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Federal Jurisdiction -- The Abstention Doctrine as Amended by Hicks v. Miranda: A Legal Definition and Ominous Omissions

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grantor has not retained sufficient controls to be considered owner of the corpus.

The real significance of the *Perry* decision lies in the advice the Fourth Circuit has given tax planners. While the transfer and leaseback of business property to a Clifford trust remains a tax savings device, the court will demand strict compliance with two requirements. First, the Fourth Circuit will apply the business purpose test at the time of the transfer into trust. The retention of no reversion by the settlor and the existence of trust income other than the settlor's rental payments will be considered factors showing real business purpose. Second, the court will look past the identity of the trustee and will focus on his actual independence, indicated by his ability to protect and further the beneficiaries' interests, to determine whether the settlor has properly relinquished control over the corpus. It is hoped that the Fourth Circuit's clear articulation of the standards it will require in the transfer and leaseback situation will provide needed predictability to those prospective grantors who seek to avail themselves of this tax savings device.

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Federal Jurisdiction—The Abstention Doctrine as Amended by Hicks v. Miranda: A Legal Definition and Ominous Omissions

The abstention doctrine[1] is a judicial device designed to reduce the tensions inherent in our dual system of government. The doctrine allows federal courts to defer to state courts and thus to avoid unnecessary confrontation when federal and state jurisdictions overlap.[2] Significantly, the impact of abstention extends beyond the procedural level to affect fundamental substantive rights.[3] Thus, in sensitive substantive areas,[4]

1. One commentator speaks of "abstention doctrines" since there are several distinguishable lines of cases. C. WRIGHT, HANDBOOK OF LAW OF FEDERAL COURTS § 52 (2d ed. 1970).

2. *See* Railroad Comm'n v. Pullman Co., 312 U.S. 496, 501 (1941); Kurland, *Toward a Co-operative Judicial Federalism: The Federal Court Abstention Doctrine*, 24 F.R.D. 481, 487 (1959); Comment, *The Abstention Doctrine: Some Recent Developments*, 46 TUL. L. REV. 762, 763 (1972).

3. *See, e.g.*, Dombrowski v. Pfister, 380 U.S. 479, 486 (1965); H. FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW 87-88 (1973); Maraist, *Federal Intervention in State Criminal Proceedings: Dombrowski, Younger, and Beyond*, 50 TEXAS L. REV. 1324, 1326-27 (1972).

4. Civil rights litigation is a particularly sensitive area in which courts have

abstention has become a volatile concept, expanded or compressed to reflect particular predilections of the federal judiciary.[5]

In *Hicks v. Miranda*[6] the United States Supreme Court focused on the scope of abstention and defined one of the situations in which the doctrine must be applied by the federal courts. The divided Court held that, absent extraordinary circumstances or bad faith and harassment, abstention is mandatory when a state criminal proceeding is initiated against a federal plaintiff after the federal complaint is filed but before any "proceeding of substance on the merits" has occurred in the federal forum.[7]

The abstention issue was raised in the federal district court[8] when Vincent Miranda brought suit against local authorities for declaratory and injunctive relief from enforcement of the California obscenity statute.[9] As president and a stockholder of Pussycat Theatre,[10] Miranda sought to assert his first amendment right to present the film "Deep Throat" without fear of prosecution under the allegedly unconstitutional state statute. At the time of filing, no criminal prosecution was pending against Miranda in state court; however, local authorities had already seized copies of the film and box office receipts on four separate occasions and had criminally charged two employees of the theatre. Before a hearing on the merits could be had in federal court, the state criminal complaint was amended to include Miranda as an additional party defendant.[11]

Relief was granted by the three judge[12] district court which applied the classic, three-pronged, "equity, comity, and federalism" analysis to the question of abstention. The court held the abstention doctrine

reached contradictory conclusions concerning the appropriateness of abstention. *Compare* Alabama Educ. Ass'n v. Wallace, 362 F. Supp. 682, 685 (M.D. Ala. 1973) *with* Silverman v. Browning, 359 F. Supp. 173, 176-77 (D. Conn. 1972), *aff'd*, 411 U.S. 941 (1973). *See generally* McCormack, *Federalism and Section 1983: Limitations on Judicial Enforcement of Constitutional Claims, Part II*, 60 VA. L. REV. 250 (1974).

5. Kennedy & Schoonover, *Federal Declaratory and Injunctive Relief Under the Burger Court*, 26 SW. L.J. 282 (1972); Note, *Federal-Question Abstention: Justice Frankfurter's Doctrine in an Activist Era*, 80 HARV. L. REV. 604, 607-08 (1967).

6. 95 S. Ct. 2281 (1975).

7. *Id.* at 2292.

8. Miranda v. Hicks, 388 F. Supp. 350 (C.D. Cal. 1974), *rev'd*, 95 S. Ct. 2281 (1975).

9. CAL. PENAL CODE §§ 311 *et seq.* (West Supp. 1975). The complaint also sought relief from the search warrant provisions of the statute. *Id.* §§ 1523-42.

10. 95 S. Ct. at 2285 n.2.

11. *Id.* at 2287.

12. 28 U.S.C. § 2281 (1970). This statute requires a three-judge court when injunction is sought against enforcement of a state statute which is challenged on constitutional grounds.

inapplicable under the circumstances on the grounds that no adequate state remedy was available to protect Miranda's first amendment right, that no criminal prosecution was pending against him in state court, and that the facts demonstrated bad faith and harassment.[13]

On direct appeal to the Supreme Court,[14] five justices[15] joined to reverse the lower court decision over the objection of a vigorous dissent.[16] Mr. Justice White, writing for the majority, concluded that, in the interests of comity alone, abstention is required to " 'permit the state courts to try cases free from interference by federal court.' "[17] Furthermore, the Court held that the "pending" criterion should be liberally construed so that the abstention doctrine is not "trivialized" by rigid adherence to an arbitrary date.[18] Mr. Justice Stewart's dissent criticized the majority's "pending" standard as failing to reflect countervailing policy considerations founded on the role of the federal courts "as the 'primary reliances' for vindicating constitutional freedoms."[19]

In order to evaluate the Court's ruling in *Hicks*, it is necessary to place the central issue of the case in historical perspective. The fountainhead of the abstention doctrine, *Railroad Commission of Texas v. Pullman Co.*,[20] illustrated the judicial effort to reverse the trend toward federal intervention which had been authorized by the landmark decision *Ex Parte Young*.[21] Justice Frankfurter's opinion for a unanimous Court, which came to be known as the Pullman Doctrine, imposed limits on the federal judiciary which were designed to "avoid the waste of a tentative decision as well as the friction of a premature constitutional adjudication."[22]

Subsequent decisions interpreted the scope of *Pullman* abstention and established the presumption in favor of the exercise of federal jurisdiction when a federal question is raised.[23] Since the hazards of

13. 388 F. Supp. at 360.

14. 28 U.S.C. § 1253 (1970) authorizes an appeal directly to the Supreme Court from a judgment of a three-judge court concerning the constitutionality of a state statute.

15. Justices White, Powell, Blackmun, Rehnquist, and Chief Justice Burger joined in the majority opinion. Chief Justice Burger also filed a concurring statement.

16. Justice Stewart was joined in the dissent by Justices Brennan, Marshall, and Douglas.

17. 95 S. Ct. at 2292, *quoting* Younger v. Harris, 401 U.S. 37, 43 (1971).

18. 95 S. Ct. at 2292.

19. *Id.* at 2295.

20. 312 U.S. 496 (1941).

21. 209 U.S. 123 (1908). The majority opinion by Justice Peckham held that federal courts may enjoin state officials from enforcing a state statute that is constitutionally defective on its face.

22. 312 U.S. at 500.

23. The federal court exercises jurisdiction unless the state law is both unclear and

abstention[24] in cases presenting constitutional issues often counterbalance the harm of interference, the lower federal courts were directed to exercise jurisdiction unless the state law in question was both unclear and susceptible to an interpretation that would avoid constitutional adjudication.[25] Thus the abstention doctrine was characterized as a narrow exception to the general rule.

An overview of the abstention cases indicates that the applicability of the doctrine is generally determined by a balancing approach rather than by application of precise rules.[26] Using this technique, a court identifies the federal and state policies that abstention will serve and assigns weights according to the relative significance of each. A line of cases outside the *Pullman*[27] mainstream indicates that the presumption of exercise of federal jurisdiction shifts when the countervailing state interest reaches the level of importance associated with a "State's good-faith administration of its criminal laws."[28] In the criminal context, the burden is on the federal plaintiff to justify intervention with a requisite showing of irreparable injury.[29]

Civil rights litigation precipitated a doctrinal dilemma in this area[30] which was reconciled in one way by *Dombrowski v. Pfister*[31] and in another by *Younger v. Harris*.[32] The Supreme Court in *Dombrowski* held that imminent state criminal proceedings may be enjoined in two situations: (1) when the state criminal statute infringes first amendment

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susceptible to an interpretation that will avoid the federal constitutional question. Lake Carriers' Ass'n v. MacMullan, 406 U.S. 498, 510-11 (1972); Harman v. Forssenius, 380 U.S. 528, 534 (1965); Field, *Abstention in Constitutional Cases: The Scope of the Pullman Abstention Doctrine*, 122 PA. L. REV. 1071, 1088 (1974).

24. The adverse consequences of abstention in terms of delay, expense, and personal liberties are pointed out by Justice Douglas' dissent in Clay v. Sun Ins. Office Ltd., 363 U.S. 207 (1960): "Some litigants have long purses. Many, however, can hardly afford one lawsuit, let alone two. Shuttling the parties between state and federal tribunals is a sure way of defeating the ends of justice." *Id.* at 228.

25. *E.g.*, Lake Carriers' Ass'n v. MacMullan, 406 U.S. 498, 510-11 (1972); Harman v. Forssenius, 380 U.S. 528, 534 (1965).

26. *See, e.g.*, Steffel v. Thompson, 415 U.S. 452 (1974); Younger v. Harris, 401 U.S. 37 (1971); Dombrowski v. Pfister, 380 U.S. 479 (1965). *See also* Maraist, *supra* note 3 at 1332-34.

27. Railroad Comm'n v. Pullman Co., 312 U.S. 496 (1941) dealt with a situation in which no criminal prosecution was pending or even threatened.

28. Dombrowski v. Pfister, 380 U.S. 479, 484 (1965). *See also* Stefanelli v. Minard, 342 U.S. 117, 120 (1951).

29. A single prosecution does not constitute "irreparable injury." Douglas v. City of Jeannette, 319 U.S. 157, 164 (1943).

30. Ironically, Railroad Comm'n v. Pullman Co., 312 U.S. 496 (1941), which introduced the abstention doctrine, contained the issue of racial discrimination which subsequently produced doctrinal crisis. Note, 80 HARV. L. REV, *supra* note 5, at 607.

31. 380 U.S. 479 (1965).

32. 401 U.S. 37 (1971).

guaranties and is overbroad or vague on its face; or (2) when officials employ the statute in a manner that indicates bad faith harassment.[33] Narrowing the potential scope of *Dombrowski*, the Court in *Younger* ruled that when criminal prosecution is pending in state court, federal judges may not justify injunctive relief solely on first amendment grounds but rather must find either bad faith harassment or extraordinary circumstances.[34]

Significantly, the narrower holdings in *Younger* and its companion cases[35] extended only to situations in which state criminal prosecutions were pending.[36] When prosecution was merely threatened, the *Dombrowski* holding remained intact.[37] The rationale in support of the pivotal distinction appeared in a later case, *Steffel v. Thompson*:[38]

> When no state criminal proceeding is pending at the time the federal complaint is filed, federal intervention does not result in duplicative legal proceedings or disruption of the state criminal justice system; nor can federal intervention, in that circumstance, be interpreted as reflecting negatively upon the state court's ability to enforce constitutional principles.[39]

Although the Court in *Steffel* addressed itself solely to a request for declaratory judgment,[40] the rationale is equally applicable to the appropriateness of injunctive relief when prosecution is threatened but not pending in state court.

In *Hicks* the Court ignored the logic of *Steffel* and decided the case on the basis of a novel definition. The majority held that "pending" speaks to the time of "proceedings of substance on the merits" rather than to the date of filing in federal court.[41] The Court assumed without discussion that the differentiation between "pending" and "threatened" is an arbitrary distinction. This assumption is contrary to the rationale, although not to the precise holdings, of prior decisions.[42]

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33. 380 U.S. at 489-90.

34. 401 U.S. at 41. *See also* Note, *Federal Jurisdiction—Younger v. Harris: A Current Appraisal of the Policy against Federal Court Interference with State Court Proceedings*, 21 DE PAUL L. REV. 519, 539 (1971).

35. Byrne v. Karalexis, 401 U.S. 216 (1971); Dyson v. Stein, 401 U.S. 200 (1971); Perez v. Ledesma, 401 U.S. 82 (1971); Boyle v. Landry, 401 U.S. 77 (1971); Samuels v. Mackell, 401 U.S. 66 (1971).

36. 401 U.S. at 41. A possible exception is *Boyle v. Landry*, 401 U.S. 77, 81 (1971), but the decision was primarily based on lack of standing rather than on the abstention doctrine since plaintiffs failed to allege that they were threatened.

37. *Cf.* Allee v. Medrano, 416 U.S. 802, 814 (1974).

38. 415 U.S. 452 (1974).

39. *Id.* at 462.

40. *Id.*

41. 95 S. Ct. at 2292.

42. Allee v. Medrano, 416 U.S. 802, 814 (1974); Steffel v. Thompson, 415 U.S.

It is significant that the Court arrived at its definition with only tangential regard for the balancing approach and its classic, three-pronged inquiry. Justice White considered only the comity factor.[43] He concluded that the state interest was paramount in this case and that the harm of intervention outweighed the harm of abstention.[44] Implicit in this approach is a trend toward greater deference to the state courts.

The dangers inherent in the Court's approach can be expressed in terms of equity and federalism, principles ignored by the majority opinion. The crux of the equity analysis in abstention problems is adequacy of state remedy. If the federal plaintiff has already violated a criminal statute, his defense to prosecution constitutes an adequate state remedy.[45] However, if a person is only threatened by state law, he may be placed in the untenable position described in *Steffel* as "between the Scylla of intentionally flounting state law and the Charybdis of foregoing what he believes to be constitutionally protected activity in order to avoid becoming enmeshed in a criminal proceeding."[46] The Court in *Hicks* failed to note this practical consequence, which was precisely the situation faced by Miranda as president of the theatre.

Federalism, the second classic consideration overlooked by the Court, concerns the proper relationship of the federal and state governments. Chief Justice Marshall once emphasized the importance of federal jurisdiction in solemn dicta: "We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution."[47] Marshall's statement is clearly not the modern rule.[48] Confined by the realities of the federal system—a limited number of judges and an ever expanding case load—federal courts frequently decline to exercise jurisdiction.

However as guarantors of constitutional freedoms, the federal courts may not abdicate responsibility to the states but rather must assess other realities. In certain sensitive legal areas state courts may be

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452, 462 (1974). *See generally* Note, *Implications of the Younger Cases for the Availability of Federal Equitable Relief When No State Prosecution is Pending*, 72 COLUM. L. REV. 874 (1972).

43. 95 S. Ct. at 2292.
44. *Id.*
45. Douglas v. City of Jeannette, 319 U.S. 157, 163-64 (1943).
46. 415 U.S. 452, 462 (1974).
47. Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 404 (1821).
48. C. WRIGHT, *supra* note 1, § 52 at 196.

unwilling to vindicate federal constitutional claims. In light of the court's function as fact finder, the need for a sympathetic forum and an independent judiciary is paramount under such circumstances.[49] Direct review to the Supreme Court cannot be expected to correct all the nuances of factfinding that may prejudice the lower court determination. Unless the court weighs all the factors and makes a deliberate effort to strike a balance, the institutional goal of comity may engulf the primary function of the federal courts as the guarantors of the individual's constitutional rights.[50]

The significance of the *Hicks* definition of "pending" lies in its impact on functional analysis of abstention problems. Traditionally, the threshold question is whether the case should be classified under the *Pullman* or the *Younger* line of authority. This determination is crucial in light of the corresponding presumption regarding jurisdiction which attaches.[51] In the absence of state criminal proceedings, the former category is appropriate. According to *Steffel*,[52] federal courts are not required to abstain unless criminal prosecution is actually pending in state court and not merely threatened. If pending, the strictures of *Younger*[53] apply unless the federal plaintiff can comply with the requirements of one of the narrow exceptions.[54]

The practical effect of broadening the scope of the "pending" criterion in *Hicks* is virtually to eliminate the distinction between pending and threatened prosecutions because state authorities can easily transform the latter into the former.[55] Thus the definitional approach adopted by the Court effectively negates much of the holding in *Steffel* without the attendant embarrassment of overruling such a recent decision. The corollary to the broader definition of "pending" in *Hicks* is growth of the doctrinal branch in which abstention is the rule and not the exception.

While *Hicks* clearly broadens the scope of *Younger* abstention, it fails to introduce certainty into doctrinal analysis. As pointed out in the

49. England v. Louisiana State Bd. of Medical Examiners, 375 U.S. 411, 436 (1964) (Douglas, J., concurring); ALI STUDY OF DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS 168 (1969); Gibert, *Questions Unanswered by the February Sextet*, 1972 UTAH L. REV. 14, 20.

50. *See* Steffel v. Thompson, 415 U.S. 452, 464 (1974); Mitchum v. Foster, 407 U.S. 225, 239 (1972); Monroe v. Pape, 365 U.S. 167, 170-71 (1961).

51. *See* notes 23-25 and accompanying text *supra*.

52. 415 U.S. 452.

53. 401 U.S. 37.

54. *Id.* at 41.

55. 95 S. Ct. at 2296 (Stewart, J., dissenting).

dissent, the new "pending" standard announced by the majority is marred by imprecise terminology that will make it difficult to apply.[56] Since the Court neglected to provide guidelines, determination of what constitutes "proceedings of substance on the merits"[57] will be governed by subjective rather than objective factors. The foreseeable result is an array of contradictory lower court opinions.

Notably, the Court in *Hicks* also failed to clarify the outer limits of *Younger* abstention. The *Younger* exceptions provide a potential safety valve for plaintiffs who satisfy the rigorous burden of proof by showing either bad faith harassment or extraordinary circumstances.[58] The clause is phrased in the disjunctive and presumably provides two means of escape. Although the Court has never precisely defined the latter exception, it indicated in *Younger* that multiple prosecutions might rise to the level of extraordinary circumstances.[59] However, the Court in *Hicks* did not find the four separate seizures and subsequent charges to be sufficiently extraordinary to justify federal intervention.[60] Bad faith harassment is an equally elusive concept. The lack of objective standards to guide the lower federal courts portends uneven application of the *Younger* exceptions. In light of the significant substantive questions that may be at stake in federal constitutional cases, uncertainty in the abstention doctrine is ground for practical as well as theoretical concern.

In the final analysis, the Court's definitional approach is the fundamental flaw of *Hicks*. Assuming that the purpose of a definition is to clarify, the opinion is a paradox, for it generates more questions and uncertainties than answers. The Court's focus on a single word represents a radical departure from the comprehensiveness of the balancing approach to abstention problems. Concern for definitional detail seems particularly inappropriate in the context of basic policy considerations that were ignored by the Court. In light of doctrinal impact on individual plaintiffs as well as on the entire federal scheme, abstention may be "a custom [m]ore honored in the breach than the observance."[61]

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56. *Id.* at 2294 n.1.
57. *Id.* at 2292.
58. 401 U.S. at 41.
59. *Id.* at 46.
60. 95 S. Ct. at 2292-93.
61. W. SHAKESPEARE, HAMLET, Act I, sc. iv, 11. 15-16.