In the

Supreme Court of the United States

RICHARD GUY STEFFEL,

Petitioner,

vs

JOHN R. THOMPSON, ET AL,

Respondents.

Docket No. 72-5581

Washington, D.C.
November 13, 1973

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v.	:	No. 72-5581
JOHN R. THOMPSON, ET AL, Respondents.	:	

Washington, D. C.

Tuesday, November 13, 1973

The above-entitled matter came on for argument at 11:43 a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

HOWARD MOORE, JR., ESQ., 1880 San Pedro, Berkeley, California 94707, for the Petitioner.

LAWRENCE M. COHEN, ESQ., Lederer, Fox and Grove, 111 West Washington Street, Chicago, Illinois 60602, for the Respondents.

I N D E X

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear argument next in 72-5581, Steffel against Thompson.

Mr. Moore, you may proceed whenever you are ready.

ORAL ARGUMENT OF HOWARD MOORE, JR., ON BEHALF OF THE PETITIONER

MR. MOORE: Mr. Chief Justice, and may it please the Court, my name is Howard Moore, Jr. I represent the petitioner, Richard Guy Steffel. This case is before the Court on a writ of certiorari to review a judgment of the United States Court of Appeals for the Fifth Circuit. That judgment affirmed the denial of declaratory judgment by the United States District Court for the Northern District of Georgia in an action in which a declaratory judgment was sought against the threatened or nonpending state criminal prosecution for trespass under Georgia law, Section 1503, 26 Georgia Code Annotated.

The issue presented to be decided by this Court is whether the standards set forth in Younger v. Harris and Samuels v. Mackell may be applied to deny petitioner declaratory relief, where there was no pending state criminal prosecution.

The factual background out of which this controversy arises is as follows: There were principally two events. The first event occurred on October 8, 1970. The petitioner and a young lady by the name of Sandra Becker , both members of

an unincorporated association known as the Atlanta Mobilization Committee, stood outside on the exterior sidewalk of a food store located in the North Dekalb Shopping Center. The purpose for their being there was to participate in handbilling. They were passing out handbills to invite the public to attend an anti-war rally in downtown Atlanta on Saturday, October 31st, to solicit support for the Atlanta Mobilization Committee, and to urge support for the lettuce boycott.

A copy of the handbill which they were handing out on that occasion is attached to the appendix at page 13.

The duration of the handbilling was about half an hour. During the time they were handbilling, they were quiet and they were peaceful and there was no unreasonable littering if any littering at all. The handbilling was then disrupted by a shopping center security guard who ordered the petitioner to cease. When the petitioner explained he was exercising his constitutional right, the Dekalb County Police were called. The police told petitioner and Miss Becker to discontinue their peaceful handbilling or they would be arrested. The petitioner and Mrs. Becker left rather than being arrested.

The second incident occurred on October 10, 1970, when the petitioner and Mrs. Becker distributed handbills from 10:30 a.m. to 2:30 p.m., a period of four hours, at the shopping center. They conducted themselves on that occasion in an orderly and peaceful manner. They did not interfere with

the shopping center or commercial activities of the center. Disruption of the handbilling occurred again when a security guard told the petitioner and Miss Becker to cease handbilling and leave. The manager of the shopping center called the Dekalb police. The police came again. The petitioner left. Ms. Becker refused to leave and she was arrested.

On the 16th of October, the petitioner began his efforts at judicial relief or redress by filing a complaint in the United States District Court for the Northern District of Georgia for declaratory and injunctive relief on the grounds that section 1503 of the Georgia Code as applied to his and Ms. Becker's conduct deprived him of his First Amendment rights.

An evidentiary hearing was held on October 28, 1970, and the court then later, in January of 1971, stayed further proceedings in the case to await the decision of this court in Samuels v. Mackell and other cases which the court mentioned in its decision.

Then following the decision in Younger and Samuels, the district judge applied Younger and Samuels to deny petitioner relief, although petitioner was one against whom there was no pending criminal prosecution. The district judge was of the opinion that the petitioner had failed to show irreparable injury as defined by this Court and the defendant's claim lacked the rudiments of an active controversy.

Steffel then appealed. Ms. Becker and the Atlantic

Mobilization Committee who were petitioners in the district court did not appeal. The district court in a divided opinion applied Younger and Samuels to this case. The Court of Appeals was of the opinion, and stated in its opinion, that that was no different in effect in a declaratory judgment where there was not a pending criminal action than there was in one where there was a pending criminal action. And it saw no difference in reasoning, and therefore applied Younger and Samuels to this case.

Judge Tuttle dissented from the extension of Younger and Samuels to this case, but he concurred in the result on a different ground. Judge Tuttle would have affirmed on the authority of Cameron v. Johnson.

A motion was filed for rehearing, and the rehearing was denied. Three judges dissented from the denial of rehearing, and their opinion is before the Court.

QUESTION: May I ask you -- from your statement and also I recall from reading the district court that there was a finding there was no active case of controversy?

MR. MOORE: The judge said it lacked the rudiments of an active controversy. That was the finding of the district court.

QUESTION: Yes. What did the Court of Appeals ever do with that? They just ignored it?

MR. MOORE: They ignored it. I think that the Court

of Appeals was persuaded there was an active controversy as defined by this Court. The facts showed --

QUESTION: It didn't say so.

MR. MOORE: It didn't say so, but it proceeded anyway to make a determination that Younger and Samuels --

QUESTION: Is that case for controversy matter a sort of a special issue that we have to deal with?

MR. MOORE: It certainly could be, but I don't think it is dispositive, because I think there is a substantial showing between parties who have an adverse interest of an immediate controversy with reality.

QUESTION: The district court said that wasn't so.

MR. MOORE: It said it lacked the rudiments. The district court didn't say the rudiments were missing. They made no findings, they made a conclusion, but not a finding of fact. It didn't show what were facts upon which it found that the rudiments were missing. There is no statement of facts there. I think that was clearly erroneous, clearly wrong, because the petitioner on two occasions had been actually threatened with the enforcement of this specific statute, not with some different statute, but he himself on two occasions was threatened with the statute. And it is the force of that statute and his obedience to that statute that has prevented him from returning to shopping center handbilling. So there is that adversity of interest because he would like very

much to go out handbilling.

QUESTION: So we must assume, I suppose, that the Court of Appeals agreed with you.

MR. MOORE: I hope so. The Court of Appeals didn't say so, but I think that there is enough in the record on the facts where this Court can meet that question.

It is the petitioner's position that the Younger-Samuels standards were incorrectly applied to this case. In the context of a threatened prosecution, the application of the Younger-Samuels standards of irreparable injury are inappropriate. And they are inappropriate for a number of reasons. I should say the majority of lower courts have, with the exception of the Fifth Circuit, refused to apply Younger and Samuels' rule of equitable ... to situations such as this.

The restraining principles of comity which engender Younger and Samuels are inapplicable where the relief requested poses no threat to an ongoing state proceeding, either criminal or noncriminal. Comity is not an absolute value. As a practical matter, some balancing must be allowed to insure that fundamental Federal rights are not lost by blind compliance with comity. The purposes underlying the development of this principle which include the avoidance of conflict with two courts seeking to dispose of the same case and respect for state courts in the context of a threatened criminal prosecution.

In Samuels it was held there is no difference between

declaratory relief and injunction with respect to the disruptive impact each on a pending state prosecution. The purpose for equating the two forms of relief was to require a showing of irreparable injury. In the context of a pending state court proceeding, then there would be pragmatic reasons for requiring such a showing. These reasons, I submit, would include additional cost to the judicial system of two ongoing proceedings involving essentially the same subject matter and stopping of an ongoing proceeding where jurisdiction has rested in the state court and the effect of judicial intervention by the Federal court is to wrest away, take away from the state court, a matter over which its jurisdiction has vested. And you run into a principle that does not necessarily have to be respected in all cases, that ordinarily you don't wrest away jurisdiction from a court once it has vested.

You have then an indictment of the state processes because implicit in Federal intervention where there is a pending prosecution going on is that in some way the state prosecution is inadequate or that the state prosecution is in bad faith, or that the state judges are corrupt or that the state fact-finding proceeding is inadequate. There are any number of variables that I could refer to that are familiar to this Court. But it is an indictment. It is a slander, so to speak, of the state process.

Another reason is the duplication of effort and the

disruption of the status quo. These reasons are not as compelling where a state prosecution has only been threatened; where no state action is pending there is no assurance that constitutional rights will receive time and attention. This case is an example of that. It has been now over three years and Steffel still has not gotten a determination of his rights. He still can't return to the shopping center for the purposes of handbilling.

QUESTION: Did he have available to him under Georgia law any declaratory judgment procedure?

MR. MOORE: No, he did not. Georgia law by statute and by court decision prohibits the intermeddling of equity in administrations of criminal law, and Georgia cases have refused to accept jurisdiction over matters involving the enforcement of criminal law. Now, recently, more than two years after this incident, the shopping center filed an action for declaratory judgment in the Superior Court of Fulton County. That action was dismissed for failure to state a claim, among other reasons. One of the other reasons for dismissing it was that there was primary jurisdiction before, I think, the National Labor Relations Board because the union was involved.

QUESTION: Why would they file it in Fulton County if they are in Dekalb County?

MR. MOORE: The defendant lives in Fulton County and

the residence requirement is you have to file in the residence where the defendant is and that's why it was filed in Fulton County.

And there is an appeal pending now by the shopping center to the Georgia Supreme Court, and that appeal will be heard on the 15th, which is Thursday -- Friday, I believe.

Where irreparable harm is the criteria for declaratory relief, rights in doubt may be sacrificed due to the difficulty of making such a showing. The decision that irreparable harm should not be a criterion for declaratory relief when no state action is pending is supported by legislative intent, by case history, and by the writings of the chief architect of the Federal declaratory judgment, Professor Borchard. Federal intervention when a state prosecution is threatened is less disruptive of the state's activities in similar interventions when a prosecution is pending.

A decree of Federal equitable relief interferes only with the policing and prosecutorial functions of the state executive branch. When the prosecution is pending, however, such intervention interferes further with the activities of its judiciary. The dual interest of the Federal court in eliminating threat to constitutional violations and in avoiding unnecessary police interference might both be protected by directing appropriate orders to responsible officials. They could correct the situation internally

themselves. The advantage of declaratory relief in a nonpending situation is that its noncoercive effect allows law enforcement officials to continue to function.

Now, declaratory judgment and injunctive relief should be distinguished. A declaratory judgment can be distinguished from the equitable relief of an injunction in several respects, and I should indicate that declaratory judgment is not a legal remedy--not an equitable remedy, rather, but it is a legal remedy.

Some of the distinguishing factors are that (1) lack of adequate legal remedy is a prerequisite for injunctive relief but is not a criterion for declaratory relief. Rule 57 of the Federal Rules of Procedure points this out. This has been a traditional and ancient requirement for the imhibition of equity that there be an absence of adequate remedy at law or other appropriate remedy at law. That was traditionally the way that the interests of equity was balanced against the interests of the lower court and gave rise, more or less, to the equity course by preventing embarrassment, showing the ineffectiveness of equity by introducing, or by decreeing an order that could not be enforced.

To be granted declaratory relief, the petitioner need not show the inappropriateness of other forms of relief. The petitioner need only show that the declaratory judgment can handle the dispute efficiently and economically.

Injunctive relief immunizes particular conduct by enjoining further prosecution, whereas a declaration merely interprets the law and has no injunctive effect.

QUESTION: Of course, if you get far enough away from the irreparable harm and the kind of criteria you have for an injunction, then you begin to get into the case of controversy problem that Justice White mentioned, don't you? I mean, a completely abstract question.

MR. MOORE: It's not completely abstract because this Court, as well as the declaratory judgment statute, has defined standards to determine when a controversy exists over which the district court can assume jurisdiction. So it is not altogether abstract. It requires an exercise of judgment, a discretion by the district judge or whoever is determining the matter. But it's not entirely abstract. And the logical consequances of the position of case in controversy would be parhaps to repeal the Declaratory Judgment Act. If the case in controversy standard isn't given a real live content --

QUESTION: The controvery standard is constitutional, under the declaratory judgment statute. I mean, if one had to go, which I take it you are not suggesting and I am certainly not, there is certainly no doubt as to which one it would be.

MR. MOORE: I understand that. I am simply saying that the case in controversy standard has to be applied against the background of the Declaratory Judgment Act and to

be too restrictive in case in controversy could result in repealing the Declaratory Judgment Act. And whether that would be salutary or not is not a question I think that is really involved in this particular case.

QUESTION: We are close to the breaking point, but sometime in your argument would you take up for me at least the Cameron case and tell me how we escape Judge Tuttle's conclusion that Cameron controls this one?

MR. MOORE: It's a good question.

MR. CHIEF JUSTICE BURGER: We will resume after lunch.

(Whereupon, at 12 o'clock noon, a luncheon recess was taken, to reconvene at 1 p.m.)

AFTERNOON SESSION

(1 p.m.)

MR. CHIEF JUSTICE BURGER: You may continue whenever you are ready, Mr. Moore.

MR. MOORE: Mr. Chief Justice, and may it please the Court, to resume, I would like to resume with the question put to me by Mr. Justice Blackmun with respect to the application of Cameron v. Johnson to this case.

First of all, I would want to point out that Cameron v. Johnson is certainly controlled by Younger and by Samuels, the reason being that Cameron was a pending state court prosecution. There was active litigation in the state court. The petitioners had filed an affidavit to quash, on the grounds that the statute was unconstitutional.

Next of all, in Cameron v. Johnson the district court did in fact issue a declaratory judgment, but the declaratory judgment that the district court issued was one which upheld the constitutionality of Mississippi's anti-picketing statute.

Next, Cameron v. Johnson is a failure of proof case, that there was a failure of the petitioners to prove bad faith or harassment or even selective prosecution.

Fourthly, the Younger-Samuels standard is certainly inappropriate in the context of this case, that is, of a threatened prosecution, because in the context of the threatened prosecution, what is a bad faith threat to enforce a statute

against specific conduct? What standards can be devised by this Court to make the application of the Younger-Samuels standard manageable? The standard in the context of a threatened prosecution is unwieldy because there is hardly any imaginable way to fashion the appropriate standard.

Take, for example, litigation in which we were involved in Georgia, the Atlanta Vietnam Moratorium Committee. It's an unreported case of the district court. And there what was sought, the petitioners sought the right to go down to the state Capitol and hold a meeting and parade and have a demonstration in opposition to the war. And they notified the Governor of their intentions of what they planned to do, and the Governor sent them back a telegram and in the telegram he said in part, "You will be permitted to hold such a meeting on the Capitol grounds. If your purpose is the same as that of the other moratorium meetings and the ones planned for November which give aid and assistance to the enemies of this country, which downgrade the United States Government and its flag and which are directed by the Communists and other enemies of this country with the support of Viet Cong, you nor any of your group will be permitted to assemble on the Capitol grounds for such purposes."

Now, is that a good bad-faith threat to enforce Georgia's trespass statute? Without a declaratory judgment action, what really would the petitioners have had in order to

conduct their demonstration?

Fortunately, we do have declaratory judgment, and the district court did issue a declaratory judgment saying that the stated conduct of the sponsors of the meeting was constitutionally protected and that the Governor had a right to his point of view, but he could not impose his point of view on the sponsors of the demonstration so as to deny them the right to come down to a public building and orderly demonstrate and orderly hold a meeting. Of course, he could take action against them if their conduct went beyond that, cause violence, obstruction and things of that sort. But that was not involved. It was purely First Amendment activities.

So when under the standard, if the standard of Younger and Samuels is applied to a threatened prosecution, when can the district court reliably determine that bad faith or irreparable harm is reliably shown? There is just no way that you can do that, unless this Court is going to be willing to cause district court judges to try the state of mind of state prosecutors and state law enforcement agents to show that they intend to actually strike the threatened blow, they actually intend to deprive persons of their constitutional rights.

Then we get into a serious question, if the standard is extended to the threatened prosecution/case in controvery.

Next with respect to this particular case, Judge

Tuttle makes it clear in his concurrence in Steffel that it was a pending case and he relies on the language of this Court in Cameron which talked about withdrawing the determination of guilt from the state court, and the only reason a statement of that nature could be made is because there was a pending prosecution. But then this Court went on to say, in the language that Judge Tuttle used, to talk about securing protection which a prompt trial and appeal directly to this Court would provide. However, in a threatened situation, there is no prompt trial, there is no appeal. So the rubric, the technique of a single prosecution being dispositive of the claims does not work and cannot work in a threatened prosecution. The reason for that is there is nothing upon which it can work, unless a petitioner such as Steffel is required to break the law. And it does not seem that a democratic society that prides itself in a concept of ordered liberty requires actually lawbreaking in order for one to come into court.

Now, in a similar case involving a similar question, in the abortion cases, the doctors and the women who are seeking abortions and have not actually been moved against under the state statutes were allowed to enjoy the benefits of a declaratory judgment in those cases. So I think that basically the Cameron v. Johnson is not controlling and cannot be controlling in this case, because Cameron v. Johnson is more correctly a pending prosecution case.

To move on where I left off before recess, another distinguishing factor between the declaratory judgment and injunctive relief is that the state can disregard a declaratory judgment and not be cited for contempt. But it can be held in contempt for disregarding an injunction.

Again, in the abortion cases, this Court relied upon the obligation under the Constitution of State officials to obey decisions of this Court which are the supreme law of the land and to obey the decisions of this Court voluntarily.

I have been notified that my time is about to expire. Such time as I have, I would like to reserve it for rebuttal.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Moore.

Mr. Cohen.

ORAL ARGUMENT OF LAWRENCE M. COHEN ON

BEHALF OF RESPONDENTS

MR. COHEN: Mr. Chief Justice, and may it please the Court, there are two issues in this case in our opinion. The first is whether Federal courts in the exercise of their equitable jurisdiction should issue a declaration of rights as to the good faith enforcement of a facially valid state statute. There is no allegation in this case that there has either been bad faith harassment or a facial invalidity to the Georgia criminal trespass law.

The second issue which I will address myself to is whether where there is only the application of a state statute

in question, the state should first be given the opportunity under the doctrine of abstention to apply that statute. In our opinion the Court of Appeals properly declined, properly dismissed the complaint here on the basis of its equitable jurisdiction, and even if it had not, it would have properly abstained to decide the question, retain jurisdiction until the Georgia courts had spoken on this issue.

A Federal declaration of right as to a state criminal statute should issue only where it is necessary and appropriate to secure a vindication of constitutional rights. This is not such a case. The Federal courts here could not provide any protection to either the plaintiff or to any other potential plaintiff that they could not otherwise receive. Conversely, there may be many of the significant disadvantages described in Younger and Samuels of Federal intrusion upon state criminal processes.

It is significant that the petitioner in this case has not sought any declaration that the Georgia criminal trespass law is generally void or even invalid as to any class of persons. Really all that is sought is only a declaration as to a particular incident, at a particular shopping center at a particular time seeking to convey a particular message. The only declaration that the Federal court could issue in this case is that the conduct that occurred on October 8 or the different conduct that occurred on October 10 was violative of

Federal constitutional rights. It could not have adjudicated the statute generally; it could not have adjudicated the statute as to any other class of persons, or as to anybody seeking to come on any other shopping center or to convey any other message.

In that situation there is no value, there is no virtue in a Federal declaration. The Federal declaration doesn't in any way achieve anything that proceeding through the state courts could not otherwise achieve.

QUESTION: You don't contend here, then, or do you, that there was no distinguishable controversy --

MR. COHEN: We don't make that contention, Mr. Justice White.

QUESTION: So that here on the face of it is a case of controversy involving a Federal constitutional question.

MR. COHEN: It's a case of controvery involving a Federal constitutional question, but an exceptionally limited constitutional question. Where you are talking about a statute as applied, the only constitutional question is whether conduct on a particular occasion at a particular time would or would not be violative of the Constitution. It does not in any way say that the Georgia criminal trespass law generally --

QUESTION: Would you say then that the Declaratory Judgment Act gives Federal courts -- contemplates the Federal

courts will use their discretion as to which cases of controversy to entertain and which not to?

MR. COHEN: Yes. I think there are two principles that cut against the principle in the Federal Declaratory Judgment Act, and I would like to ...

The first principle is the principle of comity. Not every case of controversy that the Federal courts under the Declaratory Judgment Act could decide really warrants decision. For example, if you have a pending prosecution, then Younger and Samuels limit the right of the Federal Declaratory Judgment Act. Similarly, where you have a nonpending case, such as the one we have here, we don't think that the principle of comity should be abandoned altogether. We would say that in that case a Federal court could issue a declaration as to a facially invalid state statute, an allegation of facial invalidity, but it cannot issue a declaration where all that is being sought is to attack a statute as applied in a particular case.

QUESTION: Would either or both of those take a three-judge court?

MR. COHEN: If there is a due process argument, I would assume that would be true.

QUESTION: But to declare a state statute unconstitutional, you have to have some Federal constitutional ground. I take it it would be due process.

MR. COHEN: I would take it if the statute's statewide application is generally invalid, you would need a three-judge court. Where it is only a single incident as we have here, there was no seeking of a three-judge court, and I don't think one would be appropriate.

QUESTION: Wasn't there contention not that people were being harassed with a valid statute but at least in these circumstances it was unconstitutional to apply the statute.

MR. COHEN: That is correct. There is no allegation of harassment or bad faith prosecution.

QUESTION: Why didn't this take a three-judge court?

MR. COHEN: I don't think it warranted a three-judge court. It is only talking about a particular potential incident.

QUESTION: A hypothetical case, would you say?

MR. COHEN: No, I don't consider this to be a hypothetical case.

QUESTION: Because of the prior pattern.

MR. COHEN: Because of a prior pattern. I think we are not arguing here that there is lack of concreteness or lack of rightness or lack of standing. Our argument here is that the case was appropriate for decision, but the Federal court in exercising its discretion, equitable discretion here, should not have decided that case because of principles of comity , alternatively should have abstained deciding it because of principles of abstention.

QUESTION: Do you think you are defending the Court of Appeals' decision then?

MR. COHEN: No. I am defending Judge Tuttle's position in the Court of Appeals insofar as his concurring opinion goes. We would agree with the Court of Appeals that the principles of Younger and Samuels are applicable in this case only to the extent that in this case the processes of (inaudible).

QUESTION: (Interrupting) The Court of Appeals was somewhat broader than your --

MR. COHEN: That's correct. That's correct. To the extent the Court of Appeals is saying that Younger and Samuels apply in every instance where there is an attack upon a State statute, I would not go that far.

QUESTION: If the attack were facially unconstitutional, you would not go that far.

MR. COHEN: Yes, that is correct. I would feel where there is an attack on facial invalidity, you do not have to apply Younger and Samuels where there is no pending prosecution. Because as I see the principles here, we are dealing with the question of two principles cutting against each other. We have first a principle that a plaintiff, at least in civil law statutes, has a right to choose a forum. He has a right to go in the Federal court, he has a right to go in a State court where he is seeking a vindication of constitutional rights.

QUESTION: And you don't think the Federal Declaratory

Judgments Act rather inhibits that dichotomy?

MR. COHEN: The Federal Declaratory Judgments Act provides a minor form of equitable relief. It provides a form of relief in which there may be different standards. For example, under Younger and Samuels an injunction could not issue whether there is a pending or not a pending situation, even in a case of facial invalidity. We would say that a declaratory judgment, however, being a milder form of relief, could issue where there is only an attack on facial invalidity in a nonpending situation. So that you would achieve a right under the Federal Declaratory Judgments Act that would not be possible if you only had a --

QUESTION: Why do you suggest that equally the Declaratory Judgments Act could not be invoked where the attack is only as applied?

MR. COHEN: Because I think at that point you are balancing the interference with the State criminal processes and the need for Federal declaration of rights. Where you are only coming into it as applied, there is no necessity, there is no chilling effect, if you will, on other persons that need to be vindicated in the Federal court. You have all the same considerations on the other hand that warrant the doctrine of comity being applied. You have potential duplication of proceedings. The Becker case could still go forward here, because we don't know that the Samuels case and the Becker case involved the same considerations. If it was facial invalidity, you

couldn't go forward. Presumably the State would defer to the Federal declaration of rights in that case. So you still have a duplication of remedies, you still have interference if the State process is extended. People may want to give weight to the decision. You have an erosion of the role of the jury. You have the fact, as in Samuels, that you may have ancillary injunctions or you may have ancillary types of remedies being issued by the Federal court. And you would have, in other words, interruption of the State processes of which there is no corresponding value by obtaining a Federal declaration of rights.

Where you have a facial invalid statute, I think there is a sufficient warranting of bringing in the Federal processes and apply them, because there you have an effect on other people as well and rights that cannot be secured by piecemeal adjudication in the State courts.

QUESTION: But you don't have declaratory judgment in this action in the State court.

MR. COHEN: We don't agree with that, Justice Marshall. In our opinion the Georgia law, section 110-1101 of the Georgia Code is broader than the Uniform Declaratory Judgment Act. In our opinion the other act confers a right under Georgia law to go into the Georgia courts, as we have sought to do in a pending action already, and obtain a declaration as to whether the plaintiffs in this case could or could not have come out to

the North Dekalb Shopping Center.

QUESTION: That isn't critical to your position, I suppose --

MR. COHEN: No, it isn't.

QUESTION: -- and I take it you would make the same argument if you had no declaratory judgment act.

MR. COHEN: I would make the same argument. I defer to the Lake Carriers, for example, where Mr. Justice Frankfurter said that the existence of a State declaratory judgment statute was not material. ... the New York State Declaratory Judgment Act, that was not held to be important. I think there is no case -- I think this is what is essential -- there is no case after Younger v. Harris or before Younger v. Harris which applied a Federal declaration of rights to a State statute as applied. Abortion cases were mentioned. That was a case of facial invalidity. The case of Cameron was a case where the court said, "We don't have any facial invalidity; we don't have any bad faith. Therefore, there is no Federal equitable jurisdiction." A Federal court in the exercise of its equitable jurisdiction should issue a declaration of rights. The court didn't say, well, this would have been a different case if it had been a nonpending action. There was no differentiation prior to Younger between pending and nonpending cases. And in no case do we have a situation where the Federal court issued a declaration of rights to a statute as applied.

We do as Mr. Justice Frankfurter said, the most sensitive source of friction between State and nation, namely, active intrusion of the Federal courts in the administration of criminal law for the prosecution of crimes solely within the power of the State. This is especially apropos here, we think. We are dealing with trespass, which the Chief Justice observed in Taggart is a matter of historic State concern. This is the thrust, I think, of Lloyd? also. Where the State courts are fully competent to adjudicate Federal questions, and there is no indication that they will act in bad faith, especially we are here cognizant of an almost identical case, the Becker case, and the issue is one of special State concern, we submit that it would be out of harmony with the constitutional presumption of State competence for a Federal court then to intervene. Federal intervention, after all, is peculiarly inconsistent with our Federal framework.

This is, I think, especially appropriate here where we have a situation where the Federal courts participating would not in any way eliminate uncertainty. The next person seeking to come onto a shopping center in Georgia would not even know/if there was a declaration of rights here as to whether or not he had the right to come onto the shopping center. Someone wanting to come out to the North Dekalb Shopping Center for another message, not to protest the Vietnam War, but perhaps to obtain signatures on initiative petition or to go ahead and

campaign for political office would not know by virtue of the declaration of rights here as to whether or not he had that right to come out.

QUESTION: In the First Circuit case of Wulp v. Corcoran, that was an allegedly facially invalid ordinance, I guess, or statute.

MR. COHEN: That's correct. It was a city ordinance requiring a license to solicit in that case, and in that case it was alleged that that city ordinance by requiring a license in advance was facially unconstitutional. But there was no saving construction or construction as applied.

I think that's true, incidentally, Mr. Justice Stewart, of each of the cases that is cited by the plaintiff. There is no case they cite where as here you have someone coming on to seek construction of statute as applied.

There is a second ground which we argue in our brief here, in addition to this distinction between cases where there is a statute as applied as opposed to a facially invalid statute, and that was even if there is a distinction to be drawn between pending and nonpending cases, that distinction should not depend on whether there has been an actual arrest or an indictment.

In this case we did not have a plaintiff who merely wrote to the shopping center and said, "I want to come out to the shopping center." But, no, he went into Federal court.

We have a plaintiff who twice came out to the North Dekalb Shopping Center, twice was asked to leave, twice the police were called, and it was only on the second occasion when he left at that point that he brings Federal suit. We think, in other words, that he has actively invoked the processes of the State law enforcement officials at this point, and to proceed at this point, moreover, especially in view of the Becker case, would involve a duplication of efforts and a waste of resources. There would necessarily be State-Federal friction here if the Federal court interfered by issuing a declaration of rights. And I think this is the offense to comity that this Court was seeking to avoid when it issued Younger and Samuels decisions. The considerations which might warrant, in other words, drawing a line between pending and nonpending cases, if that is to be determinative, should not require then the situation such as the one we have here that this is considered to be "a nonpending case."

QUESTION: Mr. Cohen, does your argument go so far as to say that where you are talking about a statute as applied as opposed to facially invalid, that perhaps there is not even 1983 jurisdiction,that the State official in that case isn't actually causing the person to be deprived of any rights?

MR. COHEN: Well, you have in the shopping center cases, I think, a significant question of State action, as I read --

QUESTION: I don't mean State action. Let's assume there is no doubt that the claim here is against the sheriff and that the claim is that this is sufficient State action. But in the rather tentative stage of this situation where there wasn't actually any pending prosecution, is there any question as to whether there you can say a State officer has caused this man to be deprived?

MR. COHEN: I think you would be getting into a real question of the speculative nature of asking the Federal courts to step in where there has been no overt action here. We don't know what the State officials would have done in this case as they actually operate. And I think that raises 1983 problems. I don't think I am prepared yet -- I think you do have the element in a nonpending case of auras of speculativeness and remoteness. I think that operates to indicate, especially in an applied situation -- if you are going in against a State statute, there is no question about it. But if you are going into a particular applied situation, then there is a real question of does 1983 apply, do we have a real controversy, what is the nature of the dispute, and so on. That's one of the reasons why the Federal court should not act in advance in that type of situation.

QUESTION: Do you make anything at all out of the fact that,if it's true,that there was a criminal prosecution pending against a fellow actor? Or was there?

MR. COHEN: Yes, there was. There was a criminal prosecution --

QUESTION: Was the same question raised there?

MR. COHEN: One of the two people who came out to the shopping center, Ms. Becker, did not leave. She was arrested. Steffel left and was not arrested obviously since he left. Steffel and Becker both brought the same action. The lower court dismissed as to Becker because there was a pending prosecution.

QUESTION: And she could raise the same questions there?

MR. COHEN: She could raise identical questions, that's right.

QUESTION: And did, or not?

MR. COHEN: She hasn't raised them because it has been held up pending this action.

QUESTION: There was no motion to dismiss the indictment or anything like that?

MR. COHEN: There was no motion to dismiss the indictment. No action was taken there. The case was held up pending resolution of this controversy. I think it reached the indictment stage but hasn't proceeded beyond that point.

I think it's significant in this case to show the narrowness of the Federal injunction -- I mean, the Federal declaration of rights it sought, is to compare the two handbills

that were passed out on this occasion. We have one handbill that was passed out on October 8 -- excuse me.

QUESTION: Tell me again what happened to the Becker case.

MR. COHEN: The Becker case, Becker was arrested, was brought up, was arraigned, and then this action was filed involving both Becker and Steffel at that point.

QUESTION: Am I misinformed or under a misapprehension? I thought that her case had proceeded, that she was prosecuted and convicted and did not appeal.

MR. COHEN: That is not correct. I think it is dealt with in Footnote 2 at page 46 of the appendix in the Court of Appeals decision where the court says, "At oral argument the Court was informed that Becker's trial had been indefinitely continued, presumably awaiting the disposition of this appeal."

QUESTION: Thank you.

MR. COHEN: That's the latest word I know of it, Mr. Justice Blackmun.

What did happen in the Becker case was no appeal was taken from the district court's dismissal of the injunction and declaration of rights request, which is part of this case. The only appeal here was taken by Steffel as to declaration of rights.

The point I was going to make was to compare Exhibit A

and Exhibit B, pages 13 and 14 of the appendix which were the two handbills involved here.

Exhibit A involves a message which is unrelated to the shopping center and to which there may be alternative forms of communication. It is a communication, therefore, which directly involves the same considerations as did the type of communication desired in Tanner v. Lloyd. Under Tanner v. Lloyd we think there is no question that that type of communication was not permissible on the private property of the shopping center, unless the shopping center, which it has not been alleged here, became a functional .. of public property.

Exhibit B, however, is a message directed at a particular tenant of the shopping center, namely, the Colonial Stores which distributed lettuce. There may be different considerations in that case. That case might be held or might not be held to be more akin to Logan ? ... than to be akin to Lloyd.

So we have a declaration here that depends on the happenstance of whether the person had been arrested on October 8 or October 10. If he had been arrested on October 8, it wouldn't have governed the October 10th condut. If he had been arrested on October 10th and there was a declaration of rights as to that conduct, it wouldn't have governed the October 8th conduct.

In that type of situation, to permit the Federal courts to interrupt the State process -- interfere with the

State processes and prematurely adjudicate a question before the State courts have been able to adjudicate it, we think offends the principles of comity and of federalism which are the heart of Younger and --

QUESTION: The only thing Steffel can do is wait around at the pleasure of the State authorities before attempting again to distribute leaflets.

MR. COHEN: There are two things he could have done. He could have also sought a declaration of rights, we submit, under the Georgia law.

QUESTION: I understood -- well, you differ with --

MR. COHEN: Yes, I absolutely differ with it.

QUESTION: Oh, I see.

MR. COHEN: We think there is a right under the Georgia Declaratory Judgment Act to seek a declaration of rights.

QUESTION: You don't mention the Georgia cases.

MR. COHEN: We did mention them in our brief, Mr. Justice Marshall.

QUESTION: Well, you didn't mention it when I asked you.

MR. COHEN: I'm sorry. The cases are cited at our brief at page --

QUESTION: Well, there is a dispute.

MR. COHEN: There is a dispute.

QUESTION: Both of you have cases showing that we can read?

MR. COHEN: And we are arguing the case Thursday in the Georgia Supreme Court.

(Laughter.)

Now, I hope we will resolve the dispute, at least give some light on it, although I should mention that the lower Georgia court dismissed our action, not because we didn't have jurisdiction, but because they thought that the controversy was not then right; it had been too long in existence and we had an act accompli.

QUESTION: Were you going to suggest something else, Mr. Cohen. When you started --

MR. COHEN: That's right, there are two choices a person has. He can either file a declaration of rights or he can proceed to take the course of conduct and run the risk of prosecution. Now, clearly there are disadvantages in proceeding to become a lawbreaker, so to speak.

QUESTION: That's simple. Go to prison, you mean.

MR. COHEN: Well, not in this particular type of case.

QUESTION: What is the penalty?

MR. COHEN: It's a misdemeanor under Georgia law.

QUESTION: And what does that carry?

MR. COHEN: I think it does carry a potential jail sentence as well as a fine. But I think this is the point of

Dombrowski. This is the point of Younger where they say the penalty attached to becoming a lawbreaker is not in and of itself sufficient to invoke Federal jurisdiction.

QUESTION: Do you think what I said in my opinion in Perez v. Ledesma is consistent with the distinction you draw between facial and as applied?

MR. COHEN: I do because I think --

QUESTION: You do?

MR. COHEN: I hope you do, too, Mr. Justice Brennan. I think it's consistent because the citations in your opinion --

QUESTION: Actually, of course --

MR. COHEN: -- to .... Douglas.

QUESTION: Well, what we had involved in that case, I agree, was facial unconstitutionality only in Perez v. Ledesma, both as to the statute and the ordinance. But I thought some of my discussion of the Declaratory Judgments Act suggested that I wouldn't draw that distinction.

MR. COHEN: Well, I think the Samuels decision could be read that way.

QUESTION: Judge Tuttle certainly agreed with your position.

MR. COHEN: Judge Tuttle did agree with my position.

QUESTION: He did. He quoted from my brother Brennan's concurrence, or whatever it was, opinion in Perez v. Ledesma, to make the point that he was making.

MR. COHEN: He concurred in the result --

QUESTION: .. it was read.

MR. COHEN: Well, I think that the line of cases that you cite in there, Mr. Justice Brennan, cases like Douglas v. City of Jeannette, all --

QUESTION: As you said yourself, this Court has never addressed the distinction that you are pressing.

MR. COHEN: That's correct. It has not addressed it nor is there any suggestion in any decisions that would agree or disagree with me.

QUESTION: You took the same position in the Court of Appeals?

MR. COHEN: That's correct.

QUESTION: And they agreed with you, but too much.

MR. COHEN: We took the position in the Court of Appeals that no declaration of rights should issue.

QUESTION: Yes.

MR. COHEN: For this reason as well as because of Younger v. Harris. They agreed with the first and did not reach the second, nor did they argue abstention in the Court of Appeals, and they did not reach that question either because that question would only be reached if they had not dismissed the complaint, they decided to retain jurisdiction.

And we so argue that here that even if this Court disagrees with the position which I have urged and decides that

the court should not have dismissed the complaint, at the very least it should have retained its jurisdiction --

QUESTION: That's predicated on your position that there is a remedy by way of declaratory relief available under the Georgia system.

MR. COHEN: Well, there is a remedy there by declaratory relief. There is also the Becker case. If the Becker case proceeded to judgment, we might well have a definitive State answer in an identical situation here, as identical as two cases can get, over what the Georgia trespass law means as it is applied to people in the position of the petitioner.

The abstention doctrine, as I read the cases --

QUESTION: This petitioner isn't in charge of the Becker case.

MR. COHEN: No, but the Becker case would proceed. It may not find the sum of the controversy, but it may certainly give enlightenment and it may reach a decision which either avoids the constitutional problem by saying that someone in a similar situation can't be prosecuted, and therefore there is little risk that Steffel would be prosecuted, or might reach a modifying decision which would modify its law in such a way as to avoid the constitutional question.

QUESTION: What would you do in the situation which is certainly recurring where the plaintiff in the Federal court

in an action like this asserts both facial and as applied unconstitutionality?

MR. COHEN: And there is not a pending action?

QUESTION: No.

MR. COHEN: If there is not a pending action, I think the Federal court can issue a declaration of rights as to the facial invalidity of the statute.

QUESTION: But not as to --

MR. COHEN: Not as to applied because that would vary from case to case and there is no virtue as to any other person in having such a declaration of rights. There is no constitutional right to Federal courts to secure --

QUESTION: And if it says the law is facially constitutional, then it must dismiss the rest of the case.

MR. COHEN: I would submit that that's the case, yes. I would submit that in that type of situation, the Federal court took the pose it's constitutional, the plaintiff is going to be advised of all the rights to which he is entitled to be known in advance before he proceeds under State law.

The case I think in some ways, as far as the abstention ground goes, resembles a case that was decided last term by this Court called Gibson v. Berryhill where you had a State statute, optometry statute, there had been a decision by the Court in that case that it should exercise equitable jurisdiction, there was no room for abstention. But there was

also a State case that was proceeding that involved other people in a similar situation. And this Court held in that type of situation that there should be abstention until the lower courts of the State had passed upon the people -- the decision of the highest court, I think it was, of Georgia as to people similarly situated to those who had brought the action in Federal court.

And it is our position that the same kind of consideration should lead to abstention here should this Court find Federal courts properly refused to exercise their equitable jurisdiction.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Cohen.

Mr. Moore, you have a few minutes left.

REBUTTAL ORGAL ARGUMENT OF HOWARD MOORE, JR.

ON BEHALF OF THE PETITIONER

MR. MOORE: Several things in rebuttal.

Indeed as applied adjudications have less dignity than facial adjudications. That is, the facial constitutionality of a statute. I think that for the reason that they do have less dignity, that they should be routed into the district court where it is appropriate, and the reason for that is that I believe it makes a more manageable relationship between a State and Federal court and it unburdens this Court with needless applications for certiorari which may be substantial

questions in a Federal district court, but not necessarily substantial questions warranting the exercise of this Court's certiorari jurisdiction.

I should say further that district courts are familiar with the exercise of their declaratory judgment action in applied situations, because they do it every day in diversity cases where insurance companies are suing to determine whether or not a particular accident is within coverage of the policy. Why, then, should Federal constitutional rights have any less dignity than ordinary personal injury cases? I think as applied adjudications are appropriate for routing into the district court.

That's not necessarily a question to be decided in this case.

Additionally, I think that the Court should take seriously the statement of Judge Tuttle with respect to turning federalism on its head. What would happen here if this Court were to affirm the Court of Appeals, it would create a situation where conduct could be controlled not by State courts, but rather by prosecutorial officials, law enforcement officials. The rule of "Watch it, boy," would really become a statute. Take, for example, if Steffel, instead of being an outside handbiller were a tenant in the shopping center, a long-haired tenant in the shopping center, operating an ice cream stand, and instead of operating an ice cream stand every day, he had people

to gather into his ice cream stand and planned protests against the war, ecological protests, support in behalf of women, racial rights, racial equality, and things of that sort. But yet someone, and the police didn't like what Mr. Steffel was doing and told him that unless he ceased, they would arrest him for unlawful assembly, without the right to come into Federal court, Mr. Steffel may very well have to obey the admonishment of State prosecutorial officials.

QUESTION: In your hypothetical case is Mr. Steffel doing this in a cubicle rented by him, a store?

MR. MOORE: He is a tenant. And, of course, that would be greater sensitivity and acceptivity to his position because then he would also have a property right as well as a personal right of liberty. But there is a tremendous danger that the Declaratory Judgment Act would be potential of repeal as Judge Tuttle indicated, and there is tremendous danger to federalism because valuable constitutional rights may be lost and there would be no remedy, no forum in which they could be protected.

QUESTION: I don't see how it helps you that much to say that Mr. Steffel might be able to do something in his private quarters when we are dealing with a case where he is not doing anything in his private quarters.

MR. MOORE: Mr. Chief Justice, the example is that it illustrates some of the harms and variations that could flow

from withholding the right to seek a declaratory judgment where there is a nonpending prosecution.

QUESTION: In your hypothetical case, he has in effect hired a hall, to take the vernacular, he has hired a hall and presumably can do anything he wants to in that place.

MR. MOORE: Not actually. What he has actually done is to operate a business, but he is sensitive to the issues of the day and he devotes himself to the issues of the day rather than to his business and someone is offended by it.

QUESTION: To all the customers who come in his store, your assumption is?

MR. MOORE: Perhaps his customers are friends of his. It's his space, he's a tenant, he uses it as he pleases. But the problem is that if declaratory judgment is withheld, then there would be no way that Federal rights can be reliably protected and that he would have to obey the admonishment against perfectly proper and constitutionally protected activities.

QUESTION: Mr. Moore, let me ask you one question similar to what I asked Mr. Cohen. As I read 1983, in order for you to state a claim you have to show that the defendant, in line with the statute, subjects or causes to be subjected your client the deprivation of constitutional rights.

Now, in the absence of a pending prosecution, how do you fit the facts of your case into that language?

MR. MOORE: Well, we would certainly claim that

police officers who came and admonished him were State agents. And the question then would become whether or not there would be sufficient State action based upon the enforcement apparently in good faith --

QUESTION: Assume there is sufficient State action, but the statute reads in the present tense, they subject or cause to be subjected your client. And in the absence of a present prosecution, don't you have some trouble fitting those facts into the language of the statute?

MR. MOORE: Certainly not, Mr. Justice Rehnquist, because my client is obeying the State law. His staying away from the premises is in deference to the State law as enforced by the State agents. They actually came out, the police actually came out, the State police came out and told Mr. Steffel to leave the premises.

QUESTION: So the gist of your complaint isn't, then, the threatened prosecution.

MR. MOORE: I don't quite understand your thrust of your question.

QUESTION: Well, I have taken too much of your time.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

(Whereupon, at 1:45 p.m., the orgal argument in the above-entitled matter was concluded.)