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Procedural and Structural Obstacles in Challenging Aspects of the Criminal Justice System

Cover Page Footnote

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PROCEDURAL AND STRUCTURAL OBSTACLES IN CHALLENGING ASPECTS OF THE CRIMINAL JUSTICE SYSTEM

*John Boston*¹

I am going to analyze the various procedural and structural obstacles facing an attorney pursuing a decision on the merits in litigation challenging aspects of the criminal justice system. Some of the things that I am going to talk about are particular to litigation about criminal justice. Others are applicable to litigation generally, though they may have applications that are particular to criminal justice litigation. In fairness, the word obstacle and the image of an obstacle course may be a bit clichéd given the complexity, contrivance, and contortion that is involved in some of the legal doctrines that I will talk about here. Maybe a better metaphor is miniature golf, which may better convey the whimsical and arbitrary quality of some of these legal rules from the standpoint of a plaintiff seeking a remedy for a constitutional wrong.

The first issue I want to address is the *Younger v. Harris*

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abstention doctrine.² *Younger* arose when a college professor, prosecuted under a state criminal syndicalism law for his political statements, sought to have his prosecution enjoined in federal court.³ The Supreme Court stated, in an opinion emphasizing the phrase “Our Federalism” (capital O, capital F), that a federal court injunction of a state prosecution was not permitted.⁴ I am not going to discuss the federalism rationale extensively because I think it is pretty familiar by now. However, *Younger v. Harris* has spawned a large amount of case law and a large family of rules which can be stated relatively clearly.

The basic *Younger* rules are as follows: You cannot obtain an injunction against a pending state criminal prosecution in federal court.⁵ You cannot get a declaratory judgment either.⁶ You can get a declaratory judgment against a threatened prosecution and a preliminary injunction on a sufficient showing of irreparable harm.⁷ There is, however, an exception. If you attempt to obtain a

² 401 U.S. 37 (1971).

³ *Id.* at 41-42.

⁴ *Id.* at 54.

⁵ *Id.* at 43-44.

⁶ *Samuels v. Mackell*, 401 U.S. 66, 69-73 (1971).

⁷ *Wooley v. Maynard*, 430 U.S. 705, 710 (1977); *Doran v. Salem Inn*, 422 U.S. 922, 930-31 (1975).

declaratory judgment after the prosecution has already begun and you have not yet accomplished anything of substance in the federal court proceeding, you cannot obtain declaratory or injunctive relief.⁸ This places the attorney in a difficult position. For, if the attorney should wait until the prosecution has concluded and then subsequently seek to overturn the state court result in a federal court proceeding, he or she will not be able to do that either. That attempt to overturn the state decision will be viewed as an affront to the state, which is as great as preventing it from having the proceeding in the first place.⁹

Moreover, you cannot "cherry pick." You cannot go into federal court and try to get rulings on individual issues that are part of a pending or threatened criminal prosecution, for example by arguing in federal court that an illegal seizure amounted to a constitutional violation and that the federal judge should instruct the state court judge that the evidence cannot be used against the defendant.¹⁰

⁸ Hicks v. Miranda, 422 U.S. 332, 349-50 (1975).

⁹ Huffman v. Pursue, Ltd., 420 U.S. 592, 607-09 (1975).

¹⁰ Perez v. Ledesma, 401 U.S. 82, 84-86 (1971).

The *Younger* abstention doctrine has been extended from state judicial proceedings to include state civil proceedings where the state is prosecuting an enforcement action or where an important state interest is involved.¹¹ When was the last time the Supreme Court said a state interest was not important? I cannot recall such a case. The *Younger* doctrine has also been extended to administrative proceedings that are quasi-judicial in nature and allow constitutional claims to be raised.¹²

An important premise of the *Younger* doctrine is that issues such as the constitutionality of a state statute or a claim of unconstitutionally motivated prosecution can and should be raised as part of the state criminal prosecution. That is usually true, and for that reason, the *Younger* rule is well grounded in the logic of coordinate court systems. There are instances when state and

¹¹ See, e.g., *Pennzoil Co. v. Texaco*, 481 U.S. 1, 11-16 (1987) (enforcement of private state court judgment); *Middlesex County Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 432 (1982) (state bar disciplinary proceeding); *Trainor v. Hernandez*, 431 U.S. 434, 449 (1977) (attachment proceeding alleging welfare fraud); *Juidice v. Vail*, 430 U.S. 327 (1977) (civil contempt proceeding); *Huffman*, 420 U.S. at 594 (nuisance proceeding against obscene film). But see *New Orleans Pub. Serv., Inc. v. Council of New Orleans*, 491 U.S. 350, 367-73 (1989) (refusing to apply *Younger* to judicial review proceeding reviewing legislative or executive action).

¹² See, e.g., *Ohio Civil Rights Comm. v. Dayton Christian Schs.*, 477 U.S. 619, 626-28 (1986) (holding *Younger* applicable to sex discrimination case because the case involved an important state issue); *Hawaii Hous. Auth. v. Midkiff*, 467

federal courts will be called upon to rule on the same issues involving the same parties. Thus, it is institutionally necessary that there be some sort of protection to avoid conflicting rulings between court systems on the same point. Essentially, these are necessary traffic rules.

However, that conclusion is not the end of the story. Sometimes there are issues in the prosecution of criminal cases that cannot be raised in the context of a single criminal prosecution. One of the paradigm cases here is the Supreme Court's decision in *Gerstein v. Pugh*.¹³ In *Gerstein*, the issue was the failure to provide timely probable cause hearings to arrestees.¹⁴ Whether a defendant received a timely probable cause hearing at the outset of a state criminal proceeding is not easy to litigate later in the proceeding. By that time, the grand jury is likely to have already returned an indictment, or some other proceeding is likely to have occurred to determine the existence of probable cause, mooting the

U.S. 229, 237-38 (1984) (holding *Younger* inapplicable to proceedings that state law said were not part of a judicial proceeding).

¹³ 420 U.S. 103, 108 n.9 (1975); accord, *Fernandez v. Trias Monge*, 586 F.2d 848, 851 (1st Cir. 1978) (holding relief could be granted against improper pre-trial detention of juveniles where Commonwealth law provided no adequate remedy).

¹⁴ *Gerstein*, 420 U.S. at 105.

issue for that defendant and leaving the unlawful practice to go unchallenged. Moreover, in *Gerstein*, which originated in Florida, the state system did not provide any procedure by which that issue could be raised at all.¹⁵ The Supreme Court said that since the matter could not be litigated in the criminal prosecution, the plaintiffs could pursue a class action to enjoin the challenged practice, and that action would not be barred by the *Younger* doctrine.¹⁶

Beyond the specific holding of *Gerstein*, there are other systemic issues in state criminal justice systems that litigants would like to challenge in federal court. That has proved to be an extremely difficult proposition. I characterized the *Younger* doctrine essentially as a system of traffic rules. That is only part of the story. They are traffic rules with a penumbra. Now, penumbras are in bad odor these days, especially penumbras invoked to benefit ordinary citizens. Penumbras to protect people in power are much more robust, as you can see if you read the Supreme Court's Eleventh Amendment decisions of the last few

¹⁵ *Id.* at 105-06.

¹⁶ *Id.* at 108 n.9.

years.¹⁷ There have been a number of cases in which federal courts have rejected efforts to impose systemic reform on judicial systems in the manner that they have imposed systemic reforms in other kinds of institutions.

The starting point in these decisions is the Supreme Court's decision in *O'Shea v. Littleton*.¹⁸ In *O'Shea*, there were some rather sweeping allegations of racial discrimination in the criminal justice system in Illinois and a demand for injunctive relief.¹⁹ The Supreme Court decided that the federal courts should not entertain the case because, among other things, the Court reasoned it might result in relief that would require an ongoing audit or continuing federal court supervision of the Illinois state criminal justice system.²⁰ Of course, continuing federal court supervision or monitoring of other state institutions is a regular feature of federal civil rights litigation.²¹ *O'Shea* might lead one to wonder why state

¹⁷ See, e.g., *Fed. Mar. Comm'n. v. South Carolina State Ports Auth.*, 535 U.S. 743, 769 (2002) (holding that states may not be made parties to federal administrative proceedings, even though these do not fall within the Eleventh Amendment's prohibition, because of the need to protect states' dignity).

¹⁸ 414 U.S. 488 (1974).

¹⁹ *Id.* at 502.

²⁰ *Id.* at 500-01.

²¹ See, e.g., *Freeman v. Pitts*, 503 U.S. 467 (1992) (addressing incremental termination of injunctive relief entered two decades earlier in school desegregation case).

judicial systems should be exempt from the usual remedies in civil rights litigation.

Professor Burt Neuborne used to lecture on immunity at these programs, and he was fond of stating – after pointing out that the strongest of the immunities under Section 1983 is judicial immunity - that if dentists made the law, there would be a very powerful dental immunity. I think that the principle underlying that comment goes far to explain why there is a double standard when it comes to protecting state criminal justice systems sued for civil rights violations.

Consider, for example, *Hoover v. Wagner*, a Seventh Circuit decision authored by Judge Posner.²² In *Hoover*, the plaintiffs sought relief in federal court from the administration of a state court injunction that provided, *inter alia*, for the number of feet of distance anti-abortion protestors must leave between themselves and the women seeking abortions.²³ Judge Posner said that granting relief in this case would be an “insult to the judicial and law enforcement officials of Wisconsin.”²⁴ He stated that he

²² 47 F.3d 845 (7th Cir. 1995).

²³ *Id.* at 846.

²⁴ *Id.* at 851.

was not relying on the actual holding in *Younger*, but rather was relying on “the principles of equity and comity that underlie *Younger*.”²⁵

One would think that persons wielding the power of substantial public offices, including judges, would not require this sort of protection against insult and indignity. As President Truman famously said, “If you can't stand the heat get out of the kitchen.” However, that is not the attitude that federal judges apply to state court judges. Practitioners need to be aware of that fact when attempting to use litigation to remedy even the most egregious defects in state criminal justice systems.

A particularly disturbing example is the Eleventh Circuit’s decision in *Luckey v. Miller*.²⁶ That case was a challenge to the notoriously deficient system of providing counsel to the indigent in the state of Alabama. The court held that the state’s system was protected by the *Younger* doctrine from any sort of federal court remedy, even one that did not directly interfere with individual prosecutions, because of the *Younger* doctrine as expanded by

²⁵ *Id.*

²⁶ 976 F.2d 673 (11th Cir. 1992).

O'Shea v. Littleton.²⁷ Decisions like *Luckey* leave us with the question: If state courts do not correct their constitutional dysfunctions, and state legislatures also shirk the task, and if the federal courts refuse to confront even the most long-standing and entrenched disobedience of constitutional commands, how will the Constitution be enforced? The answer appears to be, it won't.

Next, I would like to discuss the rule of *Heck v. Humphrey*.²⁸ The plaintiff in *Heck* brought a federal civil rights action alleging that the county prosecutors and investigator responsible for his criminal conviction had destroyed exculpatory evidence, among other misconduct, and he sought damages from them.²⁹ The Supreme Court rejected his claim.³⁰ It began with the long-established proposition that a state prisoner cannot challenge the length or duration of custody under the civil rights statute, but instead must pursue a writ of habeas corpus after first exhausting any available state remedy.³¹ The Court went on to hold, in substance, that state prisoners cannot circumvent this process by

²⁷ *Id.* at 677-79.

²⁸ 512 U.S. 477 (1994).

²⁹ *Id.* at 478-80.

³⁰ *Id.* at 490.

³¹ *Id.* at 481 (citing *Preiser v. Rodriguez*, 411 U.S. 475 (1973)).

means of a civil action for damages or some other kind of relief. Specifically, it held that if a civil action “necessarily require[s] the plaintiff to prove the unlawfulness of his conviction or confinement,” the plaintiff must exhaust state remedies and proceed by habeas corpus regardless of the relief sought.³² Indeed, a Section 1983 claim in such a case does not even accrue until the criminal defendant’s conviction is overturned.³³

There are a number of exceptions and qualifications to that rule that are worth discussing. One of the most important, and at this point controversial, is the Supreme Court’s decision in *Spencer v. Kemna*,³⁴ decided a few years after *Heck*. If you review the *Spencer* decision with its several opinions and carefully count on your fingers, you will find that five Justices assent to the proposition that if a litigant cannot use federal habeas corpus to challenge a criminal conviction, that litigant is no longer bound by the habeas corpus exhaustion requirement.³⁵ The most common case in which a litigant cannot proceed in habeas corpus is likely to

³² *Id.* at 486.

³³ *Heck*, 512 U.S. at 489-90.

³⁴ 523 U.S. 1 (1998).

³⁵ *Id.* at 18-19, 21, 25 n.8.

be one in which the litigant was released unconditionally or his sentence expired before the petition and was, therefore, no longer “in custody,” a jurisdictional requirement of federal habeas corpus.³⁶ It is certainly most logical to excuse litigants from the exhaustion requirement when the passage of time has made compliance with it impossible, at least so long as the litigant has not unreasonably delayed filing. Nonetheless, there is a split among the circuits as to whether or not to adopt the *Spencer* gloss on the *Heck* rule.³⁷ That is not surprising since the *Spencer* exception does not appear in the majority opinion, but rather only in the plurality and concurring opinions.³⁸

Another concern is the litigation problem that results because the line *Heck* draws, while bright in the abstract, can

³⁶ *Maleng v. Cook*, 490 U.S. 488, 490-91 (1989). In *Spencer* itself, the petitioner was “in custody” because he had filed his petition while still incarcerated, but his release after a parole revocation mooted his petition since collateral consequences will not be presumed from a revocation of parole as they are after a criminal conviction. *Spencer*, 523 U.S. at 10-17.

³⁷ Compare *Huang v. Johnson*, 251 F.3d 65, 75 (2d Cir. 2001) (holding challenge to juvenile placement and detention was not barred by *Heck* where no habeas remedy was available because the plaintiff had been released), with *Randell v. Johnson*, 227 F.3d 300, 301 (5th Cir. 2000) (holding release does not excuse § 1983 plaintiff from obligation to exhaust, even if he can no longer do it), and *Figueroa v. Rivera*, 147 F.3d 77, 81 (1st Cir. 1998) (declining to follow the five-Justice consensus of *Spencer v. Kemna*).

³⁸ *Spencer*, 523 U.S. at 18-19, 21, 25 n.8.

present significant analytical problems in real litigation. *Heck* does not say that a person convicted of a crime cannot bring an action for damages, or any other type of action, connected to that crime. As noted, the *Heck* rule turns on whether a civil action “necessarily require[s] the plaintiff to prove the unlawfulness of his conviction or confinement. . . .”³⁹ An attorney needs to look very closely at what was actually presented and what was decided in the prior criminal action in order to determine whether his or her client’s subsequent civil rights action challenging the events connected with conviction *necessarily* implies its invalidity.

By way of example, consider that a criminal defendant convicted of a crime may well have been unconstitutionally beaten by the police during arrest. That defendant should be able to file a suit and demonstrate that he or she was unconstitutionally beaten in violation of the Fourth Amendment right to be free from unreasonable force regardless of the outcome of the criminal trial since there is no inconsistency between being guilty of a crime and being abused by the police.⁴⁰ Let us slice things a little thinner.

³⁹ *Heck*, 512 U.S. at 486.

⁴⁰ *Jackson v. Suffolk County Homicide Bureau*, 135 F.3d 254, 257 (2d Cir. 1998).

Suppose that the claim the criminal defendant wishes to assert in a federal civil rights action is closely related to the crime of which he was convicted; for example, an excessive force claim by someone convicted of resisting arrest. Does the conviction show that, as a matter of law, the defendant was not unconstitutionally beaten, for resisting arrest must mean that he was doing something to justify the police in the use of force?

Not necessarily. The court must closely examine the defense and prosecution evidence and theories of the case including, but not limited to, an examination of the trial transcript in some cases. If the criminal defendant went to trial in state court on the theory that he or she did not do anything and that the police came along and started banging on him or her, and nonetheless he or she was convicted of resisting arrest, then the *Heck* rule will probably preclude the defendant from bringing a damage suit about that alleged police beating, since success in that suit would necessarily show that the factual basis of the underlying criminal conviction was false. However, if the defendant's allegation was, "I fought the law but the law won," and that *after* the police finally subdued and restrained the resisting defendant, they stomped and

beat him or her, a conviction for resisting arrest is not at all inconsistent with a claim that the defendant was subsequently beaten in violation of the Fourth Amendment.⁴¹

The next Supreme Court case that implicated the holding in *Heck* is *Edwards v. Balisok*.⁴² Decided in 1997, this case considered the application of *Heck* in prison disciplinary proceedings. The Supreme Court had addressed this subject in 1973 in *Preiser v. Rodriguez*, which held that a state prisoner cannot obtain from a federal court the return of “good time” (time off for good behavior) taken in prison disciplinary proceedings except via habeas corpus after exhaustion of administrative remedies, since such a request is a challenge to the fact or duration of state custody.⁴³

Edwards addressed the question of whether a prisoner who has lost good time in a disciplinary proceeding can obtain other relief besides return of good time. The answer is no; a federal court may not entertain a proceeding that would “necessarily imply

⁴¹ See *Sanford v. Motts*, 258 F.3d 1117, 1120 (9th Cir. 2001) (holding that a claim of excessive force at a different time from the acts of resistance is not barred under *Heck* by a resisting arrest conviction).

⁴² 520 U.S. 641 (1997).

⁴³ 411 U.S. 475, 494 (1973).

the invalidity” of a proceeding in which good time was lost, regardless of the relief sought.⁴⁴ Consistently with the logic and holding of *Heck*, the convict must first bring an action in a state forum and have it resolved favorably, either administratively or judicially, or obtain a favorable decision via federal habeas corpus after state remedies have been exhausted.⁴⁵

A practitioner must be careful in applying the *Heck/Balisock* rule because there are some significant differences between criminal proceedings and prison disciplinary proceedings that affect their application. If a person convicted of a crime brings a federal civil rights action on the ground that, “I didn’t do it,” then the litigant has a problem under *Heck v. Humphrey* because the claim necessarily implies the invalidity of the conviction. However, if the litigant’s assertion is that he was convicted on a prison disciplinary defense and, “I didn’t do it, they made it up, they framed me, the officer lied,” then that claim does not imply the invalidity of the prison disciplinary proceeding because lying to obtain a prison disciplinary conviction does not

⁴⁴ *Edwards*, 520 U.S. at 646.

⁴⁵ *Id.* at 649.

violate the Constitution.

You may find that proposition startling, but the Second Circuit has held precisely that in *Freeman v. Rideout*,⁴⁶ consistently with every other circuit that has passed on the question.⁴⁷ Essentially, in prison disciplinary proceedings the convict is entitled to have state officials touch all of the procedural bases, and that is it. If the charges were trumped up intentionally by employees of the state for malicious purposes but the convict received a hearing and it met procedural standards, the convict is out of luck.

The importance of this point is that prisoners are not limited in the substantive allegations they may pursue in federal civil rights litigation by the findings and conclusions of prison disciplinary proceedings. An allegation that prison staff assaulted a prisoner does not “necessarily imply the invalidity” of a prison finding that the prisoner assaulted staff and was properly

⁴⁶ 808 F.2d 949 (2d Cir. 1986).

⁴⁷ See, e.g., *Sprouse v. Babcock*, 870 F.2d 450, 452 (8th Cir. 1989); *Hanrahan v. Lane*, 747 F.2d 1137, 1140-41 (7th Cir. 1984).

restrained, as long as the prisoner's suit does not seek to overturn the disciplinary proceeding.⁴⁸

I would now like to move on to a doctrine that is somewhat similar and somewhat dissimilar to the *Heck* doctrine. *Heck* and *Balisok* stand for the proposition that if a challenge is raised in federal court that “would necessarily imply the invalidity” of the state proceeding, then the plaintiff cannot pursue it while the result of the state proceeding stands. The notion of “necessarily imply[ing] the invalidity” of the prior state decision is analogous to notions of preclusion, res judicata, and collateral estoppel. In each instance, the question is whether there is an existing adjudication of the same issues that should bind a party that is trying to bring a new lawsuit.

There is a fundamental difference, however. The holdings in *Heck* and *Edwards* are directed to whether a federal civil proceeding is inconsistent in a legally significant sense with the result of a prior state proceeding that affects the fact or duration of state custody. Thus, the restrictions of the *Heck/Balisok* doctrine

⁴⁸ See, e.g., *Marquez v. Gutierrez*, 51 F. Supp. 2d 1020, 1023-25 (E.D. Cal. 1999), *rev'd on other grounds*, 322 F.3d 689 (9th Cir 2003) (holding excessive force claim not barred by disciplinary conviction).

operate only one way, from state proceedings to subsequent federal proceedings, and on a limited category of cases, namely those implicating criminal judgments, sentences, and administrative adjustments to custodial sentences. By contrast, preclusion doctrines may apply without regard to the existence of a penal sanction in the prior case and from federal to state cases as well as from state to federal ones. State to federal preclusion is both strengthened and limited by the Full Faith and Credit Statute,⁴⁹ which demands that the judgments of state forums be given the same preclusive effect in federal court that they would receive in the state's own courts.

The statutory command to look to state preclusion law is much more than formalism because there are significant variations among states. In Virginia, for example, it appears that the law affords no preclusive effect to a judgment in a state criminal proceeding in a subsequent civil proceeding.⁵⁰ Criminal to civil preclusion just does not exist, contrary to the law in many, perhaps

⁴⁹ 28 U.S.C. § 1738 (2000).

⁵⁰ See, e.g., *Selected Risks Ins. Co. v. Dean*, 355 S.E.2d 579, 579-81 (Va. 1987).

most, jurisdictions.⁵¹ Another kind of example arises in New York where judgments in Article 78 proceedings, which are a sort of expedited administrative proceeding in which a plaintiff generally cannot recover damages, are not deemed preclusive in a subsequent suit for damages.⁵² The Second Circuit has applied that body of law in Section 1983 actions, as it must.⁵³

Further, there is an exception to the Full Faith and Credit doctrine. It is a case law based exception which provides that regardless of what state law requires, a party must have had a full and fair opportunity in the state proceeding to litigate the issues that are now being contested in federal court, or preclusion will not apply.⁵⁴ While the Supreme Court has stated that courts need only look to minimal standards of due process to make a determination of whether or not a party had a full and fair opportunity to litigate,⁵⁵ the issue is a little more complicated than that.

⁵¹ See, e.g., *Allen v. McCurry*, 449 U.S. 90, 105 (1980) (holding that findings on a state suppression motion could collaterally estop the plaintiff in a subsequent § 1983 Fourth Amendment suit).

⁵² *Davidson v. Capuano*, 792 F.2d 275, 278-79 (2d Cir. 1986). But see *Giakoumelos v. Coughlin*, 88 F.3d 56, 60-61 (2d Cir. 1996) (giving preclusive effect to a legal determination made on undisputed facts in an Article 78 proceeding).

⁵³ *Davidson*, 792 F.2d at 278-79.

⁵⁴ *Kremer v. Chem. Constr. Co.*, 456 U.S. 461, 480-81 (1982).

⁵⁵ *Id.*

Consider this example: There are many federal court cases about whether there was probable cause to arrest somebody. Arrestees are entitled to a judicial determination of the existence of probable cause.⁵⁶ Would such a determination not be preclusive in federal court if it were preclusive under state law? Not necessarily. The reality of criminal practice in many states is that the probable cause hearing a suspect receives is not a plenary determination of probable cause made on a fully adversarial proceeding and record. Essentially, it is a proceeding in which the judge looks to see if the prosecution has a *prima facie* case, and the ability of the criminal defendant to put in evidence or even to cross-examine and otherwise test the evidence on which the prosecution relies is extremely limited. In those situations, federal courts may hold that the suspect did not have a sufficiently full and fair opportunity to litigate to preclude the suspect from pursuing a false arrest claim in federal court. Indeed, state law may limit preclusion under these circumstances, making it unnecessary for the federal court to reach the “full and fair opportunity” question.⁵⁷ Such considerations as

⁵⁶ *Gerstein*, 420 U.S. at 112-13.

⁵⁷ *Golino v. City of New Haven*, 950 F.2d 864, 869-70 (2d Cir. 1991).

restrictions on presenting evidence, a lack of discovery, and lack of time to prepare have also been applied to assess the fairness of other kinds of state proceedings for purposes of application of the preclusion rule.⁵⁸

Administrative agency findings may also be given preclusive effect if they would be treated as preclusive in the state's own courts, as long as the administrative agency acted in a judicial capacity, resolved disputed issues of fact, and afforded the parties an adequate opportunity to litigate the issues.⁵⁹ However, decisions made by certain types of administrative bodies are generally not considered to have preclusive effect. For example, prison disciplinary decisions are not given preclusive effect because no one seriously contends that such bodies are quasi-judicial,⁶⁰ and in any case the standard of due process

⁵⁸ See, e.g., *Lee v. Winston*, 717 F.2d 888, 895-96 (4th Cir. 1983) (holding inadequate notice and preparation time made state proceeding non-preclusive); *Sprecher v. Graber*, 716 F.2d 968, 972 (2d Cir. 1983) (holding lack of discovery and difference in burden of proof prevented summary subpoena enforcement proceeding from having preclusive effect).

⁵⁹ *Univ. of Tennessee v. Elliott*, 478 U.S. 788, 799 (1986).

⁶⁰ *Johnson v. Freeburn*, 144 F. Supp. 2d 817, 823 (E.D. Mich. 2001) (noting that a preclusion rule would result in pressure on hearing officers not to dismiss disciplinary charges); *Marquez v. Gutierrez*, 51 F. Supp. 2d 1020, 1027 (E.D. Cal. 1999) (noting state court's holding that a disciplinary hearing is not a "judicial-type adversary proceeding" and is not conducted by a "detached and neutral judicial officer acting in a judicial capacity"). The Supreme Court made

required of them is so compromised by concerns for prison security that it is doubtful whether they can ever provide a full and fair opportunity to litigate a constitutional claim.⁶¹ State law may

similar observations in holding that prison disciplinary hearing officers are entitled only to qualified immunity and not absolute quasi-judicial immunity:

We do not perceive the discipline committee's function as a "classic" adjudicatory one, as petitioners would describe it. . . . Surely, the members of the committee, unlike a federal or state judge, are not "independent"; to say that they are is to ignore reality. They are not professional hearing officers, as are administrative law judges. They are, instead, prison officials, albeit no longer of the rank and file, temporarily diverted from their usual duties. . . . They are employees of the Bureau of Prisons and they are the direct subordinates of the warden who reviews their decision. They work with the fellow employee who lodges the charge against the inmate upon whom they sit in judgment. The credibility determination they make is one between a co-worker and an inmate. They thus are under obvious pressure to resolve a disciplinary dispute in favor of the institution and their fellow employee. . . . It is the old situational problem of the relationship between the keeper and the kept, a relationship that hardly is conducive to a truly adjudicatory performance.

Cleavinger v. Saxner, 474 U.S. 193, 203-04 (1985).

⁶¹ *Johnson*, 144 F. Supp. 2d at 823 (noting that prisoners can be convicted at disciplinary hearings on hearsay from confidential informants). See *Colon v. Coughlin*, 58 F.3d 865, 869 (2d Cir. 1995) (questioning whether collateral estoppel is applicable in prison disciplinary hearings) (dictum). See generally *Wolff v. McDonnell*, 418 U.S. 539 (1974) (denying prisoners right of confrontation and cross-examination; holding the right to call witnesses and present documentary evidence limited by "institutional safety [and] correctional goals;" denying right to counsel). The Supreme Court cited similar considerations in denying federal prison disciplinary hearing officers absolute immunity:

The prisoner was to be afforded neither a lawyer nor an independent nonstaff representative. There was no right to compel the attendance of witnesses or to cross-examine. There was no right to discovery. There was no cognizable burden of proof. No verbatim transcript was afforded. Information presented often was hearsay or self-serving. The committee members were not truly independent. In sum, the

also explicitly make these determinations non-preclusive.⁶² Police review boards, many of which are often explicitly investigatory rather than judicial in nature, present similar questions as to their preclusivity.⁶³

I would like to turn now to questions of standing. This is probably the biggest, most serious and complicated issue that

members had no identification with the judicial process of the kind and depth that has occasioned absolute immunity.

Cleavinger, 474 U.S. at 206.

⁶² *Johnson*, 144 F. Supp. 2d at 823; *Marquez*, 51 F. Supp. 2d at 1027.

⁶³ Two cases involving Chicago police employees are informative. In *Banks v. Chicago Hous. Auth.*, 13 F. Supp. 2d 793 (N.D. Ill. 1998), the employee was discharged for misconduct after a hearing before the Chicago Police Board. The court held that the Board acted in a judicial capacity because the proceeding:

entail[ed] the essential elements of an adjudication . . . includ[ing] (1) adequate notice; (2) a right to present evidence on one's own behalf, and to rebut evidence presented by the opposition; (3) a formulation of issues of law and fact; (4) a final decision; and (5) the procedural elements to determine conclusively the issues in question.

Id. at 796.

By contrast, in *Cosey v. City of Chicago*, 33 F. Supp. 2d 714 (N.D. Ill. 1999), the police employee received a hearing before the Complaint Review Panel, apparently because a lesser sanction had been sought than in *Banks*. The court held that this body was not judicial and lacked procedural safeguards required for its findings to be preclusive:

The Complaint Review Panel is an investigatory body with advisory powers only. The Panel does not provide the accused with an opportunity to examine or cross-examine witnesses or to present memoranda of law. The Panel also has no power to subpoena witnesses. Because the Panel has no adjudicatory powers, it is not authorized to reach final findings of fact and conclusions of law. Rather, the Panel is limited to making recommendations to the Superintendent of Police. The Superintendent can accept, reject or modify the Panel's recommendation.

Id. at 719.

attorneys who practice in the area of injunctive litigation against the criminal justice system face. The basic requirements of standing are very familiar. The plaintiff must have a personal injury or threat of injury; the injury has to be fairly traceable to the challenged action; and the injury has to be likely to be redressed by the relief sought.⁶⁴ The context for most of these standing arguments in criminal justice litigation is set by the Supreme Court's decision in *City of Los Angeles v. Lyons*.⁶⁵ In *Lyons*, the Supreme Court held that a person who alleged that he had been choked by the police for no apparent reason lacked standing to seek injunctive relief, though he could seek damages, against the police officers' use of chokeholds because there was no showing of likelihood that he would again be subjected to that practice.⁶⁶

Lyons represented the first occasion that the Supreme Court analyzed standing separately for injunctive relief and for damages.

⁶⁴ *Comer v. Cisneros*, 37 F.3d 775, 787 (2d Cir. 1994) (citing N.E. Florida Chapter of the Assoc. Gen. Contractors of Am. v. City of Jacksonville, 508 U.S. 656, 663-64 (1993); *Valley Forge Christian Coll. v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982); *AMSAT Cable v. Cablevision of Connecticut*, 6 F.3d 867, 873 (2d Cir. 1993); *Heldman v. Sobol*, 962 F.2d 148, 154 (2d Cir. 1992); *Lamont v. Woods*, 948 F.2d 825, 829 (2d Cir. 1991)).

⁶⁵ 461 U.S. 95 (1983).

⁶⁶ *Id.* at 105-06.

It stated that in order to show a sufficient likelihood of recurrence, the plaintiff would have to make the “incredible assertion” that either all of the police officers from Los Angeles always choke any citizen whom they attempt to apprehend or encounter, or that the City ordered or authorized police officers to act in such a manner.⁶⁷

This decision was viewed as a near fatal blow to civil rights litigation at the time that it was issued and was characterized as establishing a test that no plaintiff could ever meet.⁶⁸ In fact, matters have not really worked out that way. Many of the critics of the decision paid insufficient attention to the Court’s statement that the plaintiff could prevail by proving that the City had ordered or authorized police officers to act in the manner in which they did.⁶⁹

There is also a semantic issue in *Lyons*. Although the Supreme Court framed its holding in terms of likelihood of

⁶⁷ *Id.*

⁶⁸ Justice Marshall’s dissenting opinion, which is representative of much of the reaction to *Lyons* from the civil rights community, stated:

The Court’s decision removes an entire class of constitutional violations from the equitable powers of a federal court. It immunizes from prospective equitable relief any policy that authorizes persistent deprivations of constitutional rights as long as no individual can establish with substantial certainty that he will be injured or injured again, in the future.

Id. at 137 (Marshall, J., dissenting).

⁶⁹ *Id.* at 106.

recurrence, which is an idea that we tend to think of in quantitative terms (e.g., a forty percent chance of rain rising to eighty percent by nightfall), the way this issue of likelihood of recurrence has been treated is more qualitative than quantitative. A close look at *Lyons*, the cases on which it relies, and its progeny suggests that what is really going on is not so much a discussion about likelihood in any kind of literal sense, much less a quantitative sense, but a discussion of whether or not the controversy between the plaintiff and the defendant is sufficiently well-defined for the courts to be able to deal effectively with it given the nature of the judicial process and the role of the courts.

The Supreme Court has, in some of its other standing cases, expressed a concern that the courts should not be entertaining “generalized grievances” that are “pervasively shared and most appropriately addressed in the representative branches.”⁷⁰ In *Lyons*, the Court stated, “[a]bsent a sufficient likelihood that he will again be wronged in a similar way, Lyons is no more entitled to an injunction than any other citizen”⁷¹ “[N]o more entitled

⁷⁰ *Valley Forge*, 454 U.S. at 474-75 (quoting *Warth v. Seldin*, 422 U.S. 490, 499 (1975)).

⁷¹ *Lyons*, 461 U.S. at 111.

than any other citizen” is really the key phrase, and it suggests that the Court is concerned about litigation usurping the functions of the executive and legislative bodies. Though the case’s main holding is stated in terms of the likelihood of recurrence, actual probability is really not the central concern.

In the years since *Lyons*, the courts have been faced repeatedly with difficult questions of standing in litigation challenging police misconduct, in particular the numerous recent cases alleging racial profiling – i.e., discriminatory police conduct directed towards persons who are “driving while black,” “walking while black,” “breathing while black,” and so on. Courts have weighed several factors in making these standing determinations. First, they have given great emphasis to the language in *Lyons* stating that the plaintiff could have prevailed if he had shown that the conduct he complained of was ordered or authorized.⁷² The *Lyons* opinion makes it clear that the question whether or not there was a municipal policy that authorized what happened to Mr. Lyons was actually litigated, and Mr. Lyons lost. The district court

⁷² *Id.* at 106.

found that there was no policy, and the Supreme Court stated that particular issue was not before it on *certiorari*, and so it assumed that there was no policy.⁷³ A great deal of what the Court determined in *Lyons* is based on that premise. Many of the lower courts have taken the position that if a plaintiff can demonstrate that there is an administrative policy underlying the challenged conflict, then the plaintiff has essentially overcome the *Lyons* standing requirement.⁷⁴

These decisions reflect the considerable elaboration since *Lyons* of the holding in *Monell v. Department of Social Services*⁷⁵ concerning policy based municipal liability. Many of these cases involve concepts and ways of pleading and proving policy that really scarcely existed at the time *Lyons* was decided but which now are part of the standard toolkit of plaintiffs' lawyers in civil

⁷³ *Id.* at 110. See *INS v. Delgado*, 466 U.S. 210, 217 n.4 (1984) (holding that persons subject to an ongoing law enforcement policy have standing to challenge the policy).

⁷⁴ See *DeShawn E. v. Safir*, 156 F.3d 340, 344-45 (2d Cir. 1998); *Church v. City of Huntsville*, 30 F.3d 1332, 1338-39 (11th Cir. 1994); *Thomas v. County of Los Angeles*, 978 F.2d 504, 507-08 (9th Cir. 1993); *Roe v. City of New York*, 151 F. Supp. 2d 495, 503-04 (S.D.N.Y. 2001); *Nat'l Cong. for Puerto Rican Rights v. City of New York*, 75 F. Supp. 2d 154, 161 (S.D.N.Y. 1999).

⁷⁵ 436 U.S. 658, 694 (1978) (holding that a "local government may not be sued under § 1983 for an injury inflicted solely by its employees or agents;" however, the "government as an entity is responsible under § 1983" for injuries inflicted through the "execution of a government's policy or custom").

rights cases. As matters now stand, once the plaintiff can demonstrate the existence of a policy, there tends not to be any further inquiry about the likelihood of recurrence. In effect, if not explicitly, the courts treat a showing of a policy as the equivalent of a showing of likelihood of recurrence. If a plaintiff sufficiently alleges the existence of a policy and alleges that the plaintiff is within what might be described as the target zone of that policy, arguably the plaintiff has met the concerns that the Supreme Court expressed in *Lyons* using the phrase “likelihood of recurrence.”⁷⁶

If you step back from *Lyons*, a case about police practice, and look at cases addressing standing to challenge a statute (a statute being, of course, the most authoritative and definite kind of policy), you will see that the way I have just characterized the analysis is quite consistent with those decisions. In order to engage in a pre-enforcement challenge to a criminal statute, the Supreme Court has held that the plaintiff must show a genuine or credible threat of enforcement.⁷⁷ That generally means that if a person is potentially subject to prosecution under the statute

⁷⁶ *Lyons*, 461 U.S. at 107 n.8.

⁷⁷ *Ellis v. Dyson*, 421 U.S. 426, 434-35 (1975).

because the person intends to do something that he or she has a constitutional right to do and the statute prohibits it, then that is a sufficient showing of risk. As the Court phrased it in *Babbitt v. United Farm Workers National Union*, standing is established if the plaintiff's fear of prosecution is "not imaginary or wholly speculative."⁷⁸

Another reason that courts have cited in holding *Lyons* inapplicable to attempts to seek injunctions against criminal justice agencies and police forces is that the challenged practice, whether asserted as a policy or not, seeks to target an identifiable subgroup, for example, the homeless,⁷⁹ or the residents of a particular, mostly minority neighborhood,⁸⁰ or participants in state authorized needle exchange programs in known drug areas.⁸¹ When a practice is focused on a small number or a well-defined group of people, it does not present the concern evident in *Lyons* that the plaintiff's claim for injunctive relief is no different from any other citizen's claim for that relief, and at best, he or she has a "generalized

⁷⁸ 442 U.S. 289, 298 (1979). *Accord, Younger*, 401 U.S. at 42. *See also* *United States v. Loy*, 237 F.3d 251, 259-61 (3d Cir. 2001).

⁷⁹ *Church*, 30 F.3d at 1338-39.

⁸⁰ *Thomas*, 978 F.2d at 507-08.

⁸¹ *Roe*, 151 F. Supp. 2d at 503.

grievance” better addressed by the other branches of the government.

Another issue that courts have considered in *Lyons* controversies is whether or not the application of the challenged practice depends on the plaintiff’s engaging in some future violation of the law. Mr. Lyons alleged that he committed a traffic violation, was stopped for the violation, and then was choked while the police were dealing with his traffic violation and issuing him a ticket. The Supreme Court noted that for this scenario to recur, he was going to have to violate the law again.⁸² There is an understandable policy-based reluctance to allow standing to challenge government practice to be based on the assertion, either direct or indirect, that an offender is going to violate the law again.

The converse of this concern is that when the application of the challenged practice does not depend on the plaintiff’s further violations of the law, the claim may be outside the concern expressed in *Lyons*. This is clearly the scenario in cases of racial profiling, where the plaintiff’s allegation is that he is subjected to

⁸² *Lyons*, 461 U.S. at 102-03, 108.

police coercion based on no wrongful behavior on his part.⁸³ The Eleventh Circuit has applied a variation of this reasoning to people who were mentally ill in *Lynch v. Baxley*, where the allegation was not that the particular policy related to the incarceration of mentally ill people was being applied to innocent people, but that it was being applied to people who, by hypothesis, were not able to conform their conduct to the requirements of the law, and therefore were not responsible for their conduct and for decisions to violate the law, as Mr. Lyons was presumed to be.⁸⁴

This last cited factor has particular application in prison and parole litigation, given the nature of the regimes of supervision involved. That is, you can be arrested, you can be charged, you can be locked up, you can be thrown in the hole, or worse, for many things that do not violate the criminal law, but that violate the much more restrictive rules of conduct that apply in institutions or the restrictive rules of parole.⁸⁵

⁸³ See, e.g., *Nat'l Cong.*, 75 F. Supp. 2d at 161 (noting allegation that "plaintiffs were stopped while engaging in everyday tasks").

⁸⁴ 744 F.2d 1452, 1457 (11th Cir. 1984).

⁸⁵ *Armstrong v. Davis*, 275 F.3d 849, 881 (9th Cir. 2001) (Berzon, J. concurring).

Moreover, prison life and parole supervision are by nature vastly different from the life of a free citizen. In *Rizzo v. Goode*, the Supreme Court suggested a lack of standing in a police case, noting that the alleged misconduct was taking place “at large in a city of three million inhabitants, with 7,500 policemen.”⁸⁶ The treatment of prisoners at the hands of prison staff by definition does not occur “at large” in a city of three million people, and it does not involve many thousands of police officers. It occurs in a very narrow and restrictive setting. Furthermore, the setting is one where the encounter with law enforcement is not intermittent; it is not unpredictable; and it is not occasional. It is continuous and unavoidable. Prisoners are under rigorous supervision by people whose job it is at all times to impose on them a kind of surveillance and discipline that none of us are subjected to,⁸⁷ except possibly when we are in court in front of a judge.

The conceptualization of the relevant rights is also different in prison litigation. The Supreme Court has recognized that

⁸⁶ 423 U.S. 362, 373 (1976).

⁸⁷ See *Smith v. Zachary*, 255 F.3d 446, 450 (7th Cir. 2001) (noting that harassment by prison staff is “made possible by the correctional environment”). See also *Armstrong*, 257 F.3d at 881 (Berzon, J. concurring) (citing “the fact of

imprisonment so restricts liberty that prisoners must rely on government to protect their safety and has held that their substantive rights are violated by unreasonable risks to their future health and safety, even if it is impossible to predict which prisoners will be harmed or will inflict the harm.⁸⁸ In other words, it is exposure to the risk of harm, and not necessarily the actual occurrence of the harm, that is unconstitutional when the government disables persons by incarcerating them. This point is sharpened by the Court's citation as examples of actionable "threats to personal safety" the existence of "exposed electrical wiring, deficient firefighting measures, and the mingling of inmates with serious contagious diseases with other prison inmates."⁸⁹ Thus, prisoners' allegations of a pattern of assault by staff, or assault by other prisoners resulting from a failure to

mandatory ongoing interactions with law enforcement officials" as a factor supporting standing to challenge parole practice).

⁸⁸ *Farmer v. Brennan*, 511 U.S. 825, 843-44 (1994) (holding that it is irrelevant whether the risk of inmate on inmate assault stems from one or numerous sources, "any more than it matters whether a prisoner faces an excessive risk of attack for reasons personal to him or because all prisoners in his situation face such a risk," and that prisoners at risk need not await assault before seeking relief); *Helling v. McKinney*, 509 U.S. 25, 35 (1993) (holding that prisoners may seek relief against unsafe conditions that "pose an unreasonable risk of serious damage to [a prisoner's] future health," even if the damage has not yet occurred and the condition may not affect every prisoner exposed to it).

⁸⁹ *Helling*, 509 U.S. at 34.

supervise, or dangers resulting from the environment or structure of the prison present fundamentally different legal issues from cases like *Lyons* or *Rizzo*.

We will find out what other courts think about this in the not too distant future. My office has filed a case challenging excessive use of force in those New York City jails where we have not already prevailed on this issue.⁹⁰ The class certification motion is presently pending before Judge Chin. For the first time, the City has raised the claim in opposition to class certification that the named plaintiffs have no right to seek relief because they cannot demonstrate that they are going to be beaten again at any ascertainable time or place. In all of our prior use of force litigation, the City consented to class certification.⁹¹ The City's new litigation position simply illustrates that the assertion of

⁹⁰ *Ingles v. Toro*, 01 Civ. 8279 (S.D.N.Y.), amended complaint filed Sept. 6, 2002.

⁹¹ See e.g., *Sheppard v. Phoenix*, 210 F. Supp. 2d 450, 451 (S.D.N.Y. 2002) (terminating consent decree addressing excessive force in Rikers Island Central Punitive Segregation Unit on the ground that it had solved the problem); *Jackson v. Montemagno*, No. 85 Civ. 2384 (AS), Order Approving Stipulation for Entry of Judgment (S.D.N.Y., Nov. 26, 1991) (entering consent judgment to control excessive force in Brooklyn House of Detention); *Reynolds v. Ward*, No. 81 Civ. 101 (PNL), Order and Consent Judgment ¶¶ 42-48 (S.D.N.Y. Oct. 1, 1990) (adopting consent judgment with measures to control excessive force in jail hospital wards).

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standing barriers reflects political issues as well as legal ones, and I leave you to draw your own conclusions on that subject.⁹²

⁹² The motion under discussion was subsequently decided in plaintiff's favor, with Judge Chin rejecting the *Lyons* argument as applied to a jail excessive force claim for substantially the reasons stated above. *Ingles v. City of New York*, 01 Civ. 8279, 2003 WL 402565, at * 8-9 (S.D.N.Y., Feb. 20, 2003).

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