

VOL 28 ISS 1 ART 3 | VII | INJUNCTIVE RELIEF: AN EXCEPTION TO JUDICIAL IMMUNITY

It has been accepted in the circuits, and implied by the Supreme Court,¹²⁴ that judicial immunity is limited to damages and does not extend to injunctive relief. *Littleton v. Berbling*,¹²⁵ a leading case from the Seventh Circuit, so held where class discrimination based on race was alleged in connection with the application of the criminal laws. It relied primarily on two decisions, also involving class discrimination based on race, which found that judicial immunity extended only to immunity from damages.¹²⁶ However, the injunctive relief exception is apparently not limited to class discrimination cases. The Second Circuit, in a case which involved plaintiff's attempt to enjoin disciplinary proceedings instituted against him by the judges of the Appellate Division of New York, has stated: "[N]o sound reason exists for holding that federal courts should not have the power to issue injunctive relief against the commission of acts in violation of a plaintiff's civil rights by state judges acting in their official capacity."¹²⁷ The Fourth Circuit has more recently taken a similar position.¹²⁸

Despite this general acceptance of an injunctive relief exception,¹²⁹ concern has been expressed about interfering with the exercise of state judicial discretion. As stated by Judge Dillion, dissenting in *Littleton*:

[In the cases .. .in which this [exception] has been applied, the equitable relief granted has invariably been in the form of a prohibitory injunction, confining such officials to the limits of their legal authority. There is a great difference between ordering an official not to do a particular act, measurable by objective standards, and in ordering him to exercise his discretion in a certain general way, measurable only by subjective standards.¹³⁰

The Fifth Circuit has expressed a similar note of caution in a case where the plaintiff in effect was asking the federal court to hold the decision of a state appellate court to be unconstitutional. While it ended up relying on collateral estoppel, the court did observe that the plaintiff's "requested relief would directly and irrebutably interfere with a discretionary judicial function."¹³¹ However, the concern reflected in such cases is not with the threat to judicial independence stemming from unhappy litigants, as it is in cases involving actions for damages. The concern is rather with the sensitive



relationship between state and federal courts when the latter attempt to regulate state judicial conduct. Indeed, the Supreme Court raised this federalism and comity concern in connection with injunctive relief directed against judges and prosecutors who were allegedly enforcing the criminal laws in a racially discriminatory way.¹³²

The injunctive relief exception to judicial immunity seems to be the equivalent of a bifurcated approach to the meaning of "person" under section 1983; that is, a judge, because he is absolutely immune, is treated as if he were not a "person" for damages purposes, but is treated as a "person" for injunctive relief purposes. Despite the difficulty in another context with such a bifurcated approach,¹³³ there is no such difficulty here. The Court would use the *Ex parte Young*¹³⁴ fiction and consider the judge being sued for injunctive relief as an individual stripped of his official functions and thus as a "person" for 1983 purposes. Furthermore, applying judicial immunity to a judge does not mean that he is not a "person," but only that he is a "person" who is absolutely immune from liability for damages and not from injunctive relief.

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Footnotes

¹²⁴. *O'Shea v. Littleton*, 414 U.S. 488, 499 (1974). The Court implied that if there is a showing of irreparable injury which is both great and immediate there is the possibility that injunctive relief will issue. It is clear that the Supreme Court is reluctant to permit federal equitable intervention in proceedings involving state officials. See generally A GUIDE TO SECTION 1983 chapter 5.

¹²⁵. 468 F.2d 389 (7th Cir. 1972), rev'd on other grounds sub. nom. *O'Shea v. Littleton*, 414 U.S. 488 (1974).

¹²⁶. *United States v. Clark*, 249 F. Supp. 720, 722 (S.D. Ala. 1965) (three judge court) and *United States v. McLeod*, 385 F.2d 734, 738 n.3 (5th Cir. 1967).

¹²⁷. *Erdmann v. Stevens*, 458 F.2d 1205, 1208 (2d Cir. 1972), cert. denied, 409 U.S. 889 (1972). See also *Law Students Civil Rights Research Council, Inc. v. Wadmond*, 299 F. Supp. 117, 123 (S.D.N.Y. 1969) (three judge court), aff'd, 401 U.S. 154 (1971).

¹²⁸. *Timmerman v. Brown*, 528 F.2d 811 (4th Cir. 1975). See also *Fowler v. Alexander*, 478 F.2d 694 (4th Cir. 1973) which relied on *Littleton*. Id. at 696. Fowler did not involve class discrimination.



¹²⁹. See *Shipp v. Todd*, 568 F.2d 133 (9th Cir. 1978), in which the court held that while a court clerk acting pursuant to judicial direction was absolutely immune from liability for damages, he was not immune from injunctive relief ordering him to expunge the plaintiff's state criminal conviction.

¹³⁰. *Littleton v. Berbling*, 468 F.2d 389, 415 (7th Cir. 1972), rev'd sub. nom. *O'Shea v. Littleton*, 414 U.S. 488 (1974).

¹³¹. *Cheramie v. Tucker*, 493 F.2d 586, 588 (5th Cir. 1974), cert. denied, 419 U.S. 868 (1974).

¹³². *O'Shea v. Littleton*, 414 U.S. 488, 499-502 (1974). This was the second ground used in reversing the Seventh Circuit. See note 125 and accompanying text *supra*. The first ground was the absence of a case or controversy.

Federalism and comity concepts are beyond the scope of this Article. These concepts are however, of considerable significance in cases involving attempts by 1983 plaintiffs to secure declaratory or injunctive relief in connection with the constitutionality of state statutes involved in pending state criminal proceedings. See *Younger v. Harris*, 401 U.S. 37 (1971) and its numerous progeny. So-called "Younger abstention" is discussed briefly in C. WRIGHT, LAW OF FEDERAL COURTS 229-36 (3d ed. 1976). See generally A GUIDE TO SECTION 1983 chapter 5.

¹³³. *City of Kenosha v. Bruno*, 412 U.S. 507 (1973), which rejected a similar approach for municipalities, appears to undercut the rationale of the foregoing cases. In holding that municipalities are not "persons" for section 1983 purposes regardless of the relief sought, the Court stated that a bifurcated approach to the meaning of "person" was without support. *Id.* at 513. However, this has all been changed since *Monell v. Department of Soc. Serv.*, 98 S. Ct. 2018, 2041 (1978), which held that cities and counties are "persons" for 1983 damages purposes. See n.2 *supra*. Such "persons" can also now be sued for injunctive relief.

¹³⁴. 209 U.S. 123 (1908).