I. INTRODUCTION

I have enforced nondiscrimination statutes as an attorney for the United States Department of Justice \[\text{[FN1]}\] and, as a private attorney, I have requested that a federal agency enforce a nondiscrimination statute by filing a case on behalf of my client. \[\text{[FN2]}\] In both capacities, I have been frustrated with prosecutorial decisions that were inconsistent with the underlying statute and that had widespread impact on disadvantaged groups in society. I have also witnessed the importance of agency discretion in determining which civil rights violations to prosecute. This Essay emerges from these dual experiences. It considers the proper *878 scope of judicial review of administrative agency prosecutorial decisions.

A great deal has been written about the related topics of discretionary and informal decisionmaking. \[\text{[FN3]}\] In general, commentators agree that such decisionmaking can be an area of abuse—political, racial, sexist, or class biases can become a part of discretionary decisionmaking. \[\text{[FN4]}\] Much of the research into the problems with discretionary, informal decisionmaking has focused on the comparative advantages of formal litigation over alternative dispute resolution. \[\text{[FN5]}\] Some of this research suggests that, although alternative dispute resolution offers the advantages of speed, lower costs, and efficiency, the lack of formality can result in serious problems of abuse. \[\text{[FN6]}\]

Problems of abuse do not arise only in the alternative dispute resolution setting, however. Another possibly abuse-laden *879 setting, which has received far less scholarly attention, is administrative agency prosecutorial decisionmaking. \[\text{[FN7]}\] Administrative agencies have broad discretion to determine which cases to prosecute. Often they have the sole authority for the enforcement of particular statutes. Thus, their decisions can have widespread impact on how these statutes are enforced.

On the positive side, prosecutorial discretion in the administrative process can further individualized justice. For example, Kenneth Culp Davis has explained: 'Rules without discretion cannot fully take into account the need for tailoring results to unique facts and circumstances of particular cases. The justification for discretion is often the need for individualized justice. This is so in the judicial process as well as in the administrative process.' \[\text{[FN8]}\] Some judges have argued that prosecutorial discretion furthers aggressive and effective law enforcement, especially when decisions must be made about controversial issues. \[\text{[FN9]}\]

*880 On the negative side, when biases enter the decisionmaking process, the flexibility of prosecutorial discretion may hamper parties from obtaining individualized justice. \[\text{[FN10]}\] The biases have become more pronounced in recent years, as the process of prosecutorial decisionmaking has become increasingly politicized. As administrative agencies become more sensitive to political considerations, their exercise of discretion is more likely to be in response to these concerns, rather than to the facts and law of the specific cases. Two recent examples in the administrative law area highlight this problem and show the potential for abuse and the need for increased review of prosecutorial decisions, especially when highly controversial and difficult legal issues are involved. The first example concerns the Justice Department's attempt to eliminate race- or sex-
conscious goals or quotas from fifty-one consent decrees or court orders, arguing that those goals and quotas were unlawful or unconstitutional. [FN11] Because no procedure for direct review of this Justice Department policy existed, civil rights advocates had to seek intervention into the Justice Department enforcement proceedings to challenge the government’s policy on a case by case basis. [FN12] The second example concerns the Justice Department’s policy under Attorney General Meese not to prosecute AIDS-related complaints of discrimination under section 504 of the Rehabilitation Act of 1973. [FN13] Because of the strong presumption against reviewing decisions not to prosecute, it would be very difficult to challenge this enforcement policy. [FN14]

*881 These examples pose difficult problems. In each case, the government enforcement policies had widespread effects on disadvantaged groups within society and were arguably inconsistent with the statutes for which the Justice Department has enforcement authority. [FN15] Moreover, inappropriate political considerations appear to have motivated the decisions. [FN16] However, only very limited means exist for challenging these prosecutorial decisions. The enforcement policies could conceivably be challenged on a case basis in suits for injunctive relief or mandamus [FN17] as the government implemented its enforcement (or lack of enforcement) policy. Alternatively, as I propose in this Essay, the validity of these policies should be able to be challenged under the Administrative Procedure Act. [FN18]

I argue that increased judicial review of discretionary decisionmaking is needed to limit the opportunity for harmful decisions that may result from the exercise of discretion. At the same time, this review should not unduly impede the benefits that may be achieved through the exercise of discretion. [FN19] My general argument that the judicial process should seek to promote *882 fairness in discretionary decisionmaking is not very controversial. The adversarial process generally tries to attain that ideal. [FN20] Nevertheless, the judicial process is often ineffective at monitoring prosecutorial discretion because it fails to recognize the problems underlying that discretion. [FN21]

In this Essay, I will examine the case law on federal judicial review of prosecutorial decisions in two different settings: Federal administrative agency prosecutorial decisions and state prosecutorial decisions. Although my primary concern is how to improve federal review of federal agency prosecutorial decisions, I have chosen to examine federal review of state prosecutorial decisions for comparative purposes. The judicial standard for federal review of state prosecutorial decisions is well developed and reflects a somewhat more satisfactory response to the problem of reviewing prosecutorial decisions. Therefore, after examining some of the problems with the existing standards for federal review of federal administrative agency prosecutorial decisions, I turn to the case law involving federal review of state prosecutorial decisions for guidance in developing a more appropriate standard of review.

My survey of the case law on federal review of federal agency prosecutorial decisions reveals two basic problems. First, judicial review of federal agency prosecutorial decisionmaking is more limited when prosecutors decide not to prosecute than when they decide to prosecute. However, judicial review is generally needed more when prosecutors decide not to prosecute because such a decision can seriously undermine Congress’ statutory mandate. Second, federal judicial review of federal decisionmaking has become more limited than federal review of state decisionmaking. This trend should be reversed; federal review of federal decisionmaking should be at least as broad as federal review of state decisionmaking because problems of federalism *883 do not exist in reviewing federal decisions. [FN22]

In general, I suggest that the courts use three factors to determine whether to review administrative prosecutorial decisionmaking: [FN23] Whether other forms of judicial review are available; whether the prosecutorial decision is likely to cause substantial hardship; and whether the prosecutorial decision is inconsistent with the underlying statute. [FN24] These factors are drawn from the case law involving federal review of state prosecutorial decisions but are flexible enough to deal with some of the problems of abuse that the case law is not satisfactorily addressing. These factors are most likely to be
present when a federal agency has systematically failed to bring prosecutions to enforce a statute for which it has exclusive
enforcement authority, such as in the AIDS example.

II. FEDERAL REVIEW OF FEDERAL AGENCY PROSECUTORIAL DECISIONS

Federal review of federal agency decisionmaking proceeds under the rules set forth in the Administrative Procedure Act
(APA). Although the APA presumes the availability of judicial review of agency action, that presumption does not apply to review of prosecutorial decisions. To understand the courts’ decisions in this area, it is helpful to have a basic
knowledge of the numerous, and sometimes conflicting, statutory requirements within the APA that apply to this area.

A. Final Agency Action and the Substantial Hardship Requirement

In order to bring an action under the APA, a plaintiff must demonstrate that the challenged action is a 'final agency action.' The courts have interpreted the final agency action requirement to include the subrequirement that substantial hardship will result if the court withholds consideration.

In F.T.C. v. Standard Oil Co., the Supreme Court concluded that the agency's decision to commence a prosecution before an administrative law judge was agency action, but not final agency action. One reason the Court declined to intervene was that it did not consider the party's hardship in defending a lawsuit to constitute substantial hardship. The Court stated, 'We do not doubt that the burden of defending this proceeding will be substantial. But 'the expense and annoyance of litigation is 'part of the social burden of living under government.' Thus, in a case challenging an agency decision to prosecute, the plaintiff would have to overcome a strong presumption that the challenged action did not constitute final agency action because of the perceived lack of substantial hardship.

The problem with this presumption is that it does not reflect the impact that a prosecuted institution may feel by the filing of a lawsuit. Although Standard Oil may not have faced substantial hardship in not being able to pursue an administrative law challenge, other institutions may face substantial hardship through the denial of administrative review. An example can clarify the scope of this potential hardship.

In 1984, the United States Supreme Court held in Firefighters Local Union No. 1784 v. Stotts that a district court did not have the power to modify the layoff provisions of the city's contract with its firefighters in order to maintain a certain number of black firefighters within the fire department. Although the Court used some broad language suggesting that racial goals and quotas would never be permissible, that issue was not before the Court and was not approved by a majority of its members.

At the time of the Stotts decision, the Justice Department was monitoring the enforcement of more than fifty cases throughout the country in which state or local governments had agreed to or had been ordered by a court to adopt race-or sex-conscious goals or quotas in employment decisions for remedial purposes. The Department adopted a broad interpretation of the Stotts decision, arguing that the goals or quotas in the orders and decrees were unconstitutional or unlawful. The Department therefore requested its attorneys to seek to have each of those decrees or orders modified to eliminate the goals or quotas. If voluntary cooperation could not be achieved, attorneys were requested to seek court modification of those decrees or orders.

The Justice Department sent letters to fifty-one jurisdictions seeking voluntary modification of existing decrees or orders. Because few jurisdictions were willing to cooperate, the Department instituted litigation. The First, Third, and Sixth Circuits soon rebuffed the Justice Department's efforts, finding that the existing goals and quotas were lawful and
constitutional. [FN37] Not one circuit court agreed with the Department's position that the orders or decrees needed to be modified. After three circuit courts had rejected the Department's arguments, the NAACP sought direct judicial review under the APA of the Department's enforcement policy.

In NAACP v. Meese, [FN38] the NAACP sought review under the APA because of its concern that local governments would not vigorously defend against the Justice Department's actions. Few of the local governments involved had substantial resources for litigation. In addition, these governments did not necessarily have an interest in opposing the Justice Department's position. The consent decrees or court orders had been entered because the affected state or local governments had allegedly committed unlawful acts of employment discrimination. These governments had initially opposed the imposition of goals and quotas, while the Justice Department had insisted on the imposition of such devices. Thus, the Justice Department's position in seeking modification—that goals and quotas should not be permitted—was consistent with the state and local government's original position in the cases. It was unrealistic to expect many state and local governments to argue strenuously for the continuation of goals and quotas, given their original positions in these cases. Hence, it was possible that the Justice Department would go unopposed in its attempts to effect major changes in consent decrees that it had initially sought and that affected a large number of people.

The district court apparently recognized this problem but thought that it could be solved by the intervention of the NAACP or other similarly situated parties in these lawsuits on a case by case basis. [FN39] Nevertheless, the court recognized that intervention might not always happen, because in at least one instance, 'individual blacks were not permitted to participate in the modification procedure because they were not parties to the *887 original decree.' [FN40]

Even if the NAACP or another organization were permitted to intervene in each of the fifty-one cases that challenged existing goals and quotas, intervention would not be the best way to have those issues resolved. It is very expensive to intervene in fifty-one similar lawsuits. A centralized lawsuit to resolve the issue once is a better use of judicial and private resources. In most of these cases, the Justice Department's position was untenable because the circuit court had already ruled against the Government. At that point, the district court did not have the discretion to agree with the Justice Department no matter what it thought was ultimately correct. [FN41] Thus, from the point of view of the plaintiff, the courts, and the public as a whole, an across-the-board challenge to the legality of a policy seems superior to isolated, case by case lawsuits. In finding that the plaintiffs did not meet the Standard Oil substantial hardship test, the court failed to recognize that the public interest would be served best by the centralized determination of these issues in one lawsuit under the APA rather than through fifty-one separate law suits. [FN42]

Because the district court in NAACP v. Meese refused to review the Department's enforcement actions, [FN43] civil rights *888 groups tried to change the enforcement policy through political pressure on the Attorney General. They used budget hearings and confirmation hearings to make their charges of frivolous litigation. [FN44] Ultimately, they achieved some concessions and helped defeat the confirmation of William Bradford Reynolds to the position of associate attorney general. [FN45] In addition, they helped repudiate the Government's position in related litigation that occurred more than a year later. [FN46] However, the political process does not seem to be the most desirable way to deal with disputes about the appropriateness of Justice Department policies. It would have been better to let the NAACP's case go forward rather than to drag those arguments into Reynolds' confirmation hearings. Speedy resolution of these issues would have furthered the public interest.

The purpose of the APA is to permit challenges to erroneous policies that have a widespread impact throughout society. Such review seems especially appropriate when direct review may not effectively occur. In a situation like NAACP v. Meese, it seems important for the courts to examine more fully whether a fair and effective method of direct review did exist. If the
court had concluded that the opportunity for direct review did not exist, that the Attorney General's decision was based on legal conclusions rather than factual conclusions, and that the decision would have widespread impact, it should have permitted review under the APA. In such a case, it seems possible to have judicial review without unnecessarily impeding the Attorney General's discretionary authority over individualized decisions, especially when such a case would probably be a rare one.

B. Discretionary Decisions

In addition to the final decision and substantial hardship requirements, the APA contains specific requirements relating to review of discretionary decisions. Section 701 of the APA provides that judicial review is available 'except to the extent that . . . agency action is committed to agency discretion by law.' [FN47] Section 706(2)(A) of the APA provides that one ground for invalidating agency action is that the agency action was 'arbitrary, capricious, or an abuse of discretion.' [FN48] Thus, some discretionary decisions are reviewable under section 706's abuse of discretion standard, although section 701 would seem to preclude review of any discretionary decisionmaking. The courts have been faced with a difficult issue of statutory interpretation in trying to reconcile these two parts of the statute.

The most important case to interpret these dual requirements is Heckler v. Chaney. [FN49] The action in Chaney was brought by death row inmates to prevent the use of lethally injected drugs to carry out their death sentences. They filed suit under the APA to require the Food and Drug Administration (FDA) to begin investigatory and enforcement proceedings to prevent the use of the drugs for that purpose. [FN50]

The Supreme Court unanimously held that the decision by the FDA not to bring enforcement proceedings to prevent the use of drugs for lethal injections was not reviewable. Six justices joined then-Associate Justice Rehnquist's opinion, which used very strong language to suggest that the courts should rarely, if ever, review decisions not to take enforcement action. The majority stated 'that an agency's decision not to take enforcement action should be presumed immune from judicial review under [section] 701(a)(2).' [FN51]

Although the Court was faced with a case involving a failure to prosecute, many of the justifications that Justice Rehnquist offered in support of nonintervention would seem to be equally applicable to a case involving a decision to prosecute. His justifications included administrative concerns [FN52] as well as broader concerns that courts should be more likely to interfere when coercive actions have taken place. [FN53] In addition, he noted that a federal agency decision not to prosecute is similar to a decision by the executive branch not to indict, which is immune from judicial review under principles of executive immunity. [FN54] Thus, aside from his concern about the lack of a coercive decision, Justice Rehnquist's concerns would seem to apply equally strongly to decisions to prosecute. [FN55]

The Court noted that the presumption was against judicial review, but was rebuttable 'where the substantive statute has provided guidelines for the agency to follow in exercising its enforcement powers.' [FN56] In other words, the courts could intervene when the exercise of discretion was the most limited. In fact, one might argue that the Court's test was circular. If Congress provided guidelines and thereby made a decision nondiscretionary, then the courts could review a prosecutorial decision. But if Congress gave discretion to the agency to decide which cases to prosecute, then judicial review could not occur. Thus, although Justice Rehnquist purported to reconcile the two statutory provisions of the APA with regard to discretionary decisionmaking, he really permitted the provision limiting review to override the provision permitting review. Further, he seems to have interpreted section 706's abuse of discretion standard as applying only when the prosecutorial decision is actually nondiscretionary.

Another important aspect of the Court's decision was to make clear that courts were not to consider pragmatic factors in
determining whether to review agency prosecutorial decisions. The court of appeals had relied on pragmatic considerations, such as an assessment of the importance of the interests at stake, to justify intervention in the agencies' decisionmaking. [FN57] The Supreme Court rejected that analysis:

The danger that agencies may not carry out their delegated powers with sufficient vigor does not necessarily lead to the conclusion that courts are the most appropriate body to police this aspect of their performance. That decision is in the first instance for Congress, and we therefore turn to the FDCA [Food, Drug, and Cosmetic Act] to determine whether in this case Congress has provided us with 'law to apply.' If it has indicated an intent to circumscribe agency enforcement discretion, and has provided meaningful standards for defining the limits of that discretion, there is 'law to apply' under [section] 701(a)(2), and courts may require that the agency follow that law; if it has not, then an agency refusal to institute proceedings is a decision 'committed to agency discretion by law' within the meaning of that section. [FN58]

In rejecting the consideration of pragmatic factors, Justice Rehnquist disapproved a developing line of case law as well as the lower court's opinion. [FN59]

*892 Justice Brennan's concurrence in Chaney provides a more pragmatic approach to the issue of judicial review, considering the various ways in which a failure to invoke judicial review might cause serious harm. He lists the following four areas as appropriate for judicial review:

(1) An agency flatly claims that it has no statutory jurisdiction to reach certain conduct . . .; (2) an agency engages in a pattern of nonenforcement of clear statutory language . . .; (3) an agency has refused to enforce a regulation lawfully promulgated and still in effect . . .; or (4) a nonenforcement decision violates constitutional rights. [FN60]

Justice Brennan emphasized that the prior decisions permitting review of agency inaction were still good law, and he approved of each of the categories that Justice Rehnquist declined to retain. [FN61]

Both the Rehnquist and Brennan approaches seek limitations on the courts' review of prosecutorial decisions. Both approaches seem to be searching for 'law' for the courts to apply in reviewing agency inaction. Justice Rehnquist wants the courts to review discretionary decisions only when substantive provisions of the statute that an agency is enforcing dictate how an agency should make resource allocation decisions. Justice Brennan is willing to have the courts review discretionary decisions when the statute contains a broad statement of purpose that the courts can ensure is followed.

Justice Brennan's approach seems superior because it is the only way that we can assure that the agencies are performing their underlying responsibilities-- to put Congress' intent into effect by enforcing certain statutes. If agencies are given complete power under the rubric of resource allocation to disregard congressional intention, agencies would then have the power to write legislation. It seems reasonable for Congress and the public to expect the agencies to enforce a statute, consistent with congressional intent, without Congress having to spell out how the agencies are to make resource allocation decisions. Further, as we will see, Justice Brennan's approach is more consistent with the pragmatic approach that the courts have taken in determining whether to review state prosecutorial decisions.

The case law on federal prosecutorial decisions also raises the general question of whether the standard for review should be the same in cases involving a failure to enforce a statute and cases involving an insistence on enforcing a statute. Despite Chief Justice Rehnquist's comments in Chaney, [FN62] it seems that we should be more, not less, concerned about failures to enforce a statute. By not enforcing a statute, an agency can effectively undo Congress' work. By insisting on enforcing a statute in a particular situation in which the case is weak, the agency is creating a less significant harm in one important regard--the agency's error will ultimately be corrected by the courts when its prosecution fails. Admittedly, by instituting frivolous prosecutions, the agency may be using valuable resources that could be better used in cases needing prosecution. The effect
of enforcing certain cases may be the nonenforcement of other cases. However, the procedural problem of the absolute lack of any other way to correct the error is not present.

Thus, the Chief Justice has the presumption reversed. We should be most concerned about problems of unfairness that can only be reviewed through the APA—the nonenforcement cases. As troubling as the other category of cases may be, we can tolerate less intervention under the APA because of the assurance that direct review of the prosecution itself will usually be available. *894 Under this analysis, review of an insistence on prosecution is most appropriate when we have reason to believe that direct review would be ineffective.

Reversing the presumption also makes it easier to reconcile Chaney and Standard Oil. The harm that the courts should be considering in this area is the harm to society at large through the dereliction of Congress' mandate, not the harm to an individual or institution that may or may not be prosecuted. The Standard Oil decision may be correct that the courts need not concern themselves with the costs of defending a lawsuit, especially when litigation costs will occur irrespective of whether review occurs collaterally or directly. [FN63] But the substantial harm to society can be significant when an agency fails to enforce Congress's mandate. By recognizing the potential harms of nonenforcement, the courts can therefore meet the Standard Oil test and reverse the Chaney presumption. [FN64]

*895 The potential harms of nonenforcement can be seen by tracing a recent problem with prosecution of AIDS-related complaints. In early 1986, the Department of Health and Human Services 'instructed its regional offices to submit all AIDS-related . . . complaints [under section 504 of the Rehabilitation Act] to the Washington, D.C. headquarters office for guidance on how to proceed.' [FN65] On April 1, 1986, Justice Department officials sent a memorandum to the Assistant Attorney General for the Civil Rights Division in which they recommended a policy of vigorously processing AIDS-related claims of discrimination. [FN66]

This memorandum was leaked to the press and received *896 immediate media attention. [FN67] In addition, the Justice Department was flooded with mail from people who claimed that the Department 'loved queers' and supported homosexuality. [FN68]

On June 20, 1986, the Justice Department issued its formal memorandum to HHS on the issue of enforcement of AIDS-related claims of discrimination. [FN69] The policy had few similarities with the earlier Justice memorandum on its interpretation of existing regulations or existing medical information. The memorandum, which was written by Assistant Attorney General Charles J. Cooper, concluded that section 504 prohibits discrimination based on the disabling effects that AIDS and related conditions may have on their victims. But it also concluded that 'an individual's (real or perceived) ability to transmit the disease to others is not a handicap within the meaning of the statute and, therefore, that discrimination on this basis does not fall within section 504.' [FN70]

The medical and legal authorities cited in the June 1986 memorandum have been discredited to a great extent. [FN71] Cooper reportedly wrote letters of apology to the doctors whom he cited *897 for evidence of AIDS contagion through casual contact. [FN72] He *898 was also not able to defend his position well before a House subcommittee hearing. [FN73] In addition, as Cooper admitted in his memorandum, his opinion conflicted with both existing regulations and case law. [FN74] Cooper's analysis has been largely repudiated by seven members of the Supreme Court in School Board v. Arline [FN75] and has since been rejected by newly appointed Attorney General Richard Thornburgh. [FN76]

Nevertheless, until Attorney General Thornburgh issued his recent memorandum, HHS had accepted Cooper's analysis as governing policy because HHS is required to comply with the Justice Department's opinions. [FN77] If direct review of the HHS enforcement policy is not permitted, Congress' intent can be effectively nullified.
The June 1986 memorandum constitutes agency rulemaking because of its binding effect on HHS. The real issue is whether it is subject to review under section 701(a)(2) because it relates to an area of agency prosecutorial discretion. Inasmuch as the effect of the policy is to limit the areas in which HHS could pursue enforcement, it is presumptively unreviewable under Chaney.

The need for review, however, should be obvious. The June 1986 memorandum was extremely controversial and inconsistent with prior regulations and case law. It appears to have been motivated by inappropriate political considerations rather than from consideration of the longstanding law and policy in this area. Many parts of the memorandum are inconsistent with the Supreme Court's decision in Arline. Because of widespread AIDS hysteria and the disease's fatal nature, the effects of AIDS discrimination can be devastating and immediate. Thus, under a traditional irreparable harm and likelihood of success on the merits standard, the policies contained in the June memorandum would seem appropriate for review. The Chief Justice, however, has disclaimed consideration of such pragmatic factors in Chaney. Thus, it is time to reconsider the usefulness of those pragmatic considerations, especially because, as we will see, such considerations have played a substantial part in the case law on federal review of state prosecutorial decisions.

III. FEDERAL REVIEW OF STATE PROSECUTORIAL DECISIONS

In contrast to federal review of federal agency prosecutorial decisions, the courts do consider pragmatic factors in determining whether to review state prosecutorial decisions. Two major cases have influenced the law in this area: Ex parte Young and Younger v. Harris. Young governs the standards that apply when federal review is sought before a prosecution is instituted; Younger applies when federal review is sought after a prosecution is instituted. In addition, the courts do not distinguish between cases challenging a failure to prosecute and cases challenging insistence on prosecution. The same pragmatic factors apply in both areas.

A. Ex parte Young

In Ex parte Young, railroad companies that feared prosecution under a state statute setting maximum railroad rates sought relief in federal court to enjoin the state attorney general from enforcing the statute, arguing that the law was unconstitutional. Rather than make the individual companies defend separate lawsuits and thereby incur the costs of a defense, as well as risk the heavy fines imposed by the statute, the Supreme Court upheld collateral intervention by the federal courts to enjoin the potential state prosecution.

In general, Ex parte Young permits anticipatory injunctions against state officials to prevent the enforcement of unconstitutional state statutes, notwithstanding the eleventh amendment's limitations on suits against the State. Although the Ex parte Young Court recognized that such an injunction was a 'delicate matter,' it found that such an injunction could ensue when state authorities threatened civil or criminal proceedings that would violate the United States Constitution. The Court used an irreparable harm standard because the relief requested was injunctive relief; however, it did not impose any additional explicit requirements, such as a finding of bad faith or harassment. Its reasoning suggested that it thought an unconstitutional prosecution would cause substantial harm. For example, in discussing the importance of the federal court interfering with the state official's actions before a prosecution occurred, the Court noted:

To await proceedings against the company in a state court grounded upon a disobedience of the act, and then, if necessary, obtain a review in this court by writ of error to the highest state court, would place the company in peril of large loss and its agents in great risk of fines and imprisonment if it should be finally determined that the act was valid. This risk the company ought not to be required to take. . . . The courts having jurisdiction, Federal or state, should at all times be open to them as well as to others, for the purpose of protecting their property and their legal rights.
Thus, implicit in the Court's decision was the recognition that having to defend against prosecution could cause substantial harm and that courts have a responsibility to prevent harm where an examination of the legal record can demonstrate that the prosecution would violate constitutional rights. This recognition is in opposition to the Court's assessments of the harms of defending litigation as expressed in Standard Oil [FN88] and NAACP v. Meese. [FN89]

A somewhat more lenient standard for intervening to prevent a potential state prosecution can occur in a suit for declaratory relief. In Steffel v. Thompson, [FN90] the Supreme Court held that a plaintiff did not have to meet the irreparable harm standard in order to obtain a declaration that the state statute was unconstitutional. The Court concluded that federal declaratory relief is possible when a state prosecution is not pending and a federal plaintiff demonstrates a genuine threat of enforcement of a disputed criminal statute. Thus, the plaintiff would need to establish the seriousness of the threat of a prosecution, but would not need to establish irreparable harm if the suit were for declaratory relief rather than injunctive relief. [FN91]

In transferring this case law to the federal agency area, one interesting question is whether federal intervention into potential federal prosecutions looks more like a Steffel declaratory judgment action or an Ex parte Young injunction action. Because the nature of the request for relief under the Administrative Procedure Act is a declaration that an announced enforcement policy is contrary to law and therefore should not be followed, it would seem that such a suit is more like Steffel than Ex parte Young. If that is true, we might expect the courts to use a standard that is more lenient than the irreparable harm standard in reviewing federal prosecutorial policies. As we have seen, however, the courts have adopted a standard that is even more stringent than Ex parte Young in the federal agency area.

B. Younger v. Harris

The more narrow area of interference is federal interference into ongoing state judicial proceedings. The Anti-Injunction Act [FN92] generally bars federal court injunctions of state judicial proceedings. The statute contains several exceptions to the bar on federal injunctions, however, including when such an injunction is 'expressly authorized' by Congress. [FN93] This 'expressly authorized' exception operates to permit a federal court to enjoin state prosecutions that violate federal constitutional or statutory rights under the Civil Rights Act of 1871. [FN94]

Nevertheless, the doctrine of equitable restraint, as developed in Younger v. Harris, [FN95] limits these injunctions except "under extraordinary circumstances where the danger of irreparable loss is both great and immediate." [FN96] More specifically, the Supreme Court has noted that intervention is appropriate when there is a showing of bad faith or harassment by state officials who are responsible for the prosecution; when the state law to be applied is "flagrantly and patently violative of express constitutional prohibitions"; or when there exist other 'extraordinary circumstances in which the necessary irreparable injury can be shown even in the absence of the usual prerequisites of bad faith and harassment.' [FN97] The Supreme Court has stated that bad faith 'generally means that a prosecution has been brought without a reasonable expectation of obtaining a valid conviction.' [FN98] The underlying theory is that if there is no expectation of obtaining a valid conviction, then there must have been an impermissible motive behind the prosecution. [FN99] Thus, despite statutory and equitable presumptions against judicial review of state decisions to act, the federal courts can intervene when bad faith, harassment, or extraordinary circumstances are present in addition to irreparable harm. [FN100]

A major question in understanding this case law is what the courts mean by irreparable harm, harassment, bad faith, or extraordinary circumstances. [FN101] Some of the cases that have been found to meet the Younger test involved the threat of repeated prosecutions that have virtually no chance of being successful. [FN102] The irreparable harm seems to be that there is no way to undo the detriment of having had to defend a frivolous lawsuit if the courts do not prevent the prosecution from
A showing of the illegality or unconstitutionality of the prosecution, however, is not sufficient under Younger unless the state has threatened repeated prosecutions. In Younger the plaintiff had alleged the facial unconstitutionality of the statute, but had only been subjected to one prosecution. Assuming that the statute was unconstitutional, the Court nevertheless insisted that the plaintiff demonstrate bad faith, harassment, or other unusual circumstances for intervention to be appropriate. [FN105]

If a demonstration that the pending prosecution has little chance of succeeding is insufficient to meet the Younger test, what else is required? One way to think of the substantive standard is that it is used to keep such intervention limited to exceptional or extraordinary circumstances including, for example, a situation in which numerous prosecutions have been instituted. That interpretation emerges from a recent case in which the Supreme Court stated that 'whatever else is required, such circumstances must be 'extraordinary' in the sense of creating an extraordinarily pressing need for immediate federal equitable relief, not merely in the sense of presenting a highly unusual factual situation.' [FN106] The Court then used that analysis to find that the federal courts need not interfere with a prosecution by state officials in a case in which the plaintiff's central defense was that the state supreme court justices coerced his testimony before the grand jury. [FN107] His allegations of prejudice and unfairness were insufficient to meet the Younger standard because they were not sufficiently extraordinary. Thus, the Court's remarks seem to suggest an attempt to use the extraordinariness requirement to limit intervention to pervasive legal problems rather than individualized factual problems. This two-part formulation of the Younger standard--asking first whether constitutional rights have been violated and second whether extraordinary circumstances exist--may have been developed to limit a court's inquiry into highly factual matters.

Two general issues arise in transferring the Younger standard to the area of federal review of federal agency prosecutorial decisions. First, one must ask whether the irreparable harm standard is the best way to describe the limitations that seem appropriate on judicial interference. Is the Court really talking about irreparable harm, or is it instead talking about substantial harm in which an individual can show the unconstitutionality of a prosecution and the possibility of the prosecution having widespread effects? Calling the harm irreparable does not seem to say much because the underlying claim is that the prosecution is illegal or unconstitutional in nearly all cases when an individual seeks judicial intervention. The harm is also irreparable because it cannot be remedied by having the defendant simply prevail when the prosecution is brought against him. The harm was the act of having to defend the lawsuit itself. Thus, that harm exists irrespective of whether the defendant is acquitted. The only way to prevent the harm is to prevent the prosecution from taking place. (This situation is analogous to habeas corpus actions that are brought to prevent double jeopardy. It is not enough for the defendant to prevail in the criminal trial; he needs to use other means to prevent the prosecution from ever occurring.) Thus, it seems useful to describe with more specificity why the courts should intervene into some allegedly unconstitutional or illegal prosecutions but not others. A requirement of substantiality, although necessarily vague, would seem to be a more precise formulation of the harm that justifies intervention, because it can codify the need for evidence of widespread harm.

The second issue that arises in trying to transfer these cases to the federal agency area is whether intervention into agency action is more like the Ex parte Young pre-enforcement cases or the Younger post-enforcement cases. In the state area, the courts have found that judicial involvement is less intrusive into state prosecutorial decisions in the pre-enforcement setting, especially when the claim is for declaratory relief. Applying this case law to the federal agency area, it would seem that judicial interference is more warranted in cases in which the agency has decided not to bring an enforcement action than in cases in which the agency has decided to bring an enforcement action, because the former involves a pre-enforcement decision and the latter involves a post-enforcement decision. As we have seen in Chaney, Chief Justice Rehnquist has suggested that it is more intrusive to interfere with agency decisions not to enforce a statute than to interfere with decisions to enforce a

The case law on review of state prosecutorial decisions suggests that he is wrong.

**C. Reviewing Failures to Prosecute**

The federal courts have used two different remedies to deal with state prosecutorial inaction. Under the Civil Rights Act of 1866, they have permitted removal when a state's failure to prosecute results in the systematic violation of the fourteenth amendment. As early as 1871, Circuit Judge Woods concluded in United States v. Hall that federal courts had a responsibility to review violations of equal protection through prosecutorial inaction as well as through insistence on prosecution. In addition, federal courts have provided for injunctive relief or mandamus under the 1871 Civil Rights Act when a state has systematically declined to prosecute violations of constitutional rights. For example, in Timmerman v. Brown, the Fourth Circuit found it appropriate for the district court to issue an injunction to prevent prison authorities from unlawfully interfering with the prosecution of a case against prison officials in which the officials had harassed the plaintiff and acted in bad faith. The Timmerman court was untroubled by its authority to issue such an injunction. It found that because it had the authority to prevent a harassing and unjustified prosecution, it also had the authority to require a legitimate prosecution. The court made no distinction between injunctions to require prosecutions and injunctions to prevent prosecutions, although it was disturbed by its authority to order the magistrate to issue a finding of probable cause.

The remedy question raises a troubling problem that we have seen emerge in the federal agency area--whether it is appropriate for a court to require a prosecution, or whether a less intrusive remedy should be used. Removal may be a good alternative to requiring a prosecution; however, removal is not available in the federal agency area because the case is already in the federal system. If other less intrusive remedies are not available, then we must confront the question of whether requiring a prosecution is a good idea. Such a remedy would be very intrusive because prosecutors are not required to prosecute every situation in which they find probable cause. Instead, they are entitled to make resource allocation decisions. A good justification for curtailing prosecutorial discretion to make resource allocation decisions is therefore needed. One justification might be that prosecutors only have the right to make resource allocation decisions when they act in good faith by making decisions consistent with their statutory mandate. In contrast, they subject themselves to the court's equitable power when they make bad faith decisions. This equitable power might include the right to insist on enforcement.

To avoid having to confront whether a court should or could require a particular prosecution, we should consider whether other less intrusive remedies might be available. For example, could the court permit the individual to bring a prosecution on his or her own behalf? Could the state be required to pay the costs of such a prosecution in order not to penalize the individual for the state's inaction? Alternatively, if a large class of people are affected by the failure to prosecute, the court might impose some guidelines for prosecution but not specify exactly which cases should be prosecuted, as we have seen in the administrative law area. It is important to think creatively in the remedy context to avoid putting the courts in the uncomfortable position of having to order specific prosecutions.

In general, the cases under the 1866 and 1871 statutes reflect a willingness to recognize that decisions not to prosecute may violate civil rights and may be made in bad faith. These cases also show that a variety of remedies may not be available to cure such problems; an injunction to force a prosecution may be the only useful remedy. Finally, these cases reflect a symmetry between the factors the courts are willing to consider in reviewing a failure to prosecute and an insistence on prosecution. As in Younger, the courts seem most willing to interfere when the alleged problems are systematic, rather
than limited to a highly individualized, factual context. Further, as we have seen in the administrative law area, it may be easier to impose workable remedies when the alleged problems are systematic rather than highly individualized.

IV. CONCLUSION

We have seen an increased politicization of prosecutorial decisions within administrative agencies under the Meese Justice Department. Sometimes, these political considerations have become so dominant that they have resulted in prosecutorial decisions being made with little or no basis in law. Because of the enormous power of the federal bureaucracy, these decisions have also caused substantial harm.

The case law on review of prosecutorial decisions has not kept apace of this growing problem, but has operated under the assumption that prosecutors should have virtually unlimited discretion. In this Essay, I have argued that this trend must be reversed. Although prosecutors do need discretion to function effectively, and although some political considerations may even be appropriate factors to consider in making prosecutorial decisions, additional checks are needed on prosecutorial decision-making. Our experience with federal review of state prosecutorial decisions has shown that it is important, at a minimum, to provide judicial safeguards against prosecutorial decisions that are inconsistent with the underlying statute and that can cause substantial harm if not immediately reviewable. In addition, this review is especially necessary when no mechanism for direct review appears to exist. Under this standard, a decision not to prosecute, such as in the AIDS example, should generally be more reviewable than a decision to prosecute, like the NAACP example, because decisions to prosecute are more likely to be subject to direct review than decisions not to prosecute. Collateral intervention should generally be reserved for those situations in which direct review is not possible.

My review of the case law concerning federal review of state prosecutorial decisions suggests that the courts should use three factors to resolve whether to permit collateral attack of prosecutorial decisions: Whether other forms of judicial review are available, whether the prosecutorial decision is likely to lead to substantial hardship, and whether the prosecutorial decision is inconsistent with the underlying statute. Through application of these three factors, we can have collateral review of prosecutorial decisions in the rare cases where there appears to be an abuse of the prosecutorial function.

Applying these three factors to NAACP v. Meese, we would conclude that collateral review should have been permitted. Because the affected parties (blacks and women who benefited from the consent decrees) were not necessarily parties to the Justice Department’s prosecutions, collateral review through the APA was the only way to seek redress. In addition, the decision to bring an enforcement action could cause substantial hardship because it had such a widespread impact throughout society. Finally, Supreme Court precedent and case law in the various circuits strongly suggested that the Department of Justice’s actions were frivolous. Thus, all three factors would point towards collateral review. Nevertheless, I should emphasize that the NAACP case is a rare case involving a decision to prosecute that would be permitted under these three factors. Usually the affected parties will be parties to the prosecution and can efficiently protect their interests by defending against the prosecution.

Applying these three factors to the AIDS example easily leads to the conclusion that collateral review should be permitted. The only way that the affected parties (victims of AIDS-related discrimination) can protect their rights is through private lawsuits under section 504. Nevertheless, they cannot use these private lawsuits to seek termination of federal funds—the remedy that might be the most effective against the defendants. Second, their hardship is substantial because the lack of enforcement affects the rights of an entire class of people. Finally, the Supreme Court and circuit court precedents strongly suggest that HHS’ enforcement policy is inconsistent with the underlying statute.

My insistence on the need for increased judicial safeguards is, in many ways, rooted in my perception of relative institu-
tional competence. Both administrative agencies and federal courts are composed of people who are appointed rather than elected. In that sense, they both represent anti-democratic institutions that nevertheless may be called upon to make judgments about controversial and difficult issues. If such issues are to be resolved in an adjudicatory setting, I want those issues to be resolved before the federal courts rather than solely before the administrative agencies, because federal courts are somewhat more removed from political influences and seem more competent to make such major decisions. [FN122] Nevertheless, even if I am wrong about the competence of various institutions of government, we can assume, based on Professor Delgado's work, [FN123] that an increased formalization of the decisions whether to prosecute will have a deterrent effect on consideration of inappropriate factors.

The irony underlying this entire discussion is that I am suggesting that a discretionary judicial standard, which considers the potential for substantial harm, be used to cure the problem of unbridled prosecutorial discretion. Judicial discretion would provide a check on prosecutorial discretion. This extra layer of review, even under a highly discretionary standard, however, should add some of the protections of formality. In addition, given the need for a flexible and fluid standard for judicial review that would not excessively limit the use of discretion by prosecutors, it seems necessary for the courts to operate under a fairly discretionary standard. Discretion needs to operate within limits, not to be eliminated altogether.

[FN1] Associate Professor of Law, Tulane University; A.B. 1978, Harvard-Radcliffe College; J.D. 1981, Harvard University. I thank Paul Barron, Michael Collins, Richard Delgado, Michael Perry, John Stick, Cass Sunstein, and Mary Whisner for providing me with comments on an earlier draft of this Essay. I also thank my colleagues at Tulane University who provided me with feedback on this Essay at a work-in-progress seminar. Finally, I thank my research assistant, Jan Dyer, for her diligent work.


[FN2] I have requested that the United States Department of Health and Human Services (HHS) bring enforcement actions under section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §§ 701-794 (1982 & Supp. IV 1986) on behalf of individuals who have suffered from AIDS-related discrimination. I have also monitored other attorneys' requests for enforcement as a member of the American Civil Liberties Union National AIDS Task Force. So far, HHS has brought only one enforcement action, and that action occurred after the complainant had died. See letter of Marie Chretien, Region Manager, Office for Civil Rights, Region IV, to unnamed hospital in Charlotte, North Carolina (August 5, 1986) (copy on file with author). At the time this Essay went to press, it appeared that the Department of Justice might begin to prosecute AIDS-related complaints. See Department of Justice Press Release (Oct. 6, 1988) (copy on file with author). For further discussion of this issue, see infra notes 65-77 and accompanying text.


[FN4]. For example, Richard Delgado and his colleagues have shown that racial prejudice is more likely to occur in informal, discretionary settings than in formal, adjudicatory settings because the 'human propensity to prejudge and make irrational categorizations is . . . checked by procedural safeguards found in an adversarial system.' Delgado, supra note 3, at 1389 (footnote omitted). They suggest that '[f]ormality and adversarial procedures thus counteract bias among legal decision-makers and disputants.' Id. (footnote omitted); see also Lerman, Mediation of Wife Abuse Cases: The Adverse Impact of Informal Dispute Resolution on Women, 7 HARV. WOMEN'S L.J. 57 (1984) (arguing that mediation fails to protect women from subsequent violence and perpetuates continued victimization of women).

[FN5]. See generally, e.g., Crouch, Divorce Mediation and Legal Ethics, 16 FAM. L.Q. 219 (1982) (arguing that mediation is preferable to formal dispute resolution); Lerman, supra note 4; Rice, Mediation and Arbitration as a Civil Alternative to the Criminal Justice System--An Overview and Legal Analysis, 29 AM. U.L. REV. 17 (1979) (proposing mediation as an alternative to the criminal justice system); Sander, Varieties of Dispute Processing, 70 F.R.D. 111 (1976) (preferring mediation).

[FN6]. For example, Richard Delgado and his colleagues have noted that informal decisionmaking through alternative dispute resolution 'can shape a decree flexibly so as to protect a continuing relationship between the parties. It is low-cost, speedy, and, for some at least, nonintimidating.' Delgado, supra note 3, at 1402 (footnotes omitted). Nevertheless, they conclude that 'there is little benefit for a minority disputant in a quick, painless hearing that renders an adverse decision tainted by prejudice.' Id.

[FN7]. But see generally Koch, supra note 3 (examining appropriate level of review for five types of discretionary decisions); Mikva, How Should the Courts Treat Administrative Agencies?, 36 AM. U.L. REV. 1 (1986) (criticizing the emerging practice under which courts routinely defer to an agency's interpretation of its organic statute); Stewart & Sunstein, Public Programs and Private Rights, 95 HARV. L. REV. 1195 (1982) (urging courts to take a more active role in reviewing agency action). Much of the literature on prosecutorial discretion focuses on criminal prosecutions. See generally, e.g., B. GERSHMAN, PROSECUTORIAL MISCONDUCT (1986) (discussing charging and plea processes); Albonetti, Prosecutorial Discretion: The Effects of Uncertainty, 21 L. & SOCY REV. 291 (1987) (assessing probability of prosecution based on consideration of several factors).

[FN8]. K. DAVIS, supra note 3, at 17. Charles Koch suggests that there are several types of discretion with each type having its own distinct advantages. He argues that 'individualizing discretion' incorporates flexibility and a sense of fairness, that 'executing discretion' gives agencies an opportunity to exercise their expertise, and that 'policymaking discretion' can further both the public interest and the agency's expertise. Koch, supra note 3, at 469-91. He argues that judicial review is most appropriate to review of individualizing and executing discretion and the least appropriate to review of policymaking discretion. Id. at 493. Although Professor Koch does an excellent job of pointing out the ways in which discretion can operate within an administrative agency, I have not found his distinct categories useful. In each of the examples that I discuss, it appears that all of these kinds of discretion are being used simultaneously.

[FN9]. The courts have considered the need for unlimited prosecutorial discretion in determining the proper scope of judicial immunity. Chief Justice Rehnquist, while he was an Associate Justice, argued for absolute immunity for federal prosecutors because of his fear that lesser immunity will 'seriously dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties.' Butz v. Economou, 438 U.S. 478, 518 (1978) (Rehnquist, J., dissenting) (quoting Judge Learned Hand in Gregoire v. Biddle, 117 F.2d 579, 581 (2d Cir. 1949)). But see id. at 505 ('The extension of absolute immunity from damages liability to all federal executive officials would seriously erode the protection provided by
basic constitutional guarantees.') (majority opinion). For further discussion of prosecutorial immunity, see generally Note, Immunizing the Investigating Prosecutor: Should the Dishonest Go Free or the Honest Defend?, 48 FORDHAM L. REV. 1110 (1980).

[FN10]. See Note, supra note 9, at 1110-11 (discussing the harms that can result from prosecutorial decisions and suggesting a damages remedy to respond to these problems); see also Sunstein, Reviewing Agency Inaction After Heckler v. Chaney, 52 U. CHI. L. REV. 653, 655-56 (1985) (arguing that the four central considerations on which refusal to review agency inaction is based--judicial solicitude for private rights, deference to executive discretion, the existence of alternative remedies, and various prudential concerns--no longer carry significant weight).

[FN11]. See infra notes 32-45 and accompanying text.

[FN12]. See NAACP v. Meese, 615 F. Supp. 200, 202-03 (1985) (rejecting challenge to the policy under the Administrative Procedure Act). For further discussion, see infra notes 32-45 and accompanying text.


[FN14]. See Heckler v. Chaney, 470 U.S. 821 (1985). For further discussion, see infra notes 49-62 and accompanying text; see also Sunstein, supra note 10 (discussing impact of Chaney on review of agency inaction).

[FN15]. The Justice Department's position with respect to goals and quotas was rejected in Local No. 28 Sheet Metal Workers' Int'l Ass'n v. EEOC, 478 U.S. 421 (1986); Local No. 93 Int'l Ass'n of Firefighters v. City of Cleveland, 478 U.S. 501 (1986), aff'd, Vanguards v. City of Cleveland, 753 F.2d 479 (6th Cir. 1985); Kromnick v. School Dist., 739 F.2d 894 (3d Cir. 1984), cert. denied, 469 U.S. 1107 (1985); Deveraux v. Geary, 596 F. Supp. 1481 (D. Mass. 1984), aff'd, 765 F.2d 268 (1st Cir. 1985), cert. denied, 978 U.S. 1021 (1986). The Justice Department's position with respect to AIDS-related discrimination was implicitly rejected in School Bd. v. Arline, 480 U.S. 273 (1987). The Thornburgh Justice Department had recognized the inconsistency between the Meese Justice Department's position and federal law. See Opinion from Douglas W. Kmiec, Acting Assistant Attorney General, Office of Legal Counsel, to Arthur B. Culvahouse, Counsel to the President, at 2 n. 4 (Sept. 27, 1988) (‘These conclusions differ from, and supercede to the extent of the difference, a June 20, 1986 opinion from Charles J. Cooper, Assistant Attorney General, Office of Legal Counsel, for Ronald E. Robertson, General Counsel, Department of Health and Human Services (Cooper Opinion).’) (copy on file with author).

[FN16]. See infra note 68 and accompanying text (reporting that Justice Department was pressured by persons who were prejudiced against gay people in the AIDS context).


[FN19]. The need for more latitude to review agencies' prosecutorial decisions is especially timely because of statements by former Attorney General Edwin Meese that he planned to use the government's prosecutorial power to challenge existing constitutional and statutory case law. See Meese, The Law of the Constitution, 61 TUL. L. REV. 979 (1987).

Meese's view of the Attorney General's role is frightening if there are no limits or checks on his power to interpret vari-
ous statutes and constitutional provisions. The Attorney General is not supposed to be able to determine unilaterally what is the law of the land. Thus, procedures for judicial review of the Attorney General's interpretations of statutes and constitutional provisions must be firmly in place. One part of that apparatus is review of the legal basis upon which prosecutorial decisions, such as broad policy decisions by the Attorney General to prosecute or not to prosecute certain kinds of cases, are made.

[FN20] Professor Delgado and his colleagues do an excellent job of summarizing the elements of the adversarial process that strive to attain fairness. Delgado, supra note 3, at 1368-75 (describing internal and external constraints on the judge and jury and the use of certain procedural rules). Of course, prejudice and unfairness do occur within the formal, adversarial process. The important point is whether it is more or less likely to occur in a formal rather than an informal setting. Based on their work, I assume that prejudice and unfairness are more likely to occur in a discretionary process than in a highly structured one.


[FN22] The Supreme Court's decision in Younger v. Harris, 401 U.S. 37, 43-44 (1971) provides the general justification for noninterference in the state setting, stressing federalism concerns:

The precise reasons for this longstanding public policy against federal court interference with state court proceedings have never been specifically identified but the primary sources of the policy are plain. One is the basic doctrine of equity jurisprudence that courts of equity should not act, and particularly should not act to restrain a criminal prosecution, when the moving party has an adequate remedy at law and will not suffer irreparable injury if denied equitable relief. . . . This underlying reason for restraining courts of equity from interfering with criminal prosecutions is reinforced by an even more vital consideration, the notion of 'comity,' that is, a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways.

[FN23] In thinking about the proper role of the courts, it is helpful to recognize that a formalized review process can have two components: Internal review within the agency or department, and external review by the courts. In addition, prosecutorial decisions can be incorrect on two levels, either factually or legally. External judicial review seems to be the best vehicle to correct errors of law because litigants can produce the necessary legal record for judicial review. External judicial review, however, seems to be an ineffective way to correct factual errors. It is unlikely that there would be a sufficient factual record for the courts to review, and it seems unduly burdensome to expect the courts to conduct de novo reviews on a routine basis. Increased internal checks may be the best safeguard for the problem of factual error, but consideration of those safeguards is beyond the scope of this Essay.

[FN24] I do not suggest that courts closely probe agencies' fact finding with respect to prosecutorial decisions, nor do I suggest that the courts review an agency's resource allocation decisions. My argument for heightened scrutiny of law rather than facts is supported by the observation that the rationale for prosecutorial insularity is strongest when the prosecutorial decision is based on fact rather than law. It is also consistent with our general structure of judicial review of law rather than fact.


[FN26] See, e.g., Abbott Laboratories v. Gardner, 387 U.S. 136, 140 n.2 (1967) ("To preclude judicial review under this bill a statute, if not specific in withholding such review, must upon its face give clear and convincing evidence of an intent to withhold it.") (quoting H.R. REP. NO. 1980, 79th Cong., 2d Sess. 41 (1946), reprinted in 1946 U.S. CODE CONG. & AD-

MIN. NEWS 1195).


[FN28]. See Abbott Laboratories, 387 U.S. at 148-49 (emphasizing the importance of the courts not interfering 'until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties').


[FN30]. Id. at 244 (quoting Petroleum Exploration, Inc. v. Public Serv. Comm'n, 304 U.S. 209, 222 (1938), quoting Bradley Lumber Co. v. National Labor Relations Bd., 84 F.2d 97, 100 (5th Cir. 1936)).

[FN31]. In Standard Oil, the parties were large oil companies that were being made to defend themselves before an administrative law judge.


[FN33]. Id. at 580-81.


[FN35]. I was working at the Department of Justice at the time. These statements are based on personal observation and experience.

[FN36]. See articles cited supra note 34 (reporting that only 3 of 53 municipalities agreed to cooperate with the Department of Justice in overturning existing consent decrees).


[FN39]. Id. at 203 n.8.

[FN40]. Id.

[FN41]. This point was made most forcefully by Judge Curtin in United States v. City of Buffalo, 609 F. Supp. 1252 (W.D.N.Y.), aff'd sub nom. United States v. NAACP, 779 F.2d 881 (2d Cir. 1985), cert. denied, 478 U.S. 1020 (1986). When asked to modify a court order that required goals and timetables under the Justice Department's policy, Judge Curtin responded that he was limited by the decision of the Second Circuit, which had already ruled that 'Stotts does not bar race-conscious relief of the sort in effect in the present cases,' Id. at 1253. Moreover, Judge Curtin noted that the Government had conceded that point: '[T]he government conceded at oral argument that the Second Circuit's decision in [EEOC v. Local 638 . . . Local 28 of Sheet Metal Workers, 753 F.2d 1172 (2d Cir. 1985)] constrains this court to deny the instant motion.' Id.

In the City of Buffalo litigation, Attorney General Meese had ordered Justice Department attorneys to challenge the goals and timetables even though he knew that the district court did not have the power to modify those goals and timetables.
No efficient method existed to challenge the Attorney General's actions frontally. Instead, they had to be attacked on a piece-meal basis and were indirectly repudiated.

This problem is analogous to the problem faced by civil rights groups before Brown v. Board of Education, 347 U.S. 483 (1954) was decided. They could challenge the notion of 'separate but equal' on a case by case basis, or they could seek a broad statement by the Court that 'separate cannot be equal.' Their ability to convince the Court to issue that final statement resulted in a much greater potential for effective desegregation. See generally R. KLUGER, SIMPLE JUSTICE (1975).


[FN43] Id. at 203.

[FN44] Some people might argue that political pressure is the correct way to resolve this issue, and that lawsuits should be avoided. I do not object to the political arena being used to put pressure on governmental officials. My more basic concern is that the political arena should not be the only place for those pressures to occur, especially when the political argument is that the governmental official is not enforcing a statutory mandate.


[FN46] See Local No. 28 Sheet Metal Workers' Int'l Ass'n v. EEOC, 478 U.S. 421 (1986); Local No. 93 Int'l Ass'n of Firefighters v. City of Cleveland, 478 U.S. 501 (1986) (upholding the use of race-conscious goals or quotas for remedial purposes).

[FN47] Section 701(a) provides that the APA requirements apply 'except to the extent that--(1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law.' 5 U.S.C. § 701(a) (1982 & Supp. IV 1986).

[FN48] Section 706 provides:

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall--

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be--

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law . . . .


[FN50] Id. at 823-24.

[FN51] Id. at 832.

[FN52] The administrative concerns included the need for the agency to balance factors within its expertise and to consider its own resources and priorities. Id. at 831-32.

[FN54] Id. (referring to article II’s requirement that the Executive ‘take Care that the Laws be faithfully executed’; U.S. CONST. art. II, § 3).

[FN55] The lower courts have struggled with the question of how broadly to apply Chaney to review of decisions to prosecute. In NAACP v. Meese, 615 F. Supp. 200, 204 (D.D.C. 1985), the district court decided to apply the Chaney presumption in a case challenging the decision by the Department of Justice to seek modification of all of its existing consent decrees or court orders that contained race- or sex-specific goals or quotas. The District of Columbia Circuit has applied Chaney narrowly in cases involving review of discretionary decisions. See Farmworker Justice Fund, Inc. v. Brock, 811 F.2d 613 (D.C. Cir. 1987) (reviewing decision by the Secretary of Labor not to promulgate a field sanitation standard); Doyle v. Brock, 821 F.2d 778 (D.C. Cir. 1987) (reviewing decision by the Department of Labor not to sue to set aside a union election); Shelley v. Brock, 793 F.2d 1368 (D.C. Cir. 1986) (same); International Union, United Auto. Workers v. Brock, 783 F.2d 237 (D.C. Cir. 1986) (reviewing settlement decision by the Department of Labor); Robbins v. Reagan, 780 F.2d 37 (D.C. Cir. 1985) (reviewing decision by President to close a shelter for homeless people). In contrast, the Second and Seventh Circuits have adopted a much broader view of Chaney’s applicability. See Marlow v. United States Dep’t of Educ., 820 F.2d 581 (2d Cir. 1987) (not reviewing the Department of Education’s discretionary disposition of a Rehabilitation Act claim); Salvador v. Bennett, 800 F.2d 97 (7th Cir. 1986) (not reviewing Department of Education’s failure to prosecute under section 504 of the Rehabilitation Act).

[FN56] Chaney, 470 U.S. at 833 (footnote omitted).


[FN58] Chaney, 470 U.S. at 834-35.

[FN59] Justice Rehnquist seemed to recognize this problem and therefore tried to distinguish several prior decisions by stating:

> We do not have in this case a refusal by the agency to institute proceedings based solely on the belief that it lacks jurisdiction. Nor do we have a situation where it could justifiably be found that the agency has ‘consciously and expressly adopted a general policy’ that is so extreme as to amount to an abdication of its statutory responsibilities. . . . [I]n those situations the statute conferring authority on the agency might indicate that such decisions were not ‘committed to agency discretion.’

Id. at 833 n.4 (citation omitted). Although the Justice tried to explain those prior cases as ones in which the decisions were not committed to agency discretion, it is probably easier to understand them as considering pragmatic factors such as the potential for substantial harm.

[FN60] Id. at 838-39 (Brennan, J., concurring) (citations and footnote omitted). Although I prefer Justice Brennan’s pragmatic approach, I recognize that it might present some additional problems. As Professor Delgado has indicated, the use of discretionary standards can facilitate the use of prejudicial standards. See generally Delgado, supra note 3. Thus, in suggesting the consideration of pragmatic factors, I recognize that I may be introducing a potential source of abuse into the decisionmaking process. My answer to this potential problem is quite simple. Currently, prosecutors within administrative agencies can make discretionary decisions without limitations. There are virtually no judicial checks. Under my proposed framework, these prosecutors would be checked, admittedly by a discretionary standard. I believe that it is better to provide some check than not to provide any check. In addition, since the kind of harm that is being generated needs to be reviewed under a flexible framework (in order not to tip the balance too far), I do not know any other available method for review.

[FN61] In Chaney, Justice Marshall’s concurrence sets forth an additional category for which judicial review of prosecutorial
inaction is available: 'If a plaintiff makes a sufficient threshold showing that a prosecutor's discretion has been exercised for impermissible reasons.' Chaney, 470 U.S. at 847 (Marshall, J., concurring). Justice Marshall notes that much of this case law has emerged in the area of criminal prosecutorial discretion. In the civil area, he argues that review of prosecutorial discretion should be even greater because Congress has often specifically provided that a group of people are entitled to receive certain benefits. By failing to enforce such statutes, the agencies are not abiding by congressional intent. As the Supreme Court noted in an earlier case, 'The decision to enforce--or not to enforce--may itself result in significant burdens on a . . . statutory beneficiary.' Marshall v. Jerrico, Inc., 446 U.S. 238, 249 (1980).

[FN62] See supra notes 51-55 and accompanying text.

[FN63] See supra notes 29-31 and accompanying text.

[FN64] An additional problem presented by the prosecutorial inaction cases is that of finding an appropriate remedy. What is the appropriate remedy when an agency fails to enforce a statute--should it be required to institute a specific act of enforcement? Can or should the courts insist on a specific prosecution? Such a requirement seems troubling in the federal agency area because of the large resource allocation issues with which federal agencies must contend. Once the parties have established that an agency has disregarded congressional intent in making an enforcement decision, it is still quite possible that the agency would not choose to bring a specific enforcement action because of resource allocation decisions. Thus, the courts may not feel comfortable interfering with an agency's ability to make resource allocation decisions.

The remedy problem is especially troubling because it also relates to a standing problem. See generally Linda R. S. v. Richard D., 410 U.S. 614 (1973) (developing logical nexus test for standing). If a court does not have the power to require a specific prosecution then one might argue that the plaintiff did not have standing, because the court's finding that the decision not to prosecute was inconsistent with the statutory mandate might still leave the agency free not to prosecute for resource allocation reasons.

The proper remedy for the courts to impose might be to order the agency to prosecute some cases, but not specify exactly which cases. This remedy has been used in litigation brought against the United States Department of Health, Education, and Welfare to force the agency to take appropriate enforcement action to end racial discrimination in education. See Women's Equity Action League v. Bell, 743 F.2d 42 (D.C. Cir. 1984); Adams v. Bell, 711 F.2d 161 (D.C. Cir. 1983), cert. denied, 465 U.S. 1021 (1984); Adams v. Matthews, 536 F.2d 417 (D.C. Cir. 1976); Adams v. Richardson, 480 F.2d 1159 (D.C. Cir. 1973). The District of Columbia Circuit Court has required the Department to issue decision letters within 105 days after receiving a civil rights complaint and to correct any violations within 195 days. The Department is not required to prosecute each complaint; however, it is subjected to guidelines to ensure that it is enforcing the statute effectively. But see Kurtz, How Education Officials Tried Turning Back the Hands of Time, Wash. Post Nat'l Weekly Ed., April 13, 1987, at 31, col. 1 (reporting that Education Department officials complied with the Adams order by backdating documents in six of the department's ten regional offices).

Alternatively, the court might give the affected individual the right to go forward as a private attorney general on her own behalf, when the statute would not have otherwise permitted such a remedy. This remedy may be problematic because the court would be creating jurisdiction as a remedy. If jurisdiction does not exist independently for the individual to bring a private suit, it is doubtful that the court could create the jurisdiction in a remedial setting. On the other hand, the ineffectiveness of government enforcement of a statute may be one legitimate factor that the court could consider in determining whether an implied private right of action existed. See Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11, 20-24 (1979) (setting forth standard for implied right of action).

[FN65] Memorandum from Stewart B. Oneglia, Chief, Coordination and Review Section, Civil Rights Division, United States Department of Justice, to William Bradford Reynolds, Assistant Attorney General, Civil Rights Division, United
States Department of Justice, at 6 (April 1, 1986) [hereinafter Oneglia memorandum] (on file with author).

[FN66]. This memorandum was issued pursuant to the Department of Justice's responsibility for coordinating the implementation and enforcement of section 504 of the Rehabilitation Act, under executive order. See Exec. Order No. 12250 § 1-201(c), 3 C.F.R. 298 (1981), reprinted in 42 U.S.C. § 2000d-1 note (1982). If adopted by the Justice Department, this memorandum would have become the policy of the federal agencies with respect to the enforcement of section 504 regarding AIDS-related claims of discrimination.

The memorandum concluded that AIDS constitutes a handicap under the Rehabilitation Act. It also recognized that persons who are seropositive to the AIDS antibody, or are perceived to be seropositive, and are therefore discriminated against on that basis, are also protected by the Rehabilitation Act from discrimination. Oneglia memorandum, supra note 65, at 1.

In reaching those conclusions, the memorandum relied on medical information supplied by the United States Center for Disease Control, the federal agency charged with protecting the public health of the nation. See Recommendations for Preventing Transmission of Infection with Human T-Lymphotropic Virus Type III/Lymphadenopathy-Associated Virus in the Workplace, MORBIDITY & MORTALITY WEEKLY REP., Nov. 15, 1985, at 682 (cited in Oneglia memorandum, supra, at 5). The memorandum also relied on the longstanding definition by HHS and the Department of Justice of 'physical impairment' to determine that AIDS fit that part of the definition of a handicap. Oneglia memorandum, supra, at 8-9. Next, the memorandum examined the existing definition of a 'substantial limitation on a major life activity,' id. at 11, to determine if AIDS fit that part of the definition of a handicap. Because learning and working have been defined as major life activities, the memorandum concluded that a person with AIDS 'could easily be substantially limited in a major life activity if he or she were barred from employment, education, training, or assistance opportunities.' Id. at 12. Specifically, the memorandum recognized the problem of AIDS hysteria and how it could contribute to the existence of discrimination. Id. at 13.

Having concluded that persons with AIDS were fully covered by the Rehabilitation Act, the memorandum next considered discrimination on the basis of a perception that a person had AIDS. Based on the statutory definition of a handicap that includes a perception of a handicap, and the longstanding definition of a handicap, the memorandum concluded that those persons perceived as having AIDS are also fully covered by the statute. Id. at 14-15. The memorandum then considered the issue of whether a person who has been barred from employment or other activity on the basis of a fear of contagion is being discriminated against in violation of the Rehabilitation Act. The memorandum concluded in unequivocal terms that such discrimination would be unlawful under the statute. Id. at 16. Justice Department officials therefore recommended an enforcement policy based on longstanding regulations and policies regarding discrimination on the basis of handicap, and existing governmental medical information on AIDS. Id. at 19-21.


[FN69]. Memorandum from Charles J. Cooper, Assistant Attorney General, Office of Legal Counsel, United States Department of Justice to Ronald E. Robertson, General Counsel, United States Department of Health and Human Services (June 20, 1986) [hereinafter Cooper memorandum] (copy on file with author).

[FN70]. Id. at 1.

[FN71]. See Leonard, AIDS and Employment Law Revisited, 14 HOFSTRA L. REV. 11 (1985). (Although the cover date of this article is 1985, it appeared in print after the issuance of Cooper's memorandum.) For example, discussing the validity of the Cooper memorandum, Leonard argues:

Cooper's interpretation seems contrary to a regulation adopted by the Department of Health and Human Services in

construing the statutory definition of handicap, and to the underlying policy of the statute itself. . . .

[Cooper's] approach fails to appreciate the critical distinction between diseases which present a genuine issue of workplace contagion and those which do not. The CDC Guidelines and the overwhelming weight of medical authority since their publication support the contention that contagion in the workplace is a spurious issue in the case of AIDS. To allow such a spurious issue to be used as a justification for discrimination defeats one of the purposes articulated by Congress for passing the statute, which was to 'guarantee equal opportunity' so that handicapped persons would be able to live independently; rendering persons with AIDS or ARC (most of whom Cooper concedes to be handicapped within the meaning of section 504) unemployable due to unjustified fears of workplace contagion destroys their ability to live independently.


[FN72]. See Oversight of the Office for Civil Rights at the Department of Health and Human Services, 99th Cong., 2d Sess. 318 (August 6, 1986). Representative Weiss summarized the inaccurate nature of Cooper's medical observations:

Well, just so that the record is complete, you had quoted Dr. William Haseltine from a New York Times letter to the editor written by Prof. Alan Dershowitz, who later acknowledged that he had mistakenly represented the doctor's views. And so what you were doing, really, was inadvertently misquoting because Dershowitz, in fact, had misquoted.

Second, you quote Dr. Myron Essex as saying:

The C.D.C.--the Centers for Disease Control--has been trying to inform the public without overly alarming them, but we outside the Government are freer to speak. The fact is that the dire predictions of those who have cried doom ever since AIDS appeared haven't been far off the mark.

However, the New York Times magazine article from which this quote was drawn was not addressing the issue of casual transmission. But rather, Essex believes that AIDS can be transmitted through heterosexual contact.

And third, in a footnote you quote from an article by John Parry in the November-December 1985 issue of Mental and Physical Disability Law Reporter as saying:

. . . Those experts who have attempted to give the public the impression that the medical profession is certain how AIDS is transmitted and that no one outside the high-risk groups should worry may have gone too far in attempting to quell the public's fears.

The citation fails to include the sentence immediately following that sentence which says:

Those individuals who have asserted that there are reasonable dangers of exposure in public places have definitely gone too far in the other direction, needlessly stirring up public fears and insensitively stigmatizing AIDS carriers.

It appears that Parry was discussing Aids incidence outside of the groups currently at highest risks, not causal transmission.
I thought that we ought to put this on the record, so that in fact we have a clear indication as to exactly what those quotes were about.

Id. 

[FN73]. See supra note 72.

[FN74]. See, e.g., Cooper memorandum, supra note 69, at 25 n.67 (questioning the validity of 45 C.F.R. 84.3(j)(2)(iv)(B), which states that a person is handicapped if he 'has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment').

[FN75]. 480 U.S. 273 (1987). The Court concluded that persons with contagious diseases are covered by the Rehabilitation Act and that such persons cannot be fired based on an unfounded fear of contagion. Although the Court emphasized the importance of eliminating 'irrational fears or prejudice on the part of employers or fellow workers,' it declined to reach the issue of whether 'a carrier of a contagious disease such as AIDS could be considered to have a physical impairment, or whether such a person could be considered, solely on the basis of contagiousness, a handicapped person as defined by the Act.' Id. at 1128 n.7, 1129 n.13 (quoting remarks of Sen. Humphrey, 123 CONG. REC. 13515 (1977)).


[FN80]. Ex parte Young, 209 U.S. at 129-34.

[FN81]. Id. at 127-29 (reporting fines ranging from $2,500 to $10,000).

[FN82]. The Court found that the case represented 'an unconstitutional act of the state legislature and an intention by the Attorney General of the State to endeavor to enforce its provisions, to the injury of the company, in compelling it, at great expense, to defend legal proceedings of a complicated and unusual character.' Id. at 149.

[FN83]. The eleventh amendment provides that: 'The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.' U.S. CONST. amend. XI. The theory underlying the decision in Ex parte Young was that plaintiffs can trigger the state action requirement of the fourteenth amendment without automatically raising the limitations of the eleventh amendment when their constitutional rights have been violated.

[FN84]. Ex parte Young, 209 U.S. at 142.

[FN85]. Id. at 149.

[FN87]. *Ex parte Young*, 209 U.S. at 165. The Court discussed the issue of judicial review of the exercise of discretion by the state Attorney General. It found such review permissible only when the requested relief was injunctive relief. In the Court's words:

> It is also objected that as the statute does not specifically make it the duty of the Attorney General (assuming he has that general right) to enforce it, he has under such circumstances a full general discretion whether to attempt its enforcement or not, and the court cannot interfere to control him as Attorney General in the exercise of his discretion.

> In our view there is no interference with his discretion under the facts herein. There is no doubt that the court cannot control the exercise of the discretion of an officer. . . .

> The general discretion regarding the enforcement of the laws when and as he deems appropriate is not interfered with by an injunction which restrains the state officer from taking any steps towards the enforcement of an unconstitutional enactment to the injury of complainant. In such case no affirmative action of any nature is directed, and the officer is simply prohibited from doing an act which he had no legal right to do. An injunction to prevent him from doing that which he has no legal right to do is not an interference with the discretion of an officer.

Id. at 158-59.

[FN88]. See supra notes 29-30 and accompanying text.

[FN89]. See supra notes 38-40 and accompanying text.


[FN91]. Nevertheless, there may be little difference between the Steffel test and the Ex parte Young test because of the significant actual controversy or standing requirement. To meet the actual controversy requirement, the petitioner had to demonstrate that the alleged threats of prosecution were not "imaginary or speculative," *id*. at 459 (quoting *Younger v. Harris*, 401 U.S. 37, 41 (1971)), that his fear of arrest was not "chimerical." *Id*. (quoting *Poe v. Ullman*, 367 U.S. 497, 508 (1961)). In addition, the petitioner had to demonstrate that there was a continuing live controversy, involving "sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Id*. at 460 (quoting *Maryland Casualty Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270, 273 (1941)). In order to establish the existence of such an imminent and live controversy, it would seem that the petitioner would necessarily be able to establish the potential for irreparable injury.


[FN93]. The Anti-Injunction Act, 28 U.S.C. § 2283, provides that a federal court 'may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.'


[FN95]. 401 U.S. 37 (1971). The plaintiff in *Younger v. Harris* had been charged with violation of the California Penal Code for engaging in allegedly communist activity. He filed a complaint in federal district court, asking that the court enjoin the District Attorney of Los Angeles County from prosecuting him. The district court ordered the requested relief on the basis that the state statute was found to be vague or overly broad in violation of the first amendment. The Supreme Court reversed,
emphasizing the necessity of showing irreparable injury that is both great and immediate. Based on the facts before it, the Court concluded:

It is sufficient for purposes of the present case to hold, as we do, that the possible unconstitutionality of a statute 'on its face' does not in itself justify an injunction against good-faith attempts to enforce it, and that appellee Harris has failed to make any showing of bad faith, harassment, or any other unusual circumstance that would call for equitable relief.

Id. at 54.

A related doctrine is that of abstention. See generally England v. Louisiana State Bd. of Medical Examiners, 375 U.S. 411 (1964); Railroad Comm'n v. Pullman Co., 312 U.S. 496 (1941). The Supreme Court has stated that the purpose of the abstention doctrine is to "further [ ] the harmonious relation between state and federal authority." England, 375 U.S. at 421 n.12 (quoting Pullman Co., 312 U.S. at 501).

[FN96]. Younger, 401 U.S. at 45 (quoting Ex parte Young, 209 U.S. 123, 143-44 (1908)).

[FN97]. Id. at 53.

[FN98]. Id. (quoting Watson v. Buck, 313 U.S. 387, 402 (1941)).

[FN99]. Id.


[FN101]. Michael Collins has summarized these cases:

[L]ower [federal] courts have on occasion found bad faith sufficient to warrant federal injunctive relief against on-going state proceedings when state actors have undertaken a prosecution because of the defendant's membership in a traditionally suspect class or have retaliated against the [defendant's] exercise of a federally protected right. This focus on discriminatory intent is consistent with the modern equal protection analysis that these cases most nearly resemble. Some courts have found bad faith, absent discriminatory or retaliatory animus, when the prosecution has been frivolous or undertaken without any objectively reasonable hope of success.


[FN102]. For example, in Timmerman v. Brown, 528 F.2d 811, 814 (4th Cir. 1975), the court found that the district court had the power to hear a case in which prisoners contended that the state had brought criminal charges against them in bad faith to retaliate for charges that the prisoners had tried to file against prison officials. The court concluded that the plaintiffs had alleged bad faith and harassment intended to deny their constitutional rights. Id. at 815; see also Shaw v. Garrison, 467 F.2d 113, 122 (5th Cir.) (affirming injunction against state perjury prosecution when evidence indicated that the prosecution was made in bad faith with no supporting evidence), cert. denied, 409 U.S. 1024 (1972).

It is important to emphasize, however, that a court cannot intervene merely because it thinks that certain acts were unlawful. The court must, in addition, conclude that there are extraordinary circumstances in which the necessary irreparable injury can be shown.

[FN103]. For further discussion of this standard, see generally Wingate, The Bad Faith-Harassment Exception to the Younger Doctrine: Exploring the Empty Universe, 5 REV. LITIGATION 123 (1986).

[FN104]. See, e.g., Shaw, 467 F.2d at 122 (finding that perjury prosecution was brought in bad faith and for purposes of harassment when it was instituted after individual was acquitted in original case). But see Wilson v. Thompson, 593 F.2d 1375
(holding that a state prosecution undertaken in retaliation for or to deter the exercise of constitutionally protected rights may be enjoined regardless of whether the criminal defendant is threatened with repeated or multiple prosecutions).

[FN105]. Younger, 401 U.S. at 54. Nevertheless, in post-Younger cases, some courts have suggested that bad faith can be demonstrated with little more than a showing that the prosecution would have no chance of success. See, e.g., Rowe v. Griffin, 676 F.2d 524 (11th Cir. 1982) (enjoining prosecution of informant who had been promised immunity from prosecution); Heimbach v. Village of Lyons, 597 F.2d 344 (2d Cir. 1979) (enjoining attempts to evict low-income people from their homes); Timmerman v. Brown, 528 F.2d 811 (4th Cir. 1975) (enjoining pending state prosecutions against prisoners); Pizzolato v. Perez, 524 F. Supp. 914 (E.D. La. 1981) (enjoining pending state prosecution on state voting law charges).


[FN107]. Id. In addition, these exceptions are not easily translated into the administrative law setting where the prosecutions rarely involve criminal penalties. Since many of the Younger exception cases involved the consideration of the seriousness of criminal penalties, they may not readily encompass administrative law cases that appear to incorporate bad faith and harassment.

[FN108]. See supra notes 49-51 and accompanying text.

[FN109]. Ch. 31, 14 Stat. 27 (1866) (providing for removal when persons 'are denied or cannot enforce in the [state court] any of the rights secured to them by the first section of [the statute]'); see also Rev. Stat., title XIII, ch. 7, § 641 (1875) (revised and stronger version of the 1866 statute, specifying that removal was permitted when the individual could not enforce 'any right secured to him by any law providing for the equal civil rights of citizens'). See generally STATUTORY HISTORY OF THE UNITED STATES: CIVIL RIGHTS PART I (B. Schwartz ed. 1970) (discussing legislative history of the 1866 statute).

[FN110]. See Strauder v. West Virginia, 100 U.S. 303, 312 (1879) (permitting removal of criminal prosecution of black man to federal court because state juries were exclusively white). But see Virginia v. Rives, 100 U.S. 313, 322-23 (1879) (refusing to permit removal when black defendants were convicted by an all-white jury but when state law did not exclude blacks from juries); Blyew v. United States, 80 U.S. (13 Wall.) 581 (1871) (declining to apply the Civil Rights Act of 1866 to a case in which blacks could not testify). See generally Schmidt, Juries, Jurisdiction, and Race Discrimination: The Lost Promise of Strauder v. West Virginia, 61 TEX. L. REV. 1401, 1429-41 (1983) (discussing removal provision).


[FN112]. Judge Woods noted that the equal protection clause 'prohibits the states from denying to all persons within its jurisdiction the equal protection of the laws.' Id. at 81. Judge Woods then defined these denials:

Denying includes inaction as well as action, and denying the equal protection of the laws includes the omission to protect, as well as the omission to pass laws for protection. The citizen of the United States is entitled to the enforcement of the laws for the protection of his fundamental rights, as well as the enactment of such laws.

Id.

United States v. Hall involved interference with individuals' rights to speak and vote. In defending an indictment under federal legislation that protected that right, the court stated: 'And as it would be unseemly for [C]ongress to interfere directly with state enactments, and as it cannot compel the activity of state officials, the only appropriate legislation it can make is that which will operate directly on offenders and offenses, and protect the rights which the amendment secures.' Id.
This statute empowers the lower federal courts to determine the constitutionality of actions taken by persons under color of state law that allegedly deprive other individuals of rights guaranteed by the Constitution and federal law.

See, e.g., Adams v. Richardson, 480 F.2d 1159, 1161-63 (D.C. Cir. 1973) (requiring increased enforcement of Title VI of the Civil Rights Act); Young v. Pierce, 544 F. Supp. 1010, 1017-19 (E.D. Tex. 1982) (permitting action to proceed against an agency under theory that the agency has an affirmative obligation to eliminate discrimination). There are many more cases for the related proposition that a district court can prohibit a prosecutor from pursuing a bad faith prosecution. See, e.g., Supreme Court of Va. v. Consumers Union of the United States, 446 U.S. 719 (1980) (permitting injunction against enforcement of the prohibition against a lawyer's advertising of fees); Wooley v. Maynard, 430 U.S. 705 (1977) (permitting declaratory and injunctive relief against enforcement of New Hampshire statutes regarding license plates); see also Mitchum v. Foster, 407 U.S. 225 (1972) (district court erred in holding that the anti-injunction statute absolutely barred federal court injunction of a pending state court proceeding under any circumstances).

Nevertheless, Timmerman does not present a perfect example of the court ordering a prosecution. The court left open the question whether the district court could grant an injunction to compel the magistrate to issue a warrant finding probable cause. The court assumed that the magistrate would issue such a warrant without the necessity of the district court granting an injunction. Id. at 816.

However, one can imagine fact patterns that would result in such an order. For example, what if a state declined to bring any rape prosecutions because it decided that no woman's testimony was ever credible? It would seem possible, although difficult, for affected women to bring an action under the 1871 Civil Rights Act in federal court in which they alleged that their right to equal protection of the laws was violated by the state's decision not to prosecute. But the women would apparently have no opportunity to bring their own prosecution in federal court (as contemplated by the Civil Rights Act of 1866).

It is interesting to note, on policy grounds, that the 1866 statute seemed to permit unlimited interference into state decisions not to act. One certainly does not glean from that statute an historical reluctance to interfere with decision not to act.

In making this argument, I have considered how I would feel if a Democratic administration were elected and dramatically changed the composition of the administrative agencies. It would thereby be possible for the agencies to be more liberal than the courts (which would still be filled with Reagan lifetime appointees). Even under that scenario, I am troubled by administrative agencies making political, prosecutorial decisions that are not consistent with the underlying enforcement statute. I am troubled by such a process because administrative agencies are largely unaccountable to the electorate and do not have the visionary moral role of the federal courts. If the underlying statute needs to be changed, I believe that those argu-
ments should be made to the legislature. If the underlying statute needs to be reinterpreted, I believe that those arguments should be made to the courts. The administrative agencies should try to work within a sphere of limited discretion so that we can avoid the kind of substantial harm that has been discussed in this Essay. These thoughts about the relative institutional competence of agencies, courts, and legislators have been very much influenced by M. PERRY, MORALITY, POLITICS, AND LAW: A BICENTENNIAL ESSAY 121-79 (1988).

[FN123]. See supra notes 4-6 and accompanying text.

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