as an effective instrument of democracy.[219]

The federal courts also played a major role in implementing the Speedy Trial Act of 1974.[220] Under the Act, each district court was "to conduct a continuing study of the administration of criminal justice in

---

[211] Imlay, *supra* note 210, at 252; Kaufman, *supra* note 210, at 181.

[212] *See Report of the Commission on the Operation of the Jury System of The Judicial Conference of the United States*, 42 F.R.D. 353 (1967).

[213] Kaufman, *supra* note 210, at 181-82; Kerwin, *supra* note 203, at 423.

[214] 28 U.S.C. § 1861 (1976).

[215] 28 U.S.C. § 1862 (1976).

[216] 28 U.S.C. § 1863(a) (1976). The Committee on the Operation of the Jury System, *see supra* notes 211-13 and accompanying text, had two reasons for suggesting the plan requirement. First, it "permitt[ed] some local flexibility within a nationally uniform scheme." Kaufman, *supra* note 210, at 184. Second, "the existence of a formal written plan would go far toward dispelling the vagueness, confusion, and ignorance that have often cloaked jury selection." *Id.* at 185. The Act also required that the judicial council of the circuit approve the plan. 28 U.S.C. § 1863(a) (1976).

[217] *See* 28 U.S.C. §§ 1863-68 (1976). For a detailed review of the Act's provisions, see Ashby, *supra* note 210, at 1143-46; Gewin, *supra* note 210, at 357-62; Imlay, *supra* note 210, at 252-56.

[218] The implementation process in the Fifth Circuit is described in Gewin, *supra* note 210, at 362-85.

[219] Imlay, *supra* note 210, at 262. Mr. Imlay, General Counsel to the Administrative Office of the United States Courts, cautioned, however, that some problems remained. *See id.* at 263-73. Commentators have criticized federal court reluctance to recognize additional cognizable groups entitled to protection under the Act's broad antidiscrimination language. *See, e.g.*, Ashby, *supra* note 210, at 1147-49; Zeigler, *Young Adults as a Cognizable Group in Jury Selection*, 76 MICH. L. REV. 1045, 1060-61, 1066-67 (1978); Note, *Economic Groups*, *supra* note 210.

[220] Pub. L. No. 93-619, 88 Stat. 2076 (1974) (current version at 18 U.S.C. §§ 3161-74 (1982)). Congress passed the Act to clarify the rights of criminal defendants and to protect the public interest in swift adjudication of criminal cases. Frase, *The Speedy Trial Act of 1974*, 43 U. CHI. L. REV. 667, 669 (1976); Kerwin, *supra* note 203, at 425.

the district court and . . . prepare plans for the disposition of criminal cases in accordance with this chapter."[221] Each plan was to include "a description of the time limits, procedural techniques, innovations, systems and other methods" by which the district court was to expedite criminal cases.[222] The courts also were to devise reliable procedures to monitor compliance,[223] and to specify rule changes, amendments, and appropriations necessary to accomplish the goals of the legislation.[224]

The federal courts had many problems implementing the Speedy Trial Act because the reform program was complex and affected virtually all aspects of their criminal docket. Problems arose in defining the time limits for processing cases and the permissible sanctions for noncompliance.[225] The Administrative Office of the United States Courts and the Federal Judicial Center, both of which sought to promote national uniformity, were at odds with individual district courts, which tended to interpret the Act in their own way,[226] or in some cases, to ignore it.[227] In addition, lack of adequate resources hindered the work of the planning groups.[228] Implementation of the Act's permanent time limits was delayed until 1979 to enable the courts to complete the research and planning.[229] Nonetheless, there is evidence of substantial progress in complying with the provisions of the Act.[230] Many districts

---

[221] 18 U.S.C. § 3165(a)(1982).

[222] 18 U.S.C. § 3166(a)(1982).

[223] 18 U.S.C. §§ 3166(b)-(c), 3170 (1982).

[224] 18 U.S.C. § 3166(d) (1982).

[225] *See* Frase, *supra* note 220, at 676-720; Kerwin, *supra* note 203, at 437-38.

[226] Mann, *The Speedy Trial Planning Process*, 17 HARV. J. ON LEGIS. 54, 67-69 (1980).

[227] *See, e.g.*, Misner, *District Court Compliance With the Speedy Trial Act of 1974: The Ninth Circuit Experience*, 1977 ARIZ. ST. L.J. 1, 25. ("The cold fact facing the Ninth Circuit is that compliance with the reporting requirements of the Speedy Trial Act has been minimal in many districts.").

[228] Mann, *supra* note 226, at 69-71.

[229] 18 U.S.C. § 3161(f)-(g) (1982). For summaries of the provisions of the Act, see Frase, *supra* note 220, at 670-73; Misner, *supra* note 227, at 2-7. The Speedy Trial Act was amended in 1979 to simplify some of the procedures and to postpone use of the dismissal sanction until July 1, 1980. Speedy Trial Act Amendments Act of 1979, Pub. L. No. 96-43, 93 Stat. 327 (1979). For extensive analysis of the amended act, see R. MISNER, SPEEDY TRIAL FEDERAL AND STATE PRACTICE 215-328 (1983).

[230] *See* Project, *The Speedy Trial Act: An Empirical Study*, 47 FORDHAM L. REV. 13, 716, 765 (1979) ("[T]he Act has found greater acceptance and created fewer difficulties than many of its opponents presume. . . . Enforcement of the . . . Act in the districts of Eastern New York, Connecticut, and New Jersey, although not free from difficulty, has largely proven successful."); ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, *supra* note 199, at 179-80 (reporting 97% compliance with the Act).

changed pretrial procedures and reordered case processing requirements.[231] The federal courts thus have gained valuable experience in implementing complex administrative reform.

In addition to measures designed to vindicate specific constitutional rights, the judiciary has played an active role in improving the general efficiency, productivity, and fairness of the federal courts. The Federal Magistrates Act of 1968[232] created the magistrate, a new judicial officer who would assist district judges.[233] The Judicial Conference has responsibility for overseeing the magistrate system,[234] and individual district courts and judges have discretion in deciding which matters to delegate to magistrates.[235] One commentator concluded that the magistrate system is "extremely successful" and has "introduced a more efficient division of labor" in the federal trial courts.[236] Pursuant to the

---

But see M. FEELEY, *supra* note 52, at 173 (contending that the time limit provisions have not been taken seriously by federal judges and that the Act's loopholes are being exploited to give the appearance of compliance without providing speedier adjudication).

[231] Mann, *supra* note 226, at 91. Malcolm Feeley also concedes that the Act provided an impetus for modernization of the courts, and that new methods for monitoring the flow of cases have been instituted. M. FEELEY, *supra* note 52, at 173-74.

[232] Pub. L. No. 90-578, 82 Stat. 1108 (1968) (current version at 28 U.S.C. §§ 631-39 (1982) and 18 U.S.C. §§ 3401-02 (1982)).

[233] Magistrates conduct initial proceedings in criminal cases, try and dispose of minor criminal offenses, supervise pretrial and discovery proceedings, and conduct preliminary review of habeas corpus petitions. 28 U.S.C. § 636(a)-(b) (1982). Amendments to the Act in 1979 authorized magistrates with consent of the parties to try any civil case or misdemeanor designated by a district judge and required stricter standards and procedures for appointment of magistrates. Pub. L. No. 96-82, 93 Stat. 643 (1979). For discussion of the original Federal Magistrates Act, see Silberman, *Masters and Magistrates, Part II: the American Analogue*, 50 N.Y.U. L. REV. 1297 (1975). For discussion of the 1979 amendments, see generally Aug, *The Magistrate Act of 1979: From a Magistrate's Perspective*, 49 U. CIN. L. REV 363 (1980); McCabe, *the Federal Magistrates Act of 1979*, 16 HARV. J. ON LEGIS. 343 (1979).

[234] 28 U.S.C. §§ 631(a), 633(b) (1982). For a review of the role played by the Judicial Conference, see Kerwin, *supra* note 203, at 430-32.

[235] 28 U.S.C. § 636 (1982).

[236] McCabe, *supra* note 233, at 356. Some commentators have been critical of the magistrate system, and particularly of the expanded powers granted magistrates in 1979. *See, e.g.*, Note, *Article III Constraints and the Expanding Civil Jurisdiction of Federal Magistrates: A Dissenting View*, 88 YALE L.J. 1023 (1979); Note, United States v. Raddatz: *Judicial Economy at the Expense of Constitutional Guarantees*, 47 BROOKLYN L. REV. 559 (1981) (arguing that the Supreme Court decision allowing district judges to render final judgments on case-dispositive motions based on credibility determinations by magistrate violates Article III of the Constitution); Note, *The Validity of United States Magistrates Criminal Jurisdiction*, 60 VA. L. REV. 697 (1974). Practical problems with the magistrate system are discussed in Aug, *supra* note 233, at

Circuit Executive Act of 1971,[237] each circuit may appoint an executive assistant to the chief judge to aid in administering circuit affairs.[238] Circuit councils[239] have complete responsibility for defining a circuit executive's duties.[240] Finally, individual circuit and district courts have initiated reform efforts to improve the administration of justice.[241]

Thus, federal judges have gained substantial experience in criminal justice reform over the last twenty years. Their expertise makes them uniquely qualified to assist in reform of state criminal justice systems. By improperly granting state courts greater deference than is accorded to other branches of state government, *Younger* abstention shields state criminal justice systems from direct federal court scrutiny. Of course, the federal courts may review state practices and procedures in individual cases. The Supreme Court may review state court judgments raising federal questions and the federal courts hear individual habeas corpus petitions. But such review has not succeeded in working systemic reform of state criminal justice. The next section explores the reasons for this failure and explains why direct, prospective injunctive relief is necessary to achieve systemic change.

367-73.

[237] Pub. L. No. 91-647, 84 Stat. 1907 (codified at 28 U.S.C. § 332(e)-(f) (1982)).

[238] 28 U.S.C. § 332(e) (1976). *See* Tamm & Reardon, *supra* note 201, at 457-58.

[239] The circuit councils, or the judicial councils of the circuits as they are sometimes called, were created as a part of the Administrative Office Act of 1939, Pub. L. No. 76-299, § 306, 53 Stat. 1223 (codified at 28 U.S.C. § 332 (1982)). The councils are empowered to make orders necessary for the effective administration of justice in the circuits. *See* 28 U.S.C. § 332(d) (1982). The councils were originally composed of all active circuit judges within each circuit. A recent amendment requires district court representation as well. Judicial Councils Reform Act of 1980, Pub. L. No. 96-458, § 2(a), 94 Stat. 2035 (codified at 28 U.S.C. § 332(a) (1982)). *See* Remington, *supra* note 203, at 710, 729-30.

[240] 28 U.S.C. § 332(e) (1982) reads in part: "The circuit executive shall exercise such administrative powers and perform such duties as may be delegated to him by the circuit council." For a discussion of implementation of the Circuit Executive Act, see generally J. McDERMOTT & S. FLANDERS, THE IMPACT OF THE CIRCUIT EXECUTIVE ACT (1979).

[241] The Second and Eighth Circuits have instituted effective procedures for expediting appeals. *See generally* L. FARMER, APPEALS EXPEDITING SYSTEMS: AN EVALUATION OF SECOND AND EIGHTH CIRCUIT PROCEDURES (1981). The Ninth Circuit also has instituted programs to improve efficiency. *See* Deane & Tehan, *Judicial Administration in the United States Court of Appeals for the Ninth Circuit*, 11 GOLDEN GATE L. REV. 1, 8-19 (1981). Most district courts now utilize the individual calendar system. Tamm & Reardon, *supra* note 201, at 465. Assigning each case to an individual judge for all purposes discourages judge shopping and focuses responsibility for disposition of the case. *Id.*

III. The Need for Prospective Injunctive Relief to Effect Systemic Change

Although the federal courts have been much less willing to intervene directly in state criminal justice systems than in other state institutions, they have not been wholly quiescent in criminal justice reform. Indeed, the criminal procedure innovations of the Warren Court have been called "the most ambitious attempt in our constitutional history to illuminate th[e] dark underside of the [criminal] law."[242] In hindsight, however, it is apparent that the attempt was at best only partially successful.[243] There are myriad reasons why the Warren Court failed to achieve broad-based, systemic reform of state criminal justice. The factors that make criminal justice systems so resistant to change at the state level[244] also frustrate reform by the federal courts. An important additional reason for the disappointing results is that the two remedial devices chosen by the Supreme Court — Supreme Court review of state court judgments and federal habeas corpus — have inherent severe limitations that make systemic change difficult to achieve. The Court presumably chose the devices because they are less intrusive than injunctive relief. They also are much less effective.[245] Because the states have

---

[242] Cover & Aleinikoff, *supra* note 5, at 1036.

[243] *See supra* notes 45-48, 51-61 and accompanying text.

[244] *See supra* notes 65-94 and accompanying text.

[245] The major congressional attempt to reform state criminal justice also has been largely unsuccessful. The Law Enforcement Assistance Administration (LEAA) was created by Title I of the Omnibus Crime Control and Safe Streets Act of 1968 "to assist State and local governments in strengthening and improving law enforcement at every level by national assistance." Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, Declarations and Purpose, 82 Stat. 198 (1968) (current version at 42 U.S.C. § 3701 (1982)). More specifically, LEAA was established to encourage states and localities to research, plan, and develop innovative programs to help reduce crime. *Id.* Between 1969 and 1980, LEAA distributed $7.5 billion to the states for such programs. Diegelman, *Federal Financial Assistance for Crime Control: Lessons of the LEAA Experience*, 73 J. Crim. L. & Criminology 994, 996 (1982). Unfortunately, LEAA was plagued with many problems during the decade of its operation.

Confusion regarding goals and purposes was a major problem. As one of LEAA's first administrators pointed out, "[c]ertainly, from its beginnings LEAA was confronted by conflicting expectations in the Congress, in the executive branches of government at all levels, among the professionals in criminal justice and in the public." Rogovin, *The Genesis of the Law Enforcement Assistance Administration: A Personal Account*, 5 Colum. Hum. Rts. L. Rev. 9, 25 (1973). The initial Crime Control and Safe Streets Act focused almost exclusively on law enforcement. Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. 197 (1968) (current version at 42 U.S.C. §§ 3701-97 (1982)). It was not until 1973 that the Act was amended to include

failed to respond adequately to more gentle persuasion, it is time to use

---

the improvement of criminal justice and the rehabilitation of criminals in its statement of purpose. Crime Control Act of 1973, Pub. L. No. 93-83, Declarations and Purpose, 87 Stat. 197 (1973) (current version at 42 U.S.C. § 3701 (1982)).

Critics complained that a disproportionate share of LEAA funds went to police agencies at the expense of other components of the criminal justice system. In fiscal 1975, for example, only 13% of LEAA's action funds were spent on adjudication of criminal cases, and less than half of that amount went to the courts. *Law Enforcement Assistance Administration: Hearings Before the Subcomm. on Crime of the House Comm. on the Judiciary*, 94th Cong., 2d Sess. 455 (1976) (remarks of Rep. Holtzman) [hereafter 1976 *Hearings*]. The excessive focus on the police component made broad systemic reform impossible.

> The assumption that crime would be prevented through a strengthened law enforcement system is a flaw in the basic expectations of the Safe Streets Act. Prevention and reduction of crime cannot be adequately achieved without concurrently addressing the other components of the criminal justice system — courts and corrections — as well as systems involving human resources.

Rector & Wolfle, *The Law Enforcement Assistance Administration in Perspective*, 5 COLUM. HUM. RTS. L. REV. 55, 56 (1973).

Commentators also questioned the use of funds by police agencies. Critics charged that a disproportionate amount of funds were used to purchase sophisticated police hardware and electronic equipment. *See* Note, *A Reexamination of the Law Enforcement Assistance Administration*, 27 STAN. L. REV. 1303, 1308 nn.38-39 (1975). For example, in its first five years alone, LEAA spent more than $300 million on the development of computerized information and statistics systems. *See* Velde, *Progress in Criminal Justice Information Systems*, in PROJECT SEARCH, PROCEEDINGS OF THE SECOND INTERNATIONAL SYMPOSIUM ON CRIMINAL JUSTICE INFORMATION AND STATISTICS SYSTEMS 9 (1974). More frequently than not, however, the criminal history information generated by these systems was inaccurate and incomplete and thus adversely affected the rights of criminal defendants. *See generally* Doernberg & Zeigler, *Due Process Versus Data Processing: An Analysis of Computerized Criminal History Information Systems*, 55 N.Y.U. L. REV. 1110 (1980).

LEAA's effectiveness also was hampered by general maladministration in allocating funds and monitoring their use. An internal office memorandum of the Government Accounting Office stated that "LEAA funds have been used for projects which have little or no relationship to improving criminal justice programming. Funds are so widely dispersed that their potential impact is reduced." 1976 *Hearings*, *supra*, at 5 (remarks of Victor L. Lowe). Because LEAA failed to establish standards or criteria for evaluating the projects it funded, it was unable to identify useful programs or eliminate support for ineffective or inappropriate projects. *Id.* at 5-9. One major study found that despite prodding from Congress, LEAA could not fully account for the billions it spent. As of February 1975 LEAA could account for only 39.9% of its fiscal 1974 action grant funds and only 75% of its 1973 block grant funds even though it had spent 90.2% of the money. Report of the Twentieth Century Fund Task Force on the Law Enforcement Assistance Administration, *reprinted in* 1976 *Hearings*, *supra*, at 2126, App. K.

Much of the misuse of funds and lack of accountability could be attributed to com-

the injunction.

Supreme Court review of state court judgments and federal habeas corpus have many limitations in common. With either device, the adequate and independent state ground rule and the guilty plea waiver rule preclude review of federal constitutional issues raised in most state criminal cases. A state court judgment is insulated from federal court review if the judgment rests upon an independent state ground that is adequate to support the judgment regardless of a federal court decision on the federal issues involved.[246] Thus, if a criminal defendant fails to comply with state procedural requirements for raising his federal constitutional claims and is denied state court review of the claims on that basis, the federal courts will not hear the constitutional claims.[247] In

---

plex bureaucratic procedures. The state planning agencies through which funds flowed compounded the problems. Experts characterized them as "artificial, federally-created entities that are not an integral part of state government and hence have no impact on overall state policymaking in regard to the criminal justice system." 1976 *Hearings*, *supra*, at 101 (remarks of Sarah C. Carey and Leda R. Judd).

When the Senate Judiciary Committee reviewed LEAA in 1979, it concluded: "Overall, the results of the program have not measured up to expectations. Significant problems identified . . . include excessive red tape and bureaucracy; wasteful uses of grant funds; poorly ordered priorities; lack of clearly defined Federal, State, and local crime-fighting roles; inadequate targeting of funds; and ineffective research and statistical programs." S. REP. NO. 142, 96th Cong., 1st Sess. 7, *reprinted in* 1979 U.S. CODE CONG. & AD. NEWS 2471, 2478. Subsequently, Congress totally restructured LEAA. Justice System Improvement Act of 1979, Pub. L. No. 96-157, 93 Stat. 1167 (1979) (codified in scattered sections of 5, 18, 41, and 42 U.S.C.). Since 1979 the agency has gradually disbanded. *See* Diegelman, *supra*, at 996.

[246] Fox Film Corp. v. Muller, 296 U.S. 207 (1935); Herndon v. Georgia, 295 U.S. 441 (1935); Murdock v. Memphis, 87 U.S. (20 Wall.) 590 (1874). The adequate and independent state ground rule applies to both Supreme Court review of state judgments and habeas corpus. *See* Wainwright v. Sykes, 433 U.S. 72 (1977) (applying the rule in a habeas corpus case); Michel v. Louisiana, 350 U.S. 91 (1955); and Herndon v. Georgia, 295 U.S. 441 (1935) (both applying the rule in Supreme Court review of state judgment cases).

[247] The rule apparently is jurisdictional in cases of Supreme Court review of state court judgments. *See* Herb v. Pitcairn, 324 U.S. 117, 125 (1945) (The reason for the rule "is found in the partitioning of power between the state and federal judicial systems and in the limitations of our own jurisdiction."); Fox Film Corp. v. Muller, 296 U.S. 207, 210 (1935) ("[O]ur jurisdiction fails if the non-federal ground is independent . . . and adequate to support the judgment."). In habeas corpus cases, federal courts technically "possess the *power* to look beyond a state procedural forfeiture in order to entertain the contention that a defendant's constitutional rights have been abridged," Wainwright v. Sykes, 433 U.S. at 100 n.2 (Brennan, J., dissenting) (emphasis in original), but they apply the rule nonetheless because of considerations of federalism and comity. *See* Francis v. Henderson, 425 U.S. 536, 538-39 (1976). The rule can be avoided in habeas cases only if the petitioner shows good cause for failing to comply

addition, a guilty plea waives all prior nonjurisdictional defects "not logically inconsistent with the valid establishment of factual guilt."[248] Since as many as ninety-five percent of criminal defendants plead guilty in some jurisdictions,[249] constitutional violations in all but a small proportion of cases cannot be reviewed in federal court.[250]

In the relatively few cases that reach federal court, review is on a case by case basis and is limited to reversal of the conviction and release or retrial of the petitioner.[251] The federal courts are unable to achieve systemic reform or to curb widespread abuses because they can extend relief only to petitioners, not to the class of people subjected to similar constitutional deprivations.[252] In addition, Supreme Court review of state judgments and federal habeas corpus can only redress past wrongs; the federal courts cannot use these remedial devices to order

---

with state procedural requirements and demonstrates actual prejudice from the alleged constitutional violation. *Id.* at 542. *See also* Wainwright v. Sykes, 433 U.S. at 90-91. Judge Gibbons has cautioned that "[r]igid application of the [adequate and independent state ground] rule to state procedural grounds which supported the judgment would enable states to nullify the Court's intended reforms by procedural manipulations." Gibbons, *supra* note 99, at 1099.

[248] Menna v. New York, 423 U.S. 61, 62-63 n.2 (1975). *See also* Tollett v. Henderson, 411 U.S. 258, 266-67 (1973); Wallace v. Heinze, 351 F.2d 39, 40 (9th Cir. 1965), *cert. denied sub nom.* Wallace v. Oliver, 384 U.S. 954 (1966); U.S. *ex rel.* Glenn v. McMann, 349 F.2d 1018, 1019 (2d Cir. 1965), *cert. denied*, 383 U.S. 915 (1966).

[249] *See supra* note 57.

[250] If state law permits an appeal of constitutional issues despite a guilty plea, the federal courts can hear the claims as well. Lefkowitz v. Newsome, 420 U.S. 283, 291-92 (1975).

[251] *See* Cover & Aleinikoff, *supra* note 5, at 1043. If illegally obtained evidence was used to secure a conviction, reversal may simply result in a new trial without the tainted evidence.

[252] *See* Laycock, *Federal Interference with State Prosecutions: The Need for Prospective Relief*, 1977 SUP. CT. REV. 193, 194, 199; Weissman, *supra* note 8, at 517 (1974). The Supreme Court has not decided whether habeas corpus cases can be brought as class actions. *See* Schall v. Martin, 104 S. Ct. 2403, 2408 n.10 (1984). The lower federal courts that have addressed this issue have disagreed. *Compare* Williams v. Richardson, 481 F.2d 358 (8th Cir. 1973), Mead v. Parker, 464 F.2d 1108 (9th Cir. 1972), *and* Adderly v. Wainwright, 58 F.R.D. 389 (M.D. Fla. 1972) (federal habeas corpus may be brought as a class action), *with* U.S. *ex rel.* Sero v. Preiser, 506 F.2d 1115 (2d Cir. 1974), *cert. denied*, 421 U.S. 921 (1975), *and* Bijeol v. Benson, 513 F.2d 965, 968 (7th Cir. 1975) (federal habeas corpus may not be brought as a class action). Despite finding Rule 23 technically inapplicable in habeas cases, the Second Circuit in *Sero* approved a multiparty habeas corpus proceeding similar to a class action under the All Writs Act, 28 U.S.C. § 1651 (1976). 506 F.2d at 1125-27. Multiparty habeas corpus proceedings have been very rare. Note, *Developments in the Law — Federal Habeas Corpus*, 83 HARV. L. REV. 1038, 1170 (1970). *See generally* Note, *Multiparty Federal Habeas Corpus*, 81 HARV. L. REV. 1482 (1968).

prospective changes.[253] Reversal of a conviction "may give rise to inferences about the consequences of future conduct, but it does not determine those consequences of its own force."[254] Moreover, reversal of a conviction does not act directly on the officials whose behavior the court wishes to change.[255] Instead, the defendant's release is held out as an indirect incentive to officials to alter their behavior in the future. Unfortunately, ambiguities in the federal court's opinion or a decision by state officials to read the opinion narrowly may blunt the ruling's already limited effect on the day-to-day operations of state criminal justice.[256]

The ineffectiveness of the exclusionary rule in deterring state police misconduct provides a concrete and widely documented example of the inherent limitations of after-the-fact review in individual criminal cases as a means of working systemic reform of state criminal justice.[257] Critics of the rule have argued that it is ineffective because it imposes no punishment on the offending police officer[258] and does nothing to reform police department policies and procedures.[259] Even in instances in which department policy encourages observance of constitutional rights,

---

[253] Laycock, *supra* note 252, at 194, 199-200. *See also* Cover & Aleinikoff, *supra* note 5, at 1039-40.

[254] Laycock, *supra* note 252, at 200.

[255] Professors Cover and Aleinikoff have found it to be "remarkable" and "startling" that the far-reaching criminal justice decisions of the Warren Court "would be announced with no remedial instrument whatsoever acting directly, coercively or prospectively upon the persons whose behavior was purportedly controlled." Cover & Aleinikoff, *supra* note 5, at 1039-40.

[256] *See* S. WASBY, THE IMPACT OF THE UNITED STATES SUPREME COURT: SOME PERSPECTIVES 154-62, 188, 197 (1970); Milner, *Supreme Court Effectiveness and the Police Organization*, 36 LAW & CONTEMP. PROBS. 467, 482-83 (1971).

[257] The Supreme Court first extended the exclusionary rule to state prosecutions in Mapp v. Ohio, 367 U.S. 643 (1961), and required the suppression of evidence seized in violation of the fourth amendment. The rule also requires exclusion of identification testimony secured in violation of the fifth and sixth amendments, Gilbert v. California, 388 U.S. 263, 269-74 (1967), of confessions obtained in violation of the fifth amendment, Miranda v. Arizona, 384 U.S. 436 (1966); Rogers v. Richmond, 365 U.S. 534 (1961), and of evidence obtained by methods so shocking to the conscience as to violate due process, Rochin v. California, 342 U.S. 165 (1952).

[258] *See, e.g.*, Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388, 416 (1971) (Burger, C.J., dissenting); Geller, *Enforcing the Fourth Amendment: The Exclusionary Rule and its Alternatives*, 1975 WASH. U.L.Q. 621, 665; Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665, 709-10, 725-26 (1970).

[259] *See, e.g.*, PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE POLICE 31 (1967) [hereafter TASK FORCE REPORT: THE POLICE]; Oaks, *supra* note 258, at 729.

individual police officers normally operate out of view of supervisors or prosecutors.[260] In addition, the exclusionary rule does nothing to deter misconduct in cases when the police either do not wish to prosecute or have goals besides prosecution.[261] When prosecution does result, hearings on claimed constitutional violations often are swearing contests between the police officer and the defendant. Unless the officer is caught in a clumsy lie, the officer's version of events usually is believed.[262] Moreover, case law defining constitutional standards of police behavior is ambiguous, complex, and ever changing. It thus provides limited guidance to the police.[263] Finally, when a case reaches the Supreme Court from the highest state court or is brought before a federal district judge by way of habeas corpus, the federal court has only the cold record before it and is limited by the scope of appellate review.[264]

In addition to the many shortcomings that Supreme Court review of state court judgments and federal habeas corpus have in common, each device has its own limitations that restrict its usefulness in achieving systemic reform. The chief limitation of Supreme Court review of state court judgments is that the Court can fully review only a few cases

---

[260] *See* J. WILSON, VARIETIES OF POLICE BEHAVIOR 30-32 (1968); Goldstein, *Police Discretion Not to Invoke the Criminal Process: Low Visibility Decisions in the Administration of Justice*, 69 YALE L.J. 543, 543 (1960); Murphy, *The Problem of Compliance by Police Departments*, 44 TEX. L. REV. 939, 940-41 (1966).

[261] Terry v. Ohio, 392 U.S. 1, 14 (1968). *See also* TASK FORCE REPORT: THE POLICE, *supra* note 259, at 18-19, 31; Milner, *supra* note 256, at 475-76. Such goals include confiscating contraband, controlling prostitutes, searching for weapons as self-protection, harassment, and establishing and maintaining police authority. *See generally id.* at 476-80; Oaks, *supra* note 258, at 721-22.

[262] Elsen & Rosett, *Protections for the Suspect Under* Miranda v. Arizona, 67 COLUM. L. REV. 645, 658-59 (1967); Geller, *supra* note 258, at 671; Oaks, *supra* note 258, at 725; Sevilla, *The Exclusionary Rule and Police Perjury*, 11 SAN DIEGO L. REV. 839, 839-40 (1974).

[263] Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. at 417 (Burger, C.J., dissenting); Murphy, *supra* note 260, at 940, 942; Oaks, *supra* note 258, at 731.

[264] *See* Gallegos v. Nebraska, 342 U.S. 55, 60-61 (1951); Watts v. Indiana, 338 U.S. 49, 50-52 (1949); Haley v. Ohio, 332 U.S. 596, 597-98 (1948) (all holding contested factual issues authoritatively resolved by state court findings). In post-conviction habeas corpus proceedings, 28 U.S.C. § 2254(d) (1982) requires that a state court determination on the merits of a factual issue made after a hearing and evidenced by written findings shall be presumed correct, with certain limited exceptions. *See* Sumner v. Mata, 449 U.S. 539 (1981). In Stone v. Powell, 428 U.S. 465, 481-82, 493-95 (1976), the Supreme Court greatly restricted the scope of federal habeas corpus in reviewing search and seizure claims by holding habeas unavailable when the petitioner had an opportunity for full and fair litigation of his claim in the state courts. *See supra* note 87 and accompanying text.

each year.[265] A prisoner must exhaust available state court remedies before applying for federal habeas corpus.[266] In addition, discovery is available in habeas cases only with the permission of the court.[267] Finally, the right to assignment of counsel is very limited in habeas cases.[268] Even the relatively straightforward procedural requirements of these summary proceedings baffle most state prisoners who are often uneducated and almost always untutored in the law.[269] It is hardly surprising that few *pro se* litigants surmount these obstacles and present convincing legal arguments.[270]

---

[265] For example, in the October, 1982 Term, only 183 cases were argued in the Supreme Court; only a portion of these, of course, involved review of state court judgments. ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, *supra* note 199, at 219, Table A-1.

[266] The exhaustion requirement applies to both pretrial and postconviction applications. Exhaustion of state remedies before trial is mandated by the Court's decision in Ex Parte Royall, 117 U.S. 241 (1886), while exhaustion of postconviction remedies is required by 28 U.S.C. § 2254(b) (1982). In recent years the federal courts have tightened the exhaustion requirement. *See, e.g.*, Anderson v. Harless, 459 U.S. 4, 6 (1982) (state petitioner must have fairly presented the substance of his federal claim to state court to have properly exhausted); Rose v. Lundy, 455 U.S. 509, 518-19 (1982) (habeas petition containing both exhausted and unexhausted claims must be dismissed). One line of cases places state prisoners in a Catch-22 situation by requiring that denial of speedy trial claims first be presented as a defense at a state trial before the case comes to federal court. *See, e.g.*, United States *ex rel.* Scranton v. New York, 532 F.2d 292 (2d Cir. 1976); Brown v. Estelle, 530 F.2d 1280 (5th Cir. 1976); Moore v. DeYoung, 515 F.2d 437 (3d Cir. 1975). *See generally* Note, *The Right to a Speedy Trial and the Exhaustion Requirement of Federal Habeas Corpus*, 1977 DUKE L.J. 707.

[267] Harris v. Nelson, 394 U.S. 286, 298-99 (1969). Courts often withhold permission. *See, e.g.*, Loper v. Beto, 440 F.2d 934 (5th Cir. 1971); United States *ex rel.* O'Neill v. Neff, 326 F. Supp. 1010 (W.D. Pa. 1971).

[268] Some federal courts have held that due process requires assignment of counsel if a meaningful hearing of an apparently substantial claim is impossible without counsel. *See, e.g.*, Shelby v. Phend, 445 F.2d 1326, 1328 (7th Cir. 1971); Roach v. Bennett, 392 F.2d 743, 748 (8th Cir. 1968); United States *ex rel.* Wissenfeld v. Wilkins, 281 F.2d 707, 715-16 (2d Cir. 1960). The burden remains on the petitioner, however, to make a strong preliminary showing of merit as a precondition to assignment of counsel. The Criminal Justice Act of 1964, *see supra* notes 204-09 and accompanying text, was amended in 1970 to provide compensation for attorneys appointed in habeas corpus cases. Act of Oct. 14, 1970, Pub. L. No. 91-447, § 1(d), 84 Stat. 916 (1970) (codified at 18 U.S.C. § 3006(A)(g) (1982)). Compensation is limited, however, to $250. 18 U.S.C. § 3006(A)(d)(2) (1982).

[269] *See generally* Zeigler & Hermann, *The Invisible Litigant: An Inside View of* Pro se *Actions in the Federal Courts*, 47 N.Y.U. L. REV. 157, 159, 173-84 (1972).

[270] *Id.* at 198-201. The problems are merely compounded when *pro se* habeas petitioners seek to appeal. *See generally id.* at 219-26. As a result, "[f]ew pro se appeals survive preliminary screening. Of those that do, even fewer obtain final relief on the

Injunctions are much more likely to effect systemic reform of state criminal justice because they do not suffer all of the inherent limitations of Supreme Court review of state judgments and habeas corpus. Review need not be case by case. Federal courts can entertain actions under Federal Rule of Civil Procedure 23 on behalf of classes drawn as broadly as necessary to encompass the constitutional violation. Relief is not limited to reversal of a conviction or release of an individual petitioner. The federal court can order prospective change in criminal justice practices and procedures. An injunction works directly upon the officials whose behavior the court wishes to change;[271] it also can modify the official policy of an institution of state criminal justice. The court is not limited to a cold record of past events that took place entirely out of its view. Present practices and procedures can be fully investigated under the broad civil discovery rules,[272] and the federal court can conduct hearings and take testimony until it is satisfied that the record is fully developed. Finally, a federal district court can take the initiative in granting injunctive relief. It need not wait, as the Supreme Court must, until a final judgment is rendered "by the highest court of a State in which a decision could be had."[273] And, unlike federal habeas corpus, injunctions do not require that plaintiffs exhaust available state remedies in actions brought pursuant to 42 U.S.C. section

---

merits." *Id.* at 246 (citations omitted).

Civil damage actions or criminal prosecutions also are ill-suited to achieving systemic reform. State judges and prosecutors are absolutely immune in § 1983 damage actions, *see* Stump v. Sparkman, 435 U.S. 349, 356 (1978); Imbler v. Pachtman, 424 U.S. 409 (1976), and executive officials such as police and corrections officers enjoy a good faith defense. Scheuer v. Rhodes, 416 U.S. 232 (1974); Pierson v. Ray, 386 U.S. 547 (1967). Victims of abuse by such officers may fear reprisals if they sue. They sometimes waive potential claims in exchange for a more favorable plea. *See* Geller, *supra* note 258, at 692; Sevilla, *supra* note 262, at 847. If a civil action is brought, some delay inevitably occurs before trial, thus lessening the deterrent effect of the suit. *Id.* at 846-47. At trial, jurors tend to favor police and corrections officials over those charged with or convicted of crime, and they are reluctant to award damages. Geller, *supra*, at 692-93; Oaks, *supra* note 258, at 673. Prosecutors are reluctant to prosecute officers for criminal activity, and jurors are reluctant to convict. *Id.*; Geller, *supra*, at 714-15; Sevilla, *supra*, at 850. The Supreme Court has called criminal remedies "worthless and futile" in deterring unlawful search and seizure by police. *See* Mapp v. Ohio, 367 U.S. 643, 652 (1961).

[271] Although evasion and inaction may still occur, it is significantly more difficult for a state official to ignore a federal court injunction aimed directly at her than to ignore a declaration of proper procedure contained in a federal court opinion only ordering release of an individual defendant.

[272] *See* FED. R. CIV. P. 26-37.

[273] *See* 28 U.S.C. § 1257 (1982).

1983.[274] In sum, since the injunction is substantially more powerful than the other remedial devices used by the federal courts, it is more likely to be effective in achieving change.

The first three sections of this Article have demonstrated why the federal courts should use their injunctive powers to reform state criminal justice systems. Section IV considers how these powers can best be used.

IV. Guidelines for Federal Injunctive Reform of State Criminal Justice

The federal courts would enter well-charted territory if they began to entertain actions seeking systemic reform of state criminal justice systems. The courts and the public interest bar have thirty years of experience in institutional reform litigation. They have learned how to make such actions manageable and how to implement relief. In addition, a lively and continuing debate has emerged in the literature concerning the legitimacy and effectiveness of institutional reform litigation.[275] The commentaries of both proponents and critics can inform and guide federal judicial reform of state criminal justice.

This section applies the lessons learned in desegregation, reapportionment, and prisoners' rights cases to litigation seeking reform of state criminal justice systems. It provides a general blueprint for such actions.[276] Although specific plans for all cases are impossible to frame because the scope and course of particular actions will vary according to local conditions, this section proposes guidelines to assist litigants and the courts in structuring and adjudicating criminal justice reform cases.

---

[274] Patsy v. Board of Regents, 457 U.S. 496 (1982); Monroe v. Pape, 365 U.S. 167, 183 (1961). As with habeas corpus, plaintiffs have no general right to assignment of counsel in § 1983 cases. However, the large public defender organizations in the major urban centers where the problems with state criminal justice are most severe can presumably devote some resources to institutional reform litigation as a part of providing full representation for their clients. In New York City, for example, the Legal Aid Society's Criminal Defense Division employs a small corps of attorneys in the Special Litigation Unit to bring such actions.

[275] *Compare* Fiss, *Foreword: The Forms of Justice*, 93 Harv. L. Rev. 1 (1979), *and* Chayes, *The Role of the Judge in Public Law Litigation*, 89 Harv. L. Rev. 1281 (1976) (both generally favoring federal court intervention to reform errant state bureaucracies), *with* Fletcher, *supra* note 17, *and* D. Horowitz, The Courts and Social Policy (1977) (both generally opposing structural reform litigation).

[276] This section assumes that plaintiffs' claims have constitutional merit in all cases discussed, both real and hypothetical. The assumption is necessary to the discussion, for if a claim is insubstantial, a court can avoid the issues considered here by simply dismissing the case.

Several threshold obstacles will inhibit reform. Change will occur only if the courts understand and overcome the key impediments to change. Many of the factors that make criminal justice systems so highly resistant to change at the state level will hinder federal courts as well. The fragmentation of power and decentralization of administration in state criminal justice[277] will make it difficult to induce criminal justice officials to work together.[278] Of course, a federal court is not limited by separation of powers principles[279] or by state constitutional or statutory provisions that prohibit any single state agency from instituting broad criminal justice reform.[280] Nonetheless, the traditional independence of criminal justice officials will make it difficult for a federal court to enforce remedial orders that require coordinated action by different components of the system.[281] In addition, the disparate values and goals of the different actors in the criminal process[282] will limit discovery of common ground.

The broad discretion of criminal justice officials will also impede federal court reform efforts. Effective change often will require altering the way officials exercise discretion.[283] A court can monitor performance of a mechanical or ministerial act with relative ease, but how is it to enforce an order directing officials to make discretionary decisions in a fairer, wiser, more just manner? This problem cannot be avoided by restricting the exercise of discretion in the criminal process. To do justice, police officers, prosecutors, and judges must tailor their actions, recommendations, and decisions to the facts of individual cases. Reform

---

[277] *See supra* notes 52-54, 65-69 and accompanying text.

[278] *See* M. FEELEY, *supra* note 52, at 37.

[279] *See* Elrod v. Burns, 427 U.S. 347, 352 (1976) ("[T]he separation-of-powers principle . . . has no applicability to the federal judiciary's relationship to the States."). *See also* Mayor of Philadelphia v. Educational Equality League, 415 U.S. 605, 615 (1974); Baker v. Carr, 369 U.S. 186, 210 (1962). *But see* Nagel, *Separation of Powers and the Scope of Federal Equitable Remedies*, 30 STAN. L. REV. 661 (1978) (contending that separation of powers principles limit the authority of federal courts to undertake legislative and executive functions in suits against state officials).

[280] *See supra* notes 65-69 and accompanying text.

[281] *Id.* Indeed, some observers question whether participants in the criminal process actually desire change at all. *See, e.g.*, M. FEELEY, *supra* note 52, at 192; M. LEVIN, *supra* note 79, at 213; R. NIMMER, *supra* note 73, at 176-77. Lawrence T. Kurlander, New York State Director of Criminal Justice, recently stated: "I have noticed . . . an enormous resistance to change. Try and think back to when prosecutors last had an innovative idea . . . . The courts perhaps are the most resistant to change." N.Y. Times, July 17, 1983, § 4 (The Week in Review) at 6, cols. 3-4.

[282] *See supra* notes 72-77 and accompanying text.

[283] R. NIMMER, *supra* note 73, at 23.

requires that these officials have discretion.[284]

A federal court may also have trouble anticipating the unintended, indirect effects that orders aimed at one part of the criminal justice system will have on other parts. Unintended effects most likely will occur if change concerns a stage of the process at which many agencies interact. For example, if a federal court ordered prosecutors to give detailed statements of the factual bases for their bail recommendations or to explain why nonfinancial release alternatives would not suffice in lieu of money bail, the change would affect defense counsel and the criminal court. The order would slow the pace of the proceedings, perhaps necessitating more arraignment parts. The change also might require expansion of the agency charged with investigating the defendant's background and roots in the community. The difficulty in predicting the consequences of a federal court order in cases involving such many-centered, or "polycentric", problems has led some commentators to question whether such cases are suitable for judicial intervention.[285] As in other areas, federal courts will be challenged and sometimes perplexed by the complexities of devising and implementing effective relief.[286]

Finally, some reforms will cost money. Enhancing procedural due process requires that judges, prosecutors, and defense counsel spend more time on each case. Therefore, more of these officers will be needed to avoid even larger backlogs. Adding professional personnel in turn may require increased support staff and new physical facilities. In other areas, federal courts have been extremely reluctant to order state officials to spend more money remedying constitutional violations,[287]

---

[284] *Id.* ("[D]iscretionary justice is the setting within which a reform *must* operate. It is not within the power of the reform to redefine the setting by fiat." (emphasis in original)).

[285] *See, e.g.*, D. HOROWITZ, *supra* note 275, at 59; Fletcher, *supra* note 17, at 645-49; Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 398 (1978).

[286] As Owen Fiss has noted, the reconstruction of any bureaucracy entails problems of polycentrism. Fiss, *supra* note 275, at 41.

[287] In prisoners' rights cases, for example, courts have closed prisons or released prisoners instead of ordering physical renovations or the construction of new prisons. *See, e.g.*, Inmates of Suffolk County Jail v. Kearney, 573 F.2d 98 (1st Cir. 1978) (Boston's Charles Street Jail closed and court declined to order state officials to appropriate additional monies for alternate facilities); Anderson v. Redman, 429 F. Supp. 1105, 1127-28 (D. Del. 1977) (release ordered to reduce prison population); Rhem v. Malcolm, 377 F. Supp. 995, 999-1000 (S.D.N.Y. 1974), *aff'd*, 507 F.2d 333 (2d Cir. 1974) (New York City's Tombs prison closed); Hamilton v. Love, 328 F. Supp 1182, 1194 (E.D. Ark. 1971) (voters not required to make funds available but court can order

despite lip service to the principle that lack of resources cannot justify failure to honor constitutional rights.[288] Attempts to work reform without increasing resources, however, may have unanticipated and even counterproductive results. If, for example, a federal court ordered the change in bail practices suggested above without also requiring allocation of additional resources, state court administrators might be forced to take judges from trial parts to staff arraignment parts. Fewer trial parts would result in fewer trials and in a longer wait for trials.

These problems present formidable obstacles to federal court reform of state criminal justice systems. The guidelines suggested below respond to these problems and provide ways to minimize them. By observing the proposed principles, the public interest bar and the federal courts can achieve significant reform of state criminal practices and procedures while avoiding major problems of manageability and relief implementation.

A. Limit Remedies to Redress of Federal Constitution Violations

The first guideline is a cautionary reminder: Federal courts are courts of limited subject matter jurisdiction; they may hear only diversity cases and cases arising under the federal constitution and laws.[289] Although plaintiffs' counsel might seek to invoke diversity jurisdiction by designating out-of-state arrestees as named plaintiffs in class actions,[290] the state law claims presented in such cases ordinarily would not provide grounds for systemic relief.[291] In addition, since few federal

---

release of prisoners held under unconstitutional conditions of confinement).

[288] *See, e.g.*, Ahrens v. Thomas, 434 F. Supp. 873, 898 (W.D. Mo. 1977); Barnes v. Government of the Virgin Islands, 415 F. Supp. 1218, 1227 (D.V.I. 1976); Alberti v. Sheriff of Harris County, 406 F. Supp. 649, 669 (S.D. Tex. 1975).

[289] U.S. CONST. art. III, §2.

[290] In assessing the citizenship of parties for jurisdictional purposes in class actions, courts look only to the citizenship of the named parties. Supreme Tribe of Ben Hur v. Cauble, 255 U.S. 356 (1921). Thus, the presence of nondiverse members of the plaintiff class would not defeat diversity if the named plaintiffs had citizenship diverse from the defendant state officials.

[291] Even when state law provides a basis for systemic relief, federal courts may lack power to order injunctive relief against state officials for violation of state law. The Supreme Court recently held that the eleventh amendment forbade such an order in a federal question case in which the lower court had entertained the state law claim under the doctrine of pendent jurisdiction. Pennhurst State School & Hospital, Inc. v. Halderman, 465 U.S. 89 (1984). Although *Pennhurst* did not address the propriety of such relief when the ground of federal subject matter jurisdiction is diversity, the Supreme Court has on occasion refused to entertain state law claims in diversity cases. *See, e.g.*, Louisiana Power & Light Corp. v. City of Thibodaux, 360 U.S. 25 (1959);

statutes regulate the state criminal process, criminal justice reform litigation generally must allege violations of federal constitutional rights to invoke federal question jurisdiction. Therefore, litigants should ask the federal courts to restructure state institutions only when such relief is constitutionally compelled, and the courts should resist the temptation to order relief simply because it increases the general fairness or efficiency of the system. The courts do not "hold . . . roving commissions as problem solvers . . . ."[292] They may only require state criminal justice systems to comply with minimum constitutional safeguards.[293]

B. Focus Litigation on Reform of State Procedures

Plaintiffs should emphasize procedural reform. Dean Lon Fuller wrote of the importance of procedure to the judicial function:

> The essence of the judicial function lies not in the substance of the conclusion reached, but in the procedures by which that substance is guaranteed. One does not become a judge by acting intelligently and fairly, but by accepting procedural restraints designed to insure — so far as human nature permits — an impartial and informed outcome of the process of decision.[294]

Fair process and the acceptance of procedural restraints also can ensure impartial and informed decisionmaking by police and prosecutors.[295]

The federal courts are particularly able to assist state criminal justice officials in correcting procedural deficiencies because courts have special knowledge about the uses of procedure.[296] Federal courts are expert at examining disputes between citizens and government and determining the process due a citizen before government may deprive the citizen of a liberty or property interest.[297] Thus, the district court in *Rizzo v.*

Hawks v. Hamill, 288 U.S. 52 (1933).

[292] A. BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS 134 (1970).

[293] In prisoners' rights cases courts have often looked to professionally compiled minimum standards for institutional confinement but have not ordered states to provide model prisons. *See* Note, *Implementation Problems in Institutional Reform Litigation*, 91 HARV. L. REV. 428, 438 (1977) [hereafter Note, *Implementation Problems*]. In the criminal justice area generally, the federal courts might consult the American Bar Association's multi-volume work, MINIMUM STANDARDS FOR THE ADMINISTRATION OF JUSTICE.

[294] Fuller, *Collective Bargaining and the Arbitrator*, 1963 WIS. L. REV. 3, 18.

[295] The exclusionary rule, for example, seeks to enforce police compliance with established procedural requirements. *See supra* notes 257-64 and accompanying text.

[296] D. HOROWITZ, *supra* note 275, at 59. *See also* M. FEELEY, *supra* note 52, at 214-15; Komesar, *Taking Institutions Seriously: Introduction to a Strategy for Constitutional Analysis*, 51 U. CHI. L. REV. 366, 379 (1984).

[297] *See, e.g.*, Wolff v. McDonnell, 418 U.S. 539, 560-74 (1974) (placement in segre-

Goode[298] acted within its expertise when it reviewed Philadelphia police department procedures for processing civilian complaints and ordered changes.[299] Similarly, a federal court is particularly competent to evaluate the constitutionality of detaining a person for a significant period without a judicial determination of probable cause,[300] of setting money bail according to a pre-established schedule without considering individual factors,[301] or of using inaccurate and incomplete criminal history information in making any decision concerning a defendant's liberty.[302]

The federal courts also have long experience adjudicating claims of denial of equal protection in state practices and procedures.[303] Therefore, suits seeking to ensure that indigent defendants receive transcripts of court proceedings as promptly as those who pay for them,[304] or questioning a judge's practice of setting bail in nonjailable cases and incar-

---

gation in prison); Gagnon v. Scarpelli, 411 U.S. 778 (1973) (revocation of parole); Goldberg v. Kelly, 397 U.S. 254, 263 (1970) (termination of welfare benefits); Thorpe v. Housing Auth. of Durham, 393 U.S. 268 (1969) (eviction from public housing project); Drown v. Portsmouth School Dist., 435 F.2d 1182 (1st Cir. 1970), *cert. denied*, 402 U.S. 972 (1971) (dismissal as school teacher).

[298] 423 U.S. 362 (1976).

[299] Council of Orgs. on Phila. Police Accountability & Responsibility v. Rizzo, 357 F. Supp. 1289, 1320-21 (E.D. Pa. 1973), *aff'd sub nom.* Goode v. Rizzo, 506 F.2d 542 (3d Cir. 1974), *rev'd*, 423 U.S. 362 (1976).

[300] *See, e.g.*, Gerstein v. Pugh, 420 U.S. 103 (1975); Bernard v. City of Palo Alto, 699 F.2d 1023 (9th Cir. 1983); Sanders v. City of Houston, 543 F. Supp. 694 (S.D. Tex. 1982).

[301] *See, e.g.*, Ackies v. Purdy, 322 F. Supp. 38 (S.D. Fla. 1970).

[302] *See* Tatum v. Rogers, No. 75 Civ. 2782 (CBM) (S.D.N.Y. Feb. 16, 1979). *See generally* Doernberg & Zeigler, *supra* note 245.

[303] *See, e.g.*, Graham v. Richardson, 403 U.S. 365 (1971) (holding state laws denying welfare to all noncitizens violative of the equal protection clause); Loving v. Virginia, 388 U.S. 1 (1967) (invalidating on equal protection grounds Virginia law prohibiting interracial marriage); Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966) (holding violative of equal protection clause a Virginia law making payment of poll tax a precondition for voting); Anderson v. Martin, 375 U.S. 399 (1964) (invalidating on equal protection grounds a state law requiring that the race of each candidate appear on the ballot); Yick Wo v. Hopkins, 118 U.S. 356 (1886) (holding that racial discrimination in the administration of municipal ordinance violated the equal protection clause).

[304] *See, e.g.*, Simmons v. Maslysnky, 45 F.R.D. 127 (E.D. Pa. 1968); Washington v. Official Court Stenographer, 251 F. Supp. 945 (E.D. Pa. 1966) (holding such claims cognizable in § 1983 action). *But see* Leslie v. Matzkin, 450 F.2d 310, 312 (2d Cir. 1971) (abstaining in case challenging state failure to provide indigent defendants with preliminary hearing minutes), *cert. denied*, 406 U.S. 932 (1972).

cerating those who could not post the bail,[305] or challenging invidious discrimination in grand or petit juror selection procedures[306] plainly raise equal protection issues that fall within the federal courts' special competence in procedural matters. Moreover, as discussed above, the federal courts have gained additional experience in procedural reform by methodically upgrading the federal criminal justice system to enhance procedural due process and guarantee equal protection of the laws.[307]

C. Avoid Review of Individual Discretionary Decisions

Federal courts may reasonably order state criminal justice officials to implement procedures that meet minimum constitutional standards; they should avoid second-guessing discretionary decisions by state officials in individual criminal cases. Federal courts simply cannot monitor all aspects of state practice or provide immediate individual review each time a defendant's rights arguably are violated in the course of a state

---

[305] *See* Pulliam v. Allen, 104 S. Ct. 1970 (1984).

[306] *See, e.g.*, Ciudadanos Unidos de San Juan v. Hidalgo County Grand Jury Comm'rs, 622 F.2d 807, 830 n.49 (5th Cir. 1980) (entertaining a class action by community residents seeking prospective injunctive relief against discriminatory grand jury selection procedures), *cert. denied*, 450 U.S. 964 (1981). *But see* Diaz v. Stathis, 576 F.2d 9, 11 (1st Cir. 1978) (abstaining in action by defendants and a plaintiff in pending state criminal and civil proceedings, respectively, seeking injunctive relief reforming discriminatory grand and petit juror selection procedures); Bryant v. Morgan, 451 F.2d 354, 355 (5th Cir. 1971) (abstaining in case attacking trial jury selection procedures brought by persons under indictment in state court).

[307] *See supra* Section II D. Federal courts will generally not need to make direct injunctive intrusions into substantive aspects of the state criminal process. The maladministration of laws, not the laws' substance, is the major problem of American criminal justice. *See supra* notes 45-89 and accompanying text. Thus, for example, a federal judge will rarely order a state not to make particular conduct criminal or not to impose a particular sanction for violation of a criminal statute. In addition, in many instances defendants can effectively challenge unfair substantive provisions in individual criminal appeals or by way of federal habeas corpus and thus make injunctive relief unnecessary.

In some cases, however, the federal courts will have no choice but to attempt substantive reform of state criminal justice. Constitutional guarantees extend beyond procedural rights. When state officials violate a constitutional provision that reflects substantive values, federal courts must act to vindicate the constitutional right. Thus, if a state violated the first amendment by making it a crime to stand and speak in a public square or violated the eighth amendment by requiring a life sentence for simple trespass, a federal court should intervene directly despite the substantive choices underlying such laws. In addition, as any student of the *Erie* doctrine knows, no bright line divides substance from procedure. *See* Guaranty Trust Co. v. York, 326 U.S. 99, 108 (1945). Some reforms will inevitably contain elements of both.

prosecution. Moreover, if each defendant were entitled to interlocutory review of every state action, state criminal justice systems would be impracticably hindered.[308] Thus, a federal court might order a police department to adopt procedures for investigating civilian complaints, but it should avoid reviewing determinations that no action is warranted in particular cases. Similarly, a federal court might order state judges to provide procedural safeguards in setting pretrial release conditions, but it should avoid reviewing individual bail decisions.

The suggestion that federal courts limit relief in this way raises two important questions. The first is whether relief can be effective if a federal court does not adjudicate individual assertions of noncompliance with its orders. The second is whether relief can as a practical matter be limited in the manner suggested. If federal courts abandon the *Younger* abstention doctrine, will they be inundated with thousands of lawsuits seeking intervention in individual criminal cases?

As to the first question, a court rarely achieves effective change merely by ordering the adoption of minimum procedural safeguards. The federal court must rely on state officials to apply new procedures fully, fairly, and in good faith. Nevertheless, these officials may merely go through the motions, truncating processes or abandoning some new procedures altogether if they prove time consuming or tedious. Encouraging officials to embrace reform is difficult with no tangible incentives.[309] A federal court may need to detail the precise steps that officials must follow. A court may have to appoint special masters, ombudsmen, or committees to sit in clerks' offices, police precincts, and courtrooms to monitor implementation of its orders and to report back on evasions or deficiencies in compliance. It may need to issue additional orders to clarify ambiguities in earlier orders or monitor proceedings periodically to guard against backsliding. In many instances these extra actions will convince officials to exercise their discretion more wisely and to proceed more fairly. In other cases, total compliance will be impossible to achieve. Despite such disappointments, however, a federal court should not perform the functions of state criminal justice officials. Rather, the court should try to induce the officials to do their own job properly.

---

[308] Zeigler, *supra* note 1, at 286. *Cf.* Starr, *Accommodation and Accountability: A Strategy for Judicial Enforcement of Institutional Reform Decrees*, 32 ALA. L. REV. 399, 406-07 (1981) (suggesting that interference with decisions customarily within the discretion of institutional managers may heighten resistance to a federal court decree).

[309] *See* M. LEVIN, *supra* note 79, at 210-11.

As to the second question, in *Stefanelli v. Minard*[310] Justice Frankfurter forcefully stated for the Court that direct federal court intervention in state criminal justice would lead to a flood of litigation.[311] Justice Frankfurter wrote:

> If we were to [suppress illegally seized evidence in this pending state prosecution], we would expose every State criminal prosecution to insupportable disruption. Every question of procedural due process of law — with its far-flung and undefined range — would invite a flanking movement against the system of State courts by resort to the federal forum, with review if need be to this Court, to determine the issue. Asserted unconstitutionality in the empaneling and selection of grand and petit juries, in the failure to appoint counsel, in the admisson of a confession, in the creation of an unfair trial atmosphere, in the misconduct of the trial court — all would provide ready opportunities, which conscientious counsel might be bound to employ, to subvert the orderly, effective prosecution of local crime in local courts.

Moreover, the Court decided *Stefanelli* before its decisions granting indigent defendants the right to assignment of counsel.[312] If Justice Frankfurter were writing today, he might suggest that assigned counsel across the nation would file thousands of section 1983 actions on behalf of their indigent clients challenging every colorable denial of a federal constitutional right in the state criminal process.

As with many "parade of horribles" arguments, however, neither Justice Frankfurter's original spectre nor the updated version can withstand close scrutiny. Both ignore the realities of the day-to-day workings of state criminal justice systems, as well as the legal doctrines and procedural devices available to the federal courts to deflect premature applications and to manage litigation. As a practical matter, if the *Younger* doctrine is abandoned, section 1983 actions complaining of constitutional irregularities in individual criminal cases will not seriously disrupt the state criminal process or overburden the federal courts.

Most state criminal cases involve relatively petty charges.[313] Defen-

---

[310] 342 U.S. 117 (1951).

[311] *Id.* at 123-24. *See also* O'Shea v. Littleton, 414 U.S. 488, 500 (1974) (claiming that prospective injunctive relief against state criminal justice officials would require "interruption of state proceedings to adjudicate assertions of noncompliance . . . [in] an ongoing federal audit of state criminal proceedings . . . .").

[312] *See* Argersinger v. Hamlin, 407 U.S. 25 (1972) (requiring assigned counsel in any case in which the defendant faces loss of liberty); Gideon v. Wainwright, 372 U.S. 335 (1963) (granting indigent criminal defendants a right to assigned counsel in felony prosecutions).

[313] *See* FEDERAL BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS 1982, at

dants in such cases would rarely seek federal review. Many petty cases are dismissed at arraignment, if not before.[314] In the remainder, defendants usually wish to negotiate a guilty plea that allows them to go home immediately or after serving only a few days in jail.[315] In short, the client will not want to make a federal case out of the vast majority of state criminal prosecutions.

Serious charges would give defendants a greater incentive to invoke the federal forum if it were available, but most such applications would be deflected by the doctrine of *Preiser v. Rodriguez*.[316] *Preiser* prohibits federal injunctive relief that results either directly or indirectly in release of a defendant from state custody because the exclusive vehicle for such relief is habeas corpus.[317] Although *Preiser* involved convicted prisoners held in physical custody, the *Preiser* doctrine also bars persons charged with crimes[318] who are under any form of state supervisory control from seeking "release" under section 1983.[319] The doctrine

---

172 (1983) (showing arrests for such crimes as drunkenness, disorderly conduct, and "other" offenses far outnumber arrests for more serious, violent crimes such as rape, robbery, and murder).

[314] THE CHALLENGE OF CRIME, *supra* note 44, at 133 ("The limited statistics available indicate that approximately one-half of [persons] arrested [have their cases] dismissed by the police, a prosecutor, or a magistrate at an early stage. . . .").

[315] L. KATZ, L. LITWIN, & R. BAMBERGER, *supra* note 46, at 107-08. *See* TASK FORCE REPORT: THE COURTS, *supra* note 46, at 30-31.

[316] 411 U.S. 475 (1973).

[317] The plaintiffs in *Preiser* alleged that procedural deficiencies in state prison disciplinary proceedings caused unjust denial of good-time credits in violation of the due process clause of the fourteenth amendment. They brought a § 1983 action seeking restoration of the credits. *Id.* at 471. The Supreme Court held that § 1983 could not be used because habeas corpus is the exclusive remedy available to a state prisoner who challenges "the very fact or duration" of confinement and who seeks relief entitling him "to immediate release or a speedier release" from incarceration. *Id.* at 500. Because habeas corpus requires petitioners to exhaust available state remedies before seeking federal relief, *see supra* note 266, the Court ordered the action dismissed. 411 U.S. at 500.

[318] In Gerstein v. Pugh, 420 U.S. 103, 107 n.6 (1975), the Supreme Court made clear that *Preiser* applies before trial. *See also* Gomez v. Miller, 341 F. Supp. 323, 328-29 (S.D.N.Y. 1972) (three-judge court), *aff'd*, 412 U.S. 914 (1973) (*Preiser* presumed to bar release of indicted but untried defendants challenging procedures for commitment to mental institutions). *Cf.* Goldy v. Beal, 429 F. Supp. 640, 645-46 (M.D. Pa. 1976) (*Preiser* presumed to bar § 1983 suit seeking release by persons challenging state law permitting voluntary and indefinite commitment of persons needing care because of mental disability).

[319] Virtually everyone charged with crime satisfies the custody requirement for federal habeas corpus, *see* 28 U.S.C. § 2241(c)(3) (1982), because the public at large does not share the restraints on their liberty. Courts have held custody for habeas purposes

thus prohibits an order directly enjoining a pending state criminal proceeding because the dismissal of the charges would result in the defendant's unconditional release from state custody.[320] It also bars federal suppression of illegally seized evidence as requested in *Stefanelli v. Minard*[321] because a federal suppression order ordinarily would effectively terminate the state criminal case.[322] *Preiser* would also bar section 1983 challenges to the admission of a coerced confession or a tainted identification if exclusion of the evidence would terminate the prosecution. Indeed, *Preiser* would prohibit virtually every section 1983 case challenging a constitutional error in a state criminal case if the error was sufficiently serious to merit dismissal of the charges. Plainly, then, even if courts abandon the *Younger* doctrine, the doctrine of *Preiser v. Rodriguez* would severely limit the number of section 1983 actions filed by individual state criminal defendants because the relief they most want is unavailable.

Preiser, of course, does not bar all section 1983 actions involving state criminal justice. Persons in state custody may seek prospective injunctive relief to modify constitutionally defective practices and procedures without running afoul of the *Preiser* rule.[323] The federal courts

---

to include pretrial release on bail. *See, e.g.*, Arias v. Rogers, 676 F.2d 1139, 1141-42 (7th Cir. 1982); Delk v. Atkinson, 665 F.2d 90, 93-94 (6th Cir. 1981); United States *ex rel.* Russo v. Superior Court of New Jersey, 483 F.2d 7, 12 (3d Cir. 1973), *cert. denied*, 414 U.S. 1023 (1973); Burris v. Ryan, 397 F.2d 553, 555 (7th Cir. 1968). Even release on one's own recognizance constitutes custody. *See* Hensley v. Municipal Court, 411 U.S. 345, 349 (1973); Kolski v. Watkins, 544 F.2d 762, 763 n.2 (5th Cir. 1977); United States *ex rel.* Triano v. Superior Court of New Jersey, 393 F. Supp. 1061, 1065 (D.N.J.), *aff'd*, 523 F.2d 1052 (3d Cir. 1975), *cert. denied*, 423 U.S. 1056 (1976). Pretrial release in the custody of one's attorney has also been held to satisfy the custody requirement. *See, e.g.*, Foster v. Gilbert, 264 F. Supp. 209, 211-12 (S.D. Fla. 1967). Since federal habeas corpus is technically available before trial to virtually all state defendants upon exhaustion of state remedies, *Preiser* mandates that defendants pursue this avenue rather than a § 1983 action if they seek release from custody.

[320] Therefore, even if the doctrine of *Younger v. Harris* were abandoned, plaintiffs in a case like *Younger* would be barred by *Preiser* from bringing a § 1983 action challenging the constitutionality of the state statute on which their prosecution was based. *See* Younger v. Harris, 401 U.S. 37 (1971) (Plaintiff Harris sought an injunction against his prosecution under California's Criminal Syndicalism Act on the grounds that the statute violated the first amendment.).

[321] 342 U.S. 117 (1951). *See supra* notes 310-11 and accompanying text.

[322] *See* Perez v. Ledesma, 401 U.S. 82 (1971); Fernandez v. Trias Monge, 586 F.2d 848, 851 (1st Cir. 1978).

[323] *See, e.g.*, Gerstein v. Pugh, 420 U.S. 103, 107 n.6 (1975) (holding that a class of state criminal defendants could request that state officials be ordered to give them probable cause determinations without violating the *Preiser* rule.); Fernandez v. Trias

distinguish such relief from habeas corpus relief even though fairer procedures may result in the release of some persons who otherwise would have remained in custody.[324] The courts reason that release in these circumstances is speculative and indefinite because it depends upon the subsequent discretionary decisions of state officials.[325] Therefore, in the absence of the *Younger* doctrine, state criminal defendants could bring section 1983 actions asking the federal courts to order prompt probable cause determinations,[326] the proper assignment of counsel,[327] or modification of petit jury selection procedures.[328] *Preiser* would not bar these types of relief because the plaintiffs would not be seeking release from custody.

If the *Younger* doctrine were abrogated, it seems likely that criminal

---

Monge, 586 F.2d 848, 852 n.4 (1st Cir. 1978) (same); Wolff v. McDonnell, 418 U.S. 539, 555 (1974) (holding that action seeking prospective reform of prison disciplinary procedures could proceed under § 1983 without violating *Preiser* doctrine.); Walker v. Prisoner Review Bd., 694 F.2d 499, 501 (7th Cir. 1982) (Prospective injunctive relief modifying state procedures for parole of prisoners was properly sought under § 1983 rather than by way of federal habeas corpus.); Williams v. Ward, 556 F.2d 1143, 1150 (2d Cir. 1977) (same); Leonard v. Mississippi State Probation and Parole Bd., 509 F.2d 820, 823-24 (5th Cir. 1975) (same); Bradford v. Weinstein, 519 F.2d 728, 733-34 (4th Cir. 1974), *dismissed as moot*, 423 U.S. 147 (1975) (same); Chancery Clerk of Chickasaw County, Miss. v. Wallace, 646 F.2d 151, 155-58 (5th Cir. 1981) (A class action seeking prospective change in procedures for the involuntary commitment of adults was not barred by *Preiser*.); Goldy v. Beal, 429 F. Supp. 640, 645-46 (M.D. Pa. 1976) (same); Johnson v. Solomon, 484 F. Supp. 278, 296 (D. Md. 1979) (holding class action seeking change in the Maryland procedures for civil commitment of juveniles was properly brought under § 1983 rather than by way of habeas corpus.).

[324] Fernandez v. Trias Monge, 586 F.2d 848, 852 n.4 (1st Cir. 1978); Williams v. Ward, 556 F.2d 1143, 1150 (2d Cir. 1977).

[325] *See, e.g.*, Leonard v. Mississippi State Probation and Parole Bd., 509 F.2d 820, 824 (5th Cir. 1975) ("[T]he specific and concrete effect of [the injunctive relief sought] on the status of each prisoner is highly speculative."); Haymes v. Regan, 394 F. Supp. 711, 713-14 (S.D.N.Y. 1975), *aff'd as modified*, 525 F.2d 540 (2d Cir. 1975):

> [A] new release hearing . . . provides no guarantee of release, particularly in light of the discretionary nature of parole . . . . The touchstone of habeas relief would, therefore, appear to be immediacy or certainty of release. . . . Since the relief requested by plaintiff cannot result in the definite speed-up of his release . . . the Court's jurisdiction properly arises under 28 U.S.C. § 1343(4) as implemented by 42 U.S.C. § 1983, rather than 28 U.S.C. § 2254. . . .

Id. See also Chancery Clerk of Chickasaw County, Miss. v. Wallace, 646 F.2d at 155-58; Fernandez v. Trias Monge, 586 F.2d at 852 n.4; Williams v. Ward, 556 F.2d at 1150.

[326] *See, e.g.*, Gerstein v. Pugh, 420 U.S. 103.

[327] *See, e.g.*, Gilliard v. Carson, 348 F. Supp. 757 (M.D. Fla. 1972).

[328] *See, e.g.*, Bryant v. Morgan, 451 F.2d 354 (5th Cir. 1971).

defendants facing serious charges would file many section 1983 cases seeking prospective modification of state procedures. Once again, however, the realities of the day-to-day workings of the state criminal process would diminish the disruptive impact of such suits. Cases involving serious charges, like petty cases not dismissed outright, are almost always disposed of by guilty plea in most jurisdictions.[329] The negotiations simply take longer in serious cases. If a defendant suffered some serious procedural irregularity, defense counsel might file a federal action, or might threaten to do so. Because of *Preiser*, however, counsel could ask only that the defective process be repeated as remedied, or that the defendant be accorded the procedural right that had been ignored.

Since such relief would often be of limited practical utility, the federal suit would probably become a factor in the plea-bargaining process. Defense counsel could use the federal suit, or the threat of one, to negotiate a more favorable plea, in much the same way as counsel presently use a questionable search for that purpose. A federal action would complicate the state prosecution, and perhaps cause some delay, thus inducing the prosecutor to cooperate in negotiations. It would not be in the defendant's best interest to press the federal action too vigorously or to seek an unreasonable bargain because federal relief, even if granted, would be unlikely to give the defendant any major strategic advantage. Eventually, the defendant would plead guilty. A guilty plea, of course, waives all prior nonjurisdictional defects,[330] and the federal suit could promptly be terminated by voluntary dismissal[331] or on the prosecutor's motion.[332]

In addition, the federal courts have ample means to manage section 1983 suits seeking prospective change in state practices and procedures. If several cases raised the same claim, the court might order them consolidated.[333] If a large number of cases complained of the same constitutional violation, the court might convert them into a class action[334] and appoint counsel experienced in conducting federal civil litigation to represent the class.[335] The court has broad discretionary power under

---

[329] *See supra* note 57 and accompanying text.

[330] *See supra* note 248 and accompanying text.

[331] *See* FED. R. CIV. P. 41(a)(1).

[332] *See* FED. R. CIV. P. 12(b)(6).

[333] *See* FED. R. CIV. P. 42(a).

[334] *See* FED. R. CIV. P. 23.

[335] If several class members are represented by separate counsel, the court may designate a chief or lead counsel. *See* Farber v. Riker-Maxson Corp., 442 F.2d 457 (2d Cir. 1971). In large urban jurisdictions, a public defender organization might be will-

Federal Rule of Civil Procedure 23(c) and (d) to limit and define the claims raised in a class action.[336] Subsequent suits raising the same claims could be consolidated with the class suit,[337] or the new claimants might be allowed to intervene.[338] Finally, in some instances the federal court would decide that the challenged state procedures pass constitutional muster. Principles of res judicata or stare decisis would then serve to preclude further litigation by disgruntled class members or by newly charged criminal defendants seeking to raise the same claim.[339]

D. Focus the Litigation on a Single Agency

Plaintiffs can greatly reduce the complexity of a criminal justice reform case by focusing on the practices of a single agency. Such a suit may work important changes despite its relatively narrow focus. A court can review the internal procedures of one administrative unit for fairness and consistency and can order discrete changes. A focus on one agency avoids the problems of differing viewpoints among agencies, lack of cooperation, and fingerpointing to evade responsibility.[340] In short, "the more centralized the responsibility . . . the more likely the

---

ing to assign some senior attorneys to represent the plaintiffs in a federal class action.

[336] *See* Castro v. Beecher, 459 F.2d 725, 732 (1st Cir. 1972) (court can require modification of allegations to reduce the size of the class); Aaron v. Clark, 342 F. Supp. 898, 901 n.4 (N.D. Ga. 1972) (court has power to require more precise class definition); Hardy v. United States Steel, 289 F. Supp. 200, 202-03 (N.D. Ala. 1967) (court can condition denial of motion to dismiss upon an amendment of the complaint redefining the class plaintiff seeks to represent).

[337] *See* FED. R. CIV. P. 23(d)(2).

[338] *Id. See* Franks v. Kroger Co., 649 F.2d 1216, 1226 (6th Cir. 1981).

[339] Stare decisis and res judicata sometimes will not preclude relitigation. If the underlying facts change over time, an earlier judgment will not be given a preclusive effect. Commissioner v. Sunnen, 333 U.S. 591, 599 (1948). In addition, if a later court finds that plaintiffs' counsel failed to provide adequate representation in an earlier suit, the judgment will not be considered binding. *See, e.g.*, Gonzales v. Cassidy, 474 F.2d 67, 75-77 (5th Cir. 1973). *See generally* Note, *Collateral Attack on the Binding Effect of Class Action Judgments*, 87 HARV. L. REV. 589 (1974).

[340] *See* D. HOROWITZ, *supra* note 275, at 60-61. Fingerpointing may occur even though only one agency is named as a defendant. For example, in Tatum v. Rogers, No. 75 Civ. 2782 (CBM) (S.D.N.Y. Feb. 16, 1979), plaintiffs sued only the Commissioner of New York's Division of Criminal Justice Services (DCJS). DCJS is the executive agency in charge of collecting, storing, and disseminating criminal history information in that state. Plaintiffs contended that DCJS violated their right to due process by disseminating inaccurate and incomplete information. Although DCJS has sole responsibility by law for collecting, storing, and disseminating criminal history information, it nonetheless sought to lay the blame for its poor performance on other agencies. *See id.* at 13.

compliance."[341] In addition, the indirect effects of a court order are easier to foresee when only one agency's actions are directly affected. Finally, any additional expenditures required to accomplish reform should be relatively modest because only one agency is involved.

A suit challenging discrimination in the procedures for summoning and qualifying petit or grand jurors is an example of a suit structured to enjoy all of these advantages. Typically, court administrative personnel summon jurors and review their suitability for service.[342] The process is separate from other court administrative matters, and is performed by a few clerks under the direction of a jury commissioner or a judge.[343] Since responsibility is centralized, court orders can easily be given effect and compliance monitored. In addition, juror selection procedures are not complex. Therefore, a federal court can review them with ease and order apppropriate prospective change if it discovers invidious discrimination.[344]

The court can structure its order to avoid disruption of state trials. For example, if the court finds discrimination has caused underrepresentation of women on the jury rolls, an interim order might direct jury officials to summon a disproportionate number of women from the rolls for actual jury service to correct the disparity. The state could then institute a permanent change in procedures to correct the imbalance in the rolls themselves after careful planning and training of personnel. Finally, remedying the discrimination would require almost no additional money because the remedies would impose no substantial additional duties on court personnel. The court would simply order jury officials to stop discriminating, or direct that state courts replace them

---

[341] D. HOROWITZ, *supra* note 275, at 61.

[342] *See, e.g.*, CAL. CIV. PROC. CODE §§ 204.1, .3, .5, .7 (West 1983) (describes juror selection procedures to be followed by court personnel); ILL. ANN. STAT. ch. 78, §§ 25, 26, & 31 (Smith-Hurd 1984) (same); MINN. STAT. ANN. §§ 593.37-.42 (West 1984) (same); N.Y. JUD. LAW §§ 506-16 (McKinney 1983) (same).

[343] CONN. GEN. STAT. ANN. § 51-219(a) (West 1984) (jury administrator and his assistants appointed by the chief court administrator); ILL. ANN. STAT. ch. 78, § 24 (Smith-Hurd 1984) (in counties of more than 140,000 jury commissioners appointed by circuit judges); MINN. STAT. ANN. § 593.35 (West 1984) (jury comissioner a full-time court employee, usually the judicial district administrator); N.Y. JUD. LAW § 502(a) (McKinney 1984) (County Clerk designates Commissioner of Jurors in counties having a population of one million or more).

[344] *See, e.g.*, Ciudadanos Unidos de San Juan v. Hidalgo County Grand Jury Comm'rs, 622 F.2d 807, 826-30 (5th Cir. 1980) (instructing district court how it might fashion effective changes in grand jury selection procedures in two Texas counties); Broadway v. Culpepper, 439 F.2d 1253, 1258-60 (5th Cir. 1971) (remanding case to district court to grant further relief as outlined by court of appeals).

with new officials who would not discriminate.

E. Limit Litigation to a Single Stage of the Criminal Process

Although focusing litigation on a single agency is desirable, sometimes it is impossible. More than one agency may be responsible for a constitutional deficiency; many agencies may be significantly affected by a federal remedial order. Suits involving many components of state criminal justice pose the greatest problems of different perspectives and polycentricity. An effective remedy may require greater resources than in suits against a single agency. To be manageable, suits involving many components should be limited to reform of a single stage of the criminal process, and preferably, of the shorter and simpler stages.

The broader the challenge, the more deep-seated and fundamental will be the disagreements among the parties. By limiting a challenge to specific problems at a single stage of the process, a court can limit disagreement. The parties are more likely to talk in common terms when faced with a limited, specific problem. They are also more likely to focus their attention on how to solve it, instead of digging in their heels and refusing to address the problem seriously. Proposed solutions pose smaller threats to everyone involved because only a small part of each agency's overall operation is likely to be affected. The problems of polycentricity can likewise be contained. Change will reverberate as the agencies react and respond to the changes in each other's behavior. Because the context is so confined, however, responses are easier to predict and accommodations easier to achieve. Finally, narrower reform should require fewer resources than broader reform.

A suit challenging excessive delay between a suspect's arrest and presentation to a magistrate is an example of a manageable action limited to a single and relatively short stage of the criminal process. Many agencies are involved at this stage, including the police, defense counsel, and the courts. In some jurisdictions, the prosecutor[345] and a pretrial

---

[345] National commissions have recommended that prosecutors review arrests and make charge decisions before a case is filed. *See* REPORT ON COURTS, *supra* note 47, at 25; TASK FORCE REPORT: THE COURTS, *supra* note 46, at 5. Prosecutors follow this procedure in New York City. *See* Doernberg & Zeigler, *supra* note 245, at 1176-80. Police in Houston often consult the District Attorney prior to arraignment to determine the proper charges. *See* Sanders v. City of Houston, 543 F. Supp. 694, 697 (S.D. Tex. 1982). In Jackson County, Missouri, police must obtain the prosecutor's approval before a case can be filed with the court. J. JACOBY, THE AMERICAN PROSECUTOR: A SEARCH FOR IDENTITY 240 (1980). Prosecutorial involvement prior to arraignment is by no means universal, however. *See id.* at 123 (describing practice in Massachusetts, where prosecutor plays no role before arraignment). For a discussion of the various

services agency responsible for investigating defendants' backgrounds also play a role.[346] All of these agencies have different viewpoints. Defense counsel can be expected to favor speedy arraignment because it helps the defendant. Police departments might favor prompt arraignment as well because it frees police officers to return to the street and may reduce overtime pay. Courts and prosecutors would be more ambivalent. Although they are not likely to oppose speedy arraignment in principle, they might resist if required to change their procedures to help eliminate delay.

A court order to reduce arrest to arraignment delay would affect all of the agencies involved. Each agency would probably have to complete its tasks more quickly. In addition, more rapid performance by one agency might adversely affect the work of another. For example, if police brought arrestees to the courthouse more quickly, the prosecutor might have to make a charge decision without talking to the complaining witness. The pretrial services agency would have less time to investigate each defendant's background. Lack of information could hamper the court in setting bail or disposing of the case at arraignment.[347] These sorts of direct and indirect consequences of speeding arrest to arraignment processing make consideration of the federal remedy complex. Because the suit is limited to one short stage of the criminal process, however, the complexity is not overwhelming. The federal court and the agencies involved can think the matter through, anticipate at least most of the major consequences, and plan for them, making some mutual accommodations along the way.[348]

Finally, the additional resources required from each agency to cut delay likely would not be of a magnitude to cause resolute opposition.

---

practices nationally, see generally *id.* at 107-32; L. KATZ, L. LITWIN, & R. BAMBERGER, *supra* note 46, at 104-15.

[346] *See generally* M. FEELEY, *supra* note 52, at 40-79 (reviewing the development and institutionalization of pretrial services agencies in a number of American cities).

[347] Limiting the time for investigation by pretrial services agencies may disadvantage some defendants. For example, in Bernard v. City of Palo Alto, 699 F.2d 1023, 1025 (9th Cir. 1983), a district court order requiring arraignment within 24 hours of arrest forced the Office of Pretrial Services to shift its emphasis from arranging for "own recognizance" releases for defendants to ensuring police officers' affidavits were presented to the arraignment court in timely fashion.

[348] In the few instances that federal courts have entertained challenges to prearraignment delay in state criminal justice systems, the courts were able to describe and evaluate the process succinctly. *See, e.g.*, Sanders v. City of Houston, 543 F. Supp. 694, 697-99 (S.D. Tex. 1982) (describing procedures for processing an arrestee in Houston); Lively v. Cullinane, 451 F. Supp. 1000, 1006-09 (D.D.C. 1978) (reviewing prearraignment processing procedures in the District of Columbia).

If the prosecutor's office reviews a case prior to arraignment, a few additional assistant district attorneys might be needed to complete the task quickly. Court administrators might need to create an additional daytime arraignment part, or open a night arraignment part. If the court sessions were lengthened, the public defender's office would have to assign lawyers to represent indigent defendants during the extra hours. The pretrial services agency would probably need significant additional staff because its primary function is to evaluate arrestees during the arrest to arraignment period.[349] All of these changes would require only modest budget increases, with the possible exception of the changes in pretrial services.

F. Involve All Criminal Justice Agencies That May Be Affected by the Litigation

Much of the literature discussing class actions stresses the importance of broad participation by members of the plaintiff class to ensure that the potentially divergent interests of absent members are adequately represented.[350] In cases seeking systemic reform of state criminal justice systems, however, plaintiff class members generally have virtually identical interests in reform that enhances procedural due process or promotes equal protection of the laws. Therefore, as long as plaintiffs' counsel is competent and proceeds in good faith,[351] intraclass con-

---

[349] Pretrial services administrators probably would not oppose expansion of their operations, although they might be concerned about short-term dislocations before the legislature appropriated additional monies.

[350] *See, e.g.*, Berry, *Ending Substance's Indenture to Procedure: The Imperative for Comprehensive Revision of the Class Damage Action*, 80 COLUM. L. REV. 299, 300 (1980); Special Project, *The Remedial Process in Institutional Reform Litigation*, 78 COLUM. L. REV. 784, 870-901, 909-27 (1978) [hereafter Special Project, *Remedial Process*]; Note, *Developments in the Law — Class Actions*, 89 HARV. L. REV. 1318, 1391-1454, 1475-1576 (1976); Comment, *Judicial Screening of Class Action Communications*, 55 N.Y.U. L. REV. 671 (1980).

[351] The court can assess the adequacy of plaintiffs' counsel during the class certification process. FED. R. CIV. P. 23(a)(4) requires that "the representative parties will fairly and adequately protect the interests of the class." Federal courts often consider the competence of the plaintiffs' counsel in determining whether the named plaintiffs can satisfy this requirement. *See, e.g.*, Penk v. Oregon State Bd. of Higher Educ., 93 F.R.D. 45, 50 (D. Ore. 1981); Presseisen v. Swarthmore College, 71 F.R.D. 34, 45 (E.D. Pa. 1976); Johnson v. Shreveport Garment Co., 422 F. Supp. 526, 534-41 (W.D. La. 1976); Metropolitan Area Hous. Alliance v. United States Dep't of Hous. and Urban Dev., 69 F.R.D. 633, 640 (N.D. Ill. 1976). *See* 3B MOORE'S FEDERAL PRACTICE ¶ 23.07 [1.-1] at 23-215 to 23-219 (2d ed. 1982) ("Under subpart [23](a)(4), it has become routine to inquire into the competence, experience and vigor of the repre-

flicts of interest should be the exception. Notice to unnamed class members or their intervention in the suit will rarely be necessary to protect their interests.[352]

The federal court should focus instead on involving all criminal justice agencies that may be affected by federal injunctive relief. Due process requires that an agency or its officials be given notice and an opportunity to be heard before they can be subjected to a court order.[353] In addition, conflicts of interest between affected agencies will be routine, and fair resolution of the conflicts will require participation by all whose interests are at stake. Without broad participation, effective relief will be difficult to devise and implement, and unanticipated, disruptive consequences will be more likely to occur. Involving all concerned, on the other hand, will increase the information available to the court and will also increase the likelihood of cooperation by the affected agencies in formulating remedies.[354]

Initially, of course, plaintiffs' counsel selects the defendants. If the suit concerns the workings of a single criminal justice agency, designation of the agency and its top officials may suffice. If the suit concerns a stage of the criminal process in which many agencies interact, the federal court should scrutinize plaintiffs' selection of defendants. Counsel

---

sentative's counsel."). *See generally id.* at 23-215 to 23-219; 7 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1766 (1972).

[352] Most class actions seeking reform of state criminal justice systems will be brought pursuant to FED. R. CIV. P. 23(b)(2), which authorizes maintenance of a class action when "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief . . . with respect to the class as a whole." Courts routinely hold that individual notice to absent class members is not required in (b)(2) class actions if representation is adequate and the interests of unnamed members are protected. *See, e.g.*, Yaffe v. Powers, 454 F.2d 1362, 1366 (1st Cir. 1972); Smith v. Vowell, 379 F. Supp. 139, 145-46 (W.D. Tex. 1974); Richerson v. Fargo, 61 F.R.D. 641, 644 (E.D. Pa. 1974); Watson v. Branch County Bank, 380 F. Supp. 945, 960 (W.D. Mich. 1974); Citizens Environmental Council v. Volpe, 364 F. Supp. 286, 288 (D. Kan. 1973), *aff'd*, 484 F.2d 870 (10th Cir. 1973), *cert. denied*, 416 U.S. 936 (1974).

[353] North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601 (1975); Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950); Pennoyer v. Neff, 95 U.S. 714 (1877). *See* FED. R. CIV. P. 65(d) ("Every order granting an injunction . . . is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who received actual notice of the order by personal service or otherwise.").

[354] Fletcher, *supra* note 17, at 655-57; Special Project, *Remedial Process*, *supra* note 350, at 909-10; Note, *Implementation Problems*, *supra* note 293, at 439-40; Note, *Institutional Reform Litigation: Representation in the Remedial Process*, 91 YALE L.J. 1474, 1477-78 (1982).

for the plaintiffs may have named too few defendants in order to make the lawsuit unintrusive or to fasten responsibility for the problems on only one or two agencies. Alternately, the plaintiffs' counsel may have named every conceivable defendant without investigating which agencies are actually responsible for the constitutional violations. The shotgun approach may also signal that plaintiffs' counsel has not carefully thought out the claims or has cast the suit so broadly as to make it unmanageable.

It often will be difficult to determine which criminal justice agencies should be named formally as defendants and which should merely be invited to participate informally. One test is to ask whether a grant of complete relief would require the court to order the potential defendant to do (or to stop doing) something if the plaintiffs succeed on the merits. If the answer is "yes," plaintiffs should probably name the agency to avoid possible claims that it was not accorded due process.[355] If the answer is "no," but the potential defendant nonetheless may be indirectly affected by the relief ordered, the agency should be notified of the action and asked to participate informally.

The Federal Rules of Civil Procedure provide additional guidance. Rule 19 allows the court to order joinder of a party if:

> (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest . . . .[356]

Thus, the court can order formal participation by a criminal justice agency even though it will not be subjected to a coercive order if the indirect effects of the remedial scheme might "impair or impede" the agency's ablility to protect its interests "as a practical matter."[357] A potential defendant may also intervene in the action as of right if the second condition of the Rule 19 quoted above is satisfied "unless the applicant's interest is adequately represented by existing parties."[358]

---

[355] *See* Bradley v. Milliken, 484 F.2d 215, 251-52 (6th Cir. 1973), *rev'd on other grounds*, 418 U.S. 717 (1974) (ruling that all school districts that might be compelled to accept pupil assignments by school desegregation decree should be joined as parties and afforded notice and an opportunity to be heard.).

[356] FED. R. CIV. P. 19(a).

[357] *Cf.* English v. Seaboard Coast Line R.R., 465 F.2d 43, 47-48 (5th Cir. 1972) (In a class suit by black employees against employer and union, the district court appropriately held that white employees whose seniority might be directly affected if plaintiffs succeeded on the merits should have been joined under Rule 19(a)(2)(i).).

[358] FED. R. CIV. P. 24(a).

When no existing party represents the interests of the absent criminal justice agency, the agency may be able to force its way into the action even though due process does not require its presence.[359]

Once again, a suit challenging arrest-to-arraignment delay aptly illustrates these principles. Depending on the jurisdiction, an order to speed up the process might affect a large number of agencies, including the police, the prosecutor, the public defender, the agency responsible for providing criminal history information, the pretrial services agency, and the court. Those most directly responsible for the delay, such as the police and the court, should plainly be named as defendants. Whether other agencies should formally be named would depend on the facts of the particular case. If, to provide complete relief, the federal court would need to order the pretrial services agency to perform its investigations more quickly or order the agency responsible for providing criminal history information to generate rap sheets more promptly, these agencies probably should be named as defendants. On the other hand, if the pretrial services agency would probably not be directly affected by an order speeding arraignments, or the jurisdiction is one where an up-to-date rap sheet is not needed until postarraignment court appearances, it should be unnecessary to name these agencies as defendants,[360] although a court might allow them to participate informally. When the prosecutor participates in the decision to charge prior to arraignment,[361] the court could order her joinder under Rule 19 if speedier arraignment might as a practical matter impair her ability to

---

[359] Rule 24 also allows the court to permit a potential defendant to intervene when the applicant's "defense and the main action have a question of law or fact in common." FED. R. CIV. P. 24(b). The court may deny the application, however, if the intervention "will unduly delay or prejudice the adjudication of the rights of the original parties." *Id.* One author has suggested amending Rules 19 and 24 to facilitate joinder and intervention in institutional reform cases. *See* Note, *Institutional Reform Litigation: Representation in the Remedial Process*, 91 YALE L.J. 1474, 1484-88 (1982) (recommending that the rules require joinder of or allow intervention of right by a "remedial party" if the person's participation in the lawsuit will provide the court with additional information as to choice of remedy or if the court will require the person's cooperation to implement an effective decree).

[360] *See* Utz v. Cullinane, 520 F.2d 467, 472 n.9 (D.C. Cir. 1975) (In a suit seeking to enjoin the Metropolitan Police from sending arrest records to the FBI, it was unnecessary to join the FBI as a party since complete relief could be achieved without the Bureau and Bureau had no objection to the relief sought.). *Cf.* Fair Hous. Dev. Fund Corp. v. Burke, 55 F.R.D. 414, 418-19 (E.D.N.Y. 1972) (In a suit against a town challenging housing and land use policies, there was no need to join villages within the town as defendants because they did not affect the town's zoning ordinances or land use policies.).

[361] *See supra* note 345 and accompanying text.

perform this function. In addition, the prosecutor might seek to intervene either as of right or permissively, as might any agency that believed its interests were at stake.[362]

G. Ensure that the Facts Are Thoroughly Developed and Presented

Factual development and presentation is important in actions challenging state criminal justice practices and procedures because a state's criminal procedure law and court rules will rarely provide a reliable guide to the operation of state criminal justice. In most instances, plaintiffs will not challenge the facial validity of these statutes or rules; instead, they will challenge the day-to-day administration of the laws. Although the laws usually appear fair on their face, constitutional violations may exist in practice. Consequently, thorough factual development is necessary to adjudicate the merits of a case and to devise a workable remedial scheme.

Discovery rules are the primary tools for factual investigation in civil litigation.[363] Depositions pursuant to Federal Rule of Civil Procedure 30 and requests for production of documents and to inspect pursuant to Federal Rule of Civil Procedure 34 are the discovery devices best suited to factfinding in cases challenging state criminal justice practices and procedures. In depositions, counsel can question state criminal justice officials in detail about the performance of their duties. Although many parts of the criminal justice system are not open to the public, Rule 34 will enable counsel to observe and study components of the system in operation. Investigators can sit in courtrooms, clerk's offices, and police

---

[362] *See* FED. R. CIV. P. 24. The court also should be alert to conflicts of interest that may face counsel for defendants. If two or more agencies of the same level of government are sued, the same counsel may represent them all. While this arrangement may be satisfactory in the early stages of the lawsuit if the defendants assert common defenses, problems are likely to emerge in settlement negotiations or at the remedy stage when defendants' interests may conflict. Special Project, *Remedial Process*, *supra* note 350, at 903. For example, a conflict might arise if the same city attorney's office represented both the police and the municipal court in a suit challenging arrest-to-arraignment delay. Court administrators might assert that the police are at fault for failing to complete their paperwork promptly, while the police might contend that the cause of the delay is insufficient arraignment parts or antiquated courthouse procedures. One lawyer plainly would be unable to press the interests of both clients vigorously. To lessen this problem, a court might require that a separate lawyer from each agency's in-house legal staff be designated to represent the agency in the suit. If the agency did not have its own legal staff, outside counsel might be assigned on a *pro bono* basis.

[363] *See* FED. R. CIV. P. 26-37.

precincts and examine records and files to gather data.[364] Some security problems may arise when investigators come in contact with arrestees or pretrial detainees, but courts can minimize these problems by providing guards and limiting the duration of the contacts. While criminal justice data often are confidential, a court can usually eliminate breach of confidentiality or invasion of privacy by deleting individual identifying information during data collection.[365]

Federal courts should supervise the discovery process to ensure thorough factual development. Recent amendments to the Federal Rules authorize more court involvement in the management and control of the pretrial phases of litigation, including discovery.[366] Under Rule 26(f), which was added in 1980, the court can convene a discovery conference and enter an order establishing a plan and schedule for discovery.[367] Rule 16, which governs pretrial conferences, was completely revamped in 1983[368] to authorize the court to convene a pretrial conference for a number of beneficial purposes, including "improving the quality of the trial through more thorough preparation . . . ."[369] Rule 16(c)(10) states that conference participants "may consider and take action with respect to . . . the need for adopting special procedures for managing potentially difficult or protracted actions that may involve complex issues."[370] These new rules plainly give federal courts the tools to ensure thorough factual development; the courts should use them.

---

[364] FED. R. CIV. P. 34(a) reads:

> Any party may serve on any other party a request (1) to produce and permit the party making the request . . . to inspect and copy, any designated documents . . . or (2) to permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection . . . .

[365] *See, e.g.*, Doernberg & Zeigler, *supra* note 245, at 1155-64 (presenting the results of an audit of New York's computerized criminal history information system without identifying persons whose rap sheets were studied).

[366] Traditionally, the parties controlled discovery. The court intervened only when a party sought a protective order under FED. R. CIV. P. 26(c) or moved to compel discovery under FED. R. CIV. P. 37(a).

[367] FED. R. CIV. P. 26(f). The primary purpose of Rule 26(f) is to curb discovery abuse. *See* Advisory Committee Note to Rule 26(f), 85 F.R.D. 526 (1980). But the Rule is also intended to smooth the discovery process and to ensure the cooperation of all parties in conducting discovery. As the Advisory Committee Note states, "this subdivision provides that counsel who has attempted without success to effect with opposing counsel a reasonable program or plan for discovery is entitled to the assistance of the court." *Id.* at 527.

[368] *See* FED. R. CIV. P. 16.

[369] FED. R. CIV. P. 16(a)(4).

[370] FED. R. CIV. P. 16(c)(10).

Other rules give the courts additional means of ensuring that the facts are fully explored and presented. The court may appoint a master pursuant to Federal Rule of Civil Procedure 53 and direct the master "to receive and report evidence" to the court on particular issues.[371] A master may require production of documents and put witnesses under oath and examine them.[372] Federal Rule of Evidence 614 empowers a federal court to call and examine witnesses on its own motion, and Rule 706 permits the court to appoint its own expert witnesses.[373] Finally, a court may solicit amicus briefs from agencies or officials that are not formal parties to the litigation but have an interest in the suit.[374]

H. Proceed Incrementally in Devising and Implementing Relief

Much has been written about the difficulties in the relief stages of institutional reform litigation.[375] Unfortunately, the remedial phase of criminal justice reform cases will probably not proceed any more easily or smoothly than in other kinds of cases seeking systemic reform. State criminal justice officials will often resent federal court interference. They will probably obfuscate and delay to the best of their ability.[376] Federal court reform of state criminal justice systems will undoubtedly be slow and difficult.[377]

In other contexts the federal courts have proceeded incrementally when faced with state officials' intransigence. The courts slowly increase their control over remedy formulation and implementation to enforce their orders.[378] Although sometimes painstakingly slow, this "sce-

---

[371] FED. R. CIV. P. 53(c).

[372] *Id. See generally* Levine, *The Authority for the Appointment of Remedial Special Masters in Federal Institutional Reform Litigation: The History Reconsidered*, 17 U.C. DAVIS L. REV. 753 (1984).

[373] *See* FED. R. EVID. 614(a)-(b), 706(a).

[374] *See generally* Krislov, *The Amicus Curiae Brief: From Friendship to Advocacy*, 72 YALE L.J. 694 (1963).

[375] *See, e.g.*, D. HOROWITZ, *supra* note 275; Kirp & Babcock, *Judge and Company: Court-Appointed Masters, School Desegregation, and Institutional Reform*, 32 ALA. L. REV. 313 (1981); Special Project, *Remedial Process*, *supra* note 350, at 790-842, 853-70; Note, *Implementation Problems*, *supra* note 293;

[376] *See supra* note 278 and accompanying text; Special Project, *Remedial Process*, *supra* note 350, at 795-96 (exploring reasons why government bureaucrats resist court orders).

[377] *See supra* notes 277-88 and accompanying text.

[378] Well-known examples of cases following this approach are *Rhem v. Malcolm*, which concerned conditions of confinement in Manhattan's Tombs jail, *Morgan v. Kerrigan*, the Boston school desegregation case, and *Wyatt v. Stickney*, which concerned

nario of escalating intrusiveness"[379] has worked tolerably well in other institutional reform cases[380] and should be followed in criminal justice cases.

After declaring the rights and obligations of the parties, the court should order the parties to negotiate among themselves (in consultation with other interested groups) and agree upon an affirmative plan[381] to remedy the constitutional violation.[382] If agreement is impossible the court might hold hearings on proposed remedial schemes or appoint a master or oversight committee to devise a detailed plan according to general guidelines laid down by the court.[383] If the defendants ignore the court's order or otherwise proceed in bad faith, the court might

---

treatment of persons in Alabama mental institutions. The tortured histories of *Rhem* and *Morgan* and complete citations to the many opinions of the district and circuit courts in both cases are set forth in Note, *Developments in the Law — Section 1983 and Federalism*, 90 HARV. L. REV. 1133, 1231-39 (1977). Accounts of the *Wyatt* litigation can be found in Drake, *Judicial Implementation and* Wyatt v. Stickney, 32 ALA. L. REV. 299 (1981), and Note, *The* Wyatt *Case: Implementation of a Judicial Decree Ordering Institutional Change*, 84 YALE L.J. 1338 (1975) [hereafter Note, *The* Wyatt *Case*].

[379] A. GOLDSTEIN, *supra* note 66, at 64.

[380] Commentators have supported this approach. *See, e.g., id.* at 64-71; Special Project, *Remedial Process*, *supra* note 350, at 837-42; Note, *The* Wyatt *Case*, *supra* note 378, at 1247-50.

[381] Some writers have asserted that a negative injunction, which orders a defendant to stop doing something, is preferable to an affirmative injunction, which directs a defendant to do particular things, because a negative injunction is less intrusive. *See, e.g.*, O. FISS, THE CIVIL RIGHTS INJUNCTION 7-10 (1978); Fletcher, *supra* note 17, at 649-50. This theory is sometimes, but not always, valid. Pulliam v. Allen, 104 S. Ct. 1970 (1984), presents a good example of an unintrusive negative injunction. In *Pulliam*, the district court enjoined a Virginia magistrate's practice of setting bail in nonjailable cases and incarcerating defendants who could not make the bail. *Id.* at 1972-73. The impact on the magistrate's behavior was minimal, because she had no affirmative ongoing duties to perform under the order. The indirect effects on the criminal justice system also were negligible. Consider, by contrast, an order that attorneys working for a public defender not carry a caseload in excess of 30 cases in a jurisdiction in which the average caseload had been approximately 100 cases. Although negatively formulated, such an injunction would certainly slow the criminal process.

[382] *See* Fletcher, *supra* note 17, at 652-53. Directing the defendants to take the initiative in proposing a plan may be beneficial. The defendants presumably have substantial expertise in conducting their affairs, and thus can use their institutional wisdom to solve the problems. Coffin, *supra* note 198, at 994. In addition, if the defendants can be encouraged to participate, they may be more willing to implement changes than if remedies are imposed wholly from without. Note, *The* Wyatt *Case*, *supra* note 378, at 1248.

[383] Chayes, *supra* note 275, at 1299-1301; Note, *Implementation Problems*, *supra* note 293, at 460-61; Note, *The* Wyatt *Case*, *supra* note 378, at 1249.

make its instructions more specific or impose time limits for compliance. If these measures fail, and pleading, exhorting, and threatening are all to no avail, then the court ultimately must consider contempt procedures, replacing uncooperative officials, or placing an agency in receivership.[384]

Although reform will be difficult, there are reasons for hope. The federal courts' substantial expertise in court administration and criminal justice reform will aid them in assessing proffered plans and evaluating a defendant's compliance or excuses for noncompliance. In addition, when federal courts need advice or assistance concerning a state criminal justice agency, they can turn to other federal officials for help. For example, FBI officials might assist a court in devising a plan for a local police department to investigate civilian complaints about police misconduct.[385] Similarly, federal court clerks in charge of juror selection and qualification could aid in reforming state jury selection procedures. If a federal court appointed a master to reform state probation or prosecutorial practices, the federal probation department or the United States Attorney's Office could provide knowledgeable and experienced personnel. Finally, the federal courts can ask for assistance from the lawyers who practice in the state criminal justice system and from the bar generally. Bar associations certainly would agree to appoint committees to study problems and to recommend changes to remedy constitutional violations.[386] Thus, the federal courts are themselves competent and equipped with all the potential assistance they might need.

---

[384] A federal court obviously should be reluctant to impose such measures and should do so only when no other course is available. Courts have taken these steps in other contexts. *See, e.g.*, Morgan v. McDonough, 540 F.2d 527, 534 (1st. Cir. 1976) (head of school and other personnel transferred); Aspira of N.Y., Inc. v. Board of Educ., 423 F. Supp. 647, 653-58 (S.D.N.Y. 1976) (holding defendants in contempt); Morgan v. Kerrigan, 401 F. Supp. 216, 226 (D. Mass. 1975) (three members of school committee held in civil contempt); Jones v. Wittenberg, 330 F. Supp. 707, 716 (N.D. Ohio 1971), *aff'd sub nom.* Jones v. Metzger, 456 F.2d 854 (6th Cir. 1972) (psychological testing used to screen prison guards for racist or sadistic tendencies); Turner v. Goolsby, 255 F. Supp. 724, 730 (S.D. Ga. 1966) (school system placed in receivership).

[385] *Cf.* Burger, *Crime and Punishment*, 5 AM. J. TRIAL ADV. 95, 99 (1981) (suggesting that the FBI Academy provides a pattern for training state and local police).

[386] The New York City Bar Association, for example, has committees that issue regular reports on the City's criminal justice system. *See, e.g.*, The Committee on Criminal Advocacy, *The Individual Calendar System — A Needed Reform for the New York City Criminal Court*, 37 REC. A.B. CITY N.Y. 301 (1982); The Committee on Criminal Advocacy, *Prosecutorial Displacement of Judicial Sentencing Power under* People v. Farrar: *A Call for Reconsideration and Remedial Action*, 39 REC. A.B. CITY N.Y. 141 (1984); The Committee on Criminal Law, *Report on the Exclusionary Rule*, 37 REC. A.B. CITY N.Y. 598 (1982).

CONCLUSION

This Article has examined the *Younger* abstention doctrine from a modern perspective and has argued that the doctrine should be abandoned. Abstention in criminal justice cases is wholly inconsistent with federal court activism in desegregation, reapportionment and prisoners' right suits. It cannot be justified by special principles of comity between state and federal judges. Direct federal injunctive relief is necessary to reform state criminal justice systems. Litigants and courts should follow the suggested guidelines in structuring and adjudicating criminal justice reform cases.