



TOURO UNIVERSITY
JACOB D. FUCHSBERG LAW CENTER
Where Knowledge and Values Meet

**Digital Commons @ Touro Law
Center**

Scholarly Works

Faculty Scholarship

1988

The Preiser Puzzle: Continued Frustrating Conflict Between the Civil Rights and Habeas Corpus Remedies for State Prisoners

Martin A. Schwartz

Touro Law Center, mschwartz@tourolaw.edu

Follow this and additional works at: <https://digitalcommons.tourolaw.edu/scholarlyworks>



Part of the [Civil Rights and Discrimination Commons](#), [Constitutional Law Commons](#), and the [Criminal Law Commons](#)

Recommended Citation

37 DePaul L. Rev. 85 (1988)

This Article is brought to you for free and open access by the Faculty Scholarship at Digital Commons @ Touro Law Center. It has been accepted for inclusion in Scholarly Works by an authorized administrator of Digital Commons @ Touro Law Center. For more information, please contact lross@tourolaw.edu.

THE *PREISER* PUZZLE: CONTINUED FRUSTRATING CONFLICT BETWEEN THE CIVIL RIGHTS AND HABEAS CORPUS REMEDIES FOR STATE PRISONERS

*Martin A. Schwartz**

Fifteen years ago in *Preiser v. Rodriguez*¹ the United States Supreme Court attempted to resolve the potential overlap in federal remedies that are available to state prisoners. Constitutional claims asserted by state prisoners against state prison officials fall within the literal terms of the Civil Rights Act of 1871 (section 1983),² yet may also fit within the congressional grant of federal court habeas corpus jurisdiction over federal claims asserted by state prisoners.³ As a result, federal courts must often determine whether a

* Associate Professor, Touro College—Jacob D. Fuchsberg Law Center; B.B.A., 1965, City College of New York; J.D., 1968, Brooklyn Law School; LL.M, 1973, New York University.

This Article was made possible in part by research grants provided by Touro College—Jacob D. Fuchsberg Law Center. The author expresses appreciation for the dedicated work of his research assistant, David Engelsher, and the helpful suggestions of Professor Donald H. Zeigler of New York Law School.

1. 411 U.S. 475 (1973).

2. 42 U.S.C. § 1983 (1982) [hereinafter section 1983]. The statute in its present form provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Id.

3. Federal habeas corpus jurisdiction covering attacks upon state and federal custody is granted by statute. 28 U.S.C. § 2241 (1982). Specific habeas corpus jurisdiction covering attacks on state court judgments is also granted by statute. 28 U.S.C. § 2254 (1982). *See Lehman v. Lycoming County Children's Servs.*, 458 U.S. 502, 508 n.9 (1982). While section 2254 may apply to only post-trial attacks on state court judgments, pre-trial habeas petitions "are properly brought under . . . 28 U.S.C. section 2241, which applies to persons in custody regardless of whether final judgment has been rendered and regardless of the present status of the case pending against him." *Dickerson v. Louisiana*, 816 F.2d 220, 224 (5th Cir. 1987). *Accord Braden v. 30th Judicial Circuit Court of Ky.*, 410 U.S. 484, 503-04 (1973) (Rehnquist, J., dissenting) (section 2254 applies only to an individual who is in custody pursuant to a conviction in state court, while section 2241(c)(3) allows the federal courts to issue a writ of habeas corpus before judgment is given).

Section 2254(a) is the provision typically overlapping with section 1983 and provides that:

The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

42 U.S.C. § 2254(a) (1982).

state prisoner's claim may be asserted under section 1983 or only in a federal habeas corpus proceeding after state remedies have been exhausted.⁴ *Preiser* resolved that claims seeking immediate or speedier release from confinement could only be brought as habeas corpus proceedings, while other types of prisoner claims might be brought under section 1983.

The resolution of this issue is important to state prisoners, their attorneys, the states, and the state and federal judicial systems. Because state prisoners must exhaust state remedies before commencing a federal habeas corpus proceeding⁵ but not a section 1983 action,⁶ the Supreme Court in *Preiser*

4. The issue may also arise in the context of constitutional claims asserted by persons in state custody other than state prisoners, such as those confined pursuant to a judgment of civil contempt, mental patients, and juvenile delinquents. See *infra* notes 478-99 and accompanying text. Federal prisoners in federal custody may not seek relief against federal prison officials under section 1983 because these officials do not act under color of state law within the meaning of section 1983. See M. SCHWARTZ & J. KIRKLIN, SECTION 1983 LITIGATIONS: CLAIMS, DEFENSES AND FEES § 5.6 (1986). The issue may arise, however, whether a federal prisoner must proceed pursuant to the grant of federal court habeas corpus jurisdiction over federal prisoners, under section 2241, or whether relief may be sought pursuant to another remedial device, such as a mandamus proceeding, 28 U.S.C. § 1361 (1982), or a declaratory judgment action, 28 U.S.C. § 2201 (1982). See, e.g., *Del Raine v. Carlson*, 826 F.2d 698 (7th Cir. 1987) (federal prisoner's claim to expunge disciplinary sanction is within habeas corpus where objective is to enhance prospects for parole); *Dees v. Murphy*, 794 F.2d 1543 (11th Cir. 1986) (federal prisoner must exhaust federal habeas corpus remedies before bringing a civil rights action under section 1983 attacking conviction); *In re United States Parole Comm'n*, 793 F.2d 338 (D.C. Cir. 1986) (federal prisoner is not restricted to habeas corpus relief when his claim that parole action was unconstitutional will not automatically alter his sentence); *McCullum v. Miller*, 695 F.2d 1044 (7th Cir. 1982) (validity of prisoner's habeas petition is dependent upon determination, on remand, that disciplinary proceedings are reasonably likely to lengthen his imprisonment); *Billiteri v. United States Bd. of Parole*, 541 F.2d 938 (2d Cir. 1976) (prisoner who is challenging the duration of a sentence may not bring a claim under section 1983, nor may she seek release by a writ of mandamus; the sole remedy is habeas corpus). See also *Monk v. Secretary of Navy*, 793 F.2d 364 (D.C. Cir. 1986) (if the effect of a declaratory judgment is to release a prisoner or affect a new trial, the action will be construed as a petition for writ of habeas corpus even if release was not requested). Because these decisions typically analogize to the principles established by *Preiser* and its progeny, they are appropriately referred to in the context of analyzing federal remedies for state prisoners.

5. 28 U.S.C. § 2254(b) provides that:

An Applicant for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

Id. See *infra* notes 71-102 and accompanying text discussing the comparative exhaustion rules.

6. The section 1983 versus federal habeas corpus issue has generated considerable commentary. See Flannery, *Habeas Corpus Bore a Hole in Prisoners' Civil Rights Actions—An Analysis of Preiser v. Rodriguez*, 48 ST. JOHN'S L. REV. 104 (1973) [hereinafter Flannery, *Habeas Corpus*]; Plotkin, *Rotten to the "Core of Habeas Corpus": The Supreme Court and the Limitations on a Prisoner's Right to Sue*; *Preiser v. Rodriguez*, 9 CRIM. L. BULL. 518 (1973) [hereinafter Plotkin, *Rotten to the "Core of Habeas Corpus"*]; Schwartz, *Challenging State*

recognized that this issue has "considerable practical importance."⁷ The issue took on added significance when Congress enacted the Civil Rights Attorneys' Fees Awards Act of 1976,⁸ which authorizes courts to award attorneys' fees in section 1983 actions. There is, however, no similar congressional authority for judicially awarded fees in federal habeas corpus proceedings.⁹

Due to the increase in civil rights filings by state prisoners,¹⁰ federal courts have been faced with the civil rights—habeas corpus issue in myriad and novel contexts. The lower federal courts, however, have received insufficient guidance from the United States Supreme Court. *Preiser*, the only Supreme Court decision to extensively analyze the issue, is ambiguous and leaves open more questions than it answers.¹¹ Additionally, the Supreme Court has resolved only two other section 1983—habeas corpus disputes.¹² Those decisions are also incomplete and in significant respects unclear.¹³ The lower

Convictions After Completion of Sentence; The Availability of Section 1983, 20 CRIM. L. BULL. 285 (1984) [hereinafter Schwartz, *Challenging State Convictions*]; Note, *State Prisoner's Suits Brought on Issues Dispositive of Confinement: The Aftermath of Preiser v. Rodriguez and Wolff v. McDonnell*, 77 COLUM. L. REV. 742 (1977) [hereinafter Note, *The Aftermath of Preiser and Wolff*]; Comment, *New Barrier to Federal Court Review: The Habeas Corpus Exhaustion Requirement As Applied to Prisoners' Conditions of Confinement*, 9 NEW ENG. L. REV. 615 (1974) [hereinafter Comment, *New Barrier to Federal Court Review*]; Note, *Federal Courts—Bradford v. Weinstein: The Federal Courts Reopen the Door to Prisoners' Civil Rights Claims*, 54 N.C.L. REV. 1049 (1976); Note, *A Comparison of Section 1983 and Federal Habeas Corpus in State Prisoners' Litigation*, 59 NOTRE DAME L. REV. 1315 (1984) [hereinafter Note, *A Comparison*]; Comment, *Civil Rights—42 U.S.C. § 1983—Habeas Corpus—State Prisoner Challenging in Federal Court the Fact or Duration of His Confinement Limited to Remedy of Federal Habeas Corpus*, *Preiser v. Rodriguez*, 411 U.S. 475 (1973), 5 RUT.-CAM. L.J. 307 (1974) [hereinafter Comment, *Section 1983—Habeas Corpus*]; Comment, *State Prisoners' Suits: Proper Forum, Choice of Remedy, and Effect of Judgment*, 51 TEX. L. REV. 1364 (1973) [hereinafter Comment, *Proper Forum*]; Note, *Habeas Corpus, Section 1983, and State Prisoners' Litigation: Preiser v. Rodriguez In Retrospect*, 4 U. ILL. L. F. 1053 (1977) [hereinafter Note, *Preiser v. Rodriguez In Retrospect*].

7. *Preiser v. Rodriguez*, 411 U.S. 475, 477 (1973).

8. 42 U.S.C. § 1988 (1982). See *infra* notes 121-25 and accompanying text.

9. See *infra* note 122.

10. Lay, *Exhaustion of Grievance Procedures for State Prisoners Under Section 1977e of the Civil Rights Act*, 71 IOWA L. REV. 935 (1986) ("the number of section 1983 cases brought by state prisoners has swelled the federal court dockets . . ."). In 1978, state prisoners filed approximately 2,030 civil rights actions and that number increased to 11,195 in 1979. For the twelve month period ending June 30, 1985, however, state prisoners filed 19,448 civil rights actions. *Id.* at 935 n.3 (citing Annual Report of the Director of the Administrative Office of the United States Courts, 1985 Table C2, at A-7). See also *Cleavinger v. Saxner*, 474 U.S. 193, 210-12 (1985) (Rehnquist, J., dissenting) ("18,856 [*Bivens* and section 1983 prisoner] suits were filed in federal court in the year ending June 30, 1984, as compared to just 6,606 in 1975." (citing Administrative Office of the United States Courts, Annual Report of the Director 143, Table 24 (1984))). "Prisoner rights cases occupy a significant percentage of the time of federal courts, particularly of the United States district judges." I. SENSENICH, COMPENDIUM OF THE LAW ON PRISONERS' RIGHTS 10 (1979).

11. See *infra* notes 236-57 and accompanying text.

12. *Gerstein v. Pugh*, 420 U.S. 103, 107 n.6 (1975); *Wolff v. McDonnell*, 418 U.S. 539 (1975).

13. See Note, *A Comparison*, *supra* note 6, at 1316.

federal court decisions are not surprisingly in disarray, with jurists frequently bemoaning the difficulties and frustrations they encounter in attempting to solve *Preiser* puzzles.¹⁴

This Article organizes and reviews the extensive decisional law that has developed during the fifteen years since *Preiser*, with the hope of adding clarity to this difficult area. It attempts to determine the preferred approach with regard to the many instances where the case law is conflicting. A good deal of groundwork must be laid before specific issues are addressed. Part I commences with an overview of the section 1983 civil rights and federal habeas corpus remedies. Part II analyzes the distinctions between the two remedies. Part III undertakes an analysis of the Supreme Court precedent. Part IV discusses three fundamental issues that the Supreme Court has failed to resolve. Part V discusses the relationship between the *Preiser* issue and *Younger v. Harris*¹⁵ abstention.

The remainder of the Article focuses on specific issues that arise in *Preiser* analyses. Part VI categorizes various areas where the *Preiser* issue has arisen and analyzes the responses of the lower federal courts. Part VII reviews the major procedural issues that arise out of the section 1983—federal habeas corpus overlap, such as *res judicata* questions and statute of limitation problems. The Article concludes with observations concerning the vast body of law in this area.

I. SECTION 1983 AND FEDERAL HABEAS CORPUS: AN OVERVIEW

Section 1983's major purpose is to provide a remedy to enforce the fourteenth amendment.¹⁶ Section 1983 complaints must allege that a person

14. *Offet v. Solem*, 823 F.2d 1256, 1257 (8th Cir. 1987) ("ambiguous borderland"); *Serio v. State Bd. of Pardons*, 821 F.2d 1112, 1115-16 (5th Cir. 1979) ("difficult to answer . . ."; "the circuit courts have struggled to establish clear standards . . ."); *Boudin v. Thomas*, 737 F.2d 261, 262 (2d Cir. 1984) (Newman, J., concurring in denial of rehearing) ("considerable controversy and difficulty"); *Lumbert v. Finley*, 735 F.2d 239, 242 (7th Cir. 1984) (distinction may "be difficult to draw"); *Todd v. Baskerville*, 712 F.2d 70, 71 (4th Cir. 1983) ("ambiguous borderland" (citing *McKinnis v. Mosley*, 693 F.2d 1054, 1056 (11th Cir. 1982))); *Hamlin v. Warren*, 664 F.2d 29, 33 (4th Cir. 1981) (Winter, C.J., dissenting) ("difficult enough"), *cert. denied*, 455 U.S. 911 (1982); *Williams v. Ward*, 556 F.2d 1143, 1150 (2d Cir.) ("not . . . an easy one"), *cert. dismissed*, 434 U.S. 944 (1977); *Christianson v. Spalding*, 593 F. Supp. 500, 502 (E.D. Wash. 1983) ("difficult task of harmonizing *Preiser* . . . with *Wolff* . . ."); *Haymes v. Regan*, 394 F. Supp. 711, 712 (S.D.N.Y.) ("the very interesting but troublesome question of the Supreme Court's holding in *Preiser* . . ."), *aff'd as modified*, 525 F.2d 540 (2d Cir. 1975); *Edwards v. Schmidt*, 321 F. Supp. 68, 69 (W.D. Wisc. 1971) (the "recurrent riddle"). See also Note, *A Comparison*, *supra* note 6, at 1315. ("In the last two decades, federal courts have struggled to delineate the boundaries of each remedy and to establish their proper roles.").

The Supreme Court has acknowledged that "the demarcation line between civil rights actions and habeas corpus petitions is not always clear." *Wolff v. McDonnell*, 418 U.S. 539, 579 (1974). See also I. SENSENICH, *supra* note 10, at 19 ("The determination of whether an action is habeas corpus or civil rights can be difficult.").

15. 401 U.S. 37 (1971).

16. See *Monroe v. Pape*, 365 U.S. 167, 171 (1961), *rev'd in part by* *Monell v. New York*

acting under color of state law deprived the claimant of a federal right.¹⁷ The statute grants an injured party the right to sue in an action at law or in equity and it provides a basis for declaratory, injunctive, and monetary relief.¹⁸

The Congress that adopted the 1871 Act decided that a federal remedy for constitutional deprivations was necessary because state authorities were either unwilling or unable to control the widespread violence of the Ku Klux Klan against blacks and their supporters.¹⁹ Section 1983 did not provide a remedy against the Ku Klux Klan itself, but against those persons representing a state who were unable or unwilling to enforce the state law.²⁰ More

City Dep't of Social Servs., 436 U.S. 658, 663 (1978) ("overruled insofar as [*Monroe*] holds that local governments are wholly immune from suit under section 1983"). The original version of the Act was adopted by the 42nd Congress in 1871 as Section 1 of the Ku Klux Klan Act of 1871 and was entitled, "An Act to enforce the provisions of the Fourteenth Amendment to the Constitution of the United States, and for other purposes." (citing 17 Stat. 13 (1871)). See S. NAHMOND, CIVIL RIGHTS AND CIVIL LIBERTIES LITIGATION § 1.03, at 4 (2d ed. 1979) (citing 17 Stat. 13 (1871)). There was "only limited debate" on the 1871 statute. *Monell*, 436 U.S. at 664.

17. *Gomez v. Toledo*, 446 U.S. 635, 640 (1980); *Baker v. McCollan*, 443 U.S. 137, 140 (1979); *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 155 (1978).

18. 42 U.S.C. § 1983 (1982). Section 1983 does not itself create or establish any rights but fulfills an essentially procedural or remedial role by providing authorization for judicial enforcement of rights created by the United States Constitution or by federal statutes other than section 1983 itself. See *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 617 (1979). See also *Wilson v. Garcia*, 471 U.S. 261, 277-79 (1985) (respondent sought damages for deprivation of constitutional rights allegedly caused by an unlawful arrest and brutal beating by a police officer); *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 815-17 (1985) (respondent was allegedly deprived of his life "without due process of the law" in violation of the fourteenth amendment); *Baker v. McCollan*, 443 U.S. 137, 144 n.3 (1979) (respondent claimed that unlawful detention in jail deprived him of liberty without due process of the law in violation of the fourteenth amendment). When a section 1983 claim is based upon an alleged violation of the United States Constitution, federal court jurisdiction may be based upon either 28 U.S.C. section 1331 or 28 U.S.C. section 1343(3). 28 U.S.C. §§ 1331, 1343(3) (1982). While the state courts have jurisdiction to hear section 1983 claims, *Maine v. Thiboutot*, 448 U.S. 1, 3 n.1 (1980) (citing *Martinez v. California*, 444 U.S. 277, 283 n.7 (1980)), a large percentage of section 1983 actions are in fact filed in federal court. M. SCHWARTZ & J. KIRKLIN, *supra* note 4, § 1.7, at 16 (1986).

19. "The specific historical catalyst for the Civil Rights Act of 1871 was the campaign of violence and deception in the South, fomented by the Ku Klux Klan, which was denying decent citizens their civil and political rights." *Wilson* 471 U.S. at 276. Other Supreme Court decisions detailing the legislative history of section 1983 include *Patsy v. Florida Bd. of Regents*, 457 U.S. 496 (1982); *Allen v. McCurry*, 449 U.S. 90 (1980); *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600 (1979); *Monell v. New York City Dep't of Social Servs.*, 436 U.S. 658 (1978); *Examining Bd. of Eng'rs, Architects and Surveyors v. Flores de Otero*, 426 U.S. 572 (1976); *District of Columbia v. Carter*, 409 U.S. 418 (1973); *Mitchum v. Foster*, 407 U.S. 225 (1972); *Monroe v. Pape*, 365 U.S. 167 (1961). See also Blackmun, *Section 1983 and Federal Protection of Individual Rights—Will the Statute Remain Alive or Fade Away*, 60 N.Y.U. L. REV. 1 (1985) (examines the debate regarding the proper scope of federal protection of individual rights under section 1983).

20. *Monroe*, 365 U.S. at 175-76.

specifically, congressional debates show that the section 1983 remedy was strongly motivated by a grave concern that state courts were deficient in protecting federal rights.²¹

Congress's distrust for state fact finding processes impacts significantly upon the Supreme Court's contemporary interpretation of section 1983. This distrust underlies the Supreme Court's related rulings in *Monroe v. Pape*²² that state judicial remedies need not be exhausted in order to commence a section 1983 action and that unconstitutional conduct by state and local officials is redressable under section 1983, even if the same conduct violates state law for which a state court remedy exists.²³ Section 1983 supplements the state remedy, and the latter need not be sought first and refused prior to invoking a section 1983 claim.²⁴ That same distrust for state fact finding processes provided a significant basis for extending the *Monroe* holding in *Patsy v. Florida Board of Regents*.²⁵ In *Patsy*, the Court stated that Congress did not intend that state administrative remedies be exhausted before a person could commence an action under section 1983.

The *Monroe* decision in 1961 provided the initial impetus for the modern explosion of section 1983 litigation in general, and of state prisoner actions under section 1983 in particular.²⁶ Until the early 1960's, the lower federal courts had applied the "hands-off" doctrine to prisoner grievances.²⁷ *Cooper*

21. *Allen*, 449 U.S. at 98-99.

22. 365 U.S. 167 (1961).

23. *Id.* at 183. See also *Board of Regents v. Tomanio*, 446 U.S. 478, 491 (1980) ("This court has not interpreted section 1983 to require a litigant to pursue state judicial remedies prior to commencing an action under this section."); *Ellis v. Dyson*, 421 U.S. 426, 432-33 (1975) (dictum) ("we have long held that an action under § 1983 is free of that requirement"); *Steffel v. Thompson*, 415 U.S. 452, 472-73 (1974) (dictum) ("we have not required exhaustion . . . , recognizing the paramount role Congress has assigned to the federal courts to protect constitutional rights"). *Res judicata* or collateral estoppel would bar almost all federal section 1983 actions if it was necessary to exhaust state judicial remedies. *Loudermill v. Cleveland Bd. of Educ.*, 721 F.2d 550, 555 (6th Cir. 1983), *aff'd*, 470 U.S. 532 (1985). For the principles governing the application of *res judicata* and collateral estoppel of state court judgments that precede federal section 1983 actions, see *Migra v. Warren City School Dist. Bd. of Educ.*, 465 U.S. 75 (1984); *Haring v. Prosise*, 462 U.S. 306 (1983); *Allen v. McCurry*, 449 U.S. 90 (1980).

24. "The federal remedy is supplementary to the state remedy, and the latter need not be sought and refused before the federal one is invoked." *Monroe v. Pape*, 365 U.S. 167, 183 (1961).

25. 457 U.S. 496 (1982). The *Patsy* rule applies to federal and state court section 1983 actions. *Felder v. Casey*, 56 U.S.L.W. 4689 (U.S. June 22, 1988). See *infra* notes 72-97 and accompanying text. If one in fact exhausts state administrative remedies before a federal section 1983 action is brought, administrative *res judicata* may attach to the agency's findings of fact. *University of Tenn. v. Elliott*, 106 S. Ct. 3220 (1986) (state agency quasi-judicial fact finding is entitled to same preclusive effect in federal section 1983 action as it would receive under state law).

26. While only 270 civil rights actions were filed in 1961, over 30,000 were filed in 1981. Of these 30,000, 15,639 were section 1983 actions. See *Patsy v. Florida Bd. of Regents*, 457 U.S. 496, 533 n.20 (1982) (Powell, J., dissenting). See M. SCHWARTZ & J. KIRKLIN, *supra* note 4, at vii (foreword by George C. Pratt) ("After *Monroe*, civil rights litigation against state and

v. Pate,²⁸ decided in 1964, marked the end of the hands-off approach and began a new wave of prisoners' constitutional rights litigation.²⁹ Since *Cooper*, prisoners have asserted a wide variety of constitutional claims under section 1983 that test virtually every aspect of prison life under the Constitution.³⁰

While section 1983 developed into a meaningful remedy for state prisoners, federal habeas corpus rights were also expanded.³¹ The habeas corpus writ has ancient common law roots as a device designed to provide "swift judicial review of alleged unlawful restraints of liberty."³² Congress extended federal habeas corpus jurisdiction over state prisoners in 1867.³³ Habeas corpus is a

local governmental officials began to flow into the federal courts."'). Other legal developments that contributed significantly to the tremendous increase in section 1983 litigation include Congress's authorization in 1976 of attorneys' fee awards in 1983 actions, 42 U.S.C. § 1988 (1982), and the Court's 1978 decision in *Monell v. New York City Dep't of Social Servs.*, 436 U.S. 658 (1978), which overruled *Monroe* on municipal immunity and therefore subjected municipalities to section 1983 liability.

27. See Zeigler, *Federal Court Reform of State Criminal Justice Systems: A Reassessment of the Younger Doctrine From A Modern Perspective*, 19 U.C. DAVIS L. REV. 31, 56 (1985) (under the "hands-off" doctrine, "[s]ome courts held that they lacked jurisdiction; others held that their hearing prison cases would improperly interfere with the internal administration of state prisons."); Comment, *Proper Forum*, *supra* note 6, at 1365-66.

28. 378 U.S. 546 (1964) (per curiam). The state prisoner in *Cooper* alleged "that solely because of his religious beliefs, he was denied permission to purchase certain religious publications and denied other privileges enjoyed by other prisoners." *Id.* The district and circuit courts held that the complaint failed to state a claim upon which relief could be granted. The Supreme Court ruled that "the complaint stated a cause of action and it was error to dismiss it." *Id.* (citations omitted).

29. Zeigler, *supra* note 27, at 56-57; Comment, *Proper Forum*, *supra* note 6, at 1370.

30. See Lay, *supra* note 10, at 936 n.4. "Prisoner grievances relating to conditions of confinement, food, privacy, heat, mail, hair length, work details, segregation from the prison population, religious practices, and rehabilitation have all become issues of federal litigation under section 1983." *Id.* See generally I. SENSENICH, *supra* note 10 (surveys constitutional claims arising under section 1983 which tested aspects of prison life under the Constitution). While the Supreme Court no longer takes the position that an "iron curtain" separates prisoners from the United States Constitution, it also takes the position "that imprisonment carries with it the circumscription or loss of many significant rights." *Hudson v. Palmer*, 468 U.S. 517, 523-24 (1984) (citing *Wolff v. McDonnell*, 418 U.S. 539, 555 (1974)). Moreover, Supreme Court prisoners' rights decisions frequently stress that "[p]rison administrators, therefore, should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security." *Bell v. Wolfish*, 441 U.S. 520, 547 (1979) and cases cited therein. See also *Block v. Rutherford*, 468 U.S. 576, 585 (1984) (jail's blanket prohibition on contact visits is a reasonable, nonpunitive response to legitimate security concerns, consistent with the fourteenth amendment). To a significant extent the hands-off approach has been replaced by a standard of broad deference.

31. *Jones v. Cunningham*, 371 U.S. 236 (1963). *Accord* *Braden v. 30th Judicial Circuit Court of Ky.*, 410 U.S. 484, 501 (1973) (Blackmun, J., concurring) (referring to "the extraordinary expansion of the concept of habeas corpus effected in recent years").

32. *Peyton v. Rowe*, 391 U.S. 54, 63 (1968). The writ of habeas corpus is "of immemorial antiquity" *Fay v. Noia*, 372 U.S. 391, 400 (1963) (quoting Secretary of State for Home

controversial remedy because of the tension and friction that results when federal courts review state court convictions.³⁴ The language of the congressional grant of federal court habeas corpus jurisdiction over state prisoners has not changed significantly since its original enactment, but the judicial interpretation of this jurisdiction continually undergoes change.³⁵ Early in this century habeas corpus was available only to challenge the sentencing tribunal's jurisdiction.³⁶ Habeas corpus is now available to anyone in state custody who asserts that his confinement violates any provision of the United States Constitution.³⁷ The doctrine was narrowed somewhat in *Stone v.*

Affairs v. O'Brien (1923) A.C. 603, 609 (H.L.)). The writ was inscribed in English law in the 17th century. Flannery, *Habeas Corpus*, *supra* note 6, at 107. For a discussion of the history of the writ see 17 C. WRIGHT, A. MILLER & E. COOPER, *FEDERAL PRACTICE AND PROCEDURE* § 4261, at 588 (1981) [hereinafter WRIGHT, MILLER & COOPER]; *Developments in the Law, Federal Habeas Corpus*, 83 HARV. L. REV. 1038, 1042-45 (1970) [hereinafter *Developments*]. The writ is given explicit recognition and protection in the United States Constitution. U.S. CONST. art. I, § 9, cl. 2 ("The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."). It was incorporated into the first congressional grant of federal court jurisdiction. *Fay*, 372 U.S. at 400 (citing Act of September 24, 1789, C.20, § 14, Stat. 81-82). While the Supreme Court typically describes the writ in lofty terms, see, e.g., *Fay* 372 U.S. at 400 ("the most celebrated writ"; "perhaps the most important writ known to the constitutional law of England . . ."); *Bowen v. Johnston*, 306 U.S. 19, 26 (1939) ("There is no higher duty than to maintain it unimpaired."); *Ex parte Yerger*, 75 U.S. (8 Wall.) 85, 95 (1869) ("only sufficient defense of personal freedom"); *Ex parte Bollman and Swartout*, 8 U.S. (4 Cranch) 75, 95 (1807) ("that great writ"), not all agree, with some describing it as the "Greatly Abused Writ." Galtieri v. Wainwright, 582 F.2d 348, 365 (5th Cir. 1978) (en banc) (Hill, J., specially concurring), *quoted in* Robbins, *Whither (or Wither) Habeas Corpus?: Observations on the Supreme Court's 1985 Term*, 111 F.R.D. 265, 266 (1986).

33. See *Stone v. Powell*, 428 U.S. 465, 475, *reh'g denied*, 429 U.S. 874 (1976); *Fay*, 372 U.S. at 409. Today, federal habeas corpus jurisdiction over state prisoners is specifically provided for in 28 U.S.C. § 2254 (1982). See *supra* note 3.

34. "There is an affront to state sensibilities when a single federal judge can order discharge of a prisoner whose conviction has been affirmed by the highest court of a state." WRIGHT, MILLER & COOPER, *supra* note 32, § 4261, at 600; C. WRIGHT, *THE LAW OF FEDERAL COURTS* § 53, 344 (4th ed. 1983). See also Robbins, *supra* note 32, at 266 (discussing the controversy over the writ of habeas corpus); Yackle, *Explaining Habeas Corpus*, 60 N.Y.U. L. REV. 991 (1985) (theorizes that the writ of habeas corpus is better explained as providing a federal forum in which to enforce federal rights that may be unpopular with the states).

35. WRIGHT, MILLER & COOPER, *supra* note 32, § 4261, at 597.

36. *Kuhlmann v. Wilson*, 477 U.S. 436, 446 (1986) (citing *Stone v. Powell*, 428 U.S. 465, 475 (1976)).

37. *Brown v. Allen*, 344 U.S. 443 (1953). See *Kimmelman v. Morrison*, 477 U.S. 365 (1986) (fourteenth amendment right to effective assistance of counsel); *Rose v. Mitchell*, 443 U.S. 545 (1979) (claim of racial discrimination in selection of grand jury); *Jackson v. Virginia*, 443 U.S. 307 (1979) (claim of lack of proof of guilt beyond a reasonable doubt). While section 2254(a) of Title 28 is not limited to federal constitutional claims but encompasses any violation of federal law, federal statutory claims asserted by state prisoners in a federal habeas corpus proceeding are exceedingly rare. "Few situations can be imagined in which a state prisoner has a federal nonconstitutional claim, and the problem has been virtually unlitigated in recent years." *Developments*, *supra* note 32, at 1070. Federal habeas corpus is available only for

Powell,³⁸ which excluded fourth amendment exclusionary rule claims from the scope of federal habeas corpus for state prisoners. *Stone*, however, was based in part upon the majority's view that the exclusionary rule is "not a personal constitutional right" but instead, "a judicially created remedy."³⁹

The increased availability of section 1983 claims in the early 1960's coincided with the Supreme Court's expansion of the parameters of federal habeas corpus in three 1963 decisions, *Jones v. Cunningham*,⁴⁰ *Fay v. Noia*,⁴¹ and *Townsend v. Sain*.⁴² In *Jones*, the Supreme Court liberalized the requirement that the federal habeas corpus petitioner be "in custody" by holding that a person released on parole is "in custody" for the purpose of federal habeas corpus.⁴³ The Court reasoned that while parolees are not physically confined, parole restrains one's liberty in a way not shared by the public.⁴⁴ Following the *Jones* decision, courts broadened the "in custody" definition to include prisoners released on probation⁴⁵ or on one's own recognizance,⁴⁶ and in situations where a detainer has been imposed.⁴⁷ Additionally, the Supreme Court has stated that a person serving consecutive sentences is "in custody" under both sentences and may challenge either the sentence presently being served⁴⁸ or the subsequent sentence.⁴⁹ While the

claims based upon federal law. *Smith v. Phillips*, 455 U.S. 209, 221 (1982) (federal courts have no supervisory authority over state judicial proceedings and may intervene only to correct "wrongs of constitutional dimension").

38. 428 U.S. 465, *reh'g denied*, 429 U.S. 874 (1976).

39. *Id.* at 486. Justice Brennan expressed the fear in his dissenting opinion in *Stone* that the Court's decision would extend beyond exclusionary rule claims. *Id.* at 516-19 (Brennan, J., dissenting). These fears have "not been realized." Robbins, *supra* note 32, at 292. See *Rose v. Mitchell*, 443 U.S. 545 (1979); *Jackson v. Virginia*, 443 U.S. 307 (1979).

40. 371 U.S. 236 (1963).

41. 372 U.S. 391 (1963).

42. 372 U.S. 293 (1963).

43. 371 U.S. at 236-43 (citing 28 U.S.C. § 2254(a) (1982)).

44. *Jones*, 371 U.S. at 240.

45. *Clark v. Prichard*, 812 F.2d 991, 997 (5th Cir. 1987) (Hill, J., concurring) (citations omitted); *United States ex rel. B. v. Shelly*, 430 F.2d 215, 218 n.3 (2d Cir. 1970); *Hahn v. Burke*, 430 F.2d 100, 102 (7th Cir. 1970) (dictum), *cert. denied*, 402 U.S. 933 (1971).

46. *Hensley v. Municipal Court*, 411 U.S. 345 (1973). Release on bail constitutes sufficient custody. See *Reimnitz v. State's Attorney*, 761 F.2d 405, 408 (7th Cir. 1985); *Delk v. Atkinson*, 665 F.2d 90, 93 (6th Cir. 1981); *Capler v. City of Greenville, Miss.*, 422 F.2d 299 (5th Cir. 1970); *Zeigler*, *supra* note 27, at 94-95 n.319; *Developments*, *supra* note 32, at 1075 n.26. ("The conditions attached to the release on bail should be the determinant.").

47. *Braden v. 30th Judicial Circuit Court of Ky.*, 410 U.S. 484, 489 n.4 (1973); *Rose v. Morris*, 619 F.2d 42, 43 (9th Cir. 1980); *Gregory v. New York Parole Comm'n*, 496 F. Supp. 748, 749 (M.D. Pa. 1980).

48. *Walker v. Wainwright*, 390 U.S. 335, 336, *reh'g denied*, 390 U.S. 1036 (1968).

49. *Peyton v. Rowe*, 391 U.S. 54, 67 (1968) (overruling *McNally v. Hill*, 293 U.S. 131 (1934)). Cf. *Ward v. Knoblock*, 738 F.2d 134 (6th Cir. 1984) (one who is incarcerated on an unrelated charge is not in custody for the purpose of challenging a previous sentence already served, since liberty is not restrained by the prior sentence), *cert. denied*, 469 U.S. 1193 (1985). One need only be in custody when the habeas corpus proceeding is commenced. *Carafas v. LaVallee*, 391 U.S. 234, 238-40 (1968); *WRIGHT, MILLER & COOPER*, *supra* note 32, § 4262, at

Court has not entirely dispensed with the custody requirement,⁵⁰ *Jones* marked a new era of "in custody" interpretation.

608. See also *Tinder v. Paula*, 725 F.2d 801 (1st Cir. 1984) (where probation expired before the habeas corpus proceeding was commenced, petitioner was not in custody and could not challenge a delinquency adjudication in the habeas corpus proceeding). Habeas proceedings will not be held moot when the habeas petitioner is unconditionally discharged from custody after commencement of the habeas proceeding if statutory collateral consequences flow from the conviction being attacked. *Carafas*, 391 U.S. at 237-38. Accord *Sibron v. New York*, 392 U.S. 40 (1968) (a state may not effectively deny a convict access to its appellate courts until his release and then argue that his case has been mooted by his failure to do what it has prevented him from doing). Cf. *Lane v. Williams*, 455 U.S. 624 (1982) (unconditional release mooted proceeding where petitioners attacked only their sentences and alleged only nonstatutory collateral consequences). *Carafas* is based in part upon the fact that release is not the sole remedy that may be granted by a federal habeas corpus court. 28 U.S.C. section 2244(b) refers to "release from custody or other remedy." See *Peyton*, 391 U.S. at 67; *Carafas*, 391 U.S. at 239.

50. Federal courts consistently hold that federal habeas corpus may not be relied upon to challenge a "fine only" conviction because the imposition of a fine does not place one "in custody." See, e.g., *Lillios v. New Hampshire*, 788 F.2d 60 (1st Cir. 1986) (fine and suspension of driver's license is not custody); *Battieste v. City of Baton Rouge, La.*, 732 F.2d 439, 441 (5th Cir. 1984) (fine is not custody); *Tinder v. Paula*, 725 F.2d 801, 804 (1st Cir. 1984) (dicta) ("habeas is not available as a remedy for fine-only convictions. . . ."); *Spring v. Caldwell*, 692 F.2d 994 (5th Cir. 1982) (fine followed by issuance of warrant of arrest to compel payment of fine not custody); *Duvallon v. Florida*, 691 F.2d 483, 485 (11th Cir. 1982) (fine only conviction is not custody), *cert. denied*, 460 U.S. 1073 (1983); *Hanson v. Circuit Court*, 591 F.2d 404, 407 (7th Cir.) (fine only conviction is not custody), *cert. denied*, 444 U.S. 907 (1979); *Russell v. City of Pierre, S.D.*, 530 F.2d 791, 792 (8th Cir.) (fine is not custody), *cert. denied*, 429 U.S. 855 (1976); *Westberry v. Keith*, 434 F.2d 623, 624-25 (5th Cir. 1970) (fine and revocation of driver's license is not custody). Accord *Ellis v. Dyson*, 421 U.S. 426, 440 (1975) (Powell, J., dissenting) (parties not "incarcerated or otherwise restrained" cannot meet the habeas corpus custody requirement). See also *Harts v. Indiana*, 732 F.2d 95 (7th Cir. 1984) (one year suspension of driver's license is not a severe enough restraint on liberty to constitute custody). Cf. *United States ex rel. Lawrence v. Woods*, 432 F.2d 1072 (7th Cir. 1970) (incarceration for refusal to pay fine; habeas proceeding considered on the merits), *cert. denied*, 402 U.S. 983 (1971). Even severe collateral consequences do not constitute "custody." *Lefkowitz v. Fair*, 816 F.2d 17, 20 (1st Cir. 1987) (revocation of medical license is not custody); *Ginsberg v. Abrams*, 702 F.2d 48, 49 (2d Cir. 1983) (petitioner's removal from the bench, revocation of his license to practice law, and disqualification as a real estate broker or insurance agent did not place him in custody); *Hanson*, 591 F.2d at 407 (collateral consequences from a fine only conviction are "not severe enough to put the convicted person in custody . . ."); *Kravitz v. Pennsylvania*, 546 F.2d 1100, 1102 (3d Cir. 1977) (custody requirement not met if habeas corpus petition filed after petitioner had been unconditionally released). But see *Connor v. Pickett*, 552 F.2d 585, 587 (5th Cir. 1977) (implying that collateral consequences may be sufficient to satisfy the custody requirement); *Thistlethwaite v. City of N.Y.*, 497 F.2d 339, 443 (2d Cir.) (dictum) (imposition of fine may be sufficient to satisfy custody requirements if there are possible collateral consequences), *cert. denied*, 419 U.S. 1093 (1974). The Supreme Court cases relied upon in *Connor* and *Thistlethwaite* deal with mootness, not custody. *Benton v. Maryland*, 395 U.S. 784, 787-88 (1969); *Street v. New York*, 394 U.S. 576, 579-80 n.3 (1969); *Sibron*, 392 U.S. at 51-58; *Carafas*, 391 U.S. at 237-38; *Ginsberg v. New York* 390 U.S. 629, 633-34 n.2 (1968). See *Hanson*, 591 F.2d at 406-07. One difficult issue discussed in Part VI, *infra*, is whether, given the unavailability of federal habeas corpus to test a fine only or expired sentence conviction, such convictions may be attacked under section 1983. See *infra* notes 318-44 and accompanying text.

*Fay v. Noia*⁵¹ simplified the federal habeas corpus exhaustion requirement for state prisoners. Originally, the exhaustion requirement was imposed so that relations between the federal and state courts would not be unnecessarily disturbed.⁵² The exhaustion requirement, codified by Congress in 1948, effectuates federal—state comity.⁵³ The statute now requires a prisoner to exhaust state remedies which are not “ineffective” in protecting the prisoner’s rights.⁵⁴ This policy affords state courts the initial opportunity to correct

51. 372 U.S. 391 (1963).

52. *Ex parte Royall*, 117 U.S. 241, 251 (1886). This doctrine required exhaustion of “all state remedies available, including all appellate remedies in the state courts . . .” *Ex parte Hawk*, 321 U.S. 114, 117 (1944).

53. *Braden v. 30th Judicial Circuit Court of Ky.*, 410 U.S. 484, 490 (1973); *Picard v. Connor*, 404 U.S. 270, 275 (1971); *Fay v. Noia*, 372 U.S. 392, 418 (1963).

54. 28 U.S.C. §§ 2254(b), (c) (1982). *See Fay v. Noia*, 372 U.S. 391, 434 (1963). *See also Rose v. Lundy*, 455 U.S. 509, 515 (1982) (district court must dismiss habeas petitions which contain both unexhausted and exhausted claims); *Picard v. Connor*, 404 U.S. 270, 275 (1971) (respondent failed to exhaust state remedies when highest court had no fair opportunity to consider and act upon equal protection claims); *Irwin v. Dowd*, 359 U.S. 394, 405 (1959) (section 2254 does not bar resort to federal habeas corpus if petitioner obtains a decision on constitutional claims from highest state court); *Young v. Ragen*, 337 U.S. 235, 238 n.1 (1949) (section 2254 presupposes the existence of adequate state law remedies).

Section 2254(b) provides that an application for a writ of habeas corpus shall not be granted on behalf of a state prisoner, i.e., “a person in custody pursuant to the judgment of a State court,” unless the petitioner “has exhausted the remedies available in the courts of the State, or there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.” 28 U.S.C. § 2254(b) (1982). Under subdivision (c) of section 2254, available state remedies have not been exhausted if the habeas petitioner “has the right under the law of the State to raise, by any available procedure the question presented.” 28 U.S.C. § 2254(c) (1982). The statutory exhaustion requirement presupposes the existence of an adequate state remedy, *Young*, 337 U.S. at 239, and does not require one to exhaust futile state remedies, as where the highest court in the state previously rejected petitioner’s contention. *WRIGHT, MILLER & COOPER, supra* note 32, § 4264, at 648; *Thompson v. Reivitz*, 746 F.2d 397 (7th Cir. 1984), *cert. denied*, 471 U.S. 1103 (1985). The mere claim that the state courts will not be sympathetic to a petitioner’s constitutional claim will not excuse exhaustion, because one significant assumption behind the exhaustion requirement is that the state courts are as “equally bound to guard and protect rights secured by the Constitution” as the federal courts. *Duckworth v. Serrano*, 454 U.S. 1, 3-4 (1981) (citing *Ex parte Royall*, 117 U.S. 241, 251 (1886)). This is consistent with the Supreme Court’s view that the state courts are as competent to decide federal constitutional claims as the federal courts. *California v. Grace Brethren Church*, 457 U.S. 393, 417 n. 37 (1982); *Allen v. McCurry*, 449 U.S. 90, 105 (1980); *Stone v. Powell*, 428 U.S. 465, 494 n.35 (1976); *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 611, *reh’g denied*, 421 U.S. 971 (1975); *Robb v. Connolly*, 111 U.S. 624, 637 (1884). Many strongly believe, however, that federal courts are “more likely to apply federal law sympathetically and understandingly than are state courts.” *Preiser v. Rodriguez*, 411 U.S. 475, 514 (1973) (Brennan, J., dissenting) (quoting ALI, *Study of Division of Jurisdiction Between State and Federal Courts*, 166 (1969)); M. REDISH, *FEDERAL JURISDICTION, TENSIONS IN THE ALLOCATION OF FEDERAL POWER* 2-3 (Bobbs-Merrill 1980); Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105 (1977). Competing authorities on the issue are discussed and analyzed in Yackle, *supra* note 34, at 1022-24.

constitutional errors⁵⁵ and balances federalism interests against the need to preserve the writ of habeas corpus as a federal remedy in all cases of restraint or confinement in violation of federal law.⁵⁶

Fay compromised some federalism interests in favor of making federal habeas corpus available to state prisoners. The *Fay* Court held that the exhaustion requirement does not encompass state remedies that a petitioner could have had but failed to pursue,⁵⁷ and are no longer available when the federal petition was filed, unless the petitioner had "deliberately by-passed" the available state remedies.⁵⁸ The ruling in *Fay* was a rough counterpart to the holding in *Monroe v. Pape*⁵⁹ that the existence of a state judicial remedy does not defeat a section 1983 claim for relief.⁶⁰

55. *Wilwording v. Swenson*, 404 U.S. 249, 250 (1971) (per curiam) (citing *Fay*, 372 U.S. at 438). The Court has described "comity" as

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.

Younger v. Harris, 401 U.S. 37, 44 (1971). *Younger* also refers to the principle of comity as "Our Federalism." *Id.* "Considerations of finality, avoiding piecemeal litigation, and preventing disruption of custody also support comity." *McGee v. Estelle*, 722 F.2d 1206, 1210 (5th Cir. 1984) (en banc). The federal habeas corpus exhaustion requirement envisions "only the postponement, not the relinquishment of federal habeas corpus jurisdiction . . ." *Fay*, 372 U.S. at 418.

56. *Braden*, 410 U.S. at 490 (quoting *Secretary of State for Home Affairs v. O'Brien*, (1923) A.C. 603, 609 (HL)). A leading article describes the interests protected by the exhaustion requirement in more detail:

The significant interests protected by the exhaustion requirement are of two types. First, exhaustion preserves the role of the state courts in the application and enforcement of federal law. Early federal intervention in state criminal proceedings would tend to remove federal questions from the state courts, isolate those courts from constitutional issues, and thereby remove their understanding of and hospitality to federally protected interests. Second, exhaustion preserves orderly administration of state judicial business, preventing the interruption of state adjudication by federal habeas proceedings. It is important that petitioners reach state appellate courts, which can develop and correct errors of state and federal law and most effectively supervise and impose uniformity on trial courts.

Developments, supra note 32, at 1094 (footnotes omitted), *quoted in* *Preiser v. Rodriguez*, 411 U.S. 475, 497 n.13 (1973); *Braden*, 410 U.S. at 490-91. *See also* *Rose v. Lundy*, 455 U.S. 509, 518 (1982) ("The exhaustion doctrine is principally designed to protect the state court's role in the enforcement of federal law. . . .").

57. *Fay*, 372 U.S. at 438.

58. The Court in *Fay* ruled that "deliberate bypass" refers to a decision made by the petitioner rather than petitioner's counsel. *Id.* at 439. *Fay* also reaffirmed the holding in *Brown v. Allen*, 344 U.S. 443, *reh'g denied*, 345 U.S. 946 (1953), that a state court ruling does not preclude a federal court habeas determination, and ruled that the exhaustion requirement does not require that one seek review in the United States Supreme Court. *Fay*, 372 U.S. at 422.

59. 365 U.S. 167 (1961).

60. *See* Comment, *Proper Forum, supra* note 6, at 1367. The analogy between *Monroe* and *Fay* is not perfect because, unlike *Monroe*, *Fay* did not eliminate the exhaustion of state remedies requirement from federal habeas corpus but rather gave the requirement a liberal interpretation.

*Townsend v. Sain*⁶¹ also de-emphasized the significance of state remedies. The *Townsend* Court held that even where the state court made a factual determination, the federal court in a habeas corpus proceeding may receive evidence and make findings of fact.⁶² Furthermore, the *Townsend* Court held that where a factual dispute exists, an evidentiary hearing must be held by the federal habeas court if the applicant did not, either at the time of trial or in a collateral proceeding, receive a full and fair hearing in state court.⁶³

Of these three 1963 Supreme Court decisions, *Fay* had the greatest impact upon federal habeas corpus proceedings, although this impact was short lived. *Wainwright v. Sykes*,⁶⁴ decided in 1977, rejected *Fay*'s sweeping language and, while *Wainwright* did not explicitly overrule *Fay*, it rendered *Fay* nearly obsolete.⁶⁵ Nevertheless, *Jones*, *Fay*, and *Townsend* opened federal habeas corpus proceedings to state prisoners. Following these three decisions large numbers of habeas corpus petitions were filed by state prisoners.⁶⁶

The enhanced availability of section 1983, the demise of the hands-off doctrine, and the liberalization of federal habeas corpus set the stage for the 1973 confrontation in *Preiser v. Rodriguez*.⁶⁷ These legal developments encouraged prisoners to file section 1983 civil rights actions and federal habeas corpus proceedings in increasing numbers. Inevitably, controversies arose over whether or not the prisoner had selected the proper remedy. Before proceeding to *Preiser*, however, a comparison of section 1983 and

61. 372 U.S. 293 (1963).

62. 372 U.S. at 318.

63. *Id.* at 312. *Townsend* listed circumstances in which federal evidentiary hearings are mandatory. *Id.* at 313. These were codified by Congress in 1966 in modified form by 28 U.S.C. section 2254(b) (1982). See C. WRIGHT, *supra* note 34, § 53, at 333-39.

64. 433 U.S. 72, *reh'g denied*, 434 U.S. 880 (1977).

65. See *United States ex rel. Spurlark v. Wolff*, 699 F.2d 354, 361 (7th Cir. 1983) (en banc) ("[t]he rumors of [Fay v. Noia's] death are not greatly exaggerated."); C. WRIGHT, *supra* note 34, § 53, at 342 ("The doctrine announced in *Fay* was decisively changed in 1977 in *Wainwright v. Sykes*." (footnote omitted)). *Wainwright* held that where a state prisoner fails to assert a claim properly in state court, that claim is precluded in a federal habeas corpus proceeding absent a showing of cause for not complying with the state procedural rule and actual prejudice from an inability to litigate the claim. 433 U.S. 72 (1971). On the questions of cause and prejudice, see *Murray v. Carrier*, 477 U.S. 478 (1986); *Smith v. Murray*, 477 U.S. 527 (1986); *Engle v. Issac*, 456 U.S. 107, *reh'gs denied*, 456 U.S. 1001, 457 U.S. 1141 (1982).

66. W. McCORMACK, *FEDERAL COURTS* § 10.04, 503 (1984) ("[H]abeas corpus petitions grew in astronomical numbers during the late 1960's and early 1970's."). See also Cover & Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 YALE L.J. 1035, 1042 (1977) ("*Fay* certainly increased the number of claims brought in federal court . . ."). Between 1961 and 1970, "state prisoner petitions, including both those seeking release and those complaining of maltreatment, increased from 1,020 to 11,812, or 1,158%." H. FRIENDLY, *FEDERAL JURISDICTION: A GENERAL VIEW* 16 (1973) (citing A.O. Ann. Rep., Table 16, at 121 (1970)). Additionally, "[b]etween 1961 and 1970, civil rights actions grew from 296 to 3,985, or 1,346%." *Id.* (citing A.O. Ann. Rep., Table C2, at 238 (1961) and Table C2, at 232 (1970)).

67. 411 U.S. 475, 489 (1973).

federal habeas corpus remedies is needed to evaluate what is at stake when a court is called upon to determine the proper remedy.

II. SECTION 1983 VERSUS FEDERAL HABEAS CORPUS—THE STAKES

Since a violation of federally protected rights by a state or local official is within the "literal terms" of both section 1983 and federal habeas corpus, there is a potential overlap in the two remedies.⁶⁸ This hardly means that they are fungible. On the contrary, several significant differences in the remedies render the resolution of a *Preiser v. Rogriguez*⁶⁹ puzzle by a federal court of crucial importance.

The custody and exhaustion requirements that state prisoners must satisfy in order to commence a federal habeas corpus proceeding are not applicable to section 1983 claims. The custody requirement, however, is relatively insignificant because of the Supreme Court's liberalized definition of custody.⁷⁰ In addition, the section 1983—habeas corpus issue normally arises in cases brought by confined state prisoners who are clearly in custody.

The exhaustion requirement under the federal habeas corpus doctrine lies at the heart of the section 1983—habeas corpus conflict. In a federal habeas corpus proceeding, the petitioner must exhaust all state judicial and administrative remedies before bringing suit; there is no such prerequisite under section 1983.⁷¹ The section 1983 remedy exists, in part, because of congressional mistrust for the "factfinding processes of state institutions."⁷² Congress believed that federal courts were less susceptible than state courts to local prejudice and defects in the fact finding processes.⁷³ Congress also wanted to provide immediate access to the federal judicial system despite state laws to the contrary.⁷⁴

To assess the significance of state remedies in relation to the section 1983 remedy requires consideration of both Congress's 1980 amendment to the Civil Rights of the Institutionalized Persons Act (CRIPA),⁷⁵ and the doctrine of *Parratt v. Taylor*.⁷⁶ In *Patsy*, the Supreme Court partially relied upon the 1980 CRIPA amendment to reject the exhaustion of administrative remedies requirement.⁷⁷ CRIPA created a specific, limited exhaustion requirement for

68. *Id.* at 488.

69. *Id.* at 475.

70. See *supra* notes 43-50 and accompanying text.

71. *Patsy v. Florida Bd. of Regents*, 457 U.S. 496 (1982); *Monroe v. Pape*, 365 U.S. 167 (1961).

72. *Patsy*, 457 U.S. at 506.

73. *Id.*

74. *Id.* at 504.

75. 42 U.S.C. § 1997e (1982).

76. *Parratt v. Taylor*, 451 U.S. 527 (1981), *rev'd in part*, *Daniels v. Williams*, 474 U.S. 327, 330-31 (1986).

77. *Patsy*, 457 U.S. at 507-16.

section 1983 actions brought by adult state prisoners. The courts have discretion to continue an action for up to ninety days if the Attorney General or the court determines that a "plain, speedy, and effective" system of administrative review exists in a particular jurisdiction and that exhaustion is "appropriate and in the interests of justice."⁷⁸ Congress found that the largest group of section 1983 suits were prisoner actions⁷⁹ and the limited exhaustion requirement was adopted, therefore, to relieve the burden on federal courts by diverting some of these suits back through state and local institutions.⁸⁰ The Court in *Patsy* found that CRIPA would have been unnecessary had there been a general exhaustion requirement in section 1983 actions, and that in enacting this specific provision for adult state prisoners, Congress had created an exception to the no-exhaustion rule.⁸¹

The limited exhaustion requirement delineated in CRIPA has not significantly altered the general no-exhaustion rule established by *Monroe* and *Patsy*. CRIPA does not require that state prisoners who assert proper claims for relief under section 1983 first exhaust either state judicial or administrative remedies. CRIPA instead allows a court discretion to continue an action for no more than ninety days pending resort to administrative remedies that satisfy the statutory criteria.⁸² Thus, CRIPA intrudes into the section 1983 no-exhaustion rule in a small way. Moreover, CRIPA is apparently invoked infrequently, given the relatively few decisions discussing the statutory provision.⁸³ This is partly due to the fact that the provision may be invoked

78. 42 U.S.C. § 1997e (1982). The Supreme Court has described section 1997e as an "extraordinarily detailed exhaustion scheme." *Patsy*, 457 U.S. at 509-10. "[A]n inmate must not only commence the grievance procedure but must appeal the grievance within the ninety-day period to the highest level available to him within said ninety-day period." *Mavlick v. Central Classification Bd.*, 659 F. Supp. 24, 27 (E.D. Va. 1986). The provision authorizes only a continuance, not a dismissal. *Francis v. Marquez*, 741 F.2d 1127-28 (9th Cir. 1984); *Kennedy v. Herschler*, 655 F.2d 210, 212 (10th Cir. 1981) (per curiam). The court may dismiss, however, if the prisoner fails to make reasonable, good faith efforts to pursue administrative remedies following the continuance of the action. *Lay v. Anderson*, 837 F.2d 231 (5th Cir. 1988); *Rocky v. Vittorie*, 813 F.2d 734, 736 (5th Cir. 1987). Section 1997e is limited to actions by adults convicted of a crime and thus does not cover juvenile delinquents. *Patsy*, 457 U.S. at 510 n.10; S. REP. NO. 897, 96th Cong., 2d Sess. 5, at 16, reprinted in 1980 U.S. CODE CONG. & ADMIN. NEWS 832, 840-41. While the legislative history of the Act refers at times to federal court actions, see, e.g., S. REP. NO. 897 *supra*, at 15, the statute itself is not so limited and has been applied by at least one state court. *Ode v. Smith*, 118 Misc. 2d 617, 461 N.Y.S.2d 684, 687 (N.Y. Sup. Ct. 1983).

79. *Patsy*, 457 U.S. at 515.

80. *Id.* at 509. See *Lay*, *supra* note 10, at 936.

81. *Patsy*, 457 U.S. at 515.

82. 42 U.S.C. § 1997e(a)(1)-(a)(2) (1982).

83. One court, however, which frequently invoked the "CRIPA stay provision," found that during 1983, the year in which it began to continue section 1983 actions so that administrative remedies might be exhausted, the number of such complaints filed by inmates decreased by 35% and that "approximately 92 percent of all grievances filed were resolved within the institution." *Burt v. Mitchell*, 589 F. Supp. 186, 190 n.4 (E.D. Va. 1984), *aff'd*, 790 F.2d 83 (4th Cir. 1986). In *Goff v. Menke*, 672 F.2d 702, 706 (8th Cir. 1982), the court, in an opinion

only when the Attorney General has certified, or the court finds, that a particular state's inmate grievance procedures are plain, speedy, and effective.⁸⁴ In addition, few states have adopted procedures that comply with the CRIPA statutory requirements.⁸⁵

The doctrine of *Parratt v. Taylor*⁸⁶ is also an important factor to consider when assessing the significance of state remedies in section 1983 actions. In both *Parratt* and *Hudson v. Palmer*⁸⁷ the plaintiff prisoners asserted due process claims in federal court section 1983 actions.⁸⁸ The Supreme Court ruled in both cases that when one is deprived of property from a "random and unauthorized act," rather than the enforcement of an "established state procedure," due process is satisfied if the state provides an adequate post-deprivation state court remedy.⁸⁹

While the parameters of this doctrine are not definitively settled, circuit courts have confined the doctrine to claims of procedural due process.⁹⁰ If

by Chief Judge Lay, urged "the State of Iowa to adopt a prisoner grievance procedure" because, "[s]uch a procedure would provide prisoners with a more accessible and quicker remedy and remove a significant number of cases from the federal docket." *Id.* at 706. Iowa apparently followed Judge Lay's suggestion and adopted a procedure that has been certified in compliance by the Attorney General. Lay, *supra* note 10, at 942 n.41.

84. See *Parratt v. Taylor*, 451 U.S. 527, 554-55 n.13 (1981) (Powell, J., concurring); *Johnson v. King*, 696 F.2d 370 (5th Cir. 1983); *Owen v. Kimmel*, 693 F.2d 711, 713-15 (7th Cir. 1982); *Ode v. Smith*, 118 Misc. 2d 617, 621-22, 461 N.Y.S.2d 684, 687 (N.Y. Sup. Ct. 1983).

85. Lay, *supra* note 10, at 937. The Justice Department has promulgated minimum standards for inmate grievance procedures. 28 C.F.R. § 40 (1986). See also 42 U.S.C. 1997e(b)(2) (1982). The only states which have inmate grievance procedures certified in compliance with the statute and regulations are the District of Columbia, Iowa, Wyoming, and Virginia. *Mavlick v. Central Classification Bd.*, 659 F. Supp. 24, 26 n.3 (E.D. Va. 1986); Lay, *supra* note 10, at 942. Chief Judge Lay concluded that largely because of the statutory requirement that prison employees and inmates have an advisory role "in the formulation, implementation, and operation of the [grievance] system . . . most states feel that obtaining federal approval is either too burdensome or an unrealistic means of resolving grievances within prison walls." *Id.* at 937.

86. 451 U.S. 527 (1981).

87. 468 U.S. 517 (1984).

88. *Parratt*, 451 U.S. at 529; *Hudson*, 468 U.S. at 520. The prisoner in *Hudson* also asserted a fourth amendment claim. 468 U.S. at 521 n.4, 522-30.

89. *Parratt*, 451 U.S. at 541; *Hudson*, 468 U.S. at 533. Compare *Parratt* and *Hudson* (random and unauthorized deprivations) with *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982) (deprivation pursuant to an established state procedure). The part of the decision in *Parratt* which holds that negligent conduct may give rise to a due process claim has since been overruled. *Daniels v. Williams*, 474 U.S. 327 (1986). "[W]e . . . overrule *Parratt* to the extent it states that mere lack of due care by a state official may 'deprive' an individual of life, liberty, or property under the Fourteenth Amendment." *Daniels*, 474 U.S. at 330-31. See also *Davidson v. Cannon*, 474 U.S. 344 (1986) (due process clause of fourteenth amendment is not implicated by the lack of due care of an official causing unintended injury to life, liberty, or property). *Daniels* and *Davidson* leave open whether or not something more than negligence though "less than intentional conduct, such as recklessness or gross negligence, is enough to trigger the protections of the Due Process Clause." *Daniels*, 477 U.S. at 344 n.3. Thus, after *Daniels* and *Davidson*, the *Parratt-Hudson* doctrine still applies to random and unauthorized intentional deprivations of property.

90. See *Littlefield v. City of Afton*, 785 F.2d 596, 608 (8th Cir. 1986); *Kidd v. O'Neil*, 774

Parratt and *Hudson* are applied to substantive constitutional claims, the doctrine would overturn the holding in *Monroe v. Pape*,⁹¹ that the federal section 1983 remedy is independent of any available state remedies.⁹² The *Parratt-Hudson* doctrine is reconciled with *Monroe* when the doctrine is limited to claimed violations of procedural due process.

When one's procedural due process claim is rejected by a federal court because of the availability of an adequate state court remedy, the claim is defeated on the merits rather than for failure to exhaust state remedies.⁹³ This is because *Parratt* and *Hudson* neither eliminate nor limit the right to commence a federal section 1983 action without exhausting state judicial remedies. Rather, these cases hold that having properly commenced the action, a procedural due process claim may be without merit under those circumstances where the available state judicial remedies provide due process. Thus, the *Parratt-Hudson* doctrine has not altered the strong no-exhaustion rule that governs section 1983 claims.

Unlike section 1983, federal habeas corpus jurisdiction requires state prisoners to exhaust adequate state remedies before bringing a habeas corpus proceeding.⁹⁴ Contrary to Congress's mistrust for state fact finding that

F.2d 1252, 1255 (4th Cir. 1985); *Gilmere v. City of Atlanta*, 774 F.2d 1495, 1500 (11th Cir. 1985) (en banc), cert. denied, 476 U.S. 1115 (1986); *Conway v. Village of Mt. Kisco*, 758 F.2d 46, 48 (2d Cir. 1985), cert. dismissed, 107 S. Ct. 390 (1986); *Thibodeaux v. Bordelon*, 740 F.2d 329, 338 (5th Cir. 1984). See also *Hudson v. Palmer*, 468 U.S. 517, 541 n.4 (1984) (Justices Stevens, Brennan, Marshall, and Blackmun concurring in part and dissenting in part) (join the opinion of the Court upon the understanding that the Court's holding does not apply to conduct that violates a substantive constitutional right).

91. 365 U.S. 167 (1961).

92. This is a result not intended by the *Parratt* court. See *Augustine v. Doe*, 740 F.2d 322, 329 (5th Cir. 1984).

93. See *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 193 (1985) (dicta); *Signet Construction Corp. v. Borg*, 775 F.2d 486, 491 (2d Cir. 1985); *L&H Sanitation v. Lake City Sanitation*, 769 F.2d 517, 523 (8th Cir. 1985); *Vicory v. Walton*, 721 F.2d 1062, 1064 n.3 (6th Cir. 1983), cert. denied, 469 U.S. 834 (1984).

94. 28 U.S.C. § 2254(b), (c) (1982). Given the fact that the habeas corpus exhaustion requirement is rooted in principles of comity, the requirement is characterized as a "doctrine of abstention," *Fay v. Noia*, 372 U.S. 391, 419 (1963), and is not "jurisdictional." *Id.* at 434-35. *Accord Granberry v. Greer*, 107 S. Ct. 1671, 1673 (1987) ("[F]ailure to exhaust state remedies does not deprive an appellate court of jurisdiction to consider the merits of a habeas corpus application."); *Strickland v. Washington*, 466 U.S. 668, 684 (while the exhaustion requirement is "to be strictly enforced, [it] is not jurisdictional"), reh'g denied, 467 U.S. 1267 (1984); *Bradburn v. McCotter*, 786 F.2d 627 (5th Cir. 1986) (en banc) ("the requirement of exhaustion is not jurisdictional but is merely a matter of comity" (quoting *McGee v. Estelle*, 722 F.2d 1206, 1210 (5th Cir. 1984))), cert. denied, 107 S. Ct. 167 (1987). Where the state does not raise petitioner's failure to exhaust in the district court and raises it for the first time in the court of appeals, the appellate court must "exercise discretion . . . to decide whether the administration of justice would be better served by insisting on exhaustion or by reaching the merits of the petition forthwith." *Granberry*, 107 S. Ct. at 1673. See, e.g., *Brown v. Fauver*, 819 F.2d 395 (3d Cir. 1987) (applying *Granberry* in a *Preiser* context; exhaustion required even though not raised by defendants in district or circuit courts). "The appellate court is not required to dismiss for nonexhaustion notwithstanding the state's failure to raise it, and the

underlies the section 1983 no-exhaustion rule,⁹⁵ the habeas corpus exhaustion requirement reflects congressional respect for state remedies and a belief that state authorities should be given the first opportunity to correct constitutional errors.⁹⁶ The Supreme Court requires strict enforcement of the exhaustion requirement in federal habeas corpus proceedings.⁹⁷ A petitioner must present the substance of his claim in state court⁹⁸ and seek review in the highest court in the state.⁹⁹ In *Rose v. Lundy*¹⁰⁰ the Supreme Court adopted the complete exhaustion rule. Pursuant to this rule "mixed petitions," that is those containing exhausted and unexhausted claims, must be dismissed unless a petitioner relinquishes the unexhausted claims.¹⁰¹ While the Court recognized that the mixed petition problem was not covered by the federal habeas corpus statute, and that in all likelihood Congress had never considered the problem, the Court required complete exhaustion to further the policies of the exhaustion rule.¹⁰² The complete exhaustion rule will not only reduce piecemeal litigation, but will also give state courts more opportunities to resolve constitutional questions.¹⁰³ The *Rose* Court thus viewed the rule as a way to promote the principle of comity that underlies the exhaustion requirement.

court is not obligated to regard the state's omission as an absolute waiver of the claim." *Granberry*, 107 S. Ct. at 1674. The court in *Peterson v. Murante*, 673 F. Supp. 664, 670 (W.D.N.Y. 1987), neglecting *Granberry*, improperly treated the *Preiser* issue as one of "subject matter jurisdiction."

95. See *supra* notes 72-74.

96. See *supra* notes 53-56.

97. *Strickland*, 466 U.S. at 684. See also *Young v. Ragen*, 337 U.S. 235, 238 (1949) ("scrupulous adherence"). In fact a large number of state prisoner federal habeas corpus petitions are dismissed for failure to exhaust state remedies. Pagano, *Federal Habeas Corpus for State Prisoners: Present and Future*, 49 ALB. L. REV. 1, 45-46 (1984).

98. *Anderson v. Harless*, 459 U.S. 4, 6 (1982); *Picard v. Connor*, 404 U.S. 270, 275-76 (1971).

99. *Brown v. Allen*, 344 U.S. 443, *reh'g denied*, 345 U.S. 946 (1953). Exhaustion does not require a state prisoner to seek review in the United States Supreme Court. *Fay v. Noia*, 372 U.S. 391, 436 (1963).

100. 455 U.S. 509 (1982).

101. The Court, however, acknowledged that by deleting unexhausted claims, a petitioner could risk forfeiting consideration of the unexhausted claims under the abuse of the writ rule set forth in 28 U.S.C. section 2254 Rule 9(b) (1982). *Rose*, 455 U.S. at 520-21. The *Rose* decision "gives petitioners the option either of going back to state court to exhaust the claims not previously presented to that forum before returning to federal court, or of resubmitting a new petition to the federal court containing only exhausted claims." Rosenberg, *Constricting Federal Habeas Corpus: From Great Writ to Exceptional Remedy*, 12 HASTINGS CONST. L.Q. 597, 628-29 (1985).

102. *Rose*, 455 U.S. at 518-19. "A rigorously enforced total exhaustion rule will encourage state prisoners to seek full relief first from the state courts, thus giving the courts the first opportunity to review all claims of constitutional error." *Id.*

103. *Id.* at 519. This will enable the state courts to become more familiar and perhaps more "hospitable toward federal constitutional issues." *Id.*

The exhaustion requirement in federal habeas corpus proceedings typically means that a significant delay will occur before there is review of federal claims. While time itself is very important for a prisoner, it is not the only factor involved. A state prisoner who has been unsuccessful in the state court system must institute a federal habeas corpus proceeding encumbered by the adverse state court determinations. While *res judicata* and collateral estoppel do not apply to federal habeas corpus proceedings,¹⁰⁴ federal habeas courts are required to give substantial deference to state findings of fact. Federal courts presume the state findings of fact are correct and set them aside only if they are "not fairly supported by the record."¹⁰⁵ The effect of a combined reading of the exhaustion and deference rules is that, in most cases, if an issue was not raised in state court a prisoner cannot obtain federal court jurisdiction and, in many cases, if an issue was decided in the state court, the decision is given great weight and the prisoner is unable to obtain federal habeas corpus relief.¹⁰⁶

Even if deference to state fact finding was not required, the exhaustion requirement places a federal habeas corpus petitioner at a tremendous strategic disadvantage. A federal court grant of the writ in a particular case constitutes an implicit statement that the state court system has been a less vigilant enforcer of the Constitution than the federal court. This is contrary to the Supreme Court's assumption that state courts are as competent and sensitive in interpreting the United States Constitution as the federal courts.¹⁰⁷ The negative state fact finding and adverse legal determinations inherent in federal habeas corpus proceedings are responsible for the fact that very few federal habeas corpus petitions filed by state prisoners are granted.¹⁰⁸ The small percentage of writs granted,¹⁰⁹ the fact that many of the petitions filed are frivolous *pro se* petitions,¹¹⁰ and the sensitive and controversial nature

104. *Sanders v. United States*, 373 U.S. 1, 7-8 (1963); *Fay v. Noia*, 372 U.S. 391, 422-23 (1963); *Brown v. Allen*, 344 U.S. 443, *reh'g denied*, 345 U.S. 946 (1953).

105. *See, e.g., Wainwright v. Witt*, 469 U.S. 412, 428 (1985) ("state court findings of fact are to be accorded the presumption of correctness"); *Sumner v. Mata*, 449 U.S. 539, 551 (1981) (interpreting 28 U.S.C. section 2254(d)(8) (1982)). The federal habeas corpus court has the power to receive evidence and try the facts anew. *Townsend v. Sain*, 372 U.S. 293, 310-12 (1963). The court will do so, however, only if the habeas petitioner "did not receive a full and fair evidentiary hearing in a state court, either at the time of the trial or in a collateral proceeding." *Id.* at 312-13. *Townsend* sets forth guidelines for determining whether a full and fair hearing was provided in state court, and these guidelines were substantially codified by Congress in 1966 in 28 U.S.C. section 2254(d) (1982). *Townsend*, 372 U.S. at 313.

106. *Robbins, supra* note 32, at 276.

107. *See supra* note 54.

108. A leading authority estimates from available studies that no more than 4% of the federal habeas corpus petitions are granted. WRIGHT, MILLER & COOPER, *supra* note 32, § 3261, at 601. *See also* Pagano, *supra* note 97, at 32 ("the success rate for habeas petitions is fairly low . . .").

109. *See supra* note 108.

110. WRIGHT, MILLER & COOPER, *supra* note 32, § 4261, at 588; Yackle, *supra* note 34, at 1010 ("habeas petitions often lack merit . . ."); Soloff, *Litigation and Relitigation: The*

of the writ contribute to the burdens facing state prisoners who petition for habeas corpus relief. Justice Jackson, for example, acknowledged that the infrequent meritorious application is prejudiced by being buried with the usual worthless claims because "[h]e who must search a haystack for a needle is likely to end up with the attitude that the needle is not worth the search."¹¹¹ Judge Friendly referred to federal habeas corpus as "a gigantic waste of effort" because the remedy produces no result in the overwhelming majority of cases and a good result only rarely.¹¹²

Judicial attitudes like these place a federal habeas corpus petitioner at a disadvantage compared to a section 1983 claimant. This attitudinal factor should be considered in evaluating the distinction between the availability of a section 1983 remedy as compared to a federal habeas corpus remedy. So as not to overstate the difference in this regard, there has been wide concern over the huge increase in section 1983 filings generally and by prisoners specifically,¹¹³ which include a large number of frivolous *pro se* complaints.¹¹⁴ While some complain that section 1983 has already exceeded its historical bounds,¹¹⁵ state prisoner section 1983 claims do not come to federal court with the same negative connotations as the federal habeas corpus petitions filed by state prisoners. Section 1983 was enacted in part because of Congress's distrust for the adequacy of state fact finding,¹¹⁶ thereby creating a type of *de facto* presumption in favor of federal court review of state action that is allegedly unconstitutional. Moreover, these claims need not come to federal court burdened by adverse state court fact findings and legal rulings because exhaustion of state remedies is not required to commence a section 1983 action.

Another major distinction between section 1983 and federal habeas corpus is the potential relief awarded in each proceeding. Release from custody lies at the heart of the habeas corpus remedy. That relief, however, is not available in a civil rights action.¹¹⁷ On the other hand, while damages are

Uncertain Status of Federal Habeas Corpus for State Prisoners, 6 HOFSTRA L. REV. 297, 298 n.4 (1978) ("the feeling that there are too many frivolous petitions. . .").

111. *Brown v. Allen*, 344 U.S. 443, 537 (Jackson, J., concurring), *reh'g denied*, 345 U.S. 946 (1953).

112. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142, 148 (1970), *quoted in* WRIGHT, MILLER & COOPER, *supra* note 32, § 4261, at 603. Several present Justices have "complained bitterly" about federal habeas corpus. Yackle, *supra* note 34, at 993.

113. See *supra* note 10 (statistics indicating increase in section 1983 filings).

114. "[I]t is generally agreed that most prisoner rights cases are frivolous and ought to be dismissed under even the narrowest definition of frivolity." I. SENSENICH, *supra* note 10, at 10.

115. *Parratt v. Taylor*, 451 U.S. 527, 554 (1981) (Powell, J., concurring); *Kostivk v. Riverhead*, 570 F. Supp. 603, 607 (E.D.N.Y. 1983).

116. See *supra* notes 72-74 and accompanying text.

117. See *Dickerson v. Walsh*, 750 F.2d 150, 153 (1st Cir. 1984); *Rodriguez v. McGinnis*, 451 F.2d 730, 731 (2d Cir. 1971), *rev'd*, 456 F.2d 79 (2d Cir. 1972) (en banc), *rev'd sub nom.*

an important section 1983 remedy,¹¹⁸ they are not available in federal habeas corpus proceedings.¹¹⁹ Hence, habeas corpus

does not even attempt to compensate for past sufferings; rather the habeas remedy begins where the section 1983 remedy leaves off. By releasing a defendant from custody, habeas corpus can prevent only future injury. Thus, the habeas corpus and section 1983 damages remedies do not overlap They are mutually exclusive, yet complementary remedies that together operate to render the injured party whole.¹²⁰

Additionally, Congress enacted the Civil Rights Attorneys' Fees Awards Act of 1976, which added court ordered attorneys' fees to the list of remedies

Preiser v. Rodriguez, 411 U.S. 475 (1973) ; United States *ex. rel.* Katzoff v. McGinnis, 441 F.2d 558, 559 (2d Cir. 1971), *rev'd sub nom.* Rodriguez v. McGinnis, 456 F.2d 79 (2d Cir. 1972) (en banc), *rev'd sub nom.* Preiser, 411 U.S. 475 (1973); Peinado v. Adult Auth. of Dep't of Corrections, 405 F.2d 1185, 1186 (9th Cir.), *cert. denied*, 395 U.S. 968 (1969); Johnson v. Walker, 317 F.2d 418, 419-420 (5th Cir. 1963). *See also* Fast v. Wead, 509 F. Supp. 744, 745 (N.D. Ohio 1981) (where state prisoner challenged his physical imprisonment on constitutional grounds, his sole remedy was a writ of habeas corpus, and not a suit for relief under section 1983).

118. Owen v. City of Independence, 445 U.S. 622, 651, *reh'g denied*, 446 U.S. 993 (1980). Damages are viewed as a "vital component" of the remedies available under section 1983 because they provide compensation for past constitutional violations and "serve as a deterrent against future constitutional deprivations." *Id.* *See also* Robertson v. Wegmann, 436 U.S. 584, 590-91 (1978) (policies which underlie section 1983 include compensation as well as the prevention of abuses of power by those acting under the color of state law); Carey v. Piphus, 435 U.S. 247, 256-57 (1978) (Congress intended section 1983 awards to compensate and deter deprivations of constitutional rights).

119. Allen v. McCurry, 449 U.S. 90, 104 (1980) (purpose of habeas corpus is "not to redress civil injury, but to release applicant from unlawful physical confinement. . . ."); Preiser v. Rodriguez, 411 U.S. 475, 494 (1973) ("In the case of a damages claim, habeas corpus is *not* an appropriate or available federal remedy.") (emphasis in original); Fulford v. Klein, 529 F.2d 377, 383 (5th Cir. 1976) (Tuttle, J., concurring in part and dissenting in part) ("[N]o one has ever obtained damages by a petition for habeas corpus."), *aff'd*, 550 F.2d 342 (5th Cir. 1977) (en banc); *See also* Note, Preiser v. Rodriguez in *Retrospect*, *supra* note 6, at 1081 (Supreme Court agreed that habeas remedy did not provide for monetary recovery); Note, *The Aftermath of Preiser and Wolff*, *supra* note 6, at 768 (damages are not considered a traditional habeas corpus remedy nor are they a remedy under federal habeas corpus law); Comment, *Proper Forum*, *supra* note 6, at 1399 (damages unavailable in federal habeas corpus proceedings). The habeas corpus statute "does not deny the federal courts power to fashion appropriate relief other than immediate release." Peyton v. Rowe, 391 U.S. 54, 66 (1968). 28 U.S.C. section 2244(b) (1982) reads: "release from custody or other remedy" while 28 U.S.C. section 2243 (1982) requires the court to "dispose of the matter as law and justice require." Carafas v. LaValle, 391 U.S. 234, 239 (1968). The most common remedy is for the prisoner to be "ordered discharged unless the prisoner is retried within a reasonable time which may be specified in the order." WRIGHT, MILLER & COOPER, *supra* note 32, § 4268, at 714. "[T]he writ is available as well to attack future confinement and obtain future releases." Preiser, 411 U.S. at 487.

120. Comment, *The Collateral Estoppel Effect to be Given State-Court Judgments in Federal Section 1983 Damage Suits*, 128 U. PA. L. REV. 1471, 1495 (1980) [hereinafter Comment, *Collateral Estoppel*]. *See also* Zeigler, *supra* note 27, at 81. ("Moreover, reversal of a conviction does not act directly on the officials whose behavior the court wishes to change.").

available in civil rights actions.¹²¹ By contrast, there is no statutory authorization for awarding attorneys' fees in federal habeas corpus proceedings.¹²² This distinction is substantial. Congress authorized fee awards in section 1983 actions because a "vast majority of victims of civil rights violations cannot afford legal counsel . . . [and therefore] are unable to present their cases to the courts."¹²³ Consistent with this statutory purpose, there is a strong presumption that a prevailing plaintiff should recover a fee.¹²⁴ Thus, a prevailing section 1983 plaintiff recovers an attorney's fee unless special circumstances render an award unjust.¹²⁵

Section 1983's no-exhaustion rule and statutory fee authority are the two major distinctions between the two remedies and generally render section 1983 more desirable than federal habeas corpus to state prisoners. Other

121. "In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." 42 U.S.C. § 1988 (1982). *See* *Evans v. Jeff D.*, 475 U.S. 717, *reh'g denied*, 476 U.S. 1179 (1986). *See also* *City of Riverside v. Rivera*, 477 U.S. 561 (1986) (fee award under 42 U.S.C. section 1988 may exceed award of damages).

122. *Ewing v. Rodgers*, 826 F.2d 967 (10th Cir. 1987); *Boudin v. Thomas*, 732 F.2d 1107, 1114 (2d Cir.), *reh'g denied*, 737 F.2d 261 (1984). *See also* *Rutledge v. Sunderland*, 671 F.2d 377, 382 (10th Cir. 1982) (petitioner was not entitled to recover attorneys' fees in a successful habeas corpus suit absent statutory authority for such an award). When a suit, nominally brought under section 1983, terminates in a consent decree providing available relief only in a habeas corpus proceeding, the proceeding will be treated as a habeas corpus proceeding and the Civil Rights Attorneys' Fees Awards Act of 1976 is inapplicable. *Larsen v. Sielaff*, 702 F.2d 116, 118 (7th Cir.), *cert. denied*, 464 U.S. 956 (1983).

123. H.R. REP. NO. 1158, 94th Cong., 2d Sess. 2 (1976). The mandate that counsel be assigned to indigent federal habeas corpus petitioners when "an evidentiary hearing" is required, 28 U.S.C. section 2254 (1982), somewhat mitigates the lack of statutory fee authority in federal habeas corpus proceedings, although in fact, hearings are held infrequently. *See infra* note 129. Discretionary authority for appointment of counsel in civil actions, which of course encompasses section 1983 actions, is provided for in 28 U.S.C. section 1915(d) (1982). Under this provision, "[b]road discretion lies with the district judge . . ." *Hodge v. Police Officers*, 802 F.2d 58, 60 (2d Cir. 1986). For an analysis of the pertinent factors *see, e.g.,* *Maclin v. Freake*, 650 F.2d 885 (7th Cir. 1981). Some courts hold that in section 1983 actions counsel should be appointed only in exceptional circumstances. *Branch v. Cole*, 686 F.2d 264, 266 (5th Cir. 1982).

124. *See* *Annunziato v. The Gan*, 744 F.2d 244, 253 (2d Cir. 1984) ("a presumption in favor of fee awards . . ."). While the prevailing plaintiff standard for a section 1988 fee award applies to prisoners, fees are not available under section 1988 to *pro se* litigants. *See, e.g.,* *Smith v. DeBartoli*, 769 F.2d 451, 453 (7th Cir. 1985) (plaintiff not entitled to attorneys' fees where there was no indication that plaintiff was an attorney), *cert. denied*, 475 U.S. 1067 (1986); *Pitts v. Vaughn*, 679 F.2d 311, 312 (3d Cir. 1982) ("the legislative history of section 1988 supports the position that Congress did not intend to award non-lawyer, *pro se* litigants an equivalent of attorneys' fees"); *Wright v. Crowell*, 674 F.2d 521 (6th Cir. 1982) (state prisoner alleging the existence of a civil rights violation due to the deprivation of his right to vote, was prohibited from recovering attorneys' fees under section 1988); *Cofield v. City of Atlanta*, 648 F.2d 986, 988 (5th Cir. 1981) (section 1988 is not intended to compensate a worthy advocate, as in the case of a successful *pro se* litigant, but rather to enable a wronged person to retain an attorney).

125. *Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983).

advantageous aspects of the section 1983 remedy include the right to trial by jury on legal claims, the potential availability of a broad spectrum of relief, including class action relief and money damages, and the applicability of the federal discovery rules.¹²⁶ On the other hand, federal habeas corpus has some advantages over section 1983. While *res judicata* fully applies to section 1983 actions,¹²⁷ traditional principles of *res judicata* do not apply to federal habeas corpus proceedings.¹²⁸ Additionally, the relative simplicity of the federal habeas corpus proceeding, a summary proceeding with infrequently held hearings,¹²⁹ has obvious advantages for *pro se* habeas corpus petitioners.¹³⁰ While federal habeas corpus law is not simple, given the various nuances of such concepts as custody, exhaustion, and presumption of correctness of state fact finding, federal habeas corpus is less complex and more contained than the multi-dimensional section 1983 litigation. State prisoners who litigate section 1983 claims typically must address several complex issues, including the distinction between state law wrongs and federal constitutional torts, proximate cause, the meaning of municipal custom or policy, common law immunities, the eleventh amendment, *res judicata* and collateral estoppel, abstention doctrines, and the computation of damages for violations of constitutional rights.¹³¹

The following chart contains a summary of important distinctions between section 1983 and federal habeas corpus remedies.

126. These and other distinctions are set forth on the annotated chart on *infra* pages 108-11.

127. See *Migra v. Warren City School Dist. Bd. of Ed.*, 465 U.S. 75 (1984); *Allen v. McCurry*, 449 U.S. 90 (1980); M. SCHWARTZ & J. KIRKLIN, *supra* note 4, at 193-96. The Supreme Court has held that administrative *res judicata* applies to section 1983 claims to the extent that "federal courts must give the agency's fact-finding the same preclusive effect to which it would be entitled in the State courts." *University of Tenn. v. Elliot*, 106 S. Ct. 3220, 3227 (1986).

128. *Preiser v. Rodriguez*, 411 U.S. 475, 495 (1973); *Sanders v. United States*, 373 U.S. 1, 7-8 (1963); *Fay v. Noia*, 372 U.S. 391, 422-23 (1963); *Brown v. Allen*, 344 U.S. 443, 458, *reh'g denied*, 345 U.S. 946 (1953).

129. "Of 8,534 petitions filed in the statistical year ending June 30, 1985, only 114 habeas cases proceeded to a hearing, with 102 of the hearings lasting one day or less." Robbins, *supra* note 32, at 266 (citing Annual Report to the Director of the United States Courts 1985 at 149, 328 (1985)).

130. But see *Rose v. Lundy*, 455 U.S. 509, 530 (1982) (Blackmun, J., concurring) (Court's rule of complete exhaustion "will serve to trap the unwary *pro se* prisoner who is not knowledgeable about the intricacies of the exhaustion doctrine . . .").

131. See S. NAHMOND, *supra* note 16; M. SCHWARTZ & J. KIRKLIN, *supra* note 4.

	SECTION 1983	FEDERAL HABEAS CORPUS
Assigned Counsel:	Only at the discretion of the court. ¹³²	"[C]ounsel must be appointed for qualified indigents when a hearing is required; the court may appoint counsel at an earlier stage if it deems appointment desirable." ¹³³
Attorney Fees:	Statutory authorization to award fees to a prevailing party. ¹³⁴	No statutory authorization. ¹³⁵
Class Actions:	The federal class action rule applies. ¹³⁶	The federal class action rule apparently does not apply but the court in narrow circumstances may order class habeas relief by applying an analogous representative procedure. ¹³⁷

132. 28 U.S.C. § 1915(d) (1982). *See, e.g.*, *Hodge v. Police Officers*, 802 F.2d 58 (2d Cir. 1986) (in making decision whether or not to appoint counsel, court should consider certain factors, such as substance of the indigent's claim); *Maclin v. Freake*, 650 F.2d 885 (7th Cir. 1981) (district courts have broad discretion to appoint counsel for indigents, and will not be reversed without a showing of fundamental unfairness which would impinge upon due process rights). However, some courts appoint counsel only in special or exceptional circumstances. *See, e.g.*, *Cookish v. Cunningham*, 787 F.2d 1, 2 (1st Cir. 1986) (inmate failed to demonstrate exceptional circumstances in his case concerning denial of proper medical care and access to the law library to justify appointment of counsel); *Smith-Bey v. Petsock*, 741 F.2d 22, 26 (3d Cir. 1984) ("only upon a showing of special circumstances . . ."); *Branch v. Cole*, 686 F.2d 264, 266 (5th Cir. 1982) (while appointment of counsel not required absent exceptional circumstances, decision cannot be based upon the unavailability of counsel).

133. *Hodge*, 802 F.2d at 60 (citing Rules Governing Section 2254 Cases in the United States District Courts, Rule 8(c) and Advisory Committee Notes). It is more difficult for an indigent prisoner to secure counsel in a civil rights action than in a habeas corpus proceeding. I. SENSENICH, *supra* note 10, at 23. While 28 U.S.C. section 1915(d) (1982), which authorizes the assignment of counsel to indigents, contains no provision for compensating assigned counsel, compensation is available to assigned counsel in habeas corpus proceedings under the Criminal Justice Act, 18 U.S.C. section 3006A(g) (1982).

134. *See supra* notes 121-25 and accompanying text.

135. *See supra* note 122.

136. S. NAHMOND, *supra* note 16, at 32.

137. *See, e.g.*, *Cox v. McCarthy*, 829 F.2d 800, 804 (9th Cir. 1987) (dicta) ("[A] class action may lie in habeas corpus."); *Martin v. Strasburg*, 689 F.2d 365, 374 (2d Cir. 1982) (class action suits are permissible in habeas corpus proceedings), *rev'd on other grounds sub nom.*

	SECTION 1983	FEDERAL HABEAS CORPUS
Damages:	Available. ¹³⁸	Not available. ¹³⁹
Exhaustion:	Generally not required except for limited, specific requirements under CRIPA. ¹⁴⁰	Stringent exhaustion of state remedies requirement. ¹⁴¹
Federal Rules of Civil Procedure:	Applicable. ¹⁴²	Not applicable. ¹⁴³
Institutional Law Reform Litigation:	The major vehicle of prisoners' rights litigation. ¹⁴⁴	Not well suited for institutional reform litigation. ¹⁴⁵

Schall v. Martin, 467 U.S. 253 (1984); Bijeol v. Benson, 513 F.2d 965, 968 (7th Cir. 1975) (FED. R. CIV. P. 23 does not apply to habeas corpus proceeding); United States *ex rel.* Sero v. Preiser, 506 F.2d 1115, 1126 (2nd Cir. 1972) (while precise provisions of Rule 23 are not applicable to habeas corpus proceedings, an analogous procedure may be employed), *cert. denied*, 421 U.S. 921 (1975). *See also* Williams v. Richardson, 481 F.2d 358, 361 (8th Cir. 1973) (class action suit may provide appropriate method to litigate a group of claims where the class would avoid duplication of judicial effort); Mead v. Parker, 464 F.2d 1108, 1112-13 (9th Cir. 1972) (prisoner's petition for a writ of habeas corpus may be treated as a class action where relief sought is of an immediate benefit going to a large and amorphous group); Faheem-El v. Klinciar, 600 F. Supp. 1029, 1033 (N.D. Ill. 1984) (habeas corpus claims may be maintained as representative actions even though they may be restricted in scope and availability); Adderly v. Wainwright, 58 F.R.D. 389, 400 (M.D. Fla. 1972) (appropriate to petition for a writ as a class action even though the Supreme Court has not yet decided this issue). The Supreme Court has never determined whether Federal Rule of Civil Procedure 23 applies to habeas corpus proceedings. *Schall*, 467 U.S. at 261 n.10; Bell v. Wolfish, 441 U.S. 520, 527 n.6 (1979); Middendorf v. Henry, 425 U.S. 25, 30 (1976); Harris v. Nelson, 394 U.S. 286, 294 n.5, *reh'g denied*, 394 U.S. 1025 (1969).

138. *See supra* note 118.

139. *See supra* note 119.

140. *See supra* notes 71-93.

141. *See supra* notes 94-103.

142. M. SCHWARTZ & J. KIRELIN, *supra* note 4, at 213; S. NAHMOND, *supra* note 16, at 28.

143. Browder v. Director, Ill. Dep't of Corrections, 434 U.S. 257, *reh'g denied*, 434 U.S. 1089 (1978). *See also* Harris v. Nelson, 394 U.S. 286, 296 (Congress never contemplated that the discovery provisions of the Federal Rules of Civil Procedure would apply to habeas corpus proceedings), *reh'g denied*, 394 U.S. 1025 (1969). The Federal Rules of Civil Procedure apply in federal habeas corpus proceedings only "to the extent that the practice in such proceedings is not set forth in statutes of the United States and has heretofore conformed to the practice in civil actions." FED. R. CIV. P. 81(a)(2). Rule 81(a)(2) recognizes the supremacy of the federal statutory habeas corpus procedures over the Federal Rules. *Browder*, 434 U.S. at 267-68.

144. Blackmun, *supra* note 19, at 21.

145. *See* Zeigler, *supra* note 27, at 81 (reversal of a conviction under habeas corpus acts indirectly rather than directly on prison official's treatment regarding prisoner's rights).

	SECTION 1983	FEDERAL HABEAS CORPUS
Jury Trial:	Available when "legal relief" sought. ¹⁴⁶	Not available. ¹⁴⁷
Pendent Claim Jurisdiction:	May be asserted in accordance with general principles of pendent jurisdiction. ¹⁴⁸	"[S]tate law claims ordinarily cannot be pendent to federal habeas claims." ¹⁴⁹
Plenary v. Summary Proceeding:	Plenary action. ¹⁵⁰	"[T]he federal habeas corpus statute provides for a swift, flexible and summary determination." ¹⁵¹
Pre-Trial Discovery:	Discovery rules are applicable. ¹⁵²	Discovery rules are inapplicable and discovery is available only with the court's permission. ¹⁵³

146. M. SCHWARTZ & J. KIRKLIN, *supra* note 4, at 289-90.

147. 28 U.S.C. section 2243 (1982) provides that: "[t]he court shall summarily hear and determine the facts, and dispose of the matter as law and justice require." *Id.*

148. *See, e.g., Hagans v. Lavine*, 415 U.S. 528 (1974) (a claim may be pendent to non-insubstantial constitutional claims). However, a state law claim that is pendent to a section 1983 claim when asserted against the state or state officials, may be defeated by the eleventh amendment. *Pennhurst State School and Hosp. v. Halderman*, 465 U.S. 89, 121-23 (1984).

149. *Mosley v. Moran*, 798 F.2d 182, 185 (7th Cir. 1986); *United States ex rel. Hoover v. Franzen*, 669 F.2d 433, 445 (7th Cir. 1982).

150. Section 1983 authorizes the imposition of liability "in an action at law, suit in equity, or other proper proceeding for redress." 42 U.S.C. § 1983 (1982).

151. *Preiser v. Rodriguez*, 411 U.S. 475, 495 (1973); *Fay v. Noia*, 372 U.S. 391, 400 (1963). *See* 28 U.S.C. § 2243 (1982). A flexible approach is used for taking evidence in a habeas corpus proceeding by utilizing oral testimony, depositions, affidavits, or written interrogatories. 28 U.S.C. § 2246 (1982). *See Harris v. Nelson*, 394 U.S. 286, 299, *reh'g denied*, 394 U.S. 1025 (1969). The federal habeas corpus petitioner has no absolute right to a hearing in federal court; "[w]here the record of the application affords an adequate opportunity to weigh the sufficiency of the allegations and the evidence, and no unusual circumstances calling for a hearing are presented, a repetition of the trial is not required." *Brown v. Allen*, 344 U.S. 443, 463, *reh'g denied*, 345 U.S. 946 (1953). The *Preiser* court observed that section 1983 actions are "frequently longer than a federal habeas corpus proceeding . . ." *Preiser*, 411 U.S. at 496.

152. *Spell v. McDaniel*, 591 F. Supp. 1090, 1114 (E.D.N.C. 1984); *Inmates of Unit 14 v. Rebideau*, 102 F.R.D. 122, 128 (N.D.N.Y. 1984) ("Federal policy favors broad discovery in civil rights actions."); *Mercy v. County of Suffolk*, 93 F.R.D. 520 (E.D.N.Y. 1982); *Frankenhauser v. Rizzo*, 59 F.R.D. 339 (E.D. Pa. 1973).

153. *Harris v. Nelson*, 394 U.S. 286, *reh'g denied*, 394 U.S. 1025 (1969). In *Harris*, the Court found that the discovery rules as written are ill suited to habeas corpus proceedings. *Id.* at 296. Courts often disallow discovery in habeas corpus proceedings. *Zeigler*, *supra* note 27, at 83.

	SECTION 1983	FEDERAL HABEAS CORPUS
Release from Confinement:	Not available. ¹⁵⁴	Available and is the essence of habeas corpus. ¹⁵⁵
<i>Res Judicata</i> and Collateral Estoppel:	Applicable. ¹⁵⁶	Not applicable. ¹⁵⁷
Simultaneous Litigation of Exhausted and Unexhausted Claims:	Permitted. ¹⁵⁸	Not permitted; full exhaustion required. ¹⁵⁹

chart shows that in any given case section 1983 or federal habeas corpus may each present relative advantages and disadvantages. From an overall standpoint, however, state prisoners and their attorneys view section 1983 as the preferred remedy. In the typical *Preiser* battle the prisoner advocates the availability of section 1983, while the state claims that habeas corpus is the appropriate remedy after state claims are exhausted.¹⁶⁰ These battle lines reflect that whatever advantages federal habeas corpus presents in a particular case, they pale by comparison because of section 1983's no-exhaustion rule and statutory fee authorization. Indeed, even though there was no fee authority when *Preiser v. Rodriguez*¹⁶¹ was decided, the exhaustion rule itself caused the plaintiff prisoners to demand the availability of section 1983, while the state urged habeas corpus as the exclusive remedy.

III. SUPREME COURT PRECEDENT: *PREISER*, *WOLFF*, AND *GERSTEIN*

Despite the crucial significance of the section 1983—habeas corpus distinction, the Supreme Court has analyzed the issue in only three cases.¹⁶² Of

154. See cases cited in *supra* note 117.

155. *Preiser*, 411 U.S. 475 (1973).

156. See *supra* note 128.

157. *Id.*

158. *Preiser*, 411 U.S. at 499 n.14. See *infra* notes 212-14 and accompanying text.

159. See *supra* notes 100-03 and accompanying text. The distinction between section 1983 and habeas corpus with respect to simultaneous litigation of exhausted and unexhausted claims is observed in *Faheem-El v. Klincar*, 600 F. Supp. 1029, 1034 (N.D. Ill. 1984).

160. Occasionally, however, a party takes a contrary position. See, e.g., *Brennan v. Cunningham*, 813 F.2d 1, 4 (1st Cir. 1987) (plaintiff prisoner sought to employ habeas corpus while defendant warden claimed section 1983 was proper remedy); *Dickerson v. Walsh*, 750 F.2d 150, 153 n.6 (1st Cir. 1984) (Commonwealth advocated use of section 1983 rather than a habeas corpus petition). In *Brennan*, the use of habeas corpus could have protected the plaintiff from the preclusive effect of an adverse state court judgment.

161. 411 U.S. 475 (1973).

162. *Gerstein v. Pugh*, 420 U.S. 103 (1975); *Wolff v. McDonnell*, 418 U.S. 539 (1975); *Preiser v. Rodriguez*, 411 U.S. 475 (1973).

those three cases, the Court has given it plenary consideration only once, in *Preiser v. Rodriguez*.¹⁶³ *Preiser*, however, is filled with ambiguities and unresolved questions.

Two pre-*Preiser* decisions began a trend toward unclear and confusing Supreme Court precedent in this area. In *Johnson v. Avery*,¹⁶⁴ a prisoner alleged in federal court that he had been transferred to a maximum security building for violating a prison regulation that prohibited inmates from assisting in the preparation of another inmate's legal papers. The district court treated the prisoner's motion for law books and a typewriter as a petition for habeas corpus, held the prison regulation void, and ordered the prisoner released from disciplinary confinement.¹⁶⁵ The Sixth Circuit, however, held the regulation valid and reversed the judgment of the district court.¹⁶⁶ The United States Supreme Court reversed and held that the state regulation was inconsistent with the right of prisoners to petition a federal court for a writ of habeas corpus. The Court said nothing about the section 1983—habeas corpus issue and its disposition of the case stated only that "[t]he judgment of the Court of Appeals is reversed and the case remanded for further proceedings consistent with this opinion."¹⁶⁷ By not disagreeing with the district court's procedural treatment of the case, the Supreme Court seemed implicitly to accept its treatment of the case as a habeas corpus proceeding.

In *Wilwording v. Swenson*,¹⁶⁸ a prisoner challenged the living conditions and disciplinary measures he was subjected to while he was confined in maximum security.¹⁶⁹ In a *per curiam* opinion, the Court stated only that these claims are "cognizable in federal habeas corpus,"¹⁷⁰ as well as under section 1983, and that "[s]tate prisoners are not held to any stricter standard of exhaustion than other civil rights plaintiffs."¹⁷¹ Neither *Johnson* nor *Wilwording* provided assistance to lower courts to help reconcile the section 1983—habeas corpus overlap.

By the time *Preiser* was litigated in the lower federal courts, the section 1983—federal habeas corpus conflict had become an increasingly important

163. 411 U.S. 475 (1973).

164. 393 U.S. 483 (1969).

165. *Id.* at 484 (citing 252 F. Supp. 783 (M.D. Tenn. 1966)).

166. *Id.* at 485 (citing 382 F.2d 353 (6th Cir. 1967)).

167. *Id.* at 490.

168. 404 U.S. 249 (1971).

169. *Id.*

170. 404 U.S. at 251 (citing *Johnson v. Avery*, 393 U.S. 483 (1969)).

171. *Id.* at 251 (citing *Houghton v. Shafer*, 392 U.S. 639 (1968)). The Court in *Houghton* did not discuss the section 1983—federal habeas corpus issue, but assumed that a prisoner's claim based upon the confiscation of his legal materials was a proper section 1983 claim for which exhaustion of state remedies was not necessary. The *Preiser* Court, after noting that conditions of confinement could be tested under section 1983, stated that "[t]his is not to say that habeas corpus may not also be available to challenge such prison conditions." 411 U.S. at 499 (citing *Johnson v. Avery*, 393 U.S. 483 (1969) and *Wilwording v. Swenson*, 404 U.S. 249 (1971)). See *infra* notes 369-96 and accompanying text.

and recurring issue.¹⁷² In 1971 the Second Circuit stated in *Preiser* that “[s]tate prisoners are increasingly resorting to the Civil Rights statutes in order to circumvent the [exhaustion] requirements of [the habeas corpus statute].”¹⁷³ When the case was reheard by the Second Circuit *en banc*, Judge Mansfield lamented that “state prisoners’ habeas petitions have been dressed up in a [section] 1983 suit of clothes.”¹⁷⁴ Judge Lumbard, dissenting, continued the play on words, stating that “it is becoming the fashion for state prisoners to bring these [section 1983] suits.”¹⁷⁵ Given these concerns, it was not surprising that the Supreme Court chose to review the issue in *Preiser*.

Preiser was a case consolidated from three separate individual actions. In two of the cases, plaintiffs Rodriguez and Kritsky claimed that they had been deprived of good-time credits in violation of procedural due process.¹⁷⁶ In the third suit, plaintiff Katzoff challenged the deprivation of his good-time credits on substantive constitutional grounds.¹⁷⁷ In each case, the district court ruled in favor of the plaintiff, ordered the good-time credits restored, and ordered each plaintiff released because restoring these credits had entitled the plaintiff to immediate release.¹⁷⁸ After consolidating the three district court cases and rehearing them *en banc*, the Second Circuit affirmed the judgments of the district courts and found the utilization of section 1983 a proper means of relief in each case.¹⁷⁹

The Supreme Court, in an opinion by Justice Stewart, reversed the judgment of the appellate court.¹⁸⁰ The Court acknowledged that whether state prisoners can utilize section 1983 “even though the federal habeas corpus statute . . . clearly provides a specific federal remedy” is “of considerable

172. The pre-*Preiser* history of the section 1983-habeas corpus issue is described in Note, *Preiser v. Rodriguez in Retrospect*, *supra* note 6, at 1054-65; Note, *The Aftermath of Preiser and Wolff*, *supra* note 6, at 743-44; Comment, *Proper Forum*, *supra* note 6, at 1365-91.

173. *Rodriguez v. McGinnis*, 451 F.2d 730 (2d Cir. 1971).

174. *Rodriguez v. McGinnis*, 456 F.2d 79, 84 (2d Cir.) (en banc) (Mansfield, J., concurring), *cert. granted sub nom. Oswald v. Rodriguez*, 407 U.S. 919 (1972), *rev'd sub nom. Preiser v. Rodriguez*, 411 U.S. 475 (1973).

175. *Id.* at 86 (Lumbard, J., dissenting).

176. Plaintiff Rodriguez alleged “that he had received no notice or hearing on the charges for which he had ostensibly been punished. Thus, he contended that he had been deprived of his good-conduct-time credits without due process of law.” *Preiser*, 411 U.S. at 478. Similarly, plaintiff Kritsky alleged “that his summary punishment had deprived him of his good-time credits without due process of law.” *Id.* at 481.

177. Plaintiff Katzoff claimed that he had been unconstitutionally deprived of good-time credits for making derogatory comments about prison officials in his diary. *Preiser*, 411 U.S. at 480.

178. The district court proceedings in the three cases are summarized in *Preiser*, 411 U.S. at 477-88.

179. *Rodriguez v. McGinnis*, 456 F.2d 79 (2d Cir. 1972) (en banc). The Second Circuit relied upon *Wilwording v. Swenson*, 404 U.S. 249 (1971) for its conclusion that section 1983 applied to plaintiffs’ claims.

180. *Preiser v. Rodriguez*, 411 U.S. 475 (1973). Justice Brennan wrote a dissenting opinion in which Justices Douglas and Marshall joined.

practical importance" because of the different exhaustion rules attached to the two remedies.¹⁸¹ The Court then described the specific issue to be resolved: may state prisoners who have challenged the duration of their confinement on grounds of an unconstitutional deprivation of good-time credits, where restoration of those credits would result in their immediate or speedier release, seek equitable relief pursuant to section 1983, or are they limited to the specific remedy of habeas corpus?¹⁸² The Court ruled that when state prisoners challenge the very fact or duration of their imprisonment, seeking the determination that they are entitled to immediate or speedier release from that imprisonment, their sole federal remedy is habeas corpus.¹⁸³ Thus, the Court held that habeas corpus is the exclusive remedy when a state prisoner (1) challenges the fact or duration of confinement *and* (2) seeks immediate or speedier release.

The *Preiser* Court reasoned that when a claim comes within the literal terms of both section 1983 and federal habeas corpus, Congress must have intended that the "specific" federal habeas corpus statute would control over the "general" section 1983 remedy and become the "exclusive" federal remedy.¹⁸⁴ According to the Court, this furthers congressional intent by preventing state prisoners from circumventing the federal habeas corpus exhaustion requirement by the simple expedient of labeling a claim under section 1983 that is actually within the scope of habeas corpus.¹⁸⁵

Given this analysis, the critical determination is whether or not the state prisoner's claims are within the scope of federal habeas corpus. The *Preiser* Court, however, did not definitively resolve this issue, but limited its discussion primarily to claims that come within the "essence," "core," or "heart" of habeas corpus.¹⁸⁶ The essence of habeas corpus, as the Court saw it, is an attack by a person in custody upon the legality of that custody, and the writ's traditional function is to secure release from that illegal custody.¹⁸⁷ Under this formulation, the claims of the plaintiffs in *Preiser* fell squarely within the "core" of habeas corpus because, by contesting the

181. *Id.* at 477.

182. *Id.* at 482.

183. *Id.* at 500.

184. *Id.* at 489. This aspect of *Preiser* is cited frequently for the principle of statutory construction that where two statutes are in potential conflict the more specific statute controls over the more general. See *Block v. North Dakota ex rel. Bd. of Univ. and School*, 461 U.S. 273, 285 (1983); *Fullilove v. Klutznick*, 448 U.S. 448, 492 n.77 (1980); *Busic v. United States*, 446 U.S. 398, 406 (1980); *Simpson v. United States*, 435 U.S. 6, 15 (1978); *Brown v. General Serv. Admin.*, 425 U.S. 820, 834 (1976).

185. *Brown v. Fauver*, 819 F.2d 395, 397 (3d Cir. 1987) ("A primary concern underlying the *Preiser* decision is the prevention of 'end-runs' around the requirement that state prisoners exhaust state remedies before seeking federal habeas corpus relief.").

186. 411 U.S. at 484, 489, 498.

187. *Id.* at 484. The *Preiser* Court stated that while there are several forms of habeas corpus, it was concerned only with the common law writ of *habeas corpus ad subjiciendum*, which is the writ used to inquire into the legality of detention in order to determine whether the petitioner

deprivation of good-time credits, the prisoners had attacked the legality of their custody and claimed entitlement to release from confinement.¹⁸⁸ The plaintiffs were thus required to proceed pursuant to the federal habeas corpus statute which required that they exhaust the adequate state remedies available in state courts.¹⁸⁹

In *Preiser*, the plaintiffs were contesting administrative, not judicial, action. The issue thus became whether or not the prisoners were required to exhaust their state administrative remedies before they sought relief in federal court. While the state argued that exhaustion of administrative remedies was required,¹⁹⁰ the plaintiffs countered that the statutory exhaustion requirement had generally been construed by courts to apply to attacks on state court convictions in order to avoid friction with state judicial systems, not administrative systems.¹⁹¹ The Court rejected that contention and concluded that the exhaustion requirement extended to state administrative challenges¹⁹² and required that both "the state prison administration and the state courts" be given "the opportunity to correct the errors committed in the State's own prisons"¹⁹³ Strong considerations of comity require giving a state judicial system the first opportunity to correct its own errors. These considerations also require giving states the first opportunity to correct errors made in the internal administration of prisons.¹⁹⁴ States have a strong interest in

should be released. *Id.* See also *Fay v. Noia*, 372 U.S. 391, 393 n.5 (1963) (habeas corpus has other functions besides inquiry into illegal detention in order to seek a prisoner's release and Blackstone names four such functions: *habeas corpus ad respondendum*; *ad satisfaciendum*; *ad prosequendum*, *testificandum*, *deliberendum*; *ad faciendum et recipiendum*). The Court gave several examples of the use of the writ to challenge the legality of detention:

whether the petitioner's challenge to his custody is that the statute under which he stands convicted is unconstitutional, as in *Ex parte Siebold*, 100 U.S. 371 (1880) . . . ; that he is unlawfully confined in the wrong institution, as in *In re Bonner*, 1451 U.S. 242 (1894), and *Humphry v. Cady*, 405 U.S. 504 (1972); that he was denied his constitutional rights at trial, as in *Johnson v. Zerbst*, [304 U.S. 458 (1938)]; that his guilty plea was invalid, as in *Von Moltke v. Gillies*, 332 U.S. 708 (1948); that he is being unlawfully detained by the Executive or the military, as in *Parisi v. Davidson*, 405 U.S. 34 (1972); or that his parole was unlawfully revoked, causing him to be reincarcerated in prison, as in *Morrissey v. Brewer*, 408 U.S. 471 (1972)—in each case his grievance is that he is being unlawfully subjected to physical restraint, and in each case habeas corpus has been accepted as the specific instrument to obtain release from such confinement.

Preiser, 411 U.S. at 486.

188. 411 U.S. at 487.

189. 28 U.S.C. § 2254(b) (1982). See also 28 U.S.C. § 2254(c) (1982) (applicant has not exhausted his state court remedies if he has right under state law to raise question presented).

190. Brief for Petitioners at 30-32, 41, *Oswald v. Rodriguez*, 407 U.S. 919 (1972).

191. Brief for Respondents at 12-13, *Oswald v. Rodriguez*, 407 U.S. 919 (1972).

192. *Preiser*, 411 U.S. at 489.

193. *Id.* at 497.

194. *Id.* at 492. The lower courts read *Preiser* as to require the exhaustion of state administrative remedies. *Baxter v. Estelle*, 614 F.2d 1030 (5th Cir. 1980), *cert. denied*, 449 U.S. 1085 (1981); *Lerma v. Estelle*, 585 F.2d 1297 (5th Cir. 1978), *cert. denied*, 444 U.S. 848 (1979);

administering their prisons, and because most potential litigation involving state prisoners arises out of daily occurrences in state prisons, those claims may be most efficiently and properly handled by state administrative bodies and state courts. State agencies and courts are, for the most part, familiar with the grievances of state prisoners and, according to *Preiser*, are better able to deal with those grievances, both physically and practically.¹⁹⁵

The *Preiser* Court's determinations that habeas corpus is the appropriate vehicle to seek restoration of good-time credits, and that the exhaustion requirement encompasses administrative remedies, were sufficient to resolve the controversies before the Court. Had the Court stopped there, much of the later ambiguity may have been avoided. The Court, however, went further and in *dicta* discussed several other issues. Those statements, while incomplete and in some respects unclear, have had considerable influence on the lower federal courts in five recurring situations.

(1) *Requests for speedier release*: The Court observed that even if the petitioners had not been entitled to immediate release, but only to shorter terms of confinement in prison, habeas corpus would have been the appropriate and exclusive remedy because their claims would still be "within the core of habeas corpus in attacking the very duration of their physical confinement itself."¹⁹⁶ A prisoner's attack on either the fact *or* the duration of confinement is within the "core" of habeas corpus because the attack goes directly to the constitutionality of his or her physical confinement and seeks either immediate release or the shortening of the confinement.¹⁹⁷ This *dicta* in *Preiser* became law in the Court's subsequent decision in *Wolff v. McDonnell*.¹⁹⁸

McCray v. Burrell, 516 F.2d 357, 361 n.1 (4th Cir. 1975), *cert. denied*, 449 U.S. 1003 (1980). The Fifth Circuit construed *Preiser* to mean that "not only state habeas remedies but federal ones as well must be exhausted before a Section 1983 action based upon them may proceed." Hernandez v. Spencer, 780 F.2d 504, 505 (5th Cir. 1986); Harvey v. Andrist, 754 F.2d 569 (5th Cir.), *cert. denied*, 471 U.S. 1126 (1985); Jackson v. Torres, 720 F.2d 877, 879 (5th Cir. 1983); Richardson v. Fleming, 651 F.2d 366, 375 (5th Cir. 1981). Neither section 2254 nor *Preiser*, however, requires the exhaustion of federal remedies.

195. 411 U.S. at 492. The Court observed that "[w]hat for a private citizen would be a dispute with his landlord, with his employer, with his tailor, with his neighbor, or with his banker becomes, for the prisoner, a dispute with the State." *Id.* States have argued that, in most instances, state judicial facilities are closer to the state prison where the prisoner is confined than the nearest federal court is. Therefore, the state court is in a better position to insure greater cooperation by state personnel, such as sheriffs and prison officials, than the federal courts. Rodriguez v. McGinnis, 456 F.2d 79, 84 (2d Cir. 1972) (en banc) (Mansfield, J., concurring). See also *id.* at 86 (Lumbard, J., dissenting) (hearing in state court is less expensive than in federal court because prisoners are not moved as far and there is less risk of escape).

196. 411 U.S. at 487-88. The Court relied in part upon the holding in *Peyton v. Rowe*, 391 U.S. 54 (1968) "that a prisoner may attack on habeas the second of two consecutive sentences while still serving the first." 411 U.S. at 487.

197. 411 U.S. at 489.

198. 418 U.S. 539, 553-54 (1974). See *infra* notes 223-32 and accompanying text for a discussion of *Wolff*.

(2) *Challenges to convictions and sentences:* Plaintiffs' counsel conceded in *Preiser* that state prisoners challenging their convictions and sentences on federal constitutional grounds are limited to a habeas corpus proceeding, following exhaustion of adequate state remedies, and that section 1983 cannot be utilized.¹⁹⁹ The Court accepted that concession, stating that a challenge to a conviction is at the "core of habeas corpus"²⁰⁰ Although the *Preiser* Court stated that a challenge to a conviction or sentence that seeks either immediate or speedier release may be made only in a habeas corpus proceeding, it did not specifically discuss, nor did it ever resolve, whether a challenge to a conviction or sentence may be made in a civil rights action when a prisoner does not seek immediate or speedier release from confinement, as where a prisoner seeks damages for an unconstitutional conviction or sentence.²⁰¹

(3) *Challenges to conditions of confinement:* The *Preiser* Court stated that a section 1983 action is a proper remedy for a state prisoner who makes a constitutional challenge to the conditions of prison life, but not to the fact or length of his or her custody.²⁰² Other than providing four examples of cases involving challenges to prison conditions,²⁰³ the Court provided no guidance to help lower courts define what a condition of prison life is. For example, does a challenge to a condition of prison life include an alleged denial of a hearing procedure?²⁰⁴ Is a claim that a prisoner is confined in the wrong institution a challenge to prison conditions?²⁰⁵ The Court's failure to define a challenge to prison conditions has contributed to the difficulties in resolving some of the section 1983—habeas corpus conflicts.

(4) *Claims for damages:* The Court indicated that a prisoner's claim for damages would be within the scope of section 1983 because a state prisoner seeking damages is attacking something other than the fact or length of the confinement, and is seeking something other than immediate or more speedy release.²⁰⁶ Habeas corpus is *not* an appropriate or available federal remedy

199. 411 U.S. at 489.

200. *Id.* See also *id.* at 507 (Brennan, J., dissenting) (similarly, where prisoners allege that deprivation of good conduct time will cause them to be in confinement past conditional release date, claim falls within "core" of habeas corpus).

201. The issue was left open in *Tower v. Glover*, 467 U.S. 914, 923 (1984). See also *Ellis v. Dyson*, 421 U.S. 426, 440 (1975) (Powell, J., dissenting) ("The Court has never expressly decided whether and in what circumstances § 1983 can be invoked to attack collaterally criminal convictions."). The issue has generated a good amount of lower court litigation. See *infra* notes 291-317 and accompanying text.

202. 411 U.S. at 499.

203. *Haines v. Kerner*, 404 U.S. 519 (1972) (solitary confinement; damages sought); *Wording v. Swenson*, 404 U.S. 249 (1971) (living conditions and disciplinary measures while in maximum security); *Houghton v. Shafer*, 392 U.S. 639 (1968) (confiscation of legal materials); *Cooper v. Pate*, 378 U.S. 546 (1964) (claimed right to purchase religious publications).

204. See *infra* notes 421-35 and accompanying text discussing prisoner procedural due process claims.

205. See *infra* notes 397-420 and accompanying text.

206. 411 U.S. at 494.

for damages.²⁰⁷ Thus, *Preiser* states that a state prisoner's damages claim may be brought under section 1983 without any requirement that the prisoner exhaust state remedies.²⁰⁸

Preiser, however, does not resolve whether all state prisoner damage claims may be brought under section 1983, including those that grow out of the fact or duration of confinement, or only those based upon challenges to the conditions of confinement. The *Preiser* Court, for example, left open whether or not a section 1983 claim for damages may be based upon an unconstitutional conviction or sentence²⁰⁹ or the denial of good-time credits.²¹⁰ Moreover, *Preiser* does not resolve the fundamental issue of whether or not the nature of a prisoner's claim, the relief sought, or both, determine whether a claim may be asserted under section 1983. The Supreme Court's failure to determine this issue leaves a major deficiency in its decisional law and is a prime reason for the lower courts' frustrations.²¹¹

(5) *Multiple claims*: The *Preiser* Court stated that when a state prisoner asserts multiple claims, one or more of which are properly within section 1983, the prisoner may assert the section 1983 claim in federal court at the same time he or she exhausts state remedies on the habeas corpus claim. The Court provided the following example:

If a prisoner seeks to attack both the conditions of his confinement and the fact or length of that confinement, his later claim . . . is cognizable only in federal habeas corpus, with its attendant requirement of exhaustion of state remedies. But . . . that holding in no way precludes him from simultaneously litigating in federal court, under [section] 1983, his claim relating to the conditions of his confinement.²¹²

The Supreme Court applied this *dicta* in *Wolff v. McDonnell*²¹³ and it generally has been followed by the lower federal courts. When a state prisoner alleges "simultaneous claims," the federal courts typically allow litigation of the section 1983 civil rights claim, while dismissing or continuing the habeas corpus claim because this claim requires a prisoner to exhaust state remedies.²¹⁴

207. *Id.* (emphasis in original).

208. *Id.*

209. See *supra* note 201, and *infra* notes 291-317 and accompanying text.

210. See *infra* notes 362-68 and accompanying text.

211. See *supra* note 14.

212. 411 U.S. at 499 n.14. See also *id.* at 511 (Brennan, J., dissenting) ("Under [the majority's] approach, state correctional authorities have no added incentive to withdraw good-time credits, since that action cannot, standing alone, keep the prisoner out of federal court.").

213. 418 U.S. 539, 553-54 (1974). See *infra* notes 223-32 and accompanying text.

214. *Faheem-El v. Klincar*, 814 F.2d 461, 465 n.2 (7th Cir. 1987); *Ybarra v. Reno Thunderbird Mobile Home Village*, 723 F.2d 675, 681-82 (9th Cir. 1984); *Moorish Science Temple of Am. v. Smith*, 693 F.2d 987, 989 (2d Cir. 1982); *Tarter v. Hury*, 646 F.2d 1010, 1012 (5th Cir. Unit A June 1981) ("The failure to exhaust state remedies provides a proper basis for dismissing some, but not all, of Tarter's claims."); *Delaney v. Giarrusso*, 633 F.2d 1126, 1128 (5th Cir. Unit A Jan. 1981); *Williams v. Ward*, 556 F.2d 1143, 1151 (2d Cir.), *cert. dismissed*, 434 U.S.

Justice Brennan's dissenting opinion in *Preiser* criticized the Court for creating "a perplexing set of uncertainties and anomalies."²¹⁵ The decision, Brennan stated, was unmanageable because the "new-found" concept of "core of habeas corpus" is essentially "ethereal."²¹⁶ Moreover, the majority's holding that the federal habeas corpus statute required exhaustion of state *administrative* remedies, in addition to the exhaustion of state judicial remedies, ignores the fact that the principle of federalism embodied in the habeas corpus exhaustion requirement is designed to protect the orderly administration of state *judicial* systems.²¹⁷

Justice Brennan predicted that the Court's decision would result in "extreme inefficiency" because many prisoners' claims would be under simul-

944 (1977); *Watson v. Briscoe*, 554 F.2d 650, 652 (5th Cir. 1977); *Meadows v. Evans*, 529 F.2d 385, 386, *adhered to*, 550 F.2d 345 (5th Cir. 1976), *cert. denied*, 434 U.S. 969 (1977); *Shaw v. Briscoe*, 526 F.2d 675, 676 (5th Cir. 1976), *cert. denied*, 430 U.S. 933 (1977); *Henderson v. Secretary of Corrections*, 518 F.2d 694 (10th Cir. 1975); *Gregory v. Wyse*, 512 F.2d 378, 381 (10th Cir. 1975); *Hartmann v. Scott*, 488 F.2d 1215 (8th Cir. 1973); *Faheem-El. v. Klinkar*, 600 F. Supp. 1029, 1033-34 (N.D. Ill. 1984); *Partee v. Lane*, 528 F. Supp. 1254, 1258-59 (N.D. Ill. 1981); *Godbolt v. Commissioner of Dep't of Correctional Servs.*, 524 F. Supp. 21, 22-23 (S.D.N.Y. 1981); *Winsett v. McGinnes*, 425 F. Supp. 609 (D. Del. 1976). *See also* *Wiggins v. New Mexico Supreme Court Clerk*, 664 F.2d 812, 816 (10th Cir. 1981) (fact that plaintiff did not combine section 1983 claim for damages with federal habeas corpus proceeding does not mean he cannot raise damages claim in independent section 1983 action), *cert. denied*, 459 U.S. 840 (1982). *But see* *Hernandez v. Spencer*, 780 F.2d 504, 506 (5th Cir. 1986) (no abuse of discretion for district court to stay action pending final resolution in state court of attack on conviction and sentence where the complaint set forth "a confusing congeries of claims . . ."); *Harvey v. Andrist*, 754 F.2d 569, 571 (5th Cir.), *cert. denied*, 471 U.S. 1126 (1985) ("When challenge is made to a conviction in a criminal case, even though accompanied by civil rights claims, exhaustion of remedies is required."); *Doe v. Russotti*, 503 F. Supp. 942, 945 (S.D.N.Y. 1980) (entire action dismissed where section 1983 claim found "incidental" to attack on guilty plea; dismissed without prejudice for failure to state a claim upon which relief may be granted); *Wallace v. Hewitt*, 428 F. Supp. 39, 42 n.7 (M.D. Pa. 1976) (limiting footnote 14 of *Preiser* to cases in which the legality of confinement could not be litigated in state court). For the simultaneous claim doctrine to apply, at least one of the prisoner's claims must, of course, be a proper section 1983 claim. Difficulties are thus presented when a claim for damages does not arise from the conditions of confinement but relates to the fact or duration of confinement. *Compare* *Monk v. Secretary of Navy*, 793 F.2d 364 (D.C. Cir. 1986) (damages claim may not be litigated as simultaneous claim when it grows out of conviction) *with* *Harper v. Jeffries*, 808 F.2d 281 (3d Cir. 1986) (where prisoner seeks release from confinement and damages, damages claim should not be dismissed but should be stayed until state remedies exhausted). On the question of whether the appropriateness of utilizing section 1983 should depend upon the nature of the claim or the nature of the relief, *see infra* notes 237-48 and accompanying text. On the general question of whether dismissal or continuance is the proper disposition when a court requires exhaustion of state remedies, *see infra* notes 552-58 and accompanying text.

215. 411 U.S. at 506 (Brennan, J., dissenting). The decision in *Preiser* has provoked widespread criticism. Flannery, *Habeas Corpus*, *supra* note 6; Plotkin, *Rotten to the "Core of Habeas Corpus"*, *supra* note 6; Comment, *New Barrier to Federal Court Review*, *supra* note 6; Note, *A Comparison*, *supra* note 6; Comment, *Section 1983 - Habeas Corpus*, *supra* note 6; Comment, *State Prisoners' Suits*, *supra* note 6.

216. 411 U.S. at 506 (Brennan, J., dissenting).

217. *Id.* at 519-22 (emphasis added).

taneous consideration in two forums, even though the same questions of fact and law are involved in both proceedings.²¹⁸ This in turn would have serious *res judicata* consequences,²¹⁹ the ramifications of which the majority failed to consider. In addition, Brennan believed the decision created an "anomaly":

If the prisoner is confined in an institution that does not offer good-time credits, and therefore cannot withdraw them, his prison-conditions claims could always be raised in a suit under [section] 1983. On the other hand, an inmate in an institution that uses good-time credits as reward and punishment, who seeks a federal hearing on the identical legal and factual claims, would normally be required to exhaust state remedies and then proceed by way of federal habeas corpus. The rationality of that difference in treatment is certainly obscure. Yet that is the price of permitting the availability of a federal forum to be controlled by the happenstance (or stratagem) that good-time credits are at stake.²²⁰

Justice Brennan believed that the federal habeas corpus exhaustion requirement was limited to those instances in which a prisoner's claim related to the conviction or sentence or would otherwise "interrupt a state proceeding or jeopardize the orderly administration of state judicial business."²²¹ By contrast, prisoners' attacks on state administrative actions were "the stereotypical situation in which relief under [section] 1983 is authorized."²²²

The Supreme Court further addressed the section 1983—habeas corpus issue in *Wolff v. McDonnell*.²²³ The plaintiffs in *Wolff* raised a number of legal claims, but the one that provoked discussion of the *Preiser* issue was the prisoners' claim that due process required certain procedures in prison disciplinary cases that could result in the forfeiture of good-time credits. The complaint was filed under section 1983 and sought the following relief: (1) restoration of good-time credits; (2) submission of a plan by prison authorities for hearing procedures under the due process clause whenever the possibility of withholding or forfeiture of good-time credits existed; and (3) damages for civil rights deprivations resulting from the use of the allegedly unconstitutional procedures.²²⁴

The Court analyzed each form of relief separately. The section 1983 claim for the restoration of good-time credits sought speedier release and was thus "foreclosed under *Preiser*."²²⁵ The claim for damages, however, could be asserted under section 1983 because "*Preiser* expressly contemplated that claims properly brought under § 1983 could go forward while actual resto-

218. *Id.* at 511.

219. *Id.* Justice Brennan observed that a ruling in either the state or federal court proceeding might be binding in the other. *Id.* See also *Wolff v. McDonnell*, 418 U.S. 539, 554 n.12 (1974).

220. 411 U.S. at 509-10 (footnote omitted).

221. *Id.* at 521.

222. *Id.* at 522.

223. 418 U.S. 539 (1974).

224. *Id.* at 553 (footnote omitted).

225. *Id.* at 554.

ration of good-time credits is sought in state proceedings.”²²⁶ While some lower courts and commentators have expressed confusion as to whether the prisoner was seeking damages for the denial of good-time credits or for the denial of procedural due process rights,²²⁷ the decision states that the damages were sought for the “deprivation of civil rights resulting from the use of the allegedly unconstitutional *procedures*”²²⁸ and that the damages claim “required determination of the validity of the *procedures* employed for imposing sanctions, including loss of good time”²²⁹

After recognizing that *Preiser* would not bar a declaratory judgment regarding the procedural due process requirements as a predicate to a damages award,²³⁰ the *Wolff* Court moved to the plaintiffs’ claim for prospective equitable relief. The Court concluded that *Preiser* would not preclude a section 1983 litigant “from obtaining by way of ancillary relief an otherwise proper injunction enjoining the prospective enforcement of invalid prison regulations.”²³¹ This sentence is ambiguous. On the one hand, it could be read as a relatively narrow rule pursuant to which a claim for prospective relief enjoining an invalid procedural prison regulation lies under section 1983, provided that the claim is considered ancillary to (presumably) a claim for monetary relief. On the other hand, the sentence could be read as broadly announcing that when a claim for prospective relief is ancillary to a claim for monetary relief, prospective relief may be sought under section 1983 to enjoin the enforcement of *any* invalid prison regulation, and not just those that violate procedural due process requirements.

Both the limited and broad aspects of the Court’s pronouncement seem unwarranted. First, there was no reason to limit the holding regarding prospective relief to ancillary claims. Under the *Preiser* analysis, if an inmate’s claim is not within the core of habeas corpus and is within the scope of section 1983, it may be asserted under section 1983 regardless of whether it is “ancillary” to another section 1983 claim. Second, it was inappropriate for the *Wolff* Court to broadly sanction the use of section 1983 to enjoin all invalid prison regulations, because at this point in its opinion the Court was concerned only with the plaintiffs’ attack on prison regulations on procedural due process grounds. Moreover, read literally, the

226. *Id.* At this point, the Court cited to footnote 14 in *Preiser*, dealing with the simultaneous litigation of section 1983 claims while state remedies are being exhausted on habeas claims. The Court stated in its own footnote that “[o]ne would anticipate that normal principles of res judicata would apply in such circumstances.” *Wolff*, 418 U.S. at 554 n.12.

227. See *infra* note 367 for competing authorities.

228. *Wolff*, 418 U.S. at 553 (emphasis added). Damages may be awarded for procedural due process violations in accordance with the principles set forth in *Carey v. Piphus*, 435 U.S. 247 (1978).

229. 418 U.S. at 554 (emphasis added). Most lower federal courts have read *Wolff* to authorize a section 1983 damages claim for a procedural due process violation. See *infra* cases cited in note 297.

230. 418 U.S. at 555.

231. *Id.*

Court's holding would encompass even those prison regulations that affect the fact or duration of confinement and thereby sanction the use of section 1983 in cases that the *Preiser* Court determined to be within the core of habeas corpus.

The *Wolff* Court, therefore, should have refrained from interjecting the concept of "ancillary claims" into the opinion and should have ruled specifically and clearly that section 1983 is available when a prisoner seeks to enjoin allegedly invalid prison regulations on procedural due process grounds and seeks neither immediate nor speedier release. There is some indication that this is what the Court in fact intended. The Court stated that it was proper for the lower courts to determine the validity of procedures revoking good-time credits and fashion appropriate remedies for any constitutional violations, "short of ordering the actual restoration of good-time already cancelled."²³²

The only other Supreme Court decision to resolve a *Preiser* issue is the Court's 1975 decision in *Gerstein v. Pugh*.²³³ In that case, the plaintiffs were pre-trial detainees who claimed, under the fourth and fourteenth amendments, that they could not be detained without a judicial determination of probable cause and an opportunity to contest that determination. They sought injunctive and declaratory relief. In a terse footnote the Court, citing *Preiser* and *Wolff*, ruled that these claims were within the scope of section 1983:

[Plaintiffs]-respondents did not ask for release from state custody, even as an alternative remedy. They asked only that state authorities be ordered to give them a probable cause determination. This was also the only relief that the District Court ordered for the named respondents. Because release was neither asked nor ordered, the lawsuit did not come within the class of cases for which habeas corpus is the exclusive remedy.²³⁴

Gerstein thus seems to be consistent with a reading of *Wolff* that allows a prisoner to contest under section 1983 the procedures that are required by the United States Constitution, so long as neither immediate nor speedier release is sought.

The Supreme Court decisions in *Preiser*, *Wolff*, and *Gerstein* surprisingly resolve few issues regarding the section 1983—federal habeas corpus conflict. A combined reading of the three decisions leads to the following conclusions when state prisoners assert federal constitutional claims: (1) requests for immediate or speedier release may be asserted only in a federal habeas corpus proceeding after adequate state remedies are exhausted; (2) conditions of confinement may be contested under section 1983; (3) at least some claims for damages may be asserted under section 1983; (4) at least some procedural due process claims that seek relief other than immediate or speedier release may be asserted under section 1983.

232. *Id.* (footnote omitted).

233. 420 U.S. 103 (1975).

234. *Id.* at 107 n.6 (citation omitted).

IV. THREE UNRESOLVED ISSUES

Preiser, *Wolff*, and *Gerstein* left many specific issues unresolved. Given the variety of prisoners' claims before the federal courts,²³⁵ this is not unusual. What is unusual is that fifteen years after *Preiser*, many fundamental aspects of the relationship between section 1983 and federal habeas corpus still remain unresolved. This is unfortunate because lower courts need guidance on the fundamental issues in order to untangle many of the specific nuances.²³⁶

The most critical issue left unanswered by the Supreme Court is whether the section 1983—habeas corpus issue should be resolved on the basis of the nature of a prisoner's claim, the specific relief requested, or both. The great weight of authority, following the Fifth Circuit's lead, holds that the propriety of utilizing section 1983 may not be determined solely on the basis of the relief sought, and that habeas corpus is the exclusive initial remedy where the cause of action contests the validity of a prisoner's confinement.²³⁷ In the most prevalent application of this principle, courts commonly hold that a claim for damages based upon an allegedly unconstitutional conviction may not be asserted under section 1983 without satisfying the state exhaustion

235. See generally I. SENSENICH, *supra* note 10.

236. See *infra* notes 268-531 and accompanying text for discussion of the specific issues.

237. The Fifth Circuit cases include *Hernandez v. Spencer*, 780 F.2d 504 (5th Cir. 1986); *Jackson v. Torres*, 720 F.2d 877, 879 (5th Cir. 1983) ("The relief sought by the prisoner or the label he places upon the action is not the governing factor."); *Williams v. Dallas County Comm'rs*, 689 F.2d 1212 (5th Cir. 1982), *cert. denied*, 461 U.S. 935 (1983); *Richardson v. Fleming*, 651 F.2d 366 (5th Cir. Unit A July 1981); *Tarter v. Hury*, 646 F.2d 1010 (5th Cir. Unit A June 1981); *Courtney v. Reeves*, 635 F.2d 326 (5th Cir. Unit A Jan. 1981); *Delaney v. Giarrusso*, 633 F.2d 1126 (5th Cir. Unit A Jan. 1981); *Johnson v. Hardy*, 601 F.2d 172 (5th Cir. 1979); *Cavett v. Ellis*, 578 F.2d 567 (5th Cir. 1978); *Robinson v. Richardson*, 556 F.2d 332 (5th Cir. 1977); *Watson v. Briscoe*, 554 F.2d 650 (5th Cir. 1977); *Grundstrom v. Darnell*, 531 F.2d 272 (5th Cir. 1976); *Meadows v. Evans*, 529 F.2d 385 (5th Cir.), *adhered to*, 550 F.2d 345 (5th Cir. 1976) (en banc), *cert. denied*, 434 U.S. 969 (1977). In its most recent decision on this issue, the court stated that because the *Preiser* issue "cannot be determined on the basis of the relief nominally sought," the Fifth Circuit has focused on the "scope of the relief actually sought." *Serio v. Members of State Bd. of Pardons*, 821 F.2d 1112, 1117 (5th Cir. 1987). Other cases reaching this result include *Offet v. Solem*, 823 F.2d 1256 (8th Cir. 1987); *Crump v. Lane*, 807 F.2d 1394 (7th Cir. 1986); *Monk v. Secretary of Navy*, 793 F.2d 364 (D.C. Cir. 1986); *Hanson v. Heckel*, 791 F.2d 93 (7th Cir. 1986); *McKinnis v. Mosley*, 693 F.2d 1054 (11th Cir. 1982); *Hamlin v. Warren*, 664 F.2d 29 (4th Cir. 1981), *cert. denied*, 455 U.S. 911 (1982); *Franklin v. Webb*, 653 F.2d 362, 364 (8th Cir. 1981) ("The district court correctly focused on the nature of the complaint rather than the relief sought . . ."); *Johnson v. Hardy*, 601 F.2d 172, 176 (5th Cir. 1979); *Hanson v. Circuit Court*, 591 F.2d 404 (7th Cir.), *cert. denied*, 444 U.S. 907 (1979); *Christianson v. Spalding*, 593 F. Supp. 500 (E.D. Wash. 1983); *Barnes v. Wolff*, 586 F. Supp. 312 (D. Nev. 1984); *Thibadoux v. Jones*, 505 F. Supp. 1107 (N.D.N.Y. 1981); *Derrow v. Shields*, 482 F. Supp. 1144 (W.D. Va. 1980).

requirement. As a corollary principle, "habeas corpus is the exclusive initial cause of action where the basis of the claim goes to the constitutionality of the state court conviction."²³⁸

The focus on the nature of the claim rather than on the relief sought is a result of the courts' desire to prevent state prisoners from circumventing the federal habeas corpus exhaustion requirement.²³⁹ If courts were to determine the proper course of action by focusing solely on the type of relief the plaintiff requested, state prisoners would be able to attack their convictions or sentences under section 1983 without exhausting state remedies by simply seeking a form of relief other than release from confinement, such as damages.²⁴⁰ A favorable federal court ruling on the damages claim could then be used to obtain release in a collateral state court proceeding because the state court would be bound by the federal ruling under normal principles of res judicata.²⁴¹ This stratagem would undermine the federal habeas corpus exhaustion requirement.²⁴²

There are a few decisions that either explicitly or implicitly focus on the specific relief requested rather than on the nature of the prisoner's claim.²⁴³

238. *Fulford v. Klein*, 529 F.2d 377, 381 (5th Cir. 1976), *adhered to*, 550 F.2d 342 (5th Cir. 1977) (en banc). See *infra* notes 291-317 and accompanying text.

239. *Hamlin v. Warren*, 664 F.2d 29, 32 (4th Cir. 1981), *cert. denied*, 455 U.S. 911 (1982); *Christianson v. Spalding*, 593 F. Supp. 500, 504 (E.D. Wash. 1983); *Derrow v. Shields*, 482 F. Supp. 1144, 1147-48 (W.D. Va. 1980).

240. See *Hamlin v. Warren*, 664 F.2d 29, 32 (4th Cir. 1981), *cert. denied*, 445 U.S. 911 (1982) ("Indeed, to hold otherwise [i.e., allow the nature of the relief sought to control] would be to substantially undermine the exhaustion of remedies requirement, for anyone who could state a viable civil rights claim could subvert it by postponing a claim for release until his substantive rights had been adjudicated in a federal forum.").

241. *Offet v. Solem*, 823 F.2d 1256, 1258 (8th Cir. 1987); *Christianson v. Spalding*, 593 F. Supp. 500, 504 (E.D. Wash. 1983); *Thomas v. Dietz*, 518 F. Supp. 794, 797 (D.N.J. 1981). Federal court judgments are entitled to preclusive effect in the state courts and "the decisions that focus directly on the effects of federal question judgments leave no doubt that federal rules measure at least most res judicata questions." 18 C. WRIGHT, A. MILLER & E. COOPER, *FEDERAL PRACTICE AND PROCEDURE* § 4468, at 656 (1981). "There would be no authority under which a person serving a term in a prison resulting from the criminal conviction could be retained in custody under that conviction once there was an authoritative determination that the conviction could not stand." *Chancery Clerk v. Wallace*, 646 F.2d 151, 157 (5th Cir. Unit A Mar. 1981). See also *Deakins v. Monaghan*, 108 S. Ct. 523, 533 (1988) (White, J., concurring) ("A judgment in the federal damages action may decide several questions at issue in the state criminal proceeding.").

242. Note, *The Aftermath of Preiser and Wolff*, *supra* note 6, at 763. Another reason that has been given for not focusing on the relief requested is that "[a] federal court has the inherent power to fashion appropriate relief" and "is not constrained by the pleader's request for relief." *Hamlin v. Warren*, 664 F.2d 29, 30 (4th Cir. 1981), *cert. denied*, 455 U.S. 911 (1982). While this principle is generally correct, FED. R. Crv. P. 54(c), it has little relevance in the present context since a federal court has no power to order release under section 1983. See *supra* note 117 and accompanying text.

243. *Harper v. Jeffries*, 808 F.2d 281 (3d Cir. 1986); *Wahl v. McIver*, 773 F.2d 1169, 1171 n. 1 (11th Cir. 1985) (although plaintiff complained about manner in which conviction was obtained, section 1983 was proper because plaintiff "d[id] not ask for reversal of his conviction

The main justification for relying upon the relief requested is that *Preiser*, *Wolff*, and *Gerstein* appear to take this approach.²⁴⁴ Even putting aside the fact that allowing the form of relief to control would enable prisoners to sidestep the exhaustion requirement, there is a pragmatic difficulty in focusing on the specific relief requested. The great majority of section 1983 prisoner cases are brought *pro se*.²⁴⁵ Many *pro se* complaints are unclear and confusing²⁴⁶ and it is not always easy, or perhaps even possible, to determine what relief a prisoner is seeking.²⁴⁷ In one case, for example, the district court upon considering a prisoner's confusing *pro se* complaint stated:

. . . .'); *Lumbert v. Finley*, 735 F.2d 239 (7th Cir. 1984); *Walker v. Prisoner Review Bd.*, 694 F.2d 499 (7th Cir. 1982), *subsequent history*, 769 F.2d 369 (7th Cir. 1985), *cert. denied*, 474 U.S. 1065 (1986) (section 1983 found proper because plaintiff did not ask for release); *Love v. Black*, 597 F. Supp. 1092 (E.D. Mo. 1984); *Coleman v. Stanziani*, 570 F. Supp. 679, 682-84 (E.D. Pa. 1983), *appeal dismissed*, 735 F.2d 118 (3d Cir.), *cert. denied*, 469 U.S. 1037 (1984); *Robinson v. Commissioner of Jurors*, 419 F. Supp. 1189, 1190 n.1 (S.D.N.Y. 1976). *See also* *Hamlin v. Warren*, 664 F.2d 29, 34-36 (4th Cir.) (Winter, J., dissenting) (*Preiser's* rule of exhaustion of remedies inapplicable where plaintiff brings action for damages), *cert. denied*, 459 U.S. 911 (1982). Despite the decisions in *Lumbert* and *Walker*, which appear to focus on the relief sought, later Seventh Circuit decisions "decline . . . to determine the applicability of *Preiser* solely by reference to the relief sought rather than by reference to the nature of the claim." *Hanson v. Heckel*, 791 F.2d 93, 96 (7th Cir. 1986) (emphasis in original). *See also* *Crump v. Lane*, 807 F.2d 1394 (7th Cir. 1986) (plaintiff must first exhaust state court remedies when core of claim for damages concerns the fact or duration of confinement).

244. *See* *Hamlin v. Warren*, 664 F.2d 29, 33-36 (4th Cir. 1981) (Winter, J., dissenting), *cert. denied*, 455 U.S. 911 (1982); *Coleman v. Stanziani*, 570 F. Supp. 679, 682-84 (E.D. Pa. 1983), *appeal dismissed*, 735 F.2d 118 (3d Cir.), *cert. denied*, 469 U.S. 1037 (1984).

245. Turner, *When Prisoners Sue: A Study of Prisoner Section 1983 Suits In the Federal Courts*, 92 HARV. L. REV. 610, 617 (1979).

246. A federal magistrate has observed that "inmates commonly file suit in manuscript on strange paper." D. Bagwell, "*Prisoner Petitions [sic]*" in the Fifth and Eleventh Circuits: *Substance and Procedure in §1983 and §2254 Cases Brought by Inmates*, 4 (1983) (unpublished manuscript) [hereinafter Bagwell].

247. Magistrate Bagwell has observed that "[d]emands for relief in prisoner §1983 cases are notoriously unlaywerlike (one in my court once demanded: 'Let me out and give me a ticket to California!'). It is usually impossible to tell from the demand for relief whether the case seeks legal or equitable relief" Bagwell, *supra* note 246, at 26. *See* *Serio v. Members of Bd. of Pardons*, 821 F.2d 1112, 1118 (5th Cir. 1987); *Hernandez v. Spencer*, 780 F.2d 504, 506 (5th Cir. 1986); *Moorish Science Temple of Am. v. Smith*, 693 F.2d 987 (2d Cir. 1982); *Richards v. New York*, 597 F. Supp. 689 (E.D.N.Y. 1984), *aff'd*, 767 F.2d 908 (2d Cir. 1985), *cert. denied*, 474 U.S. 1066 (1986); *Thibadoux v. Jones*, 505 F. Supp. 1107 (N.D.N.Y. 1981) (memorandum decision). In *Johnson v. Avery*, 393 U.S. 483 (1969), the Court observed that "[j]ails and penitentiaries include among their inmates a high percentage of persons who are totally or functionally illiterate, whose educational attainments are slight, and whose intelligence is limited." *Id.* at 487 (footnote omitted). Undoubtedly, at least in part because of this sad reality, the Supreme Court has adopted the rule that prisoner *pro se* complaints are held "to less stringent standards than formal pleadings drafted by lawyers" *Haines v. Kerner*, 404 U.S. 519, 520, *reh'g denied*, 405 U.S. 948 (1972). *Accord* *Hughes v. Rowe*, 449 U.S. 5, 10 (1980) ("Such a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.").

[T]he best judgement I can make . . . is [that] the plaintiff is seeking a declaration of an earlier determination of his jail term, and although he alleges he is entitled to damages for false imprisonment, it seems clear the plaintiff actually seeks an earlier release from confinement.²⁴⁸

The second major issue the Supreme Court decisions leave unresolved is whether section 1983 may be used to attack a conviction when federal habeas corpus is not available because, for example, the individual commencing the proceeding is not in custody. The issue arises most frequently in cases involving "fine only" convictions and in cases where a state criminal defendant's sentence has expired by the time the federal proceeding is commenced.²⁴⁹ Lower court decisions conflict on whether section 1983 may be utilized when habeas corpus is unavailable. Some courts have held that Congress intended habeas corpus to provide the exclusive federal remedy for those seeking to attack state court judgments of convictions. Therefore, "convictions not subject to question in habeas are immune from collateral inquiry by the federal courts."²⁵⁰ Other courts, however, have held that *Preiser* was based upon the necessity of reconciling competing, overlapping remedies. Further, when federal habeas corpus is not an available remedy, a claim may be asserted under section 1983 if the claim comes within its contours.²⁵¹ While the issue is one of congressional intent, there is no indication that Congress actually considered the issue when either the federal habeas corpus statute or section 1983 were enacted.²⁵²

248. *Thibadoux v. Jones*, 505 F. Supp. 1107 (N.D.N.Y. 1981) (memorandum decision). In a case involving "a confusing congeries of claims laid in one complaint," the Fifth Circuit "perceive[d] no obligation on the part of the busy trial judge to pick through such a mass of ambiguous matter, sorting out one type of claim from the other, and in effect acting as counsel for the pro se litigant in tailoring his claims, some for disposition, some for abeyance or dismissal." *Hernandez v. Spencer*, 780 F.2d 504, 506 (5th Cir. 1986).

249. See *infra* notes 319-45 and accompanying text.

250. *Hanson v. Circuit Court*, 591 F.2d 404, 410 (7th Cir.), *cert. denied*, 444 U.S. 907 (1979). *Accord* *Waste Management of Wis. v. Fokakis*, 614 F.2d 138 (7th Cir.), *cert. denied*, 449 U.S. 1060 (1980), *reh'g denied*, 450 U.S. 960 (1981) (habeas corpus is the exclusive federal route to collateral attack of state court convictions).

251. *Battieste v. Baton Rouge*, 732 F.2d 439 (5th Cir. 1984); *Todd v. Baskerville*, 712 F.2d 70 (4th Cir. 1983); *Staton v. Wainwright*, 665 F.2d 686 (5th Cir. Unit B Jan.), *cert. denied*, 456 U.S. 909 (1982); *Conner v. Pickett*, 552 F.2d 585 (5th Cir. 1977). See also *Brown v. Nutsch*, 619 F.2d 758 (8th Cir. 1980) (section 1983 may be employed to attack extradition). Some support for this position may be gleaned from the Supreme Court's statement in *Preiser* that in the cases cited by the dissenting opinion dealing with section 1983 challenges to administrative action, namely *Damico v. California*, 389 U.S. 416 (1967), *McNeese v. Board of Educ.*, 373 U.S. 668 (1963), and *Monroe v. Pape*, 365 U.S. 167 (1961), "[N]o other, more specific federal statute was involved that might have reflected a different congressional intent." 411 U.S. at 492-93 n.10. By contrast, the Court observed that the prisoners' claims in *Preiser* "fell squarely within the traditional purpose of federal habeas corpus, and Congress has made the specific determination in § 2254(b) that requiring the exhaustion of adequate state remedies in such cases will best serve the policies of federalism." *Id.*

252. *Pueschel v. Leuba*, 383 F. Supp. 576, 581 (D. Conn. 1974) (referring to the "absence of helpful legislative history").

A third major issue the Supreme Court has failed to resolve is whether habeas corpus and section 1983 might both be available in some instances. *Preiser* and *Wolff* establish that when a prisoner's claim is within the "core" of habeas corpus, because he seeks immediate or speedier release, habeas corpus is the exclusive remedy. But the Court has not considered the import of finding a prisoner's claim within the scope, though not necessarily at the core, of habeas corpus. Will the availability of habeas corpus always preclude resort to section 1983? If the Court's primary concern is to insure that the federal habeas exhaustion requirement is not circumvented, section 1983 should be unavailable whenever a claim comes within federal habeas corpus. Nevertheless, there is *dicta* in *Preiser* indicating that both remedies might be available to contest conditions of confinement.²⁵³ In addition, the *Wolff* Court stated that there are circumstances where the same violation of constitutional rights might be redressed under either form of relief.²⁵⁴

In prison condition cases, courts have established that section 1983 is available to contest conditions of confinement, but whether habeas corpus is also available is less clear.²⁵⁵ In this situation, therefore, the question is *not* whether the availability of federal habeas corpus precludes resort to section 1983, but simply whether federal habeas corpus is an alternative remedy to section 1983.²⁵⁶ The issue of dual remedies also arises in prison transfer cases, though not in the same manner as the prison condition cases. In this situation, the decisions establish that habeas corpus is available when an inmate contests a prison transfer or seeks transfer to a different institution, but it is unclear whether section 1983 is available as well.²⁵⁷

The Supreme Court's failure to resolve the three fundamental issues discussed in this section has contributed significantly to the difficulties that lower courts continue to experience in attempting to resolve many of the specific *Preiser* issues. Before turning to the specific issues, however, a discussion of the relationship between the federal habeas corpus exhaustion requirement and the doctrine of *Younger v. Harris*²⁵⁸ abstention is necessary. Each of these doctrines relies heavily upon similar principles of federalism and comity. Because of this connection, federal courts asked to resolve difficult section 1983—habeas corpus questions, for which Supreme Court

253. 411 U.S. at 499. The availability of section 1983 "is not to say that habeas corpus may not also be available to challenge such prison conditions." *Id.*

254. *Wolff*, 418 U.S. at 579. Following this sentence, the Court cited three cases preceded by the signal "Cf.", namely *Preiser v. Rodriguez*, 411 U.S. 475 (1973), *Haines v. Kerner*, 404 U.S. 519, *reh'g denied*, 405 U.S. 948 (1972), and *Wilwording v. Swenson*, 404 U.S. 249 (1971). See also *Huggins v. Isenbarger*, 798 F.2d 203, 204 (7th Cir. 1986) (claim that the reasons given for parole denial are too broad "may be raised in 1983 litigation as well as habeas corpus").

255. See *infra* notes 384-96 and accompanying text.

256. Justice Brennan has taken the position that a state prisoner who attacks the conditions of confinement may utilize section 1983 or federal habeas corpus. *Preiser*, 411 U.S. at 504-08 (Brennan, J., dissenting).

257. See *infra* notes 397-420 and accompanying text.

258. 401 U.S. 37 (1971).

precedent is either non-existent or ambiguous, often rely upon a combined reading of the principles and rationales of *Preiser* and *Younger*.²⁵⁹

V. THE YOUNGER-PREISER CONNECTION—DOUBLE BARREL COMITY

The Court made clear in *Preiser* that comity, which requires a "proper respect for state functions," underlies both the exhaustion rule in state prisoner federal habeas corpus proceedings and the *Younger* abstention doctrine.²⁶⁰ The *Younger* doctrine generally forbids a federal court from granting relief that interferes with a pending state court criminal proceeding.²⁶¹ Underlying the doctrine is the federalism notion that national government will fare best if states are allowed to carry out their judicial functions free from federal court interference.²⁶² *Younger* abstention assumes that a federal constitutional claim may be litigated as effectively in the pending state court proceeding as it would be in a federal court proceeding. This assumption is made because state courts are obligated to enforce the United States Constitution and are presumed to be as competent as the federal judiciary to do so.²⁶³

In the typical *Younger* situation, the federal court plaintiff seeks injunctive or declaratory relief against a pending state criminal proceeding. The Supreme Court has determined that the *Younger* doctrine also applies when state court proceedings have been completed and the relief sought in federal court would overturn the state court judgment. In these circumstances "an entire trial has already taken place" and federal relief would be a "direct aspersion on the capabilities and good faith of state appellate courts."²⁶⁴

259. See *infra* note 265.

260. *Preiser*, 411 U.S. at 491 (quoting *Younger v. Harris*, 401 U.S. 37, 44 (1971)). See also *Felder v. Estelle*, 693 F.2d 549, 551, 553-54 (5th Cir. 1982) (state may therefore waive the exhaustion requirement).

261. The doctrine is fully applicable in federal court section 1983 actions. *Mitchum v. Foster*, 407 U.S. 225 (1972). The Supreme Court has not limited the reach of *Younger* abstention to state court criminal proceedings and has applied it to a variety of state court civil proceedings where the state was either a party or had important interests. *Pennzoil Co. v. Texaco*, 107 S. Ct. 1519 (1987); *Middlesex County Ethics Comm'n v. Garden State Bar Assoc.*, 457 U.S. 423 (1982); *Moore v. Sims*, 442 U.S. 415 (1979); *Trainor v. Hernandez*, 431 U.S. 434 (1977); *Juidice v. Vail*, 430 U.S. 327 (1977); *Huffman v. Pursue, Ltd.*, 420 U.S. 592, *reh'g denied*, 421 U.S. 971 (1975). The Court recently extended the *Younger* doctrine to quasi-judicial state administrative proceedings that implicate important state interests. *Ohio Civil Rights Comm'n v. Dayton Christian Schools*, 477 U.S. 619 (1986). While there are exceptions to the *Younger* doctrine, they are quite narrow. See M. SCHWARTZ & J. KIRKLIN, *supra* note 4, at § 12.9. For an extensive criticism of the *Younger* doctrine, see Zeigler, *A Reassessment of the Younger Doctrine in Light of the Legislative History of Reconstruction*, 1983 DUKE L.J. 987.

262. *Younger*, 401 U.S. at 44.

263. See *supra* note 54.

264. *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 608, *reh'g denied*, 421 U.S. 971 (1975). See also *Pennzoil Co. v. Texaco*, 107 S. Ct. 1519 (1987). Of course, once the state criminal proceeding goes to judgment, *res judicata* or collateral estoppel may bar a federal section 1983 claim. *Allen v. McCurry*, 449 U.S. 90 (1980). See *supra* note 127.

The Supreme Court has yet to resolve whether the *Younger* doctrine could also serve to bar a section 1983 action for damages for alleged constitutional violations arising out of a state criminal proceeding.²⁶⁵

In attempting to resolve section 1983—federal habeas corpus conflicts, federal courts commonly rely upon the principles and rationale underlying the *Younger* doctrine or upon a combined reading of *Preiser* and *Younger*.²⁶⁶ They do this largely because many state prisoner claims, even if they could be said to be outside the scope of federal habeas corpus and within section 1983, are defeated by application of the *Younger* doctrine if the relief requested involves federal court intrusion into state criminal proceedings.²⁶⁷ The potential interplay between the principles and rationale of *Preiser* and *Younger* must thus be kept in mind in order to determine the appropriate disposition of many of the difficult section 1983—federal habeas corpus controversies.

VI. THE SPECIFIC ISSUES—PREISER IN THE LOWER COURTS

The lower court *Preiser* cases are difficult to classify. The section 1983—habeas corpus issue arises in such varied contexts that not all cases fit neatly into discrete compartments. Moreover, the Supreme Court's failure to determine whether the dispositive factor is the nature of the claim or the nature of the relief sought, and the disagreement and confusion on this point in the lower courts,²⁶⁸ make it impossible to group the cases solely by reference to these factors.

265. See *Deakins v. Monaghan*, 108 S. Ct. 523 (1988); *Tower v. Glover*, 467 U.S. 914, 923-24 (1984) ("We therefore have no occasion to decide if a Federal District Court should abstain from deciding a section 1983 suit for damages stemming from an unlawful conviction."); *Ellis v. Dyson*, 421 U.S. 426, 440 (1975) (Powell, J., dissenting) ("The Court has never expressly decided whether and in what circumstances section 1983 can be invoked to attack collaterally state criminal convictions."). The lower court decisions are in conflict on this issue. See M. SCHWARTZ & J. KIRKLIN, *supra* note 4, at 254 n.80. See also *infra* notes 302-11 and accompanying text. In *Deakins*, the Supreme Court recently ruled that a "District Court has no discretion to dismiss rather than to stay claims for monetary relief that cannot be redressed in the [pending] state proceeding." 108 S. Ct. at 529.

266. *Feaster v. Miksch*, 846 F.2d 21 (6th Cir. 1988); *Crump v. Lane*, 807 F.2d 1394, 1400 n.6 (7th Cir. 1986); *Hadley v. Werner*, 753 F.2d 514, 516 (6th Cir. 1985); *Parkhurst v. Wyoming*, 641 F.2d 775, 776-77 (10th Cir. 1981); *Hansen v. Circuit Court*, 591 F.2d 404, 410-11 (7th Cir.), *cert. denied*, 444 U.S. 907 (1979); *Martin v. Merola*, 532 F.2d 191, 194 (2d Cir. 1976); *Fulford v. Klein*, 529 F.2d 377, 381, *adhered to*, 550 F.2d 342 (5th Cir. 1976) (en banc); *Guerro v. Mulhearn*, 498 F.2d 1249, 1251-54 (1st Cir. 1974); *Schauer v. Burleigh County*, 626 F. Supp. 61, 63 (D.N.D. 1985); *Richards v. Giscome*, 597 F. Supp. 40, 42 (E.D.N.Y. 1984), *aff'd*, 762 F.2d 991 (2d Cir. 1985) (table); *Flaherty v. Nadjari*, 548 F. Supp. 1127, 1129 (E.D.N.Y. 1982); *Matos v. Quealy*, 524 F. Supp. 15, 17 (S.D.N.Y. 1981); *Ringenberg v. Cox*, 524 F. Supp. 112 (E.D. Va. 1981); *Doe v. Russotti*, 503 F. Supp. 942, 944 (S.D.N.Y. 1980); *Darrow v. Shields*, 482 F. Supp. 1144 (W.D. Va. 1980).

267. See *Fernandez v. Trias Monge*, 586 F.2d 848, 849 (1st Cir. 1978) ("This case dramatically diagrams the pitfalls that snare or nearly snare litigants and courts alike when a constitutional claim is brought in federal court that involves an ongoing state prosecution.").

268. See *supra* notes 237-48 and accompanying text.

We have attempted to solve the classification problem in the following manner. First, categories have been established for the most recurring and significant issues. In addition, we will follow the majority view, which focuses upon the nature of the claim rather than the specific relief requested, and discuss the specific issues initially by reference to the nature of the claims asserted. After all of the specific claims are discussed, we will separately discuss the significance of the form of relief requested. Finally, separate treatment is given to the applicability of *Preiser* to the state courts.

The lower court decisions are organized in the following fashion:

A. Nature of the Claim:

1. Challenges to convictions and sentences—generally
 - (a) claims for damages for unconstitutional conviction or sentence when a prisoner is in custody;
 - (b) “fine only” and expired sentence convictions.
2. Challenges to pre-trial custody, probation, parole, and good-time credit determinations.
3. Challenges to conditions of confinement.
4. Challenges to the place of confinement.
5. Procedural due process claims.
6. Challenges to post-conviction review proceedings.
7. Challenges to extradition.
8. Challenges to detainers.
9. Other confinements: civil contempt, juvenile delinquents, and mental patients.

B. Nature of the Relief Requested:

1. Declaratory relief.
2. Expungement.
3. Class relief.

C. *Preiser* in the State Courts

A. Nature of the Claim

1. Challenges to convictions and sentences—generally

The *Preiser* opinion contains *dicta* that a state prisoner's challenge to a conviction or sentence “is limited to habeas corpus” and is within “the core of habeas corpus”²⁶⁹ Justice Brennan's dissenting opinion agreed that attacks on the validity of a conviction or sentence are plainly directed at the fact or duration of confinement and prisoners, therefore, can proceed only on a habeas corpus petition.²⁷⁰ These statements reflect the undisputed proposition that a state prisoner's request for immediate or speedier release based upon the unconstitutionality of the conviction or sentence may be

269. 411 U.S. at 489.

270. *Id.* at 507 (Brennan, J., dissenting).

made only through a federal habeas corpus proceeding following exhaustion of state remedies.²⁷¹ The lower federal courts have faithfully adhered to this principle and have found federal habeas corpus to be the exclusive remedy to attack a conviction or sentence with respect to a wide variety of claimed constitutional errors.²⁷²

A prisoner's complaint might not explicitly attack the constitutionality of the conviction. Upon analysis, however, courts might find that the nature of the claim asserted in fact constitutes such an attack and prayer for release.²⁷³ In this situation, as in the case of an express prayer for immediate or speedier release, habeas corpus is the exclusive remedy. In *Robinson v. Richardson*,²⁷⁴ for example, the Fifth Circuit found that a prayer for an injunction against discrimination in jury selection was at the core of habeas corpus because "resolution of the plaintiff's claims in his favor will result in a finding that his conviction is constitutionally invalid, and his release from prison will necessarily follow from such a finding."²⁷⁵

271. See *O'Shea v. Littleton*, 414 U.S. 488, 496 (1974) ("Indeed, if any of the [plaintiffs] were then serving an assertedly unlawful sentence, the complaint would inappropriately be seeking relief from or modification of current, existing custody."). *O'Shea* also demonstrates that one who challenges an allegedly threatened prosecution faces serious standing and at times *Younger* abstention problems.

272. *United States ex rel. Villa v. Fairman*, 810 F.2d 715 (7th Cir. 1987) (attack on length of sentence); *Feeney v. Auger*, 808 F.2d 1279 (8th Cir. 1986) (attack on habitual offender statute); *Palmer v. City of Chicago*, 755 F.2d 560, 573 (7th Cir. 1985) (attack on conviction based upon evidence in prisoner's "street files"); *Borning v. Cain*, 754 F.2d 1151 (5th Cir. 1985) (denial of adequate access to law library resulting in alleged denial of effective appeal); *Harvey v. Andrist*, 754 F.2d 569 (5th Cir. 1985) (illegal search and seizure and use of perjured testimony); *Coleman v. Turpin*, 697 F.2d 1341 (10th Cir. 1982) (effective assistance of counsel); *Williams v. Dallas County Comm'rs*, 689 F.2d 1212 (5th Cir. 1982) (discriminatory imbalances in composition of grand and petit juries), *cert. denied*, 461 U.S. 935 (1983); *Ellison v. De La Rosa*, 685 F.2d 959 (5th Cir. 1982) (ineffective assistance of trial and appellate counsel); *Caldwell v. Line*, 679 F.2d 494 (5th Cir. 1982) (state trial judge without jurisdiction to try case); *Reimer v. Short*, 578 F.2d 621 (5th Cir. 1978) (challenge to plea of *nolo contendere*), *cert. denied*, 440 U.S. 947 (1979); *Edwards v. Joyner*, 566 F.2d 960 (5th Cir. 1978) (use of perjured testimony, coercive police interrogation, and withholding by prosecutor of evidence favorable to defendant); *Robinson v. Richardson*, 556 F.2d 332 (5th Cir. 1977) (claim of discrimination in jury selection process); *Mathis v. Clerk of the First Dep't*, 631 F. Supp. 232 (S.D.N.Y. 1986) (failure to provide appellate counsel with transcripts of criminal trial to take appeal); *Green v. Ballou*, 391 F. Supp. 806 (W.D. Va. 1975) (sufficiency of evidence, truthfulness of witnesses' testimony and voluntariness of guilty plea), *aff'd*, 551 F.2d 306 (4th Cir. 1977) (table); *Curley v. Bryan*, 362 F. Supp. 48 (D.S.C. 1973) (evidence obtained pursuant to illegal search and seizure); *United States ex rel. Kopystecki v. Lamb*, 321 F. Supp. 492 (E.D. Pa. 1970) (validity of guilty plea). See generally Note, *A Comparison*, *supra* note 6, at 1328 ("Claims of unconstitutional procedure during the criminal trial itself fall under habeas corpus, since such claims challenge the fact of confinement.").

273. With respect to the difficulties involved in deciphering *pro se* prisoner complaints, see *supra* notes 246-48 and accompanying text.

274. 556 F.2d 332 (5th Cir. 1977).

275. *Id.* at 335. See also *Caldwell v. Line*, 679 F.2d 494 (5th Cir. 1982) (claim that state criminal court judge was without authority to try case brings into play the validity of the

The Supreme Court's decision in *Stone v. Powell*²⁷⁶ presents a special section 1983—federal habeas corpus problem when a state inmate contests a conviction on fourth amendment grounds. In *Stone*, the Supreme Court determined that a state court criminal defendant who was afforded a full and fair opportunity to litigate a fourth amendment exclusionary rule claim in state court may not litigate this claim in a federal habeas corpus proceeding.²⁷⁷ Absent the unusual situation where a state court did not afford a fair opportunity to litigate an exclusionary rule claim,²⁷⁸ federal habeas corpus is not available to test the exclusionary rule issue. In these circumstances there is no overlap with section 1983. However, it does not necessarily follow that section 1983 is available to litigate the fourth amendment claim. In fact, in at least one instance, section 1983 is not available to test the fourth amendment issue even though habeas corpus also is not available. Where the inmate contests a conviction on fourth amendment grounds and seeks immediate or earlier release, the utilization of section 1983 would allow the prisoner to circumvent the rule in *Stone* as well as the habeas corpus exhaustion requirement by simply substituting the label "section 1983" for "habeas corpus." That result is disfavored by most courts.²⁷⁹

Whether a state prisoner may assert a federal court claim for damages under section 1983 based upon an allegedly unconstitutional search and seizure of evidence employed in securing a conviction is a more difficult question. This is an issue that suffers from the lack of Supreme Court guidance on the basic relationship between section 1983 and federal habeas corpus, including whether section 1983 should be available when federal habeas corpus is not. This basic issue has arisen most frequently in the context of challenges to "fine only" and expired sentence convictions, and the courts have come to different conclusions.²⁸⁰ The majority position is that federal habeas corpus is the exclusive method to attack any conviction or sentence. As a result, section 1983 is not available to attack "fine only" or expired sentence convictions even where habeas corpus also is not available.²⁸¹ Under this view, section 1983 would not be available when damages

conviction despite plaintiff's claim that he was not challenging his conviction); *Borning v. Cain*, 754 F.2d 1151, 1152 (5th Cir. 1985) (because claimed denial of inadequate access to law library "draws into question the validity of his conviction and is the basis for the petitioner's assertion that he was denied his right to an effective appeal" it "should not be addressed until the petitioner has exhausted his state court remedies.").

276. 428 U.S. 465 (1976).

277. The decision in *Stone* rests on prudential rather than jurisdictional grounds. *Kimmelman v. Morrison*, 477 U.S. 365, 379 n.4 (1986).

278. The circuit courts of appeals routinely reject claims that the state courts did not provide a full and fair hearing to litigate fourth amendment claims. *WRIGHT, MILLER & COOPER, supra* note 32, § 4263, at 620-21. "Indeed most of the opinions of the courts of appeals merely announce the conclusion that the prisoner had a full and fair opportunity for a hearing without discussion of what this means or what occurred in the particular case." *Id.* at 622.

279. *See supra* notes 239-42 and accompanying text.

280. *See infra* notes 319-45 and accompanying text.

281. *See infra* note 328.

are sought for a conviction allegedly resulting from a violation of the exclusionary rule. In addition, it has been persuasively argued that "allowing a prisoner to bring a federal [section] 1983 suit on a Fourth Amendment claim might well permit circumvention of *Stone*, since a prisoner could secure a federal determination of the search and seizure issue and use a favorable decision to affect release in state habeas corpus."²⁸²

On the other hand, the few courts which have determined that the section 1983 remedy should be available when federal habeas corpus is not, and which thus allow section 1983 to be used to attack "fine only" and expired sentence convictions,²⁸³ presumably would also allow a section 1983 claim for damages for an exclusionary rule violation. The Fifth Circuit in *Delaney v. Giarrusso*,²⁸⁴ tentatively stated without analysis that a prisoner who claims a fourth amendment violation and is precluded from federal habeas relief under *Stone* "may then be able to press his claim for damages under section 1983 in the federal courts after showing that he has exhausted his state-court remedies" But in the very same sentence the court took away what it granted, stating that "the defendants may be able to invoke collateral estoppel as an affirmative defense if . . . the state courts [determined] that there was no violation of . . . Fourth Amendment rights."²⁸⁵

The collateral estoppel issue is probably a significant reason why the interplay of *Stone* and *Preiser* has arisen so infrequently. Even absent the requirement imposed by *Delaney* that state remedies be exhausted before the section 1983 claim is filed, a ruling on the fourth amendment claim in the state criminal trial will normally operate to preclude a section 1983 claim. The Supreme Court's decision in *Allen v. McCurry*²⁸⁶ provides an instructive example of how collateral estoppel can be used to avoid the difficult interplay of *Stone* and *Preiser*. McCurry was a defendant in a Missouri criminal proceeding who moved to suppress evidence under the fourth amendment exclusionary rule. The motion was denied and McCurry was ultimately convicted. He then commenced a federal court section 1983 action for damages based upon an alleged fourth amendment violation. Applying the full faith and credit statute,²⁸⁷ the Supreme Court ruled that the preclusive effect of the state court judgment must be determined by reference to the Missouri law of preclusion. If a claim for damages arising out of the fourth

282. See Note, *The Aftermath of Preiser and Wolff*, *supra* note 6, at 751 n.66. See also *Feaster v. Miksch*, 846 F.2d 21 (6th Cir. 1988) (*Younger* doctrine requires stay of section 1983 claim for damages based upon fourth amendment violation).

283. See *infra* note 325.

284. 633 F.2d 1126 (5th Cir. 1981).

285. *Id.* at 1128. Accord *Allen v. McCurry*, 449 U.S. 90 (1980). Of course, section 1983 is clearly available without any exhaustion requirement if only damages are sought for a claimed violation of fourth amendment rights and the claim does not call into play the validity of the state court conviction. *Tarantino v. North Carolina*, 639 F. Supp. 661, 671-72 (W.D.N.C. 1986).

286. 449 U.S. 90 (1980).

287. 28 U.S.C. § 1738 (1982).

amendment would be barred under Missouri law, the federal section 1983 claim would be barred as well, so long as the state proceedings provided a full and fair opportunity to litigate the federal claim.

In reaching this conclusion, the Supreme Court specifically rejected McCurry's argument that "since *Stone v. Powell* had removed McCurry's right to a hearing of his fourth amendment claim in federal habeas corpus, collateral estoppel should not deprive him of a federal judicial hearing of that claim in a [section] 1983 suit."²⁸⁸ The Court reasoned that *Stone* "concerns only the prudent exercise of federal-court jurisdiction under 28 U.S.C. 2254" and, therefore, had "no bearing on [section] 1983 suits or on the question of the preclusive effect of state-court judgments."²⁸⁹ More fundamentally, McCurry's argument assumed incorrectly that every violation of a federal right may be litigated in a federal district court, "regardless of the legal posture in which the federal claim arises."²⁹⁰

Stone's virtual elimination of federal habeas corpus as a remedy for exclusionary rule claims provides a compelling reason for recognizing the section 1983 damages remedy. Nevertheless, collateral estoppel is an obstacle to the efficacy of the section 1983 remedy in this context. It is not, however, the only obstacle. The right of state inmates to seek section 1983 damages for exclusionary rule violations raises the broader question of whether a section 1983 claim for damages ever may be based upon an allegedly unconstitutional conviction or sentence. It is this question to which we now turn.

a. Damages claims for unconstitutional conviction or sentence when prisoner is in custody

Having learned from *Preiser* that prisoners may not secure immediate or speedier release from confinement by challenging the constitutionality of their convictions or sentences under section 1983, but having also read in *Preiser* that "a damages action by a state prisoner could be brought under [section] 1983 in federal court without any requirement of prior exhaustion of state remedies,"²⁹¹ many prisoners tried a different stratagem. They began to seek damages under section 1983 based upon claims that their convictions or sentences were unconstitutional because, for example: they were denied effective assistance of counsel; their right to a speedy trial was violated; their jury was selected in an unconstitutional manner; evidence was uncon-

288. 449 U.S. at 103.

289. *Id.*

290. *Id.* The Court found that "nothing in the legislative history of § 1983 reveals any purpose to afford less deference to judgments in state criminal proceedings than to those in state civil proceedings." *Id.* at 103-04. The majority thus was unmoved by the dissenting opinion's argument that "[a] state criminal defendant cannot be held to have chosen 'voluntarily' to litigate his Fourth Amendment claim in the state court." *Id.* at 115 (Blackmun, J., dissenting).

291. 411 U.S. at 494.

stitutionally introduced; exculpatory evidence was withheld; or they entered involuntary guilty pleas.²⁹²

When asserted by confined prisoners, the lower federal courts generally have viewed these claims for damages as an attempted "end around" the federal habeas corpus exhaustion requirement. To allow a state prisoner to test the constitutionality of a conviction without exhausting state remedies would frustrate the federalism concerns that underlie the habeas corpus exhaustion requirement because a state prisoner could simply "state a viable civil rights claim . . . by postponing a claim for release until his substantive rights have been adjudicated in a federal forum."²⁹³ The state prisoner could then go to state court and assert the federal finding of an unconstitutional conviction as the basis for securing release or reduction in the sentence.²⁹⁴ In order to prevent this from occurring, the lower federal courts have rather consistently ruled that a state prisoner may not seek damages under section 1983 for an unconstitutional conviction or sentence, at least until state remedies have been exhausted.²⁹⁵ To reach this result, it is necessary to (1)

292. Justice Brennan's dissenting opinion in *Preiser* predicted that prisoners might seek to avoid the Court's ruling by seeking only damages under section 1983. *Id.* at 509 (Brennan, J., dissenting). See *supra* note 272.

293. *Hamlin v. Warren*, 664 F.2d 29, 32 (4th Cir. 1981), *cert. denied*, 455 U.S. 911 (1981); *Fulford v. Klein*, 529 F.2d 377, 381 (5th Cir. 1976) ("a thinly disguised circumvention of state remedies"), *adhered to*, 550 F.2d 342 (5th Cir. 1977) (en banc).

294. *Hamlin v. Warren*, 664 F.2d 29 (4th Cir. 1981), *cert. denied*, 455 U.S. 911 (1982); *Guerro v. Mulhearn*, 498 F.2d 1249 (1st Cir. 1974); *Barnes v. Wolff*, 586 F. Supp. 312 (D. Nev. 1984). See also *Thomas v. Dietz*, 518 F. Supp. 794 (D.N.J. 1981). As the Fifth Circuit has explained, "[t]here would be no authority under which a person serving a term in prison resulting from the criminal conviction could be retained in custody once there was an authoritative determination that the conviction could not stand." *Chancery Clerk v. Wallace*, 646 F.2d 151, 157 (5th Cir. 1981). Some courts have also relied upon their inherent power to fashion appropriate relief, regardless of the relief requested, *Hamlin*, 664 F.2d at 30-32, and upon the notion that in a habeas corpus proceeding the court can afford the "best relief—namely release from custody." *Smith v. Logan*, 311 F. Supp. 898, 899 (W.D. Va. 1970). *Accord Alexander v. Emerson*, 489 F.2d 285 (5th Cir. 1973); *Moore v. Frazier*, 316 F. Supp. 318 (D. Neb. 1970). The last three cited cases were decided prior to the decision in *Preiser v. Rodriguez*, 411 U.S. 475 (1973).

295. *Hadley v. Werner*, 753 F.2d 514 (6th Cir. 1985); *Caldwell v. Line*, 679 F.2d 494 (5th Cir. 1982); *Hamlin v. Warren*, 664 F.2d 29 (4th Cir. 1981), *cert. denied*, 455 U.S. 911 (1982); *Franklin v. Oregon*, 662 F.2d 1337, 1347 n.12 (9th Cir. 1981); *Franklin v. Webb*, 653 F.2d 362 (8th Cir. 1981); *Richardson v. Fleming*, 651 F.2d 366 (5th Cir. 1981); *Tarter v. Hury*, 646 F.2d 1010 (5th Cir. 1981); *Parkhurst v. Wyoming*, 641 F.2d 775 (10th Cir. 1981); *Martin v. Merola*, 532 F.2d 191 (2d Cir. 1976); *Fulford v. Klein*, 529 F.2d 377 (5th Cir. 1976), *adhered to*, 550 F.2d 342 (1977) (en banc); *Meadows v. Evans*, 529 F.2d 385 (5th Cir.), *adhered to*, 550 F.2d 345 (5th Cir. 1976) (en banc), *cert. denied*, 434 U.S. 969 (1977); *Guerro v. Mulhearn*, 498 F.2d 1249 (1st Cir. 1974); *Burgess v. Brown*, 652 F. Supp. 1426 (W.D.N.C. 1987); *Richards v. Giscome*, 597 F. Supp. 40 (E.D.N.Y. 1984), *aff'd*, 762 F.2d 991 (2d Cir. 1985); *Barnes v. Wolff*, 586 F. Supp. 312 (D. Nev. 1984); *Flaherty v. Nadjari*, 548 F. Supp. 1127 (E.D.N.Y. 1982); *Matos v. Quealy*, 524 F. Supp. 15 (S.D.N.Y. 1981); *Carter v. Newburgh Police Dep't*, 523 F. Supp. 16 (S.D.N.Y. 1980); *Doe v. Russotti*, 503 F. Supp. 942 (S.D.N.Y. 1980); *Barksdale v. Ryan*, 398 F. Supp. 700 (N.D. Ill. 1974), *aff'd*, 511 F.2d 1405 (7th Cir.), *cert. denied*, 422 U.S. 1011 (1975). See also *Crump v. Lane*, 807 F.2d 1394 (7th Cir. 1986); *Monk v. Secretary of Navy*, 793 F.2d 364 (D.C. Cir. 1986).

reject a literal reading of the broad *dicta* in *Preiser* concerning damages, (2) read *Wolff v. McDonnell*²⁹⁶ as having authorized the section 1983 damages claim for violations of procedural due process rights,²⁹⁷ and (3) conclude, as most courts do, that the relief sought does not itself control the section 1983—federal habeas corpus issue.²⁹⁸

In the leading case of *Fulford v. Klein*,²⁹⁹ the Fifth Circuit, after finding that a section 1983 claim for damages could not be asserted to test the constitutionality of a conviction prior to exhausting state remedies, concluded that "habeas corpus is the exclusive initial cause of action where the basis of the claim goes to the constitutionality of the state court conviction." While the *Fulford* Court expressly declined to determine whether a section 1983 claim for damages may be based upon an unconstitutional conviction or sentence after state remedies have been exhausted, most courts have indicated that they would allow the damages claim following the exhaustion of state remedies.³⁰⁰ Requiring that state remedies first be exhausted, however, not only delays the damages claim but invariably dooms it to failure, because the state court ruling normally will operate to collaterally estop the section 1983 claim.³⁰¹

296. 418 U.S. 539 (1974).

297. See *supra* notes 223-32 and accompanying text. The lower federal courts typically read *Wolff* to allow a section 1983 claim for damages for the violation of procedural due process rights rather than for the deprivation of good-time credits. See, e.g., *In re United States Parole Comm'n*, 793 F.2d 338 (D.C. Cir. 1986); *Monk v. Secretary of Navy*, 793 F.2d 364 (D.C. Cir. 1986); *Fulford v. Klein*, 529 F.2d 377 (5th Cir.), *adhered to*, 550 F.2d 342 (5th Cir. 1977) (en banc); *Barnes v. Wolff*, 586 F. Supp. 312 (D. Nev. 1984).

298. See *supra* notes 237-48 and accompanying text.

299. 529 F.2d 377, 381 (5th Cir. 1976), *adhered to*, 550 F.2d 342 (5th Cir. 1977) (en banc).

300. See *Crump v. Lane*, 807 F.2d 1394, 1395, 1401 (7th Cir. 1986) (damages for denial of parole release: "Before Crump may properly maintain a 1983 action for damages arising out of his allegedly illegal confinement, he must first exhaust his state court remedies . . ."); *Hanson v. Heckel*, 791 F.2d 93 (7th Cir. 1986); *Hadley v. Werner*, 753 F.2d 514 (6th Cir. 1985); *Hamlin v. Warren*, 664 F.2d 29 (4th Cir. 1981), *cert. denied*, 455 U.S. 911 (1982); *Burgess v. Brown*, 652 F. Supp. 1426 (W.D.N.C. 1987). See also *Davis v. Rendell*, 659 F.2d 374 (3d Cir. 1981) (section 1983 claim for damages permitted where there was only a remote possibility that there was anything left to exhaust which would affect the conviction after defendant pleaded *nolo contendere*).

301. See *Wolff v. McDonnell*, 418 U.S. 539, 554 n.12 (1974) (*dicta*); *Preiser v. Rodriguez*, 411 U.S. 475, 509 (1973) (Brennan, J., dissenting) ("[I]f all of the federal claims must be held in abeyance pending exhaustion of state remedies, a prisoner's subsequent effort to assert a damages claim under 1983 might arguably be barred by principles of res judicata."); *Battieste v. Baton Rouge*, 732 F.2d 439, 441 (5th Cir. 1984); *Hamlin v. Warren*, 664 F.2d 29, 32 (4th Cir. 1981), *cert. denied*, 455 U.S. 911 (1982); *Rimmer v. Fayetteville Police Dep't*, 567 F.2d 273 (4th Cir. 1977); *Cender v. Peters*, 548 F. Supp. 198 (S.D.N.Y. 1982); *Pueschel v. Leuba*, 383 F. Supp. 576 (D. Conn. 1974). The Supreme Court has made it clear that state court rulings in state criminal proceedings are entitled to the same preclusive effect in federal section 1983 actions that they would receive in state court. *Allen v. McCurry*, 449 U.S. 90 (1980). A claim for damages in this context might also be defeated by absolute prosecutorial or judicial immunity. See H. HART & H. WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* (2d ed.) 419 (Supp. 1981). See also *Conner v. Pickett*, 552 F.2d 585 (5th Cir. 1977); *Doe v. Russotti*,

The claim for damages may also run into *Younger v. Harris*³⁰² abstention problems. In fact, the Supreme Court, which has never determined whether a section 1983 damages claim may be based upon an allegedly unconstitutional conviction,³⁰³ has described the issue in abstention terms, i.e., whether a district court should "abstain from deciding a section 1983 suit for damages stemming from an unlawful conviction pending the collateral exhaustion of state court attacks on the conviction itself."³⁰⁴

The lower federal court cases conflict over whether *Younger* abstention applies to federal claims for damages.³⁰⁵ There are several indications that if faced with the issue, the Supreme Court may well apply *Younger* to claims for damages. First, the Court has ruled that the *Younger* doctrine applies not only to federal court relief against pending state proceedings, but also to federal relief that would overturn state court judgments.³⁰⁶ While this holding is not dispositive of the *Younger*-damages issues, it is significant because the damages claim is most likely to arise after state proceedings are completed. Until that time, the criminal defendant might not have suffered the actual injury that provides a basis for a claim of compensatory damages.³⁰⁷

Moreover, the Court has indicated that a claim for damages based upon the unconstitutionality of state practices is, in effect, a request for a declaratory judgment of the constitutionality of the practices. In *Fair Assessment Real Estate Association v. McNary*,³⁰⁸ the Court ruled that a section 1983 claim for damages based upon an allegedly unconstitutional state tax scheme was barred by principles of comity and federalism because the federal court would first have to determine the constitutionality of the tax practice or policy in order to determine whether plaintiffs were entitled to damages.³⁰⁹

503 F. Supp. 942 (S.D.N.Y. 1980). In *Conner*, the court, after finding the judge and prosecutor protected by absolute immunity, stated that "it is not equally clear that the dismissal of Conner's damage claims against the police officers was correct." 552 F.2d at 587. Police officers generally are entitled to qualified good faith immunity. *Malley v. Briggs*, 475 U.S. 335 (1986); *Pierson v. Ray*, 386 U.S. 547 (1967).

302. 401 U.S. 37 (1971).

303. See *supra* note 265.

304. *Tower v. Glover*, 467 U.S. 914, 923 (1984).

305. See M. SCHWARTZ & J. KIRKLIN, *supra* note 4, § 12.7, at 253 n.80.

306. *Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975). See also *Pennzoil Co. v. Texaco*, 107 S. Ct. 1519 (1987).

307. The Supreme Court has taken the position that absent a showing of actual injury, only nominal damages may be awarded for the violation of a constitutionally protected right. *Memphis Community School Dist. v. Stachura*, 477 U.S. 299 (1986) (first amendment); *Carey v. Piphus*, 435 U.S. 247 (1978). In an appropriate case, punitive damages may also be awarded. *Smith v. Wade*, 461 U.S. 30 (1983).

308. 454 U.S. 100 (1981).

309. *Fair Assessment* dealt with the principles of federalism and comity that underlie the Tax Injunction Act, 28 U.S.C. § 1341 (1982). By basing its ruling on principles of comity and federalism, the Court in *Fair Assessment* was able to avoid the issue of whether or not a claim for damages was barred by section 1341, which prohibits a federal court from "enjoin[ing], suspend[ing] or restrain[ing] the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State."

The Court stated, "[t]he recovery of damages under the Civil Rights Act first requires a 'declaration' or determination of unconstitutionality of a state tax scheme that would halt its operation."³¹⁰ This analysis is significant to the *Younger*-damages issue because for *Younger* purposes the Supreme Court generally equates federal injunctive and declaratory relief.³¹¹

Several lower federal court decisions have relied at least in part upon the policies of the *Younger* doctrine to conclude that a section 1983 claim for damages may not be based upon an unconstitutional conviction.³¹² In *Guerro v. Mulhearn*,³¹³ the First Circuit provided the following analysis:

Despite the difference in the form of the relief being sought, a suit for damages under section 1983 may also have a substantially disruptive effect upon contemporary state criminal proceedings, and may also undermine the integrity of the writ of habeas corpus. Where the federal court, in dealing with the question of damages caused by violation of civil rights, would have to make rulings by virtue of which the validity of a conviction in contemporary state proceedings would be called in question, the potential for federal-state friction is obvious. The federal rulings would embarrass, and could even intrude into, the state proceedings.³¹⁴

The court in *Guerro* also recognized, however, that constitutionally protected rights may be denied prior to trial and might be irrelevant to the criminal conviction or sentence.³¹⁵ For example, false arrests, illegal searches and seizures, or wiretaps, may constitute compensable wrongs while not "undergirding the validity of the criminal conviction to which it might be related."³¹⁶

Guerro thus properly emphasized the distinction between claims for damages that implicate the constitutionality of state convictions, and claims for damages based upon allegedly unconstitutional law enforcement practices which do not implicate the constitutionality of convictions. The former types of claims clash with the federalism policies behind *Preiser* and *Younger* while the latter types of claims do not.³¹⁷

310. *Fair Assessment in Real Estate Ass'n v. McNary*, 454 U.S. 100, 115 (1981).

311. When the *Younger* doctrine bars federal court injunctive relief, it generally bars federal court declaratory relief as well. *Samuels v. Mackell*, 401 U.S. 66, 73 (1971). *Cf.* *Steffel v. Thompson*, 415 U.S. 452 (1974) (declaratory relief not barred by *Younger* when no criminal prosecution is pending).

312. *See* *Hadley v. Werner*, 753 F.2d 514 (6th Cir. 1985); *Parkhurst v. Wyoming*, 641 F.2d 775 (10th Cir. 1981); *Fulford v. Klein*, 529 F.2d 377 (5th Cir. 1976), *adhered to*, 550 F.2d 342 (5th Cir. 1977) (en banc); *Martin v. Merola*, 532 F.2d 191 (2d Cir. 1976); *Guerro v. Mulhearn*, 498 F.2d 1249 (1st Cir. 1974); *Richards v. Giscome*, 597 F. Supp. 40 (E.D.N.Y. 1984), *aff'd*, 762 F.2d 991 (2d Cir. 1985); *Barnes v. Wolff*, 586 F. Supp. 312 (D. Nev. 1984); *Matos v. Quealy*, 524 F. Supp. 15 (S.D.N.Y. 1981).

313. 498 F.2d 1249 (1st Cir. 1974).

314. *Id.* at 1253 (footnote omitted).

315. *Guerro*, 498 F.2d at 1253. *See also* *Fulford v. Klein*, 529 F.2d 377, 379 (5th Cir. 1976), *adhered to*, 550 F.2d 342 (5th Cir. 1977) (en banc).

316. 498 F.2d at 1253.

317. It is settled that state prisoner damages claims that do not stem from the constitutionality

b. "Fine only" and expired sentence convictions

Because a petitioner must be "in custody" in order to commence a federal habeas corpus proceeding,³¹⁸ an individual who is not in custody may not test the constitutionality of a state court conviction in a habeas corpus proceeding. While recent Supreme Court decisions have substantially liberalized the concept of "custody,"³¹⁹ courts still require a showing that a habeas corpus petitioner is subject to some form of serious restraint of liberty. Thus, the right to institute a federal habeas corpus proceeding is denied to those subject to "fine only" convictions,³²⁰ as well as to those who have been fully discharged following expiration of their terms of imprisonment,³²¹ probation,³²² or parole.³²³

of a conviction or sentence or otherwise relate to the fact or duration of confinement may be asserted under section 1983. *See Mack v. Verelas*, 835 F.2d 995 (2d Cir. 1987); *Slayton v. Willingham*, 726 F.2d 631, 635 (10th Cir. 1984); *Bodeker v. Dyson*, 544 F.2d 861, 862 (5th Cir. 1977); *Guerro v. Mulhearn*, 498 F.2d 1249, 1254 (1st Cir. 1974); *Rogers v. Fuller*, 410 F. Supp. 187 (M.D.N.C. 1976).

318. 28 U.S.C. § 2254(a) (1982).

319. *See supra* notes 43-50 and accompanying text.

320. *Battieste v. Baton Rouge*, 732 F.2d 439 (5th Cir. 1984); *Spring v. Caldwell*, 692 F.2d 994 (5th Cir. 1982); *Waste Management of Wis. v. Fokakis*, 614 F.2d 138 (7th Cir.), *cert. denied*, 449 U.S. 1060 (1980), *reh'g denied*, 450 U.S. 960 (1981); *Hanson v. Circuit Court*, 591 F.2d 404 (7th Cir.), *cert. denied*, 444 U.S. 907 (1979); *Russell v. City of Pierre*, 530 F.2d 791 (8th Cir.), *cert. denied*, 429 U.S. 855 (1976); *Edmunds v. Won Bae Chang*, 509 F.2d 39 (9th Cir.), *cert. denied*, 423 U.S. 825 (1975); *Westberry v. Keith*, 434 F.2d 623 (5th Cir. 1970) (fine and revocation of driver's license are not custody). In *Hanson*, the Court held "that the ordinary collateral consequences or civil disabilities flowing from a fine-only conviction, although they may be restraints on liberty, are not severe enough to put the convicted person in custody within the meaning of the habeas corpus statute." 591 F.2d at 407. Based upon this reasoning, "a corporate petitioner can never secure habeas corpus review . . . because a corporation's entity status precludes it from ever being incarcerated or otherwise held in custody." *Waste Management*, 614 F.2d at 140. That an arrest warrant has been issued because of failure to pay a fine does not satisfy the custody requirement, *Caldwell*, 692 F.2d at 994, although custody would exist if a petitioner was incarcerated for failure to pay the fine. *See Duvallon v. Florida*, 691 F.2d 483, 485 (11th Cir. 1982). The *Caldwell* court stated, in dictum, that "different factors must be considered" in cases of indigence or inability to pay the fine. 692 F.2d at 999 n.6.

321. *Lefkowitz v. Fair*, 816 F.2d 17, 19 (1st Cir. 1987). *See Kravitz v. Pennsylvania*, 546 F.2d 1100, 1102 (3d Cir. 1977); *Carter v. Hardy*, 526 F.2d 314, 315 (5th Cir.), *cert. denied*, 429 U.S. 838 (1976); *Harvey v. South Dakota*, 526 F.2d 840, 841 (8th Cir. 1975), *cert. denied*, 426 U.S. 911 (1976). *See also*, *Tinder v. Paula*, 725 F.2d 801, 803 (1st Cir. 1984) (dicta). The fact that one suffers collateral consequences from a conviction does not satisfy the custody requirement. *See supra* note 50.

322. *Tinder v. Paula*, 725 F.2d 801 (1st Cir. 1984). The *Tinder* court ruled that requiring restitution payment as a pre-condition for probation release did not constitute "custody." Restitution, like a fine, is not a serious restraint on liberty and the possibility that probation will be extended because of a failure to satisfy the court ordered restitution is not sufficient to place the individual in custody. *Id.*

323. *Siano v. Justices*, 698 F.2d 52, 55 (1st Cir.), *cert. denied*, 464 U.S. 819 (1983). *See also Tinder*, 725 F.2d at 803 (dicta). As the First Circuit has stated:

After the expiration of a term of imprisonment, parole or probation, however, the

The question thus arises whether one who is not in custody and therefore unable to contest the constitutionality of a conviction or sentence in a federal habeas corpus proceeding may do so in a federal court section 1983 action. Judge Newman has described the competing arguments:

It might be contended that Congress, in enacting the habeas corpus remedy, not only intended it to be the exclusive vehicle for district court collateral inquiry into the validity of state convictions but also intended that those convictions not subject to a habeas remedy, i.e., without custody consequences, should be immune from district court collateral inquiry. In the absence of helpful legislative history, it seems at least as plausible to argue that the unavailability of habeas corpus to attack a sentence involving only a fine is a sufficient reason for permitting collateral inquiry via §1983.³²⁴

Recent case law is inconclusive as to which route courts are likely to take. Some courts have ruled that when a conviction cannot be attacked in a federal habeas corpus proceeding because the petitioner is not in custody, the conviction may be attacked in a federal court section 1983 action.³²⁵ Proponents argue that section 1983 should be available because when federal habeas corpus is not available, the more specific habeas corpus remedy cannot be said to preempt the more general section 1983 remedy.³²⁶ Since *Preiser* was based upon a perceived necessity to reconcile potentially overlapping federal remedies, if the remedies do not in fact overlap, there simply

state no longer has special supervisory authority over the person. Thus, a sentence that has been fully served does not satisfy the custody requirement of the habeas statute, despite the collateral consequences that generally attend a criminal conviction.

Tinder, 725 F.2d at 803. If one is in custody when the habeas corpus proceeding is commenced but is subsequently released, the proceeding is not moot so long as statutory collateral consequences flow from the contested conviction. *Carafas v. LaVallee*, 391 U.S. 234, 234-35 (1968). *Cf. Lane v. Williams*, 455 U.S. 624 (1982) (expiration of sentence rendered attack on sentence moot where no demonstration of statutory collateral consequences). A proposed American Bar Association standard would eliminate the custody requirement entirely and permit a collateral attack upon a conviction "even though the applicant has completely served the challenged sentence" or "even though the challenged sentence did not commit the applicant to prison but was rather a fine, probation or suspended sentence." IV ABA STANDARDS FOR CRIMINAL JUSTICE Standard 22-2.3 (1982 Supplement).

324. *Pueschel v. Leuba*, 383 F. Supp. 576, 581 (D. Conn. 1974). The court in *Pueschel* did not resolve the issue but decided the case on collateral estoppel grounds. *Id.* at 578.

325. *Battieste v. Baton Rouge*, 732 F.2d 439 (5th Cir. 1984); *Todd v. Baskerville*, 712 F.2d 70 (4th Cir. 1983); *Staton v. Wainwright*, 665 F.2d 686 (5th Cir.), *cert. denied*, 456 U.S. 909 (1982); *Shipp v. Todd*, 568 F.2d 133 (9th Cir. 1978); *Conner v. Pickett*, 552 F.2d 585 (5th Cir. 1977); *Freeman v. Fuller*, 623 F. Supp. 1224 (S.D. Fla. 1985). *See also Richardson v. Fleming*, 651 F.2d 366, 373 (5th Cir. 1981) (dictum). The Fifth Circuit, in *Battieste*, recognized that it was in conflict with its prior decision in *Cavett v. Ellis*, 578 F.2d 567 (5th Cir. 1978), but stated that "*Cavett* has never been subsequently cited by this court in support of the district court's position [prohibiting the use of section 1983 by one not 'in custody' to challenge a conviction] and is in direct contravention of the other cases of this circuit . . . cited in this opinion." *Battieste*, 732 F.2d at 441 n.1.

326. Schwartz, *Challenging State Convictions*, *supra* note 6, at 290.

is no need to reconcile these remedies. In addition, the Fifth Circuit has argued that:

In *Fulford* we held that once a state conviction is final 'habeas corpus is the exclusive initial cause of action where the basis of the claim goes to the constitutionality of the state court conviction.' (citation omitted) Of course this bow to the integrity of state judicial administration is unnecessary where a Section 1983 plaintiff is ineligible for habeas relief for reasons having nothing to do with the merits of his contention that his conviction was unconstitutionally obtained.³²⁷

Two circuit courts have argued persuasively that Congress did not intend that section 1983 be available to attack the constitutionality of a conviction even when federal habeas corpus is not available because the criminal defendant is not in custody.³²⁸ In *Hanson v. Circuit Court*, the Seventh Circuit Court of Appeals reasoned that because Congress intended for habeas corpus to provide "not only the exclusive federal remedy for those in custody, but also the exclusive federal remedy for all who seek to attack state court judgments of convictions," convictions not subject to habeas attack "are immune from collateral inquiry by the federal courts."³²⁹ The *Hanson* court adopted the Fifth Circuit's reasoning in *Cavett v. Ellis*³³⁰ that a plaintiff's section 1983 action was not meant to be a substitute for habeas corpus when there is no custody present. Courts have authority to grant habeas corpus relief to persons in custody pursuant to judgments of state courts, but have refused to extend habeas relief to those not in custody. The *Cavett* court refused to make a petitioner's section 1983 action the "greater writ" by indirectly avoiding the custody requirement of section 2254.³³¹ To rule otherwise "would be to expand the scope of section 1983 beyond that contemplated by Congress."³³² Viewing federal habeas corpus as the exclusive federal remedy to attack state court convictions is consistent with federal court principles of federalism and comity.³³³

In *Waste Management of Wisconsin v. Fokakis*,³³⁴ the Seventh Circuit applied its holding in *Hanson* to a corporation that had been subject to a

327. *Conner v. Pickett*, 552 F.2d 585, 587 (5th Cir. 1977). See also *supra* note 325 for a description of Fifth Circuit decisional law.

328. *Waste Management of Wis. v. Fokakis*, 614 F.2d 138 (7th Cir.), *cert. denied*, 449 U.S. 1060 (1980), *reh'g denied*, 450 U.S. 960 (1981); *Hanson v. Circuit Court*, 591 F.2d 404 (7th Cir.), *cert. denied*, 444 U.S. 907 (1979); *Cavett v. Ellis*, 578 F.2d 567 (5th Cir. 1978). See also *Siano v. Justices*, 698 F.2d 52, 55 (1st Cir.) (dicta), *cert. denied*, 464 U.S. 819 (1983). The Fifth Circuit in *Battieste* indicated that it would no longer follow the holding in *Cavett*. 732 F.2d 441 n.1. See *supra* note 325.

329. 591 F.2d 404, 410 (7th Cir.), *cert. denied*, 444 U.S. 907 (1979).

330. 578 F.2d 567, 569 (5th Cir. 1978). *Cavett* appears to have been overruled by *Battieste*, 732 F.2d at 441 n.1. See *supra* note 325.

331. 28 U.S.C. § 2254 (1982).

332. *Hanson v. Circuit Court*, 591 F.2d 404, 411 (7th Cir.), *cert. denied*, 444 U.S. 907 (1979).

333. *Id.* at 410.

334. 614 F.2d 138 (7th Cir.), *cert. denied*, 449 U.S. 1060 (1980), *reh'g denied*, 450 U.S. 960 (1981).

"fine only" conviction. The corporation had argued that because corporations could never satisfy the habeas custody requirement, they would be deprived of their only federal remedy if they were not permitted to utilize section 1983 to attack a conviction. The Seventh Circuit found the corporation's argument foreclosed by the holding in *Hanson* that section 2254 is "the sole avenue of collateral attack of state convictions."³³⁵ Like *Hanson*, *Waste Management* stressed principles of federalism, and found that attacking the validity of state court convictions in a collateral federal court proceeding is an extraordinary intrusion on the independent functioning of the state judicial system.³³⁶ The court further found that the federal habeas corpus statute represented the balance Congress struck between an individual's interest in freedom from unlawful intrusions on his or her physical freedom and the state courts' interest in freedom from federal interference with final state court judgments.³³⁷ To allow individuals who are not in custody, and whose personal interests are not as compelling as those who are in custody, to contest their convictions in a federal section 1983 action would upset this balance.³³⁸

The Waste Management Corporation had relied upon the Eighth Circuit's decision in *McCurry v. Allen*,³³⁹ to support its argument that section 1983 should be available when federal habeas corpus is not.³⁴⁰ The Seventh Circuit found that its decision in *Hanson* precluded it from accepting Waste Management's attempt to analogize from *McCurry*.³⁴¹ Moreover, after *Waste Management* was decided, the Supreme Court reversed *McCurry*, thereby lending further support to the validity of the *Waste Management* decision.³⁴²

In *McCurry*, the Supreme Court found no authority to support the Eighth Circuit's position "that every person asserting a federal right is entitled to one unencumbered opportunity to litigate that right in a federal district court, regardless of the legal posture in which the federal claim arises. Neither the Constitution nor section 1983 supports such a conclusion."³⁴³

335. *Id.* at 141.

336. *Id.* at 140.

337. *Id.* at 140-41.

338. *Id.* at 141.

339. 606 F.2d 795 (8th Cir. 1979), *rev'd*, 449 U.S. 90 (1980).

340. 614 F.2d at 141. In *McCurry*, the Eighth Circuit ruled that a state court's rejection of a criminal defendant's fourth amendment claim in a suppression hearing did not preclude a section 1983 claim for damages based upon that fourth amendment violation. The *McCurry* court allowed the section 1983 claim because the doctrine of *Stone v. Powell*, 428 U.S. 465, 494, *reh'g denied*, 429 U.S. 874 (1976), precluded the litigant from bringing the fourth amendment claim in a federal habeas corpus proceeding. *McCurry*, 606 F.2d at 799. To allow otherwise would have left the litigant no other forum in which to bring his claim. *See supra* notes 277-91 and accompanying text for a thorough discussion of *Stone*.

341. 614 F.2d at 141.

342. *Allen v. McCurry*, 449 U.S. 90, 103 (1980).

343. The Court also held that the full faith and credit statute, 28 U.S.C. § 1738 (1982), governs the preclusive effect of state court judgments in federal section 1983 actions. 449 U.S. at 99. *See supra* notes 286-90 and accompanying text.

Moreover, the Supreme Court specifically stated that it was not likely that the 42nd Congress, which drafted the original version of section 1983, considered it a substitute for federal habeas corpus, "the purpose of which is not to redress civil injury, but to release the applicant from unlawful physical confinement . . . particularly in light of the extremely narrow scope of federal habeas relief for state prisoners in 1871."³⁴⁴

If faced with the issue, this author believes the present Supreme Court would disallow the use of section 1983 to challenge "fine only" and expired sentence convictions. In the context of ambiguous legislative intent, the Court's paramount concern for principles of federalism and comity would probably lead it to agree with the Seventh Circuit that "direct review by the United States Supreme Court is sufficient to preserve the role of the federal courts as the ultimate guardians of federally guaranteed rights."³⁴⁵

2. Challenges to pre-trial custody, probation, parole, and good-time credit determinations

The decisions in *Preiser* and *Wolff* establish that a state prisoner who asks a federal court to order immediate or earlier release must bring a federal habeas corpus proceeding rather than a section 1983 claim. Thus, habeas corpus is the exclusive federal remedy to assert claims seeking release from pre-trial custody,³⁴⁶ immediate or speedier release on parole,³⁴⁷ or a restoration or recalculation of good-time credits.³⁴⁸ Similarly, habeas corpus is the exclusive remedy to contest reincarceration resulting from the revocation of parole.³⁴⁹ In *Smallwood v. Board of Probation and Parole*,³⁵⁰ the Eighth

344. 449 U.S. at 104-05.

345. *Id.* (quoting *Hanson v. Circuit Court*, 591 F.2d 404, 411 (7th Cir.), *cert. denied*, 444 U.S. 907 (1979)). Even if section 1983 is found to be available to attack fine only and expired sentence convictions, such attacks would be countered with several other significant non-merit defenses, such as collateral estoppel, judicial or prosecutorial immunity, or by the *Younger* abstention doctrine. *See supra* note 301.

346. *Clark v. Zimmerman*, 394 F. Supp. 1166 (M.D. Pa. 1975); *Aldarondo v. Supreme Court of P.R.*, 369 F. Supp. 1173, 1176 (D.P.R. 1974).

347. *Alexander v. Johnson*, 742 F.2d 117, 118 (4th Cir. 1984); *Irving v. Thigpen*, 732 F.2d 1215 (5th Cir. 1984); *United States v. Winter*, 730 F.2d 825 (1st Cir. 1984); *Thomas v. Torres*, 717 F.2d 248 (5th Cir. 1983), *cert. denied*, 465 U.S. 1010 (1984); *Pope v. United States Parole Comm'n*, 647 F.2d 125 (10th Cir. 1981); *Schuemann v. Colorado State Bd. of Adult Parole*, 624 F.2d 172, 173 n.1 (10th Cir. 1980); *Smallwood v. Board of Probation and Parole*, 587 F.2d 369, 370 (8th Cir. 1978); *Douglas v. Muncy*, 570 F.2d 499 (4th Cir. 1978); *Cruz v. Skelton*, 502 F.2d 1101 (5th Cir. 1974); *Ringenberg v. Cox*, 524 F. Supp. 112 (E.D. Va. 1981); *Thomas v. Dietz*, 518 F. Supp. 794 (D.N.J. 1981). *See also* *Dixon v. Alexander*, 741 F.2d 121 (6th Cir. 1984) (claim that term of imprisonment should include possibility of parole is within federal habeas corpus jurisdiction); *Faheem-El v. Klinkar*, 600 F. Supp. 1029 (N.D. Ill. 1984) (withdrawal of parole revocation charge).

348. *Wolff v. McDonnell*, 418 U.S. 539 (1974); *Preiser v. Rodriguez*, 411 U.S. 475 (1973); *Hayes v. Lockhart*, 754 F.2d 281 (8th Cir. 1985); *Todd v. Baskerville*, 712 F.2d 70 (4th Cir. 1983); *Partee v. Lane*, 528 F. Supp. 1254 (N.D. Ill. 1981).

349. 411 U.S. at 486 (dictum) (citing *Morrissey v. Brewer*, 408 U.S. 471, 474 (1972)).

350. 587 F.2d 369, 371 (8th Cir. 1978).

Circuit concluded that a request for an order compelling reconsideration of a decision denying parole is, in effect, a request for release from confinement and, therefore, within the scope of habeas corpus and not section 1983.³⁵¹

In *Alexander v. Johnson*,³⁵² the Fourth Circuit stated that a prisoner could not contest the requirement that he pay the costs of assigned counsel in order to be released on parole under section 1983. The court held that this claim came instead within the scope of habeas corpus because the prisoner was seeking to be relieved of a restraint which would hasten his release on parole. Similarly, in *Drollinger v. Milligan*,³⁵³ the Seventh Circuit determined that a constitutional challenge to certain conditions of probation was within the exclusive scope of habeas corpus. While such a claim might seem to challenge conditions of confinement, and thereby come within the parameter of section 1983, the court held that this was not so. Since the terms of probation include not only its length, but also specifies prohibited and required conduct while on probation, and since "probation is by its nature less confining than incarceration, the distinction between the fact of confinement and the conditions thereof is necessarily blurred."³⁵⁴ In this context, eliminating a condition of probation diminishes the extent of custody; "figuratively speaking, one of the 'bars' would be removed from the cell."³⁵⁵ Therefore, an attempt to secure release from custody, even if partial, falls within the traditional function of habeas corpus and is not actionable under section 1983.³⁵⁶

There is authority stating that an injunction mandating immediate parole review or reconsideration of a decision denying parole falls within the exclusive scope of habeas corpus.³⁵⁷ This argument appears to be erroneous, however, because such relief does not constitute a determination that a prisoner is entitled to immediate or speedier release. As discussed below in conjunction with procedural due process claims,³⁵⁸ a claim that certain procedures or criteria be followed or that a speedier parole determination be made requires neither immediate nor speedier release but, instead, leaves that decision with the relevant officials. These procedural-type claims, therefore, are commonly held to be within the scope of section 1983.³⁵⁹ In *Walker*

351. See also *Brown v. Vermillion*, 593 F.2d 321 (8th Cir. 1979) (request for new parole release hearing construed as request for release from confinement).

352. 742 F.2d 117, 118 (4th Cir. 1984).

353. 552 F.2d 1220 (7th Cir. 1977).

354. *Id.* at 1225. *Accord* *Clark v. Prichard*, 812 F.2d 991, 998 (5th Cir. 1987) (concurring opinion).

355. *Drollinger*, 552 F.2d at 1225.

356. *Id.*

357. *Watson v. Briscoe*, 554 F.2d 650, 651 (5th Cir. 1977). See also *Thomas v. Dietz*, 518 F. Supp. 794 (D.N.J. 1981).

358. See *infra* notes 421-35 and accompanying text.

359. See, e.g., *Faheem-El v. Klinciar*, 814 F.2d 461, 465 n.2 (7th Cir. 1987) (challenge to policy of denying all parolees any consideration for release on bail pending final parole revocation hearing lies under section 1983); *In re United States Parole Comm'n*, 793 F.2d 338

v. Prisoner Review Board,³⁶⁰ the prisoner claimed that he had been given insufficient reasons for the denial of his parole application, that the Board erroneously regarded his sentences as consecutive rather than concurrent, and that he was not allowed to review the entire record. Because he contested only the manner in which parole was denied, and because he did not seek release on parole but only a rehearing in accordance with due process, leaving the ultimate release decision within the Board's discretion, the court found that the claims could be asserted under section 1983.³⁶¹

A number of decisions deal with the question of whether or not a section 1983 claim for damages may be asserted based upon an allegedly unconstitutional denial of good-time credits or parole. Resolution of this issue depends in part upon whether the Supreme Court's decision in *Wolff v. McDonnell*³⁶² recognized a section 1983 damages claim for the denial of good-time credits or whether it recognized a section 1983 damages claim only for the deprivation of procedural due process rights. Most of the lower federal courts have read *Wolff*, as this author does, to recognize a section 1983 damages claim for the deprivation of due process, and not for the loss of good-time credits.³⁶³ In a cogent analysis of the issue, the Fifth Circuit stated that the Supreme Court in *Wolff*:

(D.C. Cir. 1986) (request for ruling on constitutionality of parole guideline not restricted to habeas corpus); *In re Chatman-Bey*, 718 F.2d 484 (D.C. Cir. 1983) (claim by federal prisoner challenging parole eligibility date may, but need not be, brought as a habeas corpus proceeding); *Strader v. Troy*, 571 F.2d 1263 (4th Cir. 1978) (length of sentence not an issue); *Schwindig v. Smith*, 596 F. Supp. 224, 225 (E.D. Ark. 1984) ("The fact that one is classified as eligible for parole does not necessarily mean that he will be released from prison before his sentence is served."). *But see* *Thomas v. Dietz*, 518 F. Supp. 794 (D.N.J. 1981) (court ruled that claim for earlier date to appear before parole board was within habeas corpus because, under state law, strong presumption existed that one eligible for parole will actually be released). "For all intents and purposes, therefore, a prisoner in New Jersey seeking an earlier parole eligibility date states a claim for an earlier release from confinement, a claim which lies at the core of habeas corpus." *Id.* at 796.

360. 694 F.2d 499 (7th Cir. 1982), *subsequent history*, 769 F.2d 396 (7th Cir. 1985), *cert. denied*, 474 U.S. 1065 (1986).

361. *Id.* at 501. In a subsequent decision, the Seventh Circuit interpreted *Walker* to allow a claim stating that the reasons given for parole denial were "too broad and general to comply with due process" under section 1983 "as well as habeas corpus." *Huggins v. Isenbarger*, 798 F.2d 203, 204 (7th Cir. 1986). *Walker*, however, did not address the availability of habeas corpus, only the availability of section 1983.

362. 418 U.S. 539 (1974). *See supra* notes 223-32 and accompanying text.

363. *See In re United States Parole Comm'n*, 793 F.2d 338 (D.C. Cir. 1986); *Todd v. Baskerville*, 712 F.2d 70 (4th Cir. 1983); *Fulford v. Klein*, 529 F.2d 377 (5th Cir. 1976), *adhered to*, 550 F.2d 342 (1977) (en banc); *Christianson v. Spalding*, 593 F. Supp. 500 (E.D. Wash. 1983); *Barnes v. Wolff*, 586 F. Supp. 312 (D. Nev. 1984); *Thomas v. Dietz*, 518 F. Supp. 794 (D.N.J. 1981); *Derrow v. Shields*, 482 F. Supp. 1144 (W.D. Va. 1980). *But see* *Partee v. Lane*, 528 F. Supp. 1254 (N.D. Ill. 1981) (restoration of good-time credits curtailed in disciplinary proceeding cannot be sought through section 1983 claim); *Murphy v. Wheaton*, 381 F. Supp. 1252 (N.D. Ill. 1974); Note, *Preiser v. Rodriguez in Retrospect*, *supra* note 6, at 1080 (claims for damages dismissed under habeas action). The decision in *Edwards v. Illinois Dep't of*

authorized the district court to examine the constitutionality of the state prison procedure, and to award damages which were incidental to an invalid proceeding. Since the district court was expressly forbidden to enter an injunction concerning the merits of the issue before the state administrative body (i.e., the proper length of confinement), however, it follows as a matter of logic that the district court was similarly prohibited from awarding damages for excessive confinement.³⁶⁴

This reading of *Wolff* is consistent with the majority view that the nature of the claim asserted, rather than the specific relief requested, is the most important factor in resolving the section 1983—federal habeas corpus conflict.³⁶⁵ Thus, most lower federal courts have concluded that prior to exhaustion of state remedies, a section 1983 claim for damages does not lie to contest the deprivation of good-time credits³⁶⁶ or the denial or revocation of parole.³⁶⁷ Of course, a section 1983 claimant who awaits the exhaustion of state remedies must face the danger of being precluded by that state court determination.³⁶⁸

3. Challenges to conditions of confinement

In *Preiser*, the Supreme Court referred to its prior decisions that upheld "the right of state prisoners to bring federal civil rights actions to challenge the conditions of their confinement."³⁶⁹ *Preiser's* discussion of challenges to

Corrections, 514 F.2d 477 (7th Cir. 1975), is unclear as to whether the court recognized the section 1983 damages claim for the violation of procedural due process rights or for the revocation of good-time credits.

364. *Fulford v. Klein*, 529 F.2d 377, 381 (5th Cir. 1976), *adhered to*, 550 F.2d 342 (1977) (en banc).

365. See *supra* notes 237-48 and accompanying text.

366. *Jones v. Smith*, 835 F.2d 175 (8th Cir. 1987); *Offet v. Solem*, 823 F.2d 1256 (8th Cir. 1987); *Wilson v. Foti*, 832 F.2d 891 (5th Cir. 1987); *Hanson v. Heckel*, 791 F.2d 93 (7th Cir. 1986); *Todd v. Baskerville*, 712 F.2d 70 (4th Cir. 1983); *Watson v. Briscoe*, 554 F.2d 650 (5th Cir. 1977). *Contra Partee v. Lane*, 528 F. Supp. 1254 (N.D. Ill. 1981) (claim for damages for restoration of good-time credits may proceed under section 1983); *Murphy v. Wheaton*, 381 F. Supp. 1252 (N.D. Ill. 1974) (prisoner may maintain damages action for violation of good-time credits under section 1983). In *Love v. Black*, 597 F. Supp. 1092 (E.D. Mo. 1984), the court recognized a section 1983 claim for damages based upon the discontinuance of a merit release program.

367. *Harper v. Jeffries*, 808 F.2d 281 (3d Cir. 1986); *Crump v. Lane*, 807 F.2d 1394 (7th Cir. 1986); *Watson v. Briscoe*, 554 F.2d 650 (5th Cir. 1977); *Ringenberg v. Cox*, 524 F. Supp. 112 (E.D. Va. 1981); *Thomas v. Dietz*, 518 F. Supp. 794 (D.N.J. 1981); *Derrow v. Shields*, 482 F. Supp. 1144 (W.D. Va. 1980). In *Harper*, the court ruled that a claim for damages for the alleged unconstitutional denial of parole lies under section 1983, but the action should be stayed pending the exhaustion of state remedies. 808 F.2d at 281.

368. See *supra* note 127 and accompanying text. Claims for damages against parole officials might be defeated by absolute quasi-judicial immunity. See M. SCHWARTZ & J. KIRKLIN, *supra* note 4, at § 7.6.

369. *Preiser*, 411 U.S. at 498, 499 n.14. The Court cited the following cases for this proposition: *Haines v. Kerner*, 404 U.S. 519, *reh'g denied*, 405 U.S. 948 (1972) (solitary confinement); *Wilwording v. Swenson*, 404 U.S. 249 (1971) (per curiam) (living conditions and disciplinary measures while in maximum security); *Houghton v. Shafer*, 392 U.S. 639 (1968) (confiscation of legal materials); *Cooper v. Pate*, 378 U.S. 546 (1964) (denial of right to purchase religious publications and other privileges because of prisoner's religious beliefs).

conditions of confinement, although *dicta*, reflects the uncontested proposition that state prisoners may contest the conditions of their confinement, as opposed to its fact or length, under section 1983.³⁷⁰ State prisoners have in fact utilized section 1983 "to contest a broad range of prison conditions"³⁷¹ and, since *Preiser*, numerous Supreme Court cases have either explicitly or implicitly recognized the propriety of a state prisoner's use of this remedy to attack such conditions.³⁷²

An attack on segregated or other disciplinary confinement falls within section 1983 because it does not seek release from confinement, but only a change in the conditions of confinement.³⁷³ In *Wright v. Cuyler*,³⁷⁴ the Third Circuit distinguished between furloughs and the good-time credits at issue in *Preiser*. The *Wright* court ruled that a prisoner could challenge the state's failure to admit him into the home furlough program under section 1983 because he had challenged the conditions of his confinement, rather than attacked the ultimate duration of confinement.³⁷⁵

370. *Preiser*, 411 U.S. at 499.

371. As Judge Lay of the Eighth Circuit Court of Appeals has stated, "[p]risoner grievances relating to conditions of confinement, food, privacy, heat, mail, hair length, work details, segregation from the prison population, religious practices, and rehabilitation have all become issues of federal litigation under section 1983." Lay, *supra* note 10, at 936 n.4. Likewise, as the Court stated in *Preiser*, "[f]or state prisoners eating, sleeping, dressing, washing, working and playing are all done under the watchful eye of the State What for a private citizen would be a dispute with his landlord, with his employer, with his tailor, with his neighbor, or with his banker becomes, for the prisoner, a dispute with the State." *Preiser*, 411 U.S. at 492.

372. See, e.g., *Block v. Rutherford*, 468 U.S. 576 (1984) (denial of contact visits and irregularly scheduled shakedown searches); *Hudson v. Palmer*, 468 U.S. 517 (1984) (prison searches and seizures of property); *Rhodes v. Chapman*, 452 U.S. 337 (1981) (double celling); *Procunier v. Navarette*, 434 U.S. 555 (1978) (outgoing mail); *Hutto v. Finney*, 437 U.S. 678 (1978) (punitive isolation), *reh'g denied*, 439 U.S. 1122 (1979); *Jones v. North Carolina Prisoners' Labor Union*, 433 U.S. 119 (1977) (prohibition against prisoners soliciting inmates to join a union); *Bounds v. Smith*, 430 U.S. 817 (1977) (legal research facilities); *Estelle v. Gamble*, 429 U.S. 97, (medical care), *reh'g denied*, 429 U.S. 1066 (1976); *Pell v. Procunier*, 417 U.S. 817 (1974) (prohibition on press and media interviews with inmates); *Procunier v. Martinez*, 416 U.S. 396 (1974) (censorship of mail and prohibition against use of law students or paraprofessionals to conduct attorney-client interviews).

Justice Blackmun has suggested that "improvements in prison conditions of recent years are traceable in large part, and perhaps primarily, to actions under § 1983 challenging those conditions." Blackmun, *supra* note 19, at 21.

373. See *Preiser*, 411 U.S. at 508 (Brennan, J., dissenting). See also *Haines v. Kerner*, 404 U.S. 519 (solitary confinement), *reh'g denied*, 405 U.S. 948 (1972); *McKinnis v. Mosely*, 693 F.2d 1054, 1057 (11th Cir. 1982) ("Even if McKinnis prevails on all of his claims and receives all the relief he demands, the duration of his sentence will not be shortened by one moment."); *Campbell v. McGruder*, 580 F.2d 521 (D.C. Cir. 1978) (pre-trial detention facility); *Sostre v. McGinnis*, 442 F.2d 178 (2d Cir. 1971) (en banc) (segregated confinement), *cert. denied*, 404 U.S. 1049 (1972).

374. 624 F.2d 455 (3d Cir. 1980).

375. The court reasoned that:

[a]lthough a prisoner's total number of days actually spent behind bars can technically be reduced by the number of days during which he is out of prison on

There are some situations, however, where a challenge to conditions of confinement is so intimately connected to the length or fact of confinement that it is found to be encompassed by habeas corpus. In *Brennan v. Cunningham*,³⁷⁶ the prisoner challenged his removal from a work release program. The prisoner argued that the claim was within federal habeas corpus, presumably in order to avoid the preclusive effect of an adverse state court determination.³⁷⁷ The inmate's claim appeared, like the claim in *Wright*, to challenge conditions of confinement. Under the applicable state law, however, participation in a work release program is so closely related to an inmate's pending release that it could be asserted in a habeas corpus proceeding.³⁷⁸

Where a challenge to prison conditions is derivative of the length of confinement, it may be asserted only in a habeas corpus proceeding and not under section 1983. The Sixth Circuit addressed this issue in *Dixon v. Alexander*.³⁷⁹ In *Dixon*, the prisoner sought to enforce a plea bargain pursuant to which he was sentenced to a term of imprisonment with the possibility of parole. Despite this agreement, the State Department of Corrections refused to treat the prisoner as eligible for parole. The Sixth Circuit ruled that the claim to enforce the plea agreement was a habeas corpus claim that should be dismissed for failure to exhaust state remedies.³⁸⁰

furloughs, it cannot be said that occasional short furloughs such as these reduce the duration of confinement in the same way as did the good time credits at issue in *Preiser*, where the credits would have had the effect of terminating the prisoner's sentence at an earlier calendar date. We therefore hold that the eligibility or lack of eligibility for temporary home furloughs in Pennsylvania is a condition of one's confinement, which may be challenged directly in a section 1983 action without resort to habeas corpus and its attendant requirement for exhaustion of state remedies.

Id. at 458 (footnotes omitted). See also *Jamieson v. Robinson*, 641 F.2d 138 (3d Cir. 1981) (challenge to lack of work release program is within section 1983). The *Wright* court noted that Wright's demand for fair application of the furlough eligibility criteria constitutes a procedural challenge that is within the scope of section 1983. *Wright*, 624 F.2d at 458 n.5. See *infra* notes 413-35 and accompanying text. The court cited five district court opinions, including four within the Third Circuit, with which it disagreed. *Wright*, 624 F.2d at 458 n.6 (citing *Austin v. Armstrong*, 473 F. Supp. 1114, 1116 (D. Nev. 1979); *Thomas v. Cuyler*, 467 F. Supp. 1000, 1001-02 (E.D. Pa. 1979); *Bullock v. Cuyler*, 463 F. Supp. 40, 42-43 (E.D. Pa. 1978); *Winsett v. McGinnes*, 425 F. Supp. 609, 613-14 (D. Del. 1976); *Parson v. Keve*, 413 F. Supp. 111, 112-13 (D. Del. 1976)).

376. 813 F.2d 1 (1st Cir. 1987).

377. See *supra* note 160.

378. The state work release program "considers for admission only those inmates who are within eight months of parole." 813 F.2d at 4. The *Brennan* court also stated that even if the claim was characterized as a challenge to conditions of confinement, it could be asserted either under section 1983 or in a habeas corpus proceeding. *Id.* at 4. See *infra* notes 382-96 and accompanying text.

379. 741 F.2d 121 (6th Cir. 1984).

380. We previously questioned whether a claim of entitlement only to be considered for parole is within habeas corpus. See *supra* notes 357-61 and accompanying text.

The prisoner in *Dixon* argued that his status as a prisoner not eligible for parole denied him the possibility of work release and other privileges accorded to prisoners "being 'held with the possibility of parole.'"³⁸¹ The court acknowledged that while normally a prisoner could challenge the constitutionality of prison conditions under section 1983, this prisoner's claims related to conditions of confinement that were "simply derivative of the possibility-of-parole claim, i.e., the length of his confinement . . . [and were] . . . completely subsumed by the possibility of parole claim."³⁸² Thus, under these specific circumstances, the conditions of confinement claim could not be asserted under section 1983.³⁸³

Brennan and *Dixon* aside, state prisoner condition of confinement claims may almost always be asserted under section 1983. The question then arises whether or not these claims are also within the scope of federal habeas corpus jurisdiction.³⁸⁴ This issue can be especially important where the inmate's conditions claim has been rejected by the state court and the inmate seeks to avoid the preclusive effect of the state judgment by seeking relief in a federal habeas corpus proceeding.³⁸⁵

Habeas corpus was at one time available only to seek release from custody³⁸⁶ and it was considered "an inappropriate method for challenging prison conditions."³⁸⁷ However, in its 1969 decision in *Johnson v. Avery*,³⁸⁸ the Supreme Court seemed to agree with the district court's treatment of the prisoner's challenge to his transfer to maximum security for preparing legal papers in violation of prison regulations as a petition for habeas corpus. In *Wilwording v. Swenson*³⁸⁹ the Supreme Court, citing *Johnson*, stated that a state prisoner's challenge to "living conditions and disciplinary measures while confined in maximum security. . . ." is "cognizable in habeas corpus," as well as under section 1983.

381. 741 F.2d at 125.

382. *Id.*

383. See also *Stevens v. Heard*, 674 F.2d 320 (5th Cir. 1982) (challenges to denial of adequate medical care and emergency reprieves arise out of challenge to legality of detainers and are within the scope of habeas corpus).

384. The number of prisoner habeas corpus petitions challenging prison conditions appears to be small. Turner, *supra* note 245, at 612 n.20.

385. See *supra* notes 376-78 and accompanying text.

386. Comment, *Proper Forum*, *supra* note 6, at 1370; Note, *Developments*, *supra* note 32, at 1079.

387. *Willis v. Ciccone*, 506 F.2d 1011, 1014 (8th Cir. 1974). The *Willis* court noted that [t]his restrictive view was premised primarily upon the same belief that gave rise to the more general 'hands off' doctrine, that is, that prisoner complaints relating to conditions of confinement could only be addressed to those prison authorities who had responsibility for those conditions.

Id.

388. 393 U.S. 483 (1969). See *supra* notes 164-67 and accompanying text for a discussion of *Johnson*.

389. 404 U.S. 249, 251 (1971) (per curiam).

The Supreme Court in *Preiser* followed *Johnson* and *Wilwording* and recognized that habeas corpus may "be available to challenge such prison conditions."³⁹⁰ The Court was far from committal, however, stating that "[w]hen a prisoner is put under additional and unconstitutional restraints during his lawful custody, it is arguable that habeas corpus will lie to remove the restraints making the custody illegal."³⁹¹ It then specifically disclaimed any intent to explore the limits of habeas corpus as an alternative remedy to a section 1983 claim.³⁹² More recently, the Court explicitly left open whether habeas corpus may be used to review the constitutionality of conditions of confinement.³⁹³

In contrast to the Supreme Court's noncommittal stance, the weight of circuit court authority supports the use of federal habeas corpus to test the constitutionality of conditions of confinement.³⁹⁴ When a federal court finds a condition of confinement to be unconstitutional, it may order release from the unconstitutional custody "subject to imposition of the potential lawful custody."³⁹⁵ The prisoner's duration of confinement is thereby not affected

390. *Preiser v. Rodriguez*, 411 U.S. 475, 499 (1973).

391. *Id.* (citing Note, *Developments, supra* note 32, at 1084). Justice Brennan's dissenting opinion in *Preiser* takes the position that a state prisoner who attacks conditions of confinement may utilize section 1983 or federal habeas corpus. 411 U.S. at 504-06, 508 (Brennan, J., dissenting). See also *Wolff v. McDonnell*, 418 U.S. 539, 579 (1974) ("The Court has already recognized instances where the same constitutional rights might be redressed under either form of relief.").

392. 411 U.S. at 500 ("But we need not in this case explore the appropriate limits of habeas corpus as an alternative remedy to a proper action under § 1983.").

393. *Bell v. Wolfish*, 441 U.S. 520, 526 n.6 (1979) (suit by federal pre-trial detainees).

394. See *Brennan v. Cunningham*, 813 F.2d 1 (1st Cir. 1987); *Coates v. Smith*, 746 F.2d 393 (7th Cir. 1984); *Boudin v. Thomas*, 732 F.2d 1107, *reh'g denied*, 737 F.2d 261 (2d Cir. 1984); *Jackson v. Carlson*, 707 F.2d 943 (7th Cir.), *cert. denied sub nom. Yeager v. Wilkinson*, 464 U.S. 861 (1983); *McCullum v. Miller*, 695 F.2d 1044 (7th Cir. 1982); *Ali v. Gibson*, 631 F.2d 1126 (3d Cir. 1980) (implicit holding), *cert. denied*, 449 U.S. 1129 (1981); *Warren v. Cardwell*, 621 F.2d 319 (9th Cir. 1980); *Streeter v. Hopper*, 618 F.2d 1178 (5th Cir. 1980); *Roba v. United States*, 604 F.2d 215 (2d Cir. 1979); *Kahane v. Carlson*, 527 F.2d 492, 498 (2d Cir. 1975) (Friendly, J., concurring); *Knell v. Bensinger*, 522 F.2d 720, 726 n.7 (7th Cir. 1975); *Willis v. Ciccone*, 506 F.2d 1011 (8th Cir. 1974); *Workman v. Mitchell*, 502 F.2d 1201, 1209 n.9 (9th Cir. 1974). *Contra Crawford v. Bell*, 599 F.2d 890 (9th Cir. 1979) (dismissing petition challenging terms and conditions of confinement); *United States v. Sisneros*, 599 F.2d 946 (10th Cir. 1979) (refusing to vacate sentence where trial court failed to advise defendant of possibility that special parole term could be lifetime); *Cook v. Hanberry*, 592 F.2d 248 (5th Cir.) (alleged mistreatment of prisoner not grounds for release from prison), *cert. denied*, 442 U.S. 932 (1979); *Rhodes v. Craven*, 425 F.2d 265 (9th Cir. 1970) (habeas corpus not proper remedy for prisoner who sought access to legal books); *Granville v. Hunt*, 411 F.2d 9 (5th Cir. 1969) (no allegation of facts showing either discrimination or conspiracy). The Fifth Circuit decision in *Granville* appears to be superceded by its more recent decision in *Streeter*, 618 F.2d 1178. The Ninth Circuit decisions in *Rhodes* and *Crawford* appear to be superceded by the decision in *Warren*, 621 F.2d 319.

395. Note, *Developments, supra* note 32, at 1082. See also *Jackson v. Carlson*, 707 F.2d 943, 946 (7th Cir.) ("[H]abeas corpus is the proper remedy for getting from a more to a less restrictive custody . . ."), *cert denied sub nom. Yeager v. Wilkinson*, 464 U.S. 861 (1983).

by the judicial relief. Current decisional law thus takes the correct position that condition of confinement claims may be asserted by state prisoners either under section 1983 or federal habeas corpus.³⁹⁶

4. Challenges to the place of confinement

There are two types of prisoner challenges to the place of confinement: (1) intra-prison challenges to solitary, segregated, or other disciplinary confinement seeking transfer back to the general prison population; and (2) inter-prison challenges to confinement in the present institution seeking transfer to another institution. The first type of claims generally are treated as attacks on the conditions of confinement within the scope of section 1983.³⁹⁷ Whether these claims are also within the scope of habeas corpus depends upon whether or not habeas may be employed to contest conditions of confinement.³⁹⁸

³⁹⁶. See *supra* note 394.

³⁹⁷. See *Preiser*, 411 U.S. at 508 (Brennan, J., dissenting). See also *Haines v. Kerner*, 404 U.S. 519 (challenging solitary confinement), *reh'g denied*, 405 U.S. 948 (1972); *Toussaint v. McCarthy*, 801 F.2d 1080, 1102-03 (9th Cir. 1986) (challenging relocation of prisoners within same facility), *cert. denied*, 107 S. Ct. 2462 (1987); *McKinnis v. Mosely*, 693 F.2d 1054, 1057 (11th Cir. 1982) ("Even if McKinnis prevails on all of his claims and receives all the relief he demands, the duration of his sentence will not be shortened by one moment."); *Campbell v. McGuider*, 580 F.2d 521 (D.C. Cir. 1978) (pre-trial detainee facility); *Sostre v. McGinnis*, 442 F.2d 178 (2d Cir. 1971) (en banc) (segregated confinement), *cert. denied*, 404 U.S. 1049 (1972). *Contra* *Streeter v. Hopper*, 618 F.2d 1178, 1181 (5th Cir. 1980) (dictum) ("Plaintiffs' original complaint, seeking release from the imposition of administrative segregation without due process, would be appropriately treated as a habeas corpus petition, requiring exhaustion of state judicial remedies.").

The Ninth Circuit in *Toussaint* describes *Boudin v. Thomas*, 732 F.2d 1107, 1111-12, *reh'g denied*, 737 F.2d 261 (2d Cir. 1984), as having "held that habeas corpus provided the exclusive remedy for obtaining an order compelling release from administrative detention." *Toussaint*, 801 F.2d at 1103 n.24. In *Boudin*, however, habeas corpus was the exclusive remedy and federal habeas corpus was not available because "[t]he prison officials were not acting under color of state law for the purposes of Boudin's complaint." *Boudin*, 732 F.2d at 1112 n.2. A transfer of a state prisoner within a prison does not work a deprivation of a liberty interest unless the state law specifies that transfers will not occur absent specified substantive predicates. *Hewitt v. Helms*, 459 U.S. 460, 468 (1983) ("It is plain that the transfer of an inmate to less amenable and more restrictive quarters for nonpunitive reasons is well within the terms of confinement ordinarily contemplated by a prison sentence.").

³⁹⁸. See *supra* notes 384-95. For cases holding that federal habeas corpus is available to prisoners who seek release from solitary or disciplinary confinement and transfer back to the general prison population, see, e.g., *Boudin v. Thomas*, 732 F.2d 1107, *reh'g denied*, 737 F.2d 261 (2d Cir. 1984); *Jackson v. Carlson*, 707 F.2d 943 (7th Cir.), *cert. denied sub nom. Yeager v. Wilkinson*, 464 U.S. 861 (1983); *McCollum v. Miller*, 695 F.2d 1044 (7th Cir. 1982). *Contra* *Toussaint v. McCarthy*, 801 F.2d 1080, 1103 (9th Cir. 1986) ("We do not believe that such relief falls within the traditional core of habeas corpus."), *cert. denied*, 107 S. Ct. 2462 (1987). *Boudin*, *Jackson*, and *McCollum* involved federal prisoners. *McCollum* makes the point that if confinement within a certain prison unit is unconstitutional, "the prisoner ought to have a remedy that gets him out of it, and habeas corpus is the normal remedy for one unlawfully confined." 695 F.2d at 1046.

It is established that the second type of claim may be asserted in a federal habeas corpus proceeding³⁹⁹ because a claim of unlawful confinement in the wrong institution is a claim of unlawful physical restraint. The more difficult issue is whether or not such a claim also may be asserted under section 1983.⁴⁰⁰ In *Humphrey v. Cady*,⁴⁰¹ a pre-*Preiser* case, the Supreme Court stated that the petitioner's claim that he was unlawfully committed to a state prison rather than a mental hospital was properly brought within the scope of federal habeas corpus.⁴⁰² With respect to the use of section 1983, the Court stated ambiguously that "some or all of petitioner's claims may be entitled to be treated as claims for relief under . . . section 1983, in which case no exhaustion is required."⁴⁰³

The few lower court decisions on this issue have reached different results. Of the decisions taking the position that section 1983 is available, one was decided pre-*Preiser*,⁴⁰⁴ another contains virtually no analysis,⁴⁰⁵ and two others are limited to their specific circumstances.⁴⁰⁶ In *Villa v. Frazen*,⁴⁰⁷ a prisoner was placed in a state medical facility following his conviction and sentencing. He claimed that he was receiving inadequate treatment and sought transfer to an adequate state medical facility. Under these specific circumstances, the district court found that the prisoner's claim could be asserted under section 1983 because his request did "not necessarily involve release from the state's custody, but rather placement in any constitutionally sufficient facility."⁴⁰⁸ The court read the plaintiff's complaint to contest the "conditions rather than the propriety of his custody."⁴⁰⁹

A similar approach was taken in *Swansey v. Elrod*,⁴¹⁰ where prisoners sought transfer to another institution. While recognizing that there was

399. *Preiser*, 411 U.S. at 486 (dictum); *Humphrey v. Cady*, 405 U.S. 504 (1972); *In re Bonner*, 151 U.S. 242 (1894); *Neal v. Director*, 684 F.2d 17 (D.C. Cir. 1982); *Warren v. Cardwell*, 621 F.2d 319 (9th Cir. 1980); *Creek v. Stone*, 379 F.2d 106 (D.C. Cir. 1967); *Kearney v. Dalsheim*, 586 F. Supp. 667 (S.D.N.Y. 1984); *Parson v. Keve*, 413 F. Supp. 111 (D. Del. 1976); *Leahy v. Estelle*, 371 F. Supp. 951 (N.D. Tex.), *aff'd*, 503 F.2d 1401 (5th Cir. 1974); *United States ex rel. Murray v. Owens*, 341 F. Supp. 722 (S.D.N.Y.), *rev'd on other grounds*, 465 F.2d 289 (2d Cir. 1972), *cert. denied*, 409 U.S. 1117 (1973).

400. In dicta, the *Preiser* Court stated that a prisoner's claim "that he is unlawfully confined in the wrong institution" is a grievance "that he is being unlawfully subjected to physical restraint" for which federal habeas corpus is available. 411 U.S. at 486 (citing *In re Bonner*, 151 U.S. 242 (1894) and *Humphrey v. Cady*, 405 U.S. 504 (1972)).

401. 405 U.S. 504 (1972).

402. The Court's recognition that the claim was properly asserted in a federal habeas proceeding is implicit in its discussion of the federal habeas corpus exhaustion requirement. *Preiser* cites *Humphrey* as an example of a habeas corpus proceeding. *Preiser*, 411 U.S. at 486.

403. *Humphrey*, 405 U.S. at 516 n.18.

404. *Edwards v. Schmidt*, 321 F. Supp. 68, 77 (W.D. Wis. 1971).

405. *Cooper v. Elrod*, 622 F. Supp. 373, 374 n.1 (N.D. Ill. 1985).

406. *Villa v. Franzen*, 511 F. Supp. 231 (N.D. Ill. 1981); *Swansey v. Elrod*, 386 F. Supp. 1138, 1142 (N.D. Ill. 1975).

407. 511 F. Supp. 231 (N.D. Ill. 1981).

408. *Id.* at 234 (emphasis in original).

409. *Id.*

410. 386 F. Supp. 1138, 1142 (N.D. Ill. 1975).

authority stating that habeas corpus was the proper remedy for prisoner challenges to the location of incarceration, the court found that the requested transfer was an incidental form of relief which was requested only if the conditions could not be corrected in the present place of confinement. If the conditions could be corrected in the existing institution the constitutional violations could be rectified without the necessity of transfer to another institution. Under these circumstances the court construed the complaint as an attack on the conditions of confinement within the scope of section 1983. *Villa* and *Swansey* are limited by their specific circumstances and, thus, do not answer the general question as to the availability of section 1983 to contest confinement in a particular penal institution.

Three other district court decisions take the contrary position and hold that prisoner claims for the right to be transferred to another institution fall within the scope of habeas corpus and not section 1983.⁴¹¹ This position is supported by *dicta* in the *Preiser* opinion.⁴¹² While the Court did not specifically state that habeas corpus is the *exclusive* federal remedy in these circumstances, the fact that it regards the relief as a form of release from confinement indicates that it views the claim as being within the "core" of habeas corpus and, therefore, beyond the scope of section 1983. Under this view, habeas corpus is the exclusive federal remedy to seek a transfer to another institution, except perhaps where a prisoner's request for transfer is merely incidental to an attack on prison conditions.

There is, however, a strong argument that section 1983 should be available to secure transfer to a different penal facility, at least when such a transfer would not bring about a loss of the *state's* jurisdiction to confine. Under these circumstances, the transfer would not result in either immediate or speedier release from confinement, but merely change the geographical location of confinement. Viewed in this light, the claim is analogous to an attack upon the conditions of confinement.

The significance of section 1983 to contest confinement in a particular prison has been greatly diminished as a result of three Supreme Court decisions.⁴¹³ In each case the Court recognized, without discussion, that section 1983 was the appropriate remedy for a prisoner allegedly deprived of procedural due process rights arising from the transfer from one institution to another.⁴¹⁴ In *Montanye* and *Meachum*, the Court ruled that "absent

411. *Kearney v. Dalsheim*, 586 F. Supp. 667 (S.D.N.Y. 1984); *Parson v. Keve*, 413 F. Supp. 111 (D. Del. 1976); *Leahy v. Estelle*, 371 F. Supp. 951 (N.D. Tex.), *aff'd*, 503 F.2d 1401 (5th Cir. 1974).

412. The Court stated that when a prisoner claims, "that he is unlawfully confined in the wrong institution, . . . his grievance is that he is being unlawfully subjected to physical constraint, and . . . habeas corpus has been accepted as the specific instrument to obtain release from such confinement." *Preiser v. Rodriguez*, 411 U.S. 475, 486 (1973). See *supra* note 398.

413. *Olim v. Wakinekona*, 461 U.S. 288 (1983); *Meachum v. Fano*, 427 U.S. 215, *reh'g denied*, 429 U.S. 873 (1976); *Montanye v. Haymes*, 427 U.S. 236 (1976). See also *Hewitt v. Helms*, 459 U.S. 460 (1983) (intra-prison nonpunitive transfers).

414. The availability of section 1983 to litigate prisoner procedural due process claims is discussed in the text, Section A(5) *infra*, at p. 70-74.

some right or justifiable expectation rooted in state law that he will not be transferred except for misbehavior or upon the occurrence of other specified events," the transfer of a prisoner does not work to deprive him of a protected liberty interest.⁴¹⁵ Because "[c]onfinement in any of the State's institutions is within the normal limits or range of custody which the conviction has authorized the State to impose," prison transfers do not deprive a prisoner of a liberty interest created directly by the Constitution.⁴¹⁶ The *Olim* court extended the rationale of *Meachum* and *Montanye*, which involved intra-state transfers, to inter-state transfers.⁴¹⁷

The liberty interests protected by procedural due process may be created by the Constitution or by state law, while "substantive due process rights are created only by the Constitution."⁴¹⁸ Therefore, while *Meachum*, *Montanye*, and *Olim* deal with procedural due process claims, those cases support the conclusion that inmates have no substantive due process right to be confined in any particular penal facility. These decisions have thus drastically limited the constitutional claims that prisoners may lodge against inter-prison transfers.⁴¹⁹

5. *Procedural due process claims*

A substantial portion of federal court prisoners' rights litigation consists of claims involving administrative procedural protections, including stan-

415. *Meachum*, 427 U.S. at 224-26; *Montanye*, 427 U.S. at 242.

416. *Meachum*, 427 U.S. at 225.

417. "Just as an inmate has no justifiable expectation that he will be incarcerated in any particular prison within a State, he has no justifiable expectation that he will be incarcerated in any particular State." *Olim*, 461 U.S. at 245.

Prison transfers can create serious harm. As one expert has observed:

Few things cause a prisoner greater grief. Such a transfer may send him far from home, family, and lawyers. Equally important, it may move him out of a prison where he has learned how to survive, what can get him into trouble, which guards and inmates to avoid, which are friends and allies; he may be in a useful educational or other program that is not available to him elsewhere or may have worked himself into a good job.

H. SCHWARTZ, *THE BURGER YEARS* 184 (Viking 1987).

418. *Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 229 (1985) (Powell, J., concurring).

419. See *Turner*, *supra* note 245, at 630 (after *Meachum* and *Montanye*, most section 1983 prison transfer cases are summarily dismissed). A prisoner who has been transferred from a prison to a mental hospital is deprived of a protected liberty interest. In *Vitek v. Jones*, 445 U.S. 480 (1980), the Court recognized, in the context of a section 1983 procedural due process claim, that the transfer of a prisoner to a mental hospital works a deprivation of liberty as defined by the Constitution because "involuntary commitment to a mental hospital is not within the range of conditions of confinement to which a prison sentence subjects an individual." *Id.* at 493 (citations omitted). Additionally, a prisoner who asserts that a prison transfer was in retaliation for the exercise of a constitutional right states a proper constitutional claim. See *Montanye*, 427 U.S. at 242, 244 n.* (Stevens, J., dissenting) (referring to transfers "not otherwise violative of the Constitution . . ."); *Shango v. Jurich*, 681 F.2d 1091, 1098 n.13 (7th Cir. 1982); *McDonald v. Hall*, 610 F.2d 16 (1st Cir. 1979); *Hohman v. Hogan*, 597 F.2d 490 (2d Cir. 1979); *Garland v. Polley*, 594 F.2d 1220 (8th Cir. 1979); *Buisse v. Hudkins*, 584 F.2d 223, 229 (7th Cir. 1978), *cert. denied*, 446 U.S. 916 (1979); *Haymes v. Montanye*, 547 F.2d 188 (2d Cir. 1976).

dards, notice and a hearing, and reasons for adverse determinations. These claims arise out of a wide variety of circumstances including the denial or revocation of good-time credits, denial or revocation of parole, revocation of probation, prison classification, denial of work release or home furloughs, segregated confinement, and transfers to other prisons.⁴²⁰

In *Preiser*, two of the three plaintiffs claimed that they were denied their right to procedural due process when their good-time credits were revoked.⁴²¹ The district court ordered the good-time credits restored, which entitled the prisoners to immediate release on parole.⁴²² While the Court held that this relief was within the exclusive domain of federal habeas corpus, the Supreme Court's subsequent decisions in *Wolff v. McDonnell*⁴²³ and *Gerstein v. Pugh*⁴²⁴ provide substantial, if not conclusive, support for the proposition that procedural due process claims that do not seek immediate or speedier release from prison may be asserted under section 1983.⁴²⁵

The overwhelming weight of lower federal court authority supports this conclusion.⁴²⁶ In *Williams v. Ward*,⁴²⁷ Judge Friendly persuasively presented

420. The Supreme Court has granted prisoners procedural due process protections in a variety of contexts. See, e.g., *Board of Pardons v. Allen*, 107 S. Ct. 2415 (1987) (parole release); *Greenholtz v. Nebraska Penal Inmates*, 442 U.S. 1 (1979) (parole release); *Wolff v. McDonnell*, 418 U.S. 539 (1974) (rescission of good-time credits); *Gagnon v. Scarpelli*, 411 U.S. 778 (1973) (parole revocation); *Morrissey v. Brewer*, 408 U.S. 471 (1972) (probation revocation). The Court's decisions in *Hudson v. Palmer*, 468 U.S. 517 (1984) and *Parratt v. Taylor*, 451 U.S. 527 (1981), which hold that in cases of random and unauthorized deprivations adequate state judicial remedies satisfy procedural due process, have made it more difficult for prisoners to succeed on their procedural due process claims.

421. Plaintiff Rodriguez asserted that he received no notice or hearing on the charges for which he had been punished and plaintiff Kritsky alleged that his summary punishment deprived him of good-time credits without due process of law. *Preiser v. Rodriguez*, 411 U.S. 475, 478, 481 (1973).

422. *Id.* at 481.

423. 418 U.S. 539 (1974).

424. 420 U.S. 103 (1975). See *supra* notes 223-34 and accompanying text for a discussion of *Wolff* and *Gerstein*.

425. In addition, a number of other Supreme Court decisions concerning the procedural due process rights of state prisoners seem to assume, without discussion, that the action was properly filed under section 1983. See *Board of Pardons v. Allen*, 107 S. Ct. 2415 (1987); *Olim v. Wakinekona*, 461 U.S. 238 (1983); *Hewitt v. Helms*, 459 U.S. 460 (1983); *Connecticut Bd. of Pardons v. Dumschat*, 452 U.S. 458 (1981); *Hughes v. Rowe*, 449 U.S. 5 (1980); *Vitek v. Jones*, 445 U.S. 480 (1980); *Enomoto v. Wright*, 434 U.S. 1052 (1978), *aff'g*, 467 F. Supp. 397 (N.D. Cal. 1976); *Meachum v. Fano*, 427 U.S. 215, *reh'g denied*, 429 U.S. 873 (1976); *Montanye v. Haymes*, 427 U.S. 236 (1976); *Baxter v. Palmigiano*, 425 U.S. 308 (1976). Two procedural due process actions were brought as habeas corpus proceedings, but the Court did not discuss the section 1983—habeas corpus issue in either case. *Gagnon v. Scarpelli*, 411 U.S. 778 (1973); *Morrissey v. Brewer*, 408 U.S. 471 (1972). See also *Fernandez v. Trias Monge*, 586 F.2d 848, 852 n.4 (1st Cir. 1978) (referring to habeas corpus as a "viable alternative"). *Preiser* refers to *Morrissey* as a claim within the scope of habeas corpus because the prisoner contested the revocation of probation which resulted in reincarceration, but *Preiser* did not analyze the procedural due process nature of the claim presented in *Morrissey*. 411 U.S. at 486.

426. *Georgevich v. Strauss*, 772 F.2d 1078 (3d Cir. 1985), *cert. denied*, 475 U.S. 1028 (1986);

a rationale in support of the availability of section 1983 to contest the constitutionality of prison procedures:

Although the relief sought by petitioner [i.e., procedures employed on applications for parole release] may improve his chances for parole, the question of his release and of the length of his confinement still lies within the sound discretion of the [parole] board, unlike *Preiser* where the restoration of good-conduct-time credits would have resulted automatically in the shortening of the prisoners' confinement.⁴²⁸

Prisoner claims that contest the absence or the sufficiency of the standards used by prison officials in making determinations, challenge the manner in which those determinations are made and, if successful, do not automatically terminate or shorten the length of confinement.⁴²⁹ Most courts, therefore, properly treat these claims as procedural due process claims that may be asserted under section 1983.⁴³⁰

There is a minority view that a claim for procedural protections is within the scope of habeas corpus because the procedural relief sought "[is] preparatory to the ultimate relief sought . . . release from confinement itself."⁴³¹

Walker v. Prisoner Review Bd., 694 F.2d 499 (7th Cir. 1982); Pope v. United States Parole Comm'n, 647 F.2d 125 (10th Cir. 1981); Chancery Clerk of Chicksaw County, Miss. v. Wallace, 646 F.2d 151 (5th Cir. 1981); Ross v. Meagan, 638 F.2d 646 (3d Cir. 1981); Fernandez v. Trias Monge, 586 F.2d 848, 852 n.4 (1st Cir. 1978); Inmates of Neb. Penal and Correctional Complex v. Greenholtz, 576 F.2d 1274 (8th Cir. 1978), *rev'd on other grounds*, 442 U.S. 1 (1979); Williams v. Ward, 556 F.2d 1143 (2d Cir.), *cert. dismissed*, 434 U.S. 944 (1977); Haymes v. Regan, 525 F.2d 540 (2d Cir. 1975); Pope v. Chew, 521 F.2d 400, 406 n.8 (4th Cir. 1975); Hiney v. Wilson, 520 F.2d 589 (2d Cir. 1975); Bradford v. Weinstein, 519 F.2d 728 (4th Cir. 1974), *vacated and remanded*, 423 U.S. 147 (1975); Gregory v. Wyse, 512 F.2d 378 (10th Cir. 1975); United States *ex rel.* Johnson v. Chairman of N.Y. State Bd. of Parole, 500 F.2d 925 (2d Cir. 1974) (statement of reasons for denial of parole), *vacated and remanded sub nom.* Regan v. Johnson, 419 U.S. 1015 (1974); Clutchette v. Procunier, 497 F.2d 809 (9th Cir. 1974). 427. 556 F.2d 1143 (2d Cir.), *cert. dismissed*, 434 U.S. 944 (1977).

428. *Id.* at 1150. See also Huggins v. Isenbarger, 798 F.2d 203 (7th Cir. 1986); *In re* United States Parole Comm'n, 793 F.2d 338, 348 (D.C. Cir. 1986); Georgevich v. Strauss, 772 F.2d 1078 (3d Cir. 1985), *cert. denied*, 475 U.S. 1028 (1986); Walker v. Prisoner Review Bd., 694 F.2d 499, 501 (7th Cir. 1982); Fernandez v. Trias Monge, 586 F.2d 848, 852 n.4 (1st Cir. 1978); Clutchette v. Procunier, 497 F.2d 809, 813 (9th Cir. 1974); McCray v. Dietz, 517 F. Supp. 787 (D.N.J. 1980); Haymes v. Regan, 394 F. Supp. 711, 713 (S.D.N.Y.), *aff'd as modified*, 525 F.2d 540 (2d Cir. 1975). Judge Friendly also took the position that a request for new procedural protections is a remedy outside the scope of federal habeas corpus. *Williams*, 556 F.2d at 1150-51. *But see Huggins*, 798 F.2d at 204.

429. See *In re* United States Parole Comm'n, 793 F.2d 338, 348 (D.C. Cir. 1986) (federal prisoner's challenge to parole release guidelines is not within the exclusive scope of federal habeas corpus).

430. Wright v. Cuyler, 624 F.2d 455 (3d Cir. 1980); Strader v. Troy, 571 F.2d 1263 (4th Cir. 1978); Tunin v. Ward, 78 F.R.D. 59 (S.D.N.Y. 1977); Cicero v. Olgati, 410 F. Supp. 1080 (S.D.N.Y. 1976).

431. Baskins v. Moore, 362 F. Supp. 187, 191 (D.S.C. 1973). Accord Huggins v. Isenbarger, 798 F.2d 203, 207 (7th Cir. 1986) (Easterbrook, J., concurring); Bradford v. Weinstein, 519 F.2d 728, 736 (4th Cir.) (Bryan, J., dissenting), *vacated and remanded*, 423 U.S. 147 (1975). In *Dickerson v. Walsh*, 750 F.2d 150, 153 (1st Cir. 1984), the court relied on the fact that "the

This view, however, misses the essential points: (1) that a prisoner who seeks procedural protections is not asking for immediate or speedier release; and (2) that the adjudication of the sufficiency of the procedural due process requirements does not attack the constitutionality of a prisoner's confinement.⁴³² In addition, as one commentator has observed, "[t]he 'ultimate object' ellipsis provide[s] no guidance, for every prisoner hopes at some point to secure his freedom."⁴³³

Some courts, principally in the Fifth Circuit, have taken a middle position and allow facial attacks on state procedures within the scope of section 1983. These courts, however, disallow claims for deficient procedures in a particular prisoner's case unless brought in a federal habeas corpus proceeding.⁴³⁴ These courts support this middle position as a "workable balance between *Preiser* and *Wolff*," and an acknowledgement that it is often difficult to determine "from the usual petition not only precisely what relief is sought but also what would be the result of that relief."⁴³⁵ This reasoning fails to recognize, however, that when procedural due process relief is sought, "as applied" procedural challenges, like facial procedural challenges, do not seek or require adjudications of entitlement to immediate or speedier release because

ultimate relief this petitioner seeks is release," in order to find the constitutional challenge to a state's post-conviction procedures within federal habeas corpus. The section 1983—federal habeas corpus distinction in the context of challenges to post-conviction procedures is discussed, *infra* notes 436-37 and accompanying text.

432. However, if the procedural relief requested will for "all intents and purposes" be tantamount to ordering release on parole, the claim might properly be considered one for habeas corpus. *Thomas v. Dietz*, 518 F. Supp. 794, 796 (D.N.J. 1981).

433. Comment, *Proper Forum*, *supra* note 6, at 1382.

434. *Serio v. Members of State Bd. of Pardons*, 821 F.2d 1112 (5th Cir. 1987); *Johnson v. Pfeiffer*, 821 F.2d 1120 (5th Cir. 1987); *Irving v. Thigpen*, 732 F.2d 1215 (5th Cir. 1984); *Jackson v. Torres*, 720 F.2d 877 (5th Cir. 1983); *Keenan v. Bennett*, 613 F.2d 127 (5th Cir. 1980); *Johnson v. Hardy*, 601 F.2d 172 (5th Cir. 1979); *Watson v. Briscoe*, 554 F.2d 650 (5th Cir. 1977); *Christianson v. Spalding*, 593 F. Supp. 500 (E.D. Wash. 1983); *Derrow v. Shields*, 482 F. Supp. 1144 (W.D. Va. 1980). *But see Williams v. McCall*, 531 F.2d 1247 (5th Cir. 1976) (claim of denial of interview to particular applicant for parole is within the scope of section 1983).

In *Staton v. Wainwright*, 665 F.2d 686 (5th Cir.), *cert. denied*, 456 U.S. 909 (1982), the court ruled that while claims of deficient procedures as applied to particular cases generally are within the scope of habeas corpus, section 1983 was available in the case at bar because the plaintiff had been released on parole and could not obtain effective relief in a habeas corpus proceeding. *See supra* notes 249-52 and accompanying text.

435. *Serio v. Members of State Bd. of Pardons*, 821 F.2d 1112, 1118 (5th Cir. 1987); *Derrow v. Shields*, 482 F. Supp. 1144, 1148 (W.D. Va. 1980). The Fifth Circuit employed similar reasoning in *Leonard v. Mississippi State Probation and Parole Bd.*, 509 F.2d 820 (5th Cir.), *cert. denied*, 423 U.S. 998 (1975). The *Leonard* court allowed plaintiffs to challenge the use of disciplinary records to determine parole release and other classifications in a section 1983 class action because "the specific and concrete effect of such an injunction on the status of each prisoner is highly speculative." *Id.* at 824. The court did not decide the section 1983—habeas corpus issue for the named plaintiff, noting only that the effect of granting the requested relief on the named plaintiff might be different than the effect on the class. *Id.* at 824 n.5. *See infra* notes 520-24 and accompanying text.

they leave the question of release with the appropriate prison officials. Thus, section 1983 should be available for both facial and "as applied" procedural due process claims, so long as these claims do not seek immediate or quicker release.

6. *Challenge to post-conviction review procedures*

Some prisoners have sought to challenge the constitutionality of a state's post-conviction review procedures in federal court. The prevailing view is that such claims are not within the jurisdiction of federal habeas corpus because this remedy is intended to provide a vehicle for contesting the constitutionality of state custody and does not authorize review of state post-conviction proceedings.⁴³⁶ An attack on the constitutional adequacy of a post-conviction proceeding is not an attack on the fact or duration of confinement because, even if successful, the prisoner would not be entitled to immediate or speedier release but only to enhanced post-conviction procedures.⁴³⁷

Because challenges to state post-conviction procedures are not within federal habeas corpus, there is obviously no section 1983—habeas corpus overlap to be reconciled. Moreover, there is no reason to exclude these constitutional claims from section 1983.⁴³⁸ The prisoners in such cases seek procedural due process protections from the federal courts, and thus the claims should be a proper subject of a section 1983 suit.⁴³⁹ In *Qualls v. Shaw*,⁴⁴⁰ for example, the Fifth Circuit ruled that the prisoner's request for

436. *Kirby v. Dutton*, 794 F.2d 245 (6th Cir. 1986); *Vail v. Procunier*, 747 F.2d 277 (5th Cir. 1984); *Lumbert v. Finley*, 735 F.2d 239 (7th Cir. 1984); *Mitchell v. Wyrick*, 727 F.2d 773 (8th Cir. 1984); *Williams v. Missouri*, 640 F.2d 140 (8th Cir. 1980), *cert. denied*, 451 U.S. 990 (1981); *Rheuark v. Shaw*, 547 F.2d 1257 (5th Cir. 1977); *Qualls v. Shaw*, 535 F.2d 318 (5th Cir. 1976); *Bradshaw v. Oklahoma*, 398 F. Supp. 838, 843 (E.D. Okla. 1975); *Stokley v. Maryland*, 301 F. Supp. 653 (D. Md. 1969).

437. *Kirby v. Dutton*, 794 F.2d 245, 248 (6th Cir. 1986); *Mitchell v. Wyrick*, 727 F.2d 773 (8th Cir. 1984); *Williams v. Missouri*, 640 F.2d 140, 144 (8th Cir. 1980), *cert. denied*, 451 U.S. 990 (1981); *Bradshaw v. Oklahoma*, 398 F. Supp. 838, 843 (E.D. Okla. 1975); *Stokley v. Maryland*, 301 F. Supp. 653, 657 (D. Md. 1969).

438. The *Bradshaw* court stated that complaints alleging defects in state post-conviction proceedings did not raise federal constitutional questions because "[t]here is no federal constitutional requirement that the state provide a means of post conviction review of state court convictions." *Bradshaw*, 398 F. Supp. at 843. This overly broad statement ignores the fact that errors of constitutional magnitude may occur in the course of post-conviction proceedings. *See, e.g., Douglas v. California*, 372 U.S. 353 (1963) (constitutional right of indigent to assigned counsel on appeal from judgment of conviction); *Griffin v. Illinois*, 351 U.S. 12 (1956) (constitutional right of indigent to trial transcript necessary to take appeal).

439. *Kirby v. Dutton*, 794 F.2d 245 (6th Cir. 1986) (ineffective assistance of counsel in collateral post-conviction action); *Palmer v. City of Chicago*, 755 F.2d 560 (7th Cir. 1985) (failure to preserve police "street files"); *Lumbert v. Finley*, 735 F.2d 239 (7th Cir. 1984) (denial of transcript needed to appeal); *Rheuark v. Shaw*, 547 F.2d 1257 (5th Cir. 1977) (denial of trial transcript needed to appeal); *Qualls v. Shaw*, 535 F.2d 318 (5th Cir. 1976) (denial of records to appeal).

440. 535 F.2d 318, 319 (5th Cir. 1976).

certain court records, allegedly necessary to institute collateral proceedings, was within section 1983 because, even if the prisoner prevailed in the action, "the court's opinion would not impinge in any manner on the validity of his criminal conviction, and therefore habeas corpus is not an appropriate remedy" ⁴⁴¹

The First Circuit, on the other hand, has reached the opposite result. In *Dickerson v. Walsh*, ⁴⁴² a prisoner challenged the constitutionality of the state's post-conviction review procedure. In an unusual twist, the prisoner asserted the claim in a federal habeas corpus proceeding but the state advocated the use of section 1983. ⁴⁴³ The court found that the claim could be asserted only in a habeas corpus proceeding after state remedies had been exhausted because (1) the "ultimate relief" sought was release, and (2) considerations of comity required that the state have the first opportunity to correct its own criminal procedures. ⁴⁴⁴ As noted above, the "ultimate relief" rationale is not persuasive and comity, by itself, should not suffice to place a claim within federal habeas corpus, especially where, as in *Dickerson*, the state itself advocated the use of section 1983. ⁴⁴⁵

In *Kirby v. Dutton*, ⁴⁴⁶ the Sixth Circuit specifically and persuasively rejected the analysis of *Dickerson*. The *Kirby* court reasoned that to come within the scope of habeas corpus

the petition must directly dispute the fact or duration of the confinement. Though the *ultimate* goal . . . is release from confinement, the result of habeas review of the specific issues before us [i.e., denial of effective assistance of counsel in the post-conviction proceeding] is not in any way related to the confinement. ⁴⁴⁷

It is true that granting the procedural relief requested will enable the prisoner to pursue and perhaps enhance the chances of immediate or speedier release. Any release, however, would not derive from the federal court order,

441. See also *Lumbert v. Finley*, 735 F.2d 239, 242 n.3 (7th Cir. 1984) (claimed denial of a transcript needed to appeal might be "characterized as a species of the conditions of confinement cases").

442. 750 F.2d 150, 152 (1st Cir. 1984).

443. *Id.* at 153 n.6. See *supra* note 161.

444. 750 F.2d at 153-54. See also *Borning v. Cain*, 754 F.2d 1151 (5th Cir. 1985) (viewed claim of denial of effective direct appeal in state court as a result of inadequate access to law library as attack on constitutionality of conviction).

445. See *supra* notes 432-33 and accompanying text for a discussion of the ultimate relief rationale. When dealing with abstention under *Younger v. Harris*, 401 U.S. 37 (1971), the Supreme Court has taken the position that "[i]f the State voluntarily chooses to submit to a federal forum, principles of comity do not demand that the federal court force the case back into the State's own system." *Ohio Bureau of Employment Serv. v. Hodory*, 431 U.S. 471, 480 (1977). Accord *Swisher v. Brady*, 438 U.S. 204, 213 n.11 (1978). See *supra* notes 260-67 and accompanying text for a discussion of federalism and comity under *Younger*.

446. 794 F.2d 245 (6th Cir. 1986).

447. *Id.* at 248 (citation omitted, emphasis in original). Accord *Qualls v. Shaw*, 535 F.2d 318, 319 (5th Cir. 1976).

but from a state court determination of the post-conviction proceeding.⁴⁴⁸ In this respect, challenges to state post-conviction procedures are analogous to procedural due process claims against prison administrative determinations. The one major difference between challenges to prison administrative determinations and post-conviction review procedures is that the latter may require federal court relief against the state judicial system, thereby bringing the claim within the potential grasp of *Younger v. Harris*⁴⁴⁹ abstention. The fact that a claim is within section 1983 does not of course mean that it is appropriate to grant relief that operates against a pending state judicial proceeding. A forceful argument can be made that *Younger* abstention normally should preclude federal court relief that interferes with state post-conviction proceedings. Under current Supreme Court decisional law, *Younger* may require abstention because the state is a party to these proceedings and especially important state interests concerning the proper functioning of a state's criminal justice system are implicated.⁴⁵⁰

The Seventh Circuit's decision in *Palmer v. City of Chicago*⁴⁵¹ demonstrates how *Preiser* and *Younger* abstention interact in this area.⁴⁵² In *Palmer*, the plaintiffs in subclass A had been convicted of felonies and sentenced in state court while the plaintiffs in subclass B were charged with felonies and were awaiting trial. The complaint sought injunctive relief to restrain the concealment and destruction of police "street files."⁴⁵³ The *Palmer* court found that the subclass A plaintiffs' request for injunctive relief to preserve the "street files" did not challenge the fact or duration of their confinement and thus fell within section 1983.⁴⁵⁴ The court noted, however, that once a

448. *Rheuark v. Shaw*, 547 F.2d 1257, 1259 (5th Cir. 1977). As the Seventh Circuit has stated:

To argue that the provision of the transcript might have resulted in a successful appeal of Lumbert's murder conviction, a new trial, and possible acquittal, and thereby would have indirectly affected the fact of his confinement, is to speculate in a Palsgrafian fashion that provides too tenuous a basis for the determination whether an action properly is characterized as an exclusive habeas corpus action.

Lumbert v. Finley, 735 F.2d 239, 242 (7th Cir. 1984).

449. 401 U.S. 37 (1971). See *supra* notes 260-67 and accompanying text.

450. See *supra* note 261.

451. 755 F.2d 560 (7th Cir. 1985).

452. For a discussion of the interaction of *Preiser* and *Younger*, see *supra* notes 260-67 and accompanying text.

453. The complaint specifically sought the following injunctive relief:

(a) to restrain the defendants from continuing their alleged practice of concealing exculpatory evidence contained in 'street files'; and (b) to preserve the existing street files, in order that the plaintiffs can meaningfully proceed with their post-conviction remedies and felony trials in Illinois state court, as well as their attempt under section 1983, to obtain a declaratory judgment, a permanent injunction, and damages.

755 F.2d at 569. A "street file" is a police investigative working file. *Id.* at 564.

454. *Id.* at 573. *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983), espoused a doctrine which required a realistic threat of future injury in order to have standing to obtain prospective relief. Under that doctrine, the subclass A plaintiffs were found to be without standing to challenge the concealment of exculpatory evidence contained in the street files because it was too speculative that they would be subjected to this practice in the future.

prisoner obtained his "street file," any subsequent attack upon the fact or duration of his imprisonment in federal court would be limited to habeas corpus relief.⁴⁵⁵ The subclass B plaintiffs who were awaiting trial did not fare as well. The court denied their claims for injunctive relief because they fell within the *O'Shea v. Littleton*⁴⁵⁶ branch of the *Younger* doctrine, which forbade federal courts from granting relief that would require an "ongoing federal audit" or "major continuing intrusion" into the daily conduct of state criminal proceedings.⁴⁵⁷

In sum, while challenges to the constitutionality of state post-conviction review procedures are not within the jurisdiction of federal habeas corpus and should be within the scope of section 1983, these claims will normally be denied under *Younger* abstention principles.

7. Challenges to extradition

It has been settled since 1885 that prior to being removed to the demanding state, a prisoner may employ a writ of habeas corpus to test the legality of extradition under the extradition clause of the Constitution and its implementing statute.⁴⁵⁸ In *Brown v. Nutsch*,⁴⁵⁹ the Eighth Circuit concluded that

455. 755 F.2d at 573.

456. 414 U.S. 488 (1974).

457. *Id.* at 500, 502. Judge Cudahy, in dissent, "fail[ed] to see how ordering the preservation of the files can in any way interfere with ongoing state proceedings." 755 F.2d at 582 (Cudahy, J., dissenting in part and concurring in part).

458. *Roberts v. Reilly*, 116 U.S. 80 (1885). See *Brown v. Nutsch*, 619 F.2d 758 (8th Cir. 1980). The extradition clause of the Constitution provides:

A Person charged in any State with treason, felony, or other crime, who shall flee from justice, and be found in another State, shall on demand of the executive authority of the State from which he fled, be delivered up, to be removed to the State having jurisdiction of the crime.

U.S. CONST. art. IV, § 2, cl. 1.

The clause is implemented by the Uniform Criminal Extradition Act, 18 U.S.C. § 3182 (1982). The clause is not self-executing because it does not specifically establish a procedure by which inter-state extradition is to take place. *California v. Superior Court*, 107 S. Ct. 2433, 2437-38 (1987). "Realizing that the procedural guidelines in the federal statute needed explanations, fifty-two states . . . adopted the [Uniform Criminal Extradition Act] which provides additional extradition procedures." *United States v. Pennsylvania State Police*, 548 F. Supp. 9, 14 (E.D. Pa. 1982).

The Supreme Court has stated that the extradition clause contemplates a summary and mandatory executive proceeding. . . . Once the governor has granted extradition, a court considering release on habeas corpus can do no more than decide (a) whether the extradition documents on their face are in order; (b) whether the petitioner has been charged with a crime in the demanding state; (c) whether the petitioner is the person named in the request for extradition; and (d) whether the petitioner is a fugitive.

Michigan v. Doran, 439 U.S. 282, 288-89 (1978). Accord *California v. Superior Court*, 107 S. Ct. 2433 (1987).

The *Doran* Court held that "once the governor of the asylum state has acted on a requisition for extradition based on the demanding state's judicial determination that probable cause

federal habeas corpus is the exclusive remedy prior to extradition. The court stated:

Prior to his removal to the demanding state, the charged party can only challenge his confinement by the asylum state authorities through the writ of habeas corpus. This would require exhaustion of state remedies. A section 1983 action is not available.⁴⁶⁰

This analysis is consistent with *Preiser's* central theme that when federal habeas corpus is available as a remedy, section 1983 is not. The specific habeas corpus remedy overrides the more general section 1983 remedy. The *Brown* court also recognized the settled rules that "[o]nce the prisoner has been returned to the demanding state, the writ of habeas corpus is no longer available to challenge his confinement upon grounds arising from conduct in the asylum state,"⁴⁶¹ and that a prisoner may not "attack the validity of his conviction in the demanding state on the basis of improper extradition."⁴⁶²

Brown is in accord with the prevailing view in other circuit courts of appeals which agree that a prisoner who has been returned to the demanding state may assert a violation of the extradition safeguards guaranteed by the extradition clause and its implementing statute pursuant to section 1983.⁴⁶³

existed, no further judicial inquiry may be had on that issue in the asylum state." 439 U.S. at 290. The concurring opinion in *Doran* pointed out that the majority failed to consider the application of the fourth amendment in this context. *Id.* at 290-98 (Blackmun, J., concurring). See also W. LAFAYE & J. ISRAEL, CRIMINAL PROCEDURE § 3.1(j), at 94 (1984). The extradition clause and its implementing statute do not give courts in the asylum state authority to inquire into the prison conditions of the demanding state. *Pacileo v. Walker*, 449 U.S. 86 (1980), *reh'g denied*, 450 U.S. 960 (1981).

459. 619 F.2d 758 (8th Cir. 1980).

460. *Id.* at 763 (citing *Preiser v. Rodriguez*, 411 U.S. 475, 489-90 (1973)). The pages referred to in *Preiser* do not discuss the extradition issue.

461. 619 F.2d at 763 (citing *Mahon v. Justice*, 127 U.S. 700, 706-08 (1888)). *Accord* *Siegel v. Edwards*, 566 F.2d 958, 960 (5th Cir. 1978); *Johnson v. Buie*, 312 F. Supp. 1349, 1351 (W.D. Mo. 1970).

462. 619 F.2d at 763 (citing *Frisbie v. Collins*, 342 U.S. 519, 522 (1952); *Ker v. Illinois*, 119 U.S. 436, 444 (1886)). In *Frisbie*, the Court restated "the rule announced in *Ker* . . . that the power of a court to try a person for crime is not impaired by the fact that he had been brought within the court's jurisdiction by reason of a 'forcible abduction.'" 342 U.S. at 522.

463. *Good v. Allain*, 823 F.2d 64, 67 (5th Cir. 1987); *Ross v. Meagan*, 638 F.2d 646, 649-50 (3d Cir. 1981); *Crumley v. Snead*, 620 F.2d 481 (5th Cir. 1980); *Brown v. Nutsch*, 619 F.2d 758 (8th Cir. 1980); *McBride v. Soos*, 594 F.2d 610 (7th Cir. 1979); *Wirth v. Surles*, 562 F.2d 319 (4th Cir. 1977), *cert. denied*, 435 U.S. 933 (1978); *Sanders v. Conine*, 506 F.2d 530 (10th Cir. 1974). *Contra* *Pressly v. Gregory*, 831 F.2d 514 (4th Cir. 1987); *Adams v. Cuyler*, 441 F. Supp. 556 (E.D. Pa. 1977), *vacated and remanded*, 592 F.2d 720 (3d Cir. 1979), *aff'd*, 449 U.S. 433 (1981); *Raffone v. Sullivan*, 436 F. Supp. 939 (D. Conn. 1977), *remanded*, 595 F.2d 1209 (2d Cir. 1979); *Hines v. Guthrey*, 342 F. Supp. 594 (W.D. Va. 1972); *Johnson v. Buie*, 312 F. Supp. 1349 (W.D. Va. 1970). The decisions recognizing the availability of section 1983 in this context have not focused upon the type of relief requested and apparently contemplate claims for money damages. After recognizing that extradition challenges may be asserted under section 1983, the court in *Good v. Allain*, 823 F.2d 64 (5th Cir. 1987), without explanation, stated that "challenges to extradition must be made by petition for a writ of habeas corpus where the permissible scope of the challenge is very narrow." *Id.* at 67.

Because habeas corpus is not available in these circumstances, to rule otherwise would effectively foreclose a prisoner "from any method of enforcing the extradition safeguards recognized by the availability of the writ of habeas corpus in the asylum state."⁴⁶⁴

The *Preiser* issue has not been discussed in the decisions dealing with the availability of section 1983 after removal of a prisoner to the demanding state.⁴⁶⁵ Rather, these decisions have focused on whether the extradition clause and its implementing statute create rights that a prisoner may enforce. The prevailing view in the federal appellate courts is that these provisions do create judicially enforceable federal rights.⁴⁶⁶

8. *Challenges to detainers*

Constitutional challenges to the imposition of detainers that affect the duration of confinement are within federal habeas corpus and not section 1983.⁴⁶⁷ By contrast, challenges to detainers that affect only the conditions of confinement may be asserted under section 1983.⁴⁶⁸

464. *Brown*, 619 F.2d at 763. This part of *Brown*, however, relied in part upon the Eighth Circuit's decision in *McCurry v. Allen*, 606 F.2d 795 (8th Cir. 1980), which was subsequently reversed by the United States Supreme Court in *Allen v. McCurry*, 449 U.S. 90 (1980). *Allen* rejected the Eighth Circuit's view that "every person asserting a federal right is entitled to one unencumbered opportunity to litigate that right in a federal district court . . ." 449 U.S. at 103. A more persuasive reason for recognizing the availability of section 1983 in this context is that if federal habeas corpus is not available, there is no overlap with section 1983 and no *Preiser* puzzle to solve.

465. *But see* *Pressly v. Gregory*, 831 F.2d 514, 518 (4th Cir. 1987) (claim challenging validity of extradition which was carried out does not lie under section 1983 but "is a thinly disguised version of his unresolved habeas petition").

466. *See supra* note 463. Violations of the procedural rights set forth in the Uniform Criminal Extradition Act, *supra* note 458, provide a basis for a section 1983 claim only when they also constitute violations of federal law. *Giano v. Martino*, 673 F. Supp. 92 (E.D.N.Y. 1987); *United States v. Pennsylvania State Police*, 548 F. Supp. 9, 16 (E.D. Pa. 1982). One authority has held "that the conviction of a fugitive for the crime for which he was extradited bars any action that he might otherwise have under Section 1983." *Martin v. Sams*, 600 F. Supp. 71, 72-73 (E.D. Tenn. 1984). A few decisions take the minority view that the extradition clause and its implementing statute were designed to benefit only the states and not the individual. *See, e.g., Sami v. United States*, 617 F.2d 755, 774 (D.C. Cir. 1979) (dictum); *Giano v. Martino*, 673 F. Supp. at 94.

467. *Veneri v. Missouri*, 734 F.2d 391 (8th Cir. 1984); *Mokone v. Fenton*, 710 F.2d 998 (3d Cir. 1983); *Stevens v. Heard*, 674 F.2d 320 (5th Cir. 1982). It has been noted that "[a] detainer is a warrant filed against a person already in custody with the purpose of insuring that, after the prisoner has completed his present term, he will be available to the authority which has placed the detainer." Note, *Developments, supra* note 32, at 1081 n.44. *See also* *United States v. Mauro*, 436 U.S. 340, 358 (1978); *Dickerson v. Louisiana*, 816 F.2d 220, 222 n.2 (5th Cir. 1987). The United States Supreme Court has ruled that failure to accord a prisoner the procedural protections afforded by the Interstate Agreement on Detainers is actionable under section 1983 because the Agreement is a federal law within the meaning of section 1983. *Cuyler v. Adams*, 449 U.S. 433 (1981).

468. *Stevens*, 674 F.2d 320.

In *Veneri v. Missouri*,⁴⁶⁹ the Eighth Circuit ruled that a claim for injunctive relief to remove a detainer in the form of a parole violation warrant is cognizable only in a habeas corpus proceeding and not under section 1983 because removal of the detainer affected the length of confinement. In *Mokone v. Fenton*,⁴⁷⁰ a prisoner who had been incarcerated in New Jersey was the subject of a detainer based upon a New York State court conviction. The prisoner sought injunctive relief to prohibit his transfer from New Jersey to New York after the conclusion of his New Jersey sentence on the ground that his New York conviction was invalid. The Third Circuit ruled that the claim sought speedier release and was within federal habeas corpus because the prisoner sought release from future confinement. The court observed in a footnote that section 1983 relief would be available where a detainer results in adverse prison conditions.⁴⁷¹

The Fifth Circuit carefully analyzed a series of detainer—conditions issues in *Stevens v. Heard*.⁴⁷² In *Stevens*, a prisoner who had been convicted and confined contested two detainers that had been lodged against him as a result of two other convictions. The sentences for the other convictions would not begin to run until he had served his present sentence. The prisoner claimed that the detainers were “improperly lodged against him because the sentences which the detainers represent should have already run,” and that he had been denied adequate medical care, emergency reprieves, and the opportunity to participate in various prison programs because of the outstanding detainers.⁴⁷³ He sought, *inter alia*, expungement of the detainers, promotion to the status of “State Approved Trusty, Class III,” an award of “retroactive overtime,” adequate medical care, damages for the denial of “emergency reprieves,” and an injunction prohibiting the prison officials from considering the existence of any detainer in determining eligibility for prison programs.⁴⁷⁴

The Fifth Circuit ruled that: (1) the request to expunge the detainers clearly challenged future confinement and, therefore, could be raised only in a habeas corpus proceeding;⁴⁷⁵ (2) the requests for promotion to the specified trusty status and application of retroactive overtime also should be raised in a habeas proceeding because, if granted, they would have the effect of shortening the prisoner’s confinement; (3) the claims for “emergency reprieves” and adequate medical care were within the scope of habeas corpus because they too would require the court to determine the validity of the

469. 734 F.2d 391 (8th Cir. 1984).

470. 710 F.2d 998 (3d Cir. 1983).

471. *Id.* at 1002 n.12 (dictum).

472. 674 F.2d 320 (5th Cir. 1982).

473. *Id.* at 323.

474. *Id.*

475. *Id.* at 323-24. For a discussion of expungement as a form of relief, see *infra* notes 504-18 and accompanying text.

detainers;⁴⁷⁶ but, (4) the request to enjoin prison officials from considering the detainers in determining eligibility for prison programs was within section 1983 because it did not contest the validity of the detainers but rather “the practice of considering any detainers in determining eligibility for prison programs, such as work release or trusty programs.”⁴⁷⁷ *Stevens* thus correctly recognized the distinction between challenges to detainers that may affect the fact or duration of confinement, which fall within the exclusive domain of habeas corpus, and those that relate to conditions of confinement, which are within the scope of section 1983.

9. *Other confinements: civil contempt, juvenile delinquents, mental patients*

The same principles that govern the section 1983—habeas corpus distinction for state prisoners also apply to constitutional claims asserted by those who have been held in civil contempt,⁴⁷⁸ juvenile delinquents,⁴⁷⁹ and mental patients.⁴⁸⁰ Because federal habeas corpus relief is available to contest custody growing out of civil proceedings,⁴⁸¹ the potential overlap with section 1983 applies whenever a person in “civil custody” asserts a constitutional claim that affects the fact or duration of confinement. As the Fourth Circuit has stated, “[a]lthough *Preiser* involved a criminal prison term, its holding is equally applicable to imprisonment for civil contempt.”⁴⁸²

Claims by mental patients warrant separate discussion. It is well established that federal habeas corpus is available to seek release from a mental insti-

476. The *Stevens* court also ruled that the claim for damages relating to these claims “should be brought only after he has sought habeas relief in state court to determine the validity of the detainers.” 674 F.2d at 324. This is consistent with the Fifth Circuit’s position, which reflects the majority view, that the nature of the relief sought should not control the section 1983—federal habeas corpus issue. See *supra* notes 237-48 and accompanying text.

477. 674 F.2d at 324.

478. *Leonard v. Hammond*, 804 F.2d 838 (4th Cir. 1986).

479. See, e.g., *Fernandez v. Trias Monge*, 586 F.2d 848 (1st Cir. 1978); *Mercado v. Rockefeller*, 502 F.2d 666 (2d Cir. 1974); *Cooper v. Elrod*, 622 F. Supp. 373 (N.D. Ill. 1985); *Coleman v. Stanziani*, 570 F. Supp. 679 (E.D. Pa. 1983), *appeal dismissed*, 735 F.2d 118 (3d Cir.), *cert. denied*, 469 U.S. 1037 (1984); *Robinson v. Leahy*, 401 F. Supp. 1027 (N.D. Ill. 1975); *Swansey v. Elrod*, 386 F. Supp. 1138 (N.D. Ill. 1975); *Edwards v. Schmidt*, 321 F. Supp. 68 (W.D. Wis. 1971).

480. See, e.g., *Chancery Clerk v. Wallace*, 646 F.2d 151 (5th Cir. 1981); *Johnson v. Robinson*, 509 F.2d 395, 397 n.7 (D.C. Cir. 1974) (dictum); *Project Release v. Prevost*, 463 F. Supp. 1033 (E.D.N.Y. 1978); *Goldy v. Beal*, 429 F. Supp. 640 (M.D. Pa. 1976) (three judge court); *Gomez v. Miller*, 341 F. Supp. 323 (S.D.N.Y. 1972) (three judge court), *aff’d*, 412 U.S. 914 (1973).

481. *Leonard v. Hammond*, 804 F.2d 838, 840 n.2 (4th Cir. 1986). Federal habeas corpus has been held inapplicable to claims of child custody. *Lehman v. Lycoming County Children’s Servs.*, 458 U.S. 502 (1982); *Hickey v. Baxter*, 800 F.2d 430, 431 (4th Cir. 1986); *Anderson v. Colorado*, 793 F.2d 262 (10th Cir. 1986).

482. *Leonard*, 804 F.2d at 840 n.2.

tution.⁴⁸³ Thus, when this relief is sought, habeas corpus is the exclusive federal remedy.⁴⁸⁴ The Supreme Court, without discussing the *Preiser* issue, has impliedly sanctioned the use of section 1983 by mental patients who seek damages for unconstitutional confinement in mental institutions,⁴⁸⁵ or who contest the conditions of confinement in such institutions,⁴⁸⁶ or who challenge the procedures surrounding civil commitment.⁴⁸⁷ Lower federal court decisions that discuss the section 1983—habeas corpus issue have sanctioned the use of section 1983 to contest the procedures or standards employed in determining whether or not an individual should be committed to a mental institution.⁴⁸⁸

The most extensive analysis of the *Preiser* issue in the civil commitment context is contained in the Fifth Circuit's decision in *Chancery Clerk v. Wallace*.⁴⁸⁹ In that case, the plaintiffs lodged a constitutional challenge against procedures the state employed to involuntarily commit individuals to state mental institutions. The court ruled that involuntarily confined patients may challenge the constitutionality of those procedures under section 1983 because the challenge is not a claim "which ask[s], or, if successful, would result in automatic release from confinement."⁴⁹⁰ The court acknowledged, however, that when the patient's claim does seek release from confinement, federal habeas corpus is the exclusive federal remedy and section 1983 may not be employed.⁴⁹¹

483. See *Buthy v. Commissioner of Mental Health*, 818 F.2d 1046 (2d Cir. 1987); *Souder v. McGuire*, 516 F.2d 820, 823 (3d Cir. 1975); *Johnson v. Robinson*, 509 F.2d 395 (D.C. Cir. 1974); *Hartman v. Scott*, 488 F.2d 1215 (8th Cir. 1973); *Lake v. Cameron*, 364 F.2d 657 (D.C. Cir.), cert. denied, 382 U.S. 863 (1965); *United States ex rel. Antczak v. Superintendent*, 354 F.2d 635 (7th Cir. 1965); *Williams v. Dalton*, 231 F.2d 646 (6th Cir. 1956); *Bension v. Meredith*, 455 F. Supp. 662 (D.D.C. 1978); *Miller v. Director*, 146 F. Supp. 674 (S.D.N.Y. 1956), *aff'd*, 243 F.2d 527 (2d Cir. 1957).

One commentator has argued that the restraints imposed by civil commitment "such as physical confinement or required regular visits to a doctor, are essentially similar to imprisonment or parole in their effect on the petitioner." Note, *Developments, supra* note 32, at 1073 n.5.

484. See *Chancery Clerk v. Wallace*, 646 F.2d 151, 155-56 (5th Cir. 1981).

485. *O'Connor v. Donaldson*, 422 U.S. 563 (1975).

486. *Youngberg v. Romeo*, 457 U.S. 307 (1982).

487. *Parham v. J.R.*, 442 U.S. 584 (1979).

488. *Chancery Clerk*, 646 F.2d at 157; *Project Release v. Prevost*, 463 F. Supp. 1033, 1038-39 (E.D.N.Y. 1978); *Goldy v. Beal*, 429 F. Supp. 640 (M.D. Pa. 1976) (three judge court); *Gomez v. Miller*, 341 F. Supp. 323 (S.D.N.Y. 1972) (three judge court), *aff'd*, 412 U.S. 914 (1973). *Gomez* was decided by the district court pre-*Preiser* but was affirmed by the Supreme Court post-*Preiser*. See Note, *Preiser v. Rodriguez in Retrospect, supra* note 6, at 1074. In *Goldy*, the court stated that "[b]ecause plaintiffs in this case do not request release from custody, they are not required to proceed by habeas corpus." 429 F. Supp. at 646.

489. 646 F.2d 151 (5th Cir. 1981).

490. *Id.* at 157.

491. The *Chancery Clerk* court stated:

Specific challenges to the constitutionality of confinement in state institutions fall within the ambit of habeas corpus procedures, 28 U.S.C. 2254(a). This statutory

The *Chancery Clerk* court's analysis distinguished challenges to civil commitment from challenges to state court convictions. Once a court determines that a criminal conviction is unconstitutional, there is no authority for continuing to retain the defendant in custody. The court observed, on the other hand, that involuntary commitment is not final, like a criminal judgment would be, but is part of a continuing process and that a patient is entitled to release only when he or she is no longer mentally ill.⁴⁹² The *Chancery Clerk* court cited no authority to support those statements and at least some of the broad pronouncements that accompanied the court's conclusion are of questionable validity.⁴⁹³ The results reached by the *Chancery Clerk* court nevertheless, were correct, namely: (1) that a mental patient's request for release from confinement is exclusively within federal habeas corpus; and (2) that, like prisoners, mental patients who seek procedural protections are contesting neither the fact nor the duration of their confinement and, therefore, may assert those claims under section 1983.

B. Nature of Relief Requested

We have seen that either the nature of the relief sought *or* the nature of the claim asserted may bring a claim within the exclusive purview of federal habeas corpus. A claim for immediate or speedier release is, under *Preiser* and its multifarious progeny, within the exclusive realm of federal habeas corpus. Additionally, a claim that brings into question the validity of con-

provision requires that state remedies must be exhausted before release from confinement can be considered by the federal court.

Id. at 155. Section 1983 is thus unavailable if the challenge is "to the legality of the confinement as such." *Id.* at 155-56.

492. The court reasoned as follows:

[By] contrast, there can be no absolute right to be released from confinement in a mental institution for a person found to have been committed under procedures which violate the inmate's civil rights. Equating the invalidity of a criminal conviction with a finding that involuntary commitment procedures are invalid overlooks a salient and controlling consideration. A criminal conviction results in a final and settled binding judgment. Confinement of those who are victims of mental illness is not a final and binding event; it is part of a process. There is no sentence and there is no specific duration of confinement. A person who has been involuntarily confined for mental illness is entitled to release when he or she is no longer mentally ill. The law also recognizes there can be confinements of the mentally ill under most summary procedures when it is necessary to protect a person from self injury or injury to others.

Id. at 157.

493. *Chancery Clerk* implies that a state may continue to confine an individual who has been confined in violation of her procedural due process rights. Other than in emergency circumstances, however, a state may not summarily confine an individual in a mental institution. *See, e.g., Vitek v. Jones*, 445 U.S. 480, 494-96 (1980) (requiring notice and a hearing when a prisoner is transferred to a mental hospital); *Addington v. Texas*, 441 U.S. 418, 427-29 (1979) (due process requires that standard of proof in civil commitment proceeding be greater than preponderance of the evidence standard); *Humphrey v. Cady*, 405 U.S. 504, 509 (1972) (commitment to a mental hospital works a "massive curtailment of liberty").

finement, though not requesting immediate or speedier release, falls within federal habeas corpus under the majority view which focuses on the nature of the claim rather than on the specific relief requested.⁴⁹⁴ We have seen that most courts take the position that claims for damages that implicate the constitutionality of confinement may not be asserted under section 1983 until the federal habeas corpus exhaustion requirement has been satisfied.⁴⁹⁵

Examination of three specific types of claims for relief warrant separate treatment: declaratory relief, the expungement of records, and class action relief.

1. Declaratory relief

A request for a declaratory judgment that a conviction, sentence, detainer, or denial of good-time credits is unconstitutional calls into question the validity of the fact or length of confinement and may be asserted only in a habeas corpus proceeding.⁴⁹⁶ For example, in *Ybarra v. Reno Thunderbird*,⁴⁹⁷ the plaintiff sought a declaratory judgment that his constitutional right to receive exculpatory *Brady*⁴⁹⁸ materials had been violated. The court ruled that this claim was outside the scope of section 1983 and within federal habeas corpus because the *Brady* claim called into question the constitutionality of the conviction. While the plaintiff did not specifically request release from confinement, declaratory relief in plaintiff's favor would show that release was required.⁴⁹⁹

494. See *supra* notes 237-48 and accompanying text.

495. See *supra* notes 291-317 and accompanying text. As previously discussed, the section 1983 damages claim might be barred by *res judicata* if a person first exhausts all of his or her state remedies. See *supra* note 301 and accompanying text.

496. See *Offet v. Solem*, 823 F.2d 1256 (8th Cir. 1987); *Feeney v. Auger*, 808 F.2d 1279 (8th Cir. 1986) (length of sentence); *Hanson v. Heckel*, 791 F.2d 93 (7th Cir. 1986) (good time credits); *Ybarra v. Reno Thunderbird*, 723 F.2d 675, 682 (9th Cir. 1984); *Stevens v. Heard*, 674 F.2d 320 (5th Cir. 1982) (length of sentence); *Cavett v. Ellis*, 578 F.2d 567 (5th Cir. 1978) (conviction); *Wiggins v. Hess*, 531 F.2d 920 (8th Cir. 1976) (sentence); *Riley v. Kaye*, 664 F. Supp. 926 (D.N.J. 1987) (indictment and conviction); *Flaherty v. Nadjari*, 548 F. Supp. 1127 (E.D.N.Y. 1982) (conviction); *Fast v. Wead*, 509 F. Supp. 744 (N.D. Ohio 1981) (attack on trial procedures). See also *Monk v. Secretary of Navy*, 793 F.2d 364 (D.C. Cir. 1986) (declaratory judgment not available to test constitutionality of court martial conviction; habeas corpus is exclusive remedy).

There is a split of opinion on whether a declaratory judgment that a conviction is unconstitutional may be issued under section 1983 when the federal court plaintiff is not in custody, as in cases of expired sentence and fine only convictions. Compare *Cavett v. Ellis*, 578 F.2d 567 (5th Cir. 1978) (declaratory judgment under section 1983 available) with *Hanson v. Circuit Court*, 591 F.2d 404 (7th Cir.) *cert. denied*, 444 U.S. 907 (1979) (section 1983 action unavailable). For a full discussion of the availability of section 1983 to test the constitutionality of a conviction when the federal plaintiff is not in custody, see *supra* notes 319-45 and accompanying text.

497. 723 F.2d 675 (9th Cir. 1984).

498. *Brady v. Maryland*, 373 U.S. 83 (1963).

499. *Ybarra*, 723 F.2d at 682.

On the other hand, in *Wolff v. McDonnell*,⁵⁰⁰ the Supreme Court ruled that a federal court may issue a declaratory judgment under section 1983, "as a predicate to a damage award" based on the unconstitutionality of the procedures used in a prison disciplinary case. There is no reason, however, to allow a declaratory judgment only when it is a predicate to a damages award. Other language in *Wolff* supports the conclusion that a declaratory judgment determining the constitutionality of prison administrative procedures may be sought under section 1983.⁵⁰¹

Under the majority approach, which focuses on the nature of the prisoner's claim, a request for declaratory relief that a conviction, sentence, or denial of good-time credits is unconstitutional may not be litigated under section 1983 because the relief implicates the fact or length of confinement.⁵⁰² Conversely, prisoner claims for declaratory relief which do not implicate the fact or length of confinement, such as those which contest procedural deficiencies or the conditions of confinement, may be asserted under section 1983.

2. *Expungement*

It is established that the federal courts have the inherent power to order the expungement of arrest records, convictions, and other records relating to criminal proceedings,⁵⁰³ and that this may be an appropriate form of equitable relief under section 1983.⁵⁰⁴ There are circumstances, however,

500. 418 U.S. 539, 554-55 (1974).

501. The Court stated that a federal court, in a section 1983 action, may "determine the validity of the procedures for revoking good-time credits and . . . fashion appropriate remedies for any constitutional violations ascertained, short of ordering the actual restoration of good-time already cancelled." *Wolff v. McDonnell*, 418 U.S. 539, 555 (1974). See *supra* notes 291-317 and accompanying text for a discussion of *Wolff*.

502. See *supra* note 496.

503. See *Bromley v. Crisp*, 561 F.2d 1351 (10th Cir. 1977), *cert. denied*, 435 U.S. 908 (1978); *United States v. Doe*, 556 F.2d 391 (6th Cir. 1977); *United States v. McMains*, 540 F.2d 387 (8th Cir. 1976); *United States v. Linn*, 513 F.2d 925 (10th Cir.), *cert. denied*, 423 U.S. 836 (1975). The power to expunge should be exercised only in narrow circumstances. *Bromley*, 561 F.2d at 1364; *Rogers v. Slaughter*, 469 F.2d 1084, 1085 (5th Cir. 1972). For examples of cases granting expungement, see *United States v. McLeod*, 385 F.2d 734 (5th Cir. 1967) (arrest records expunged where arrests made to disrupt voter registration drives); *Bilick v. Dudley*, 356 F. Supp. 945 (S.D.N.Y. 1973) (arrests violated freedom of speech and freedom of association); *Wheeler v. Goodman*, 306 F. Supp. 58 (W.D.N.C. 1969) (three judge court) (arrest record expunged where arrest made pursuant to unconstitutional vagrancy statute), *vacated*, 401 U.S. 987 (1971); *Hughes v. Rizzo*, 282 F. Supp. 881 (E.D. Pa. 1968) (arrest records expunged where arrests designed to harass those with unpopular ideologies). For examples of cases denying expungement, see *United States v. Schnitzer*, 567 F.2d 536 (2d Cir. 1977), *cert. denied*, 435 U.S. 907 (1978); *United States v. McMains*, 540 F.2d 387 (8th Cir. 1976); *Rogers v. Slaughter*, 469 F.2d 1084 (5th Cir. 1972).

504. See *Maurer v. Members of Los Angeles County Sheriff's Dep't*, 691 F.2d 434, 437 (9th Cir. 1982); *Hall v. Unknown Named Agents*, 647 F. Supp. 136 (N.D.N.Y. 1986), *aff'd in part, rev'd in part*, 825 F.2d 642 (2d Cir. 1987); *Bilick v. Dudley*, 356 F. Supp. 945 (S.D.N.Y. 1973); *Wheeler v. Goodman*, 306 F. Supp. 58 (W.D.N.C. 1969) (three judge court), *vacated*, 401 U.S. 987 (1971); *Hughes v. Rizzo*, 282 F. Supp. 881 (E.D. Pa. 1968); C. ANTIEAU, *FEDERAL CIVIL RIGHTS ACTS* 378 (2d ed. 1980).

where a state prisoner's request to expunge a record may be made only in a federal habeas corpus proceeding.

A request to expunge a record of conviction, detainer, or prison disciplinary record which, if granted, will terminate or shorten confinement, may be made only in a federal habeas corpus proceeding.⁵⁰⁵ In *Crow v. Kelly*,⁵⁰⁶ the Eighth Circuit considered a petition for mandamus to order the Director of the Federal Bureau of Investigation to remove the prisoner's state court conviction and arrest record that the petitioner claimed were unconstitutional. The *Crow* court ruled that the petitioner must first exhaust state remedies, because the prayer for relief implicated the constitutionality of a state court conviction and comity required that the state authorities be given the first opportunity to pass upon the constitutionality of the conviction.⁵⁰⁷

In *Stevens v. Heard*,⁵⁰⁸ the Fifth Circuit ruled that the prisoner's request to expunge two detainers that had been lodged against him as a result of two convictions must be asserted in a federal habeas corpus proceeding. The sentences for those two convictions were not to begin until the prisoner had completed his present sentence. Stevens urged, however, that the later two sentences should have started to run when the convictions were entered.⁵⁰⁹ The court determined that habeas corpus was the exclusive remedy because Stevens's request "clearly" challenged any future confinement arising from the two convictions.⁵¹⁰

Two Seventh Circuit decisions written by Judge Posner analyzed requests to expunge prison disciplinary records. In *McCollum v. Miller*,⁵¹¹ three federal prisoners sought to have their disciplinary infractions expunged because they were concerned that the infractions might delay their release on parole. Under federal regulations, it is within the Parole Board's discretion to determine whether a disciplinary infraction should delay parole.⁵¹² The section 1983—habeas corpus *Preiser* issue was not directly involved because the case involved federal rather than state prisoners. However, the *McCollum* court's analysis is pertinent to the *Preiser* issue in the context of state prisoners. If the court had determined that habeas corpus was the appropriate remedy for federal prisoners because the expungement related to the duration of confinement, then it would also be the appropriate remedy for state prisoners.

505. *Del Raine v. Carlson*, 826 F.2d 698 (7th Cir. 1987); *Larsen v. Sielaff*, 702 F.2d 116 (7th Cir.), *cert. denied*, 464 U.S. 956 (1983); *Stevens v. Heard*, 674 F.2d 320 (5th Cir. 1982); *McCollum v. Miller*, 695 F.2d 1044 (7th Cir. 1982); *Crow v. Kelley*, 512 F.2d 752 (8th Cir. 1975).

506. 512 F.2d 752 (8th Cir. 1975).

507. The *Crow* court cited *Preiser v. Rodriguez*, 411 U.S. 475 (1973), preceded simply by a "cf." signal. 512 F.2d at 755 n.6. The *Crow* opinion did not address whether the requested expungement would affect confinement.

508. 674 F.2d 320 (5th Cir. 1982).

509. *Id.* at 321.

510. *Id.* at 323-24.

511. 695 F.2d 1044 (7th Cir. 1982).

512. 28 C.F.R. § 2.36(b) (1987).

This would preclude state prisoners from utilizing section 1983 for a similar challenge.

In fact, the *McCullum* court analyzed the issue by reference to *Preiser* principles but did not definitively resolve it. The court found the case somewhat similar to the procedural due process—parole release cases which take the position that section 1983 is the appropriate remedy because, while the procedures sought might enhance the prisoner's chances for parole, the release decision remains with the parole board.⁵¹³ The court indicated, on the other hand, that the procedural due process cases might be distinguishable because the *McCullum* regulations, which specifically authorized the Parole Board to consider disciplinary infractions, made it "likely, though not certain, that getting a disciplinary finding expunged will accelerate a prisoner's eligibility for parole and hence the date when he is paroled."⁵¹⁴

The Seventh Circuit asserted that the availability of habeas corpus should depend upon the probability that expunging the disciplinary infraction will shorten the period of confinement. The record was not sufficiently developed on this point, so the court remanded the action to the district court for a determination of the probable impact of an expungement on the length of imprisonment.⁵¹⁵

In the Seventh Circuit's subsequent decision, *Larsen v. Sielaff*,⁵¹⁶ the court observed that while expungement of prison disciplinary records had been ordered in at least one section 1983 case, albeit without discussion,⁵¹⁷ it was more commonly ordered in habeas corpus proceedings. Moreover, the court ruled that federal habeas corpus is the exclusive remedy where, as in *Larsen*, "the plaintiff wants to expunge the disciplinary proceeding from his record in order to shorten his present or future imprisonment."⁵¹⁸

513. The *McCullum* court quoted from the decision in *Williams v. Ward*, 556 F.2d 1143 (2d Cir. 1977), *cert. dismissed*, 434 U.S. 944 (1977). For a full analysis of the procedural due process cases, see *supra* notes 421-35 and accompanying text.

514. 695 F.2d at 1047.

515. "The *McCullum* court concluded:

If the evidence developed on remand shows that the outcome of the disciplinary proceedings against these three inmates are reasonably likely to delay their parole and thus lengthen their imprisonment, then presumably, by analogy to *Preiser*, their suits can be maintained as habeas corpus proceedings.

Id. A Lexis search uncovered no proceedings on remand.

516. 702 F.2d 116 (7th Cir.), *cert. denied*, 464 U.S. 956 (1983).

517. *McKinnis v. Mosely*, 693 F.2d 1054, 1055 (11th Cir. 1982) (per curiam). In *McDonnell v. Wolff*, 483 F.2d 1059, 1064 (8th Cir. 1973), *aff'd in part, rev'd in part*, 418 U.S. 539 (1974), the Eighth Circuit stated that it would be appropriate for the district court to order the expungement of prison misconduct determinations that were arrived at in violation of procedural due process rights. The Supreme Court did not specifically address the expungement issue, but did state that the district court could fashion "appropriate remedies" for any constitutional violations other than the actual restoration of good-time credits. *Wolff v. McDonnell*, 418 U.S. 539, 555 (1974).

518. *Larsen v. Sielaff*, 702 F.2d 116, 118 (7th Cir.), *cert. denied*, 464 U.S. 956 (1983). In *Hall v. Unknown Named Agents*, 647 F. Supp. 136 (N.D.N.Y. 1986), *aff'd in part, rev'd in*

3. Class action relief

There are few cases that discuss the effect of a class action on the *Preiser* issue. This perhaps is due to the fact that the section 1983—habeas corpus puzzle should be solved in the same manner in both class and individual actions. It seems apparent that if the relief sought by a class of inmates requires a determination of the validity of the fact or duration of confinement, under *Preiser* the claim could not be litigated under section 1983, but only in a habeas corpus proceeding.⁵¹⁹ There may be cases, however, where the named plaintiff's claim implicates the validity of the fact or duration of confinement though the claims of the class do not. In *Leonard v. State Probation and Parole Board*,⁵²⁰ the plaintiffs challenged the use of disciplinary records to determine whether or not a prisoner was eligible for parole release, work release, and other classifications. The Fifth Circuit found that at least insofar as the unnamed class members were concerned, the action was properly brought under section 1983 because "the specific and concrete effect" of class injunctive relief on each prisoner's fact or length of confinement "is highly speculative."⁵²¹

With respect to named plaintiff Leonard's individual claims, the court recognized that because the effect of injunctive relief in his particular case might be different than its effect on the class "[a]rguably, the principle stated in *Preiser* may affect the relief to which Leonard would, individually, be entitled in this case."⁵²² The *Leonard* court found it unnecessary to reach this point because the court ruled against the plaintiffs on the merits. It did determine, however, that the fact that Leonard might not be entitled to relief under section 1983 did not mean that he could not represent a class of prisoners seeking relief under section 1983.⁵²³

part, 825 F.2d 642 (2d Cir. 1987), the court held that section 1983 was the appropriate remedy to expunge a prison disciplinary record. The court reasoned that there was "no request for transfer or for an amendment of the duration of the confinement, nor [was] there any circumvention of the requirements for a habeas corpus petition." *Id.* at 141.

519. On the question of class habeas relief, see *supra* note 137. If class habeas relief was allowed, it would be, presumably, limited only to those persons who satisfied the federal habeas corpus exhaustion requirement. To rule otherwise would thwart the comity concerns behind the exhaustion rule.

520. 509 F.2d 820 (5th Cir.), cert. denied, 423 U.S. 998 (1975).

521. *Id.* at 824. See also *Tucker v. Montgomery Bd. of Comm'rs*, 410 F. Supp. 494, 501 (M.D. Ala. 1976) (dictum) ("Even if Tucker's suit is viewed as more in the nature of a habeas corpus claim, his status as class representative permits him to proceed under 1983 on behalf of the class.").

522. 509 F.2d at 824. See also *Project Release v. Prevost*, 463 F. Supp. 1033, 1039 (E.D.N.Y. 1978) (because habeas corpus was not available to those class members who may be committed in the future, section 1983 found proper).

523. The *Leonard* court analogized the situation to one in which a named plaintiff is permitted to represent a class even though she is not entitled to individual relief because her claim became moot after the action was commenced. 509 F.2d at 824 n.5. See *United States Parole Comm'n v. Geraghty*, 445 U.S. 388 (1980); *Franks v. Bowman Transp. Co.*, 424 U.S. 747 (1976); *Sosna*

The *Leonard* court's distinction between the individual and class claims resulted from its emphasis on the probable impact of the relief requested upon the fact or duration of confinement.⁵²⁴ Because this impact may well differ for the named plaintiff and the class, a court faced with a *Preiser* issue in a class action context should inquire into whether or not the individual and class claims require a separate analysis.

C. *Preiser in the State Courts*

Because the state courts have concurrent jurisdiction with the federal courts over section 1983 claims,⁵²⁵ the issue may arise whether a state prisoner may proceed under section 1983 or must proceed by a state habeas corpus proceeding. This raises the basic question of whether or not *Preiser* principles apply to state court actions. The decision in *Preiser* does not directly apply to state court proceedings. The Supreme Court in *Preiser* plainly viewed the case as requiring the reconciliation of two federal court remedies and relied heavily upon the federalism—comity concerns that underlie the federal habeas corpus exhaustion requirement. These concerns, which are implicated when a *federal* court is asked to grant relief that affects the fact or duration of *state* confinement, are simply not present when a state prisoner seeks relief in state court.

This does not necessarily mean that all state prisoner constitutional claims may be asserted in a state court section 1983 action. For one thing, certain state prisoner constitutional claims are not within the scope of section 1983. We have seen, for example, that release from confinement is not a form of relief available under section 1983.⁵²⁶ In addition, even where a prisoner does not seek release from confinement, but seeks only monetary relief, there is substantial authority that Congress intended federal habeas corpus as the

v. Iowa, 419 U.S. 393 (1975).

The fact that the effect of the relief upon the named plaintiff significantly differs from the effect upon the class may raise questions as to whether or not the plaintiff is a member of the class which she seeks to represent, whether the plaintiff is an adequate class representative, and whether the named plaintiffs' claims are typical of the claims of the class. FED. R. CIV. P. 23(a)(3), (4). That the named plaintiff must be a member of the class she purports to represent is not explicitly mentioned in Rule 23 but is generally thought to be "self-evident." 7A C. WRIGHT, A. MILLER & M. KANE, FEDERAL PRACTICE AND PROCEDURE § 1761, 132-33 (1986).

524. The distinction drawn by the *Leonard* court between the individual and class claims seems similar to the Fifth Circuit's distinction between facial procedural due process challenges, which it finds to be within the scope of section 1983, and individual "as applied" procedural due process claims, which it holds are not within section 1983. See *supra* notes 434-35 and accompanying text. In both the class action and procedural due process contexts, the Fifth Circuit's distinction is based upon the probable impact of the requested relief on the fact or duration of confinement.

525. *Maine v. Thiboutot*, 448 U.S. 1, 10-11 (1980); *Martinez v. California*, 444 U.S. 277, 283 n.7 (1980). For an extensive analysis of state court section 1983 actions, see Steinglass, *The Emerging State Court 1983 Action: A Procedural Review*, 38 U. MIAMI L. REV. 381 (1984).

526. See *supra* note 117 and accompanying text.

exclusive congressional remedy to attack state convictions.⁵²⁷ Under this view, a state court section 1983 claim would not lie to contest the constitutionality of a state court conviction. It is also arguable that the states have sufficient interests in requiring that claims relating to the fact or duration of confinement be asserted in a state court habeas corpus proceeding, the procedure historically employed to resolve such claims, rather than in a civil rights action.⁵²⁸

Few state court decisions discuss the section 1983—state habeas corpus issue. Those that do rely upon *Preiser* to resolve the conflict.⁵²⁹ For example, the Alabama Supreme Court has ruled that the revocation of good-time credits may not be challenged under section 1983 because *Preiser* held that the proper method by which a prisoner could challenge the revocations as a violation of due process is through a petition for a writ of habeas corpus.⁵³⁰ Three other state courts have ruled, consistent with *Preiser*, that section 1983 is available to contest the conditions of confinement.⁵³¹

527. See *supra* notes 291-317 and accompanying text.

528. M. SCHWARTZ & J. KIRKLIN, *supra* note 4, at 191 (citing, Steinglass, *supra* note 525, at 513-14). Professor Steinglass distinguishes state court attacks on convictions and sentences, where the state interest in requiring the utilization of habeas corpus is greatest, from attacks on administrative action, where he argues that the state interest in requiring resort to habeas corpus is insufficient to outweigh the interest in making section 1983 available to vindicate constitutional wrongs. Steinglass, *supra* note 525, at 514.

529. *William v. Davis*, 386 So. 2d 415 (Ala. 1980); *State v. Lincoln*, 3 Haw. App. 107, 643 P.2d 807 (1982); *Beaver v. Chaffee*, 2 Kan. App. 2d 364, 579 P.2d 1217 (1978); *Mitchem v. Melton*, 167 W. Va. 21, 277 S.E.2d 895 (1981). Courts have relied upon *Preiser* to hold that requests for good-time credits must be made in a state habeas corpus proceeding rather than in a declaratory judgment action, *Polsgrove v. Bureau of Corrections*, 549 S.W.2d 834 (Ky. Ct. App. 1977); that a challenge to a disciplinary penalty that may affect eligibility for parole is within the scope of state habeas corpus, *Calkins v. May*, 97 Idaho 402, 545 P.2d 1008 (1976); that a prisoner's claim for wrongful detention of his money is not within state habeas corpus, *Foster v. Maynard*, 222 Kan. 506, 565 P.2d 285 (1977); and that state administrative remedies must be exhausted before resort is made to a state habeas corpus proceeding, *In re Muszalski*, 52 Cal. App. 3d 125, 125 Cal. Rptr. 286 (1975).

529. *William v. Davis*, 386 So. 2d 415 (Ala. 1980); *State v. Lincoln*, 3 Haw. App. 107, 643 P.2d 807 (1982); *Beaver v. Chaffee*, 2 Kan. App. 2d 364, 579 P.2d 1217 (1978); *Mitchem v. Melton*, 167 W. Va. 21, 277 S.E.2d 895 (1981). Courts have relied upon *Preiser* to hold that requests for good-time credits must be made in a state habeas corpus proceeding rather than in a declaratory judgment action, *Polsgrove v. Bureau of Corrections*, 549 S.W.2d 834 (Ky. Ct. App. 1977); that a challenge to a disciplinary penalty that may affect eligibility for parole is within the scope of state habeas corpus, *Calkins v. May*, 97 Idaho 402, 545 P.2d 1008 (1976); that a prisoner's claim for wrongful detention of his money is not within state habeas corpus, *Foster v. Maynard*, 222 Kan. 506, 565 P.2d 285 (1977); and that state administrative remedies must be exhausted before resort is made to a state habeas corpus proceeding, *In re Muszalski*, 52 Cal. App. 3d 125, 125 Cal. Rptr. 286 (1975).

530. *Williams v. Davis*, 386 So. 2d 415, 417 (Ala. 1980).

531. *State v. Lincoln*, 3 Haw. App. 107, 113-14, 643 P.2d 807, 813 (1982); *Beaver v. Chaffee*, 2 Kan. App. 2d 364, 368, 579 P.2d 1217, 1221 (1978) (challenge to conditions of confinement may be made "by way of injunction or declaratory judgment as well as by habeas corpus"); *Mitchem v. Melton*, 167 W. Va. 21, 24, 277 S.E.2d 895, 897 (1981) ("Thus, *Preiser* may be viewed as establishing that ordinarily a 1983 action is appropriate where complaint is made to the conditions of confinement and not its duration.").

VII. PROCEDURAL ISSUES: *RES JUDICATA* AND THE STATUTE OF LIMITATIONS

The section 1983—federal habeas corpus dichotomy has given rise to specific procedural problems concerning *res judicata* and the statute of limitations. While principles of *res judicata* and collateral estoppel are generally applicable in federal court section 1983 actions, it is settled law that *res judicata* does not apply in federal habeas corpus proceedings.⁵³² The *Preiser* issue has given rise to three specific preclusion issues: (1) the effect of a state court habeas corpus ruling on a federal court section 1983 claim; (2) the effect of a federal court federal habeas corpus ruling on a section 1983 claim; and (3) the collateral estoppel impact of a federal habeas corpus ruling that favors a state inmate upon the prior state criminal conviction and adverse state habeas corpus determination.

If a claim is found to be within the scope of federal habeas corpus, a prisoner must first exhaust state remedies. Once the exhaustion requirement is satisfied, a prisoner may not only pursue the federal habeas corpus remedy in order to secure immediate or quicker release, but may also be able to seek damages in federal court under section 1983.⁵³³ If a prisoner seeks relief under section 1983, an issue may arise as to the preclusive effect of the state habeas corpus ruling on the section 1983 claim.

The little authority that exists takes the position that a state court habeas corpus ruling may be entitled to preclusive effect in a federal section 1983 action. This is the position taken by Justice Brennan in his *Preiser* dissent,⁵³⁴ in *dictum* in *Wolff v. McDonnell*,⁵³⁵ and in the one circuit court decision that has given the issue serious consideration.⁵³⁶ The Ninth Circuit determined in *Silverton v. Department of Treasury*⁵³⁷ that there is no reason to give state habeas corpus decisions less preclusive effect than any other state court

532. See *supra* notes 127-28 and accompanying text.

533. One caveat is that the prisoner's claim must be within the scope of section 1983.

534. "[I]f traditional principles of *res judicata* are applicable to suits under 1983 . . . the prior conclusion of the state court suit would effectively set at naught the entire federal court proceeding." *Preiser*, 411 U.S. at 511 (Brennan, J., dissenting).

535. "[O]ne would anticipate that normal principles of *res judicata* would apply in such circumstances." *Wolff v. McDonnell*, 418 U.S. 529, 555 n.12 (1974) (citing *Preiser*, 411 U.S. at 499 n.14, where the Court expressly contemplated simultaneous litigation of claims properly brought under section 1983 in federal court while fact or length of confinement claims are litigated in state court habeas corpus proceedings).

536. *Silverton v. Department of Treasury*, 644 F.2d 1341 (9th Cir.), *cert denied*, 454 U.S. 895 (1981). *Accord* *Hamlin v. Warren*, 664 F.2d 29, 35 (4th Cir. 1981) (Winter, J., dissenting), *cert. denied*, 455 U.S. 911 (1982); *Coe v. Ziegler*, 657 F. Supp. 182 (S.D. Ohio 1987); *Rullo v. Rodriguez*, 604 F. Supp. 366 (S.D.N.Y. 1985); Note, *Developments, supra* note 32, at 1353.

Of course, because *res judicata* does not apply in federal habeas corpus proceedings, a section 1983 judgment is not entitled to preclusive effect in a federal habeas corpus proceeding. *Heirens v. Mizell*, 729 F.2d 449 (7th Cir.), *cert. denied*, 469 U.S. 842 (1984); *Maggard v. Moore*, 613 F. Supp. 150 (W.D. Mo. 1985).

537. 644 F.2d 1341, 1346 (9th Cir.), *cert. denied*, 454 U.S. 895 (1981).

decision because state habeas corpus courts should be presumed to apply appropriate constitutional standards, at least where there was a full and fair hearing.⁵³⁸

Under the full faith and credit statute,⁵³⁹ the extent to which the state habeas decision is entitled preclusive effect in a federal section 1983 action depends upon the state law of preclusion.⁵⁴⁰ Thus, in *Rullo v. Rodriguez*,⁵⁴¹ the court ruled that a New York state court denial of a habeas corpus petition barred a federal section 1983 claim where the prisoner sought to litigate the same constitutional claim in each proceeding. The state court ruling barred the section 1983 claim because, under New York's law of preclusion, differences in legal theory and remedy do not deprive the initial ruling of *res judicata* effect.⁵⁴²

A federal habeas corpus ruling also may be entitled to preclusive effect in a federal section 1983 action.⁵⁴³ In *Williams v. Ward*,⁵⁴⁴ Judge Friendly concluded that a judgment in a federal habeas corpus proceeding may be entitled to preclusive effect in a section 1983 action as to the issues litigated and determined in the habeas corpus proceeding.⁵⁴⁵ Unlike federal habeas corpus proceedings which are exempt from *res judicata*, there is no counterpart rule that exempts the determinations in federal habeas proceedings from preclusive effect in section 1983 actions.⁵⁴⁶

538. The *Silverton* court stated:

that because of the nature of a state habeas proceeding, a decision actually rendered should preclude an identical issue from being relitigated in a subsequent section 1983 action if the state court afforded a full and fair opportunity for the issue to be heard and determined under federal standards The mere difference in the form of relief is unimportant.

Id. at 1347.

539. 28 U.S.C. § 1738 (1982).

540. See, e.g., *Migra v. Warren City School Dist. Bd. of Educ.*, 465 U.S. 75 (1984).

541. 604 F. Supp. 366 (S.D.N.Y. 1985). *Accord* *Coe v. Ziegler*, 657 F. Supp. 182 (S.D. Ohio 1987).

542. See *Migra*, 465 U.S. 75 (1984).

543. *Warren v. McCall*, 709 F.2d 1183 (7th Cir. 1983); *Williams v. Ward*, 556 F.2d 1143 (2d Cir.), *cert. dismissed*, 434 U.S. 944 (1977); *Lucien v. Seidenfeld*, 584 F. Supp. 1269 (N.D. Ill. 1984); Comment, *Collateral Estoppel*, *supra* note 120, at 1505.

While not discussing the issue in terms of preclusion, *dicta* in *Imbler v. Pachtman*, 424 U.S. 409, 428 n.27 (1976), indicates that a ruling in favor of a state prisoner in a federal habeas corpus proceeding should not operate in his favor in a section 1983 suit because "using habeas corpus as a 'door opener' for a subsequent civil rights action would create the risk of injecting extraneous concerns into that proceeding." *Id.* There may be other reasons for finding offensive collateral estoppel inapplicable to the ruling in a federal habeas corpus proceeding. See *Garza v. Henderson*, 779 F.2d 390 (7th Cir. 1985) (denying offensive collateral estoppel effect to federal habeas corpus ruling in federal court section 1983 action because defendants in the 1983 action were not parties to the habeas corpus proceeding).

544. 556 F.2d 1143, 1153 (2d Cir.), *cert. dismissed*, 434 U.S. 944 (1977).

545. The fact that the remedies sought in the two proceedings are different "does not alone suffice to differentiate the underlying claims." *Williams*, 556 F.2d at 1154.

546. *Allen v. McCurry*, 449 U.S. 90, 98 n.12 (1980). Because the *Williams* court had doubts as to whether the claims in the two sections were identical, it decided to rest its decision on the merits rather than *res judicata*. *Williams*, 556 F.2d at 1155.

If a state court habeas corpus ruling is adverse to the prisoner, but the prisoner subsequently prevails in a federal habeas corpus proceeding, there is authority that the federal judgment would "relieve him of the collateral estoppel effect of the state judgment with respect to an ancillary civil rights claim."⁵⁴⁷ In fact, offensive collateral estoppel might attach to a federal habeas corpus ruling in the prisoner's favor in a subsequent section 1983 action.⁵⁴⁸

Under the majority view, which focuses on the nature of the claim rather than the specific relief sought, a claim for damages that calls into question the validity of the fact or duration of confinement may not be litigated under section 1983 until state remedies have been exhausted.⁵⁴⁹ When a claim is within federal habeas corpus and a state prisoner has failed to exhaust state remedies, the proper disposition is normally dismissal of the federal proceeding.⁵⁵⁰ There is a danger, however, that while a prisoner is pursuing state remedies, the statute of limitations may be running on the section 1983 damages claim.⁵⁵¹ The courts uniformly agree that some action must be taken by the federal district court to guard against the running of the limitations period. The courts do not agree, however, on the nature of the appropriate action.⁵⁵²

There are a number of circuit court decisions which instruct the district courts to decide whether, in light of the applicable state statute of limitations rules, the section 1983 action should be dismissed without prejudice or held in abeyance pending the exhaustion of state remedies.⁵⁵³ Some courts take

547. *Hamlin v. Warren*, 664 F.2d 29, 32 (4th Cir. 1981), *cert. denied*, 455 U.S. 911 (1982); *Thomas v. Dietz*, 518 F. Supp. 794, 799 (D.N.J. 1981); Comment, *Collateral Estoppel*, *supra* note 120, at 1502-03. The *Hamlin* court reasoned that "[w]hen applicable, the doctrine [of collateral estoppel] precludes relitigation; however, if relitigation of the substantive issues is not precluded the doctrine does not prevent a grant of any appropriate remedy." *Hamlin*, 664 F.2d at 32.

548. *But see supra* note 543.

549. *See supra* notes 237-48 and accompanying text.

550. *Rose v. Lundy*, 455 U.S. 509 (1982); *Leonard v. Hammond*, 804 F.2d 838, 843 (4th Cir. 1986).

551. Because there is no federal limitations period for section 1983 claims, the federal courts borrow the governing period from state law that applies to state personal injury actions. *Wilson v. Garcia*, 471 U.S. 261 (1985).

552. *See Jones v. Shankland*, 800 F.2d 77, 82-83 (6th Cir. 1986), *cert. denied*, 107 S. Ct. 2177 (1987).

553. *Serio v. Members of State Bd. of Pardons*, 821 F.2d 1112, 1119 (5th Cir. 1987); *Borning v. Cain*, 754 F.2d 1151 (5th Cir. 1985); *Jackson v. Torres*, 720 F.2d 877, 879 (5th Cir. 1983); *Clark v. Williams*, 693 F.2d 381, 382 (5th Cir. 1982); *Williams v. Dallas County Comm'rs*, 689 F.2d 1212 (5th Cir. 1982), *cert. denied*, 461 U.S. 935 (1983); *Franklin v. Webb*, 653 F.2d 362, 364 (8th Cir. 1981); *Richardson v. Fleming*, 651 F.2d 366, 373 (5th Cir. 1981); *Watson v. Briscoe*, 554 F.2d 650, 652 (5th Cir. 1977); *Connor v. Pickett*, 552 F.2d 585, 587 (5th Cir. 1977); *Fulford v. Klein*, 529 F.2d 377, 382 (5th Cir. 1976), *adhered to*, 550 F.2d 342 (5th Cir. 1977) (en banc). *See also Jones v. Shankland*, 800 F.2d 77 (6th Cir. 1986), *cert denied*, 107 S. Ct. 2177 (1987); *Hadley v. Werner*, 753 F.2d 514 (6th Cir. 1985); *Courtney v. Reeves*, 635 F.2d 326 (5th Cir. 1981).

the position that the section 1983 action should be stayed,⁵⁵⁴ while others hold that the claim should be dismissed without prejudice.⁵⁵⁵ In determining whether to dismiss or to stay the action, the state's tolling rules are a crucial consideration,⁵⁵⁶ because if the state rule tolls the section 1983 claim during the pendency of the federal habeas corpus proceeding, there is no need to hold the section 1983 action in abeyance.⁵⁵⁷ A state limitations provision that tolls the limitations period for an imprisoned individual "protect[s] plaintiff against a statute of limitations bar as to any civil rights claims which he may eventually wish to assert after full pursuit of habeas corpus relief."⁵⁵⁸

VIII. CONCLUSION

The *Preiser* opinion ranged far beyond the specific issue presented to the Court and suggests a noble intent on the part of the Justices to assist the lower federal courts in resolving future section 1983—federal habeas corpus conflicts. Given the seemingly endless situations where the need to choose between section 1983 and habeas corpus arises, it is not surprising, and

554. *Jones v. Smith*, 835 F.2d 175, 176 (8th Cir. 1987); *Offet v. Solem*, 823 F.2d 1256 (8th Cir. 1987); *Bailey v. Ness*, 733 F.2d 279 (3d Cir. 1984); *Hamlin v. Warren*, 664 F.2d 29, 32 (4th Cir. 1981), *cert. denied*, 455 U.S. 911 (1982); *Guerro v. Mulhearn*, 498 F.2d 1249, 1252 (1st Cir. 1974); *Mastracchio v. Ricci*, 498 F.2d 1257 (1st Cir. 1974), *cert. denied*, 420 U.S. 909 (1975); *Flaherty v. Nadjari*, 548 F. Supp. 1127 (E.D.N.Y. 1982); *Thomas v. Dietz*, 518 F. Supp. 794, 800 (D.N.J. 1981).

In *Hadley v. Werner*, 753 F.2d 514 (6th Cir. 1985), the court stated that the correct disposition was to stay the section 1983 action, but nevertheless affirmed the district court's dismissal without leave "to refile his section 1983 claim if and when he establishes, through a petition for a writ of habeas corpus, that he was denied [his constitutional rights.]" *Id.* at 516. For a discussion of *Hadley*, see *Jones v. Shankland*, 800 F.2d 77, 82-83 (6th Cir. 1986), *cert. denied*, 107 S. Ct. 905 (1987).

In a case involving the *Younger* doctrine, the Supreme Court recently ruled that "even if the *Younger* doctrine requires abstention here, the District Court has no discretion to dismiss rather than to stay claims for monetary relief that cannot be redressed in the [pending] state proceeding." *Deakins v. Monaghan*, 108 S. Ct. 523, 529 (1988).

555. *Pheler v. Schoen*, 537 F.2d 970, 972 (8th Cir.), *cert. denied*, 429 U.S. 984 (1976); *Still v. Nichols*, 412 F.2d 778 (5th Cir. 1969); *Riley v. Kaye*, 664 F. Supp. 926 (D.N.J. 1987); *Christianson v. Spalding*, 593 F. Supp. 500 (E.D. Wash. 1983).

556. State tolling rules govern federal section 1983 actions, so long as they do not conflict with the policies of section 1983. *Board of Regents v. Tomanio*, 446 U.S. 478 (1980).

557. *Crump v. Lane*, 807 F.2d 1394, 1401 n.8 (7th Cir. 1986); *Hanson v. Heckel*, 791 F.2d 93, 97 (7th Cir. 1986); *Hernandez v. Spencer*, 780 F.2d 504, 505 (5th Cir. 1986); *Williams v. Dallas County Comm'rs*, 689 F.2d 1212 (5th Cir. 1982), *cert. denied*, 461 U.S. 935 (1983); *Grundstrom v. Darnell*, 531 F.2d 272 (5th Cir. 1976); *Meadows v. Evans*, 529 F.2d 385, 386 (5th Cir. 1976), *adhered to*, 550 F.2d 345 (5th Cir.), *cert. denied*, 434 U.S. 969 (1977); *Fulford v. Klein*, 529 F.2d 377, 382 (5th Cir. 1976), *adhered to*, 550 F.2d 342 (5th Cir. 1977) (en banc); *Still v. Nichols*, 412 F.2d 778 (1st Cir. 1969).

558. *Grundstrom v. Darnell*, 531 F.2d 272, 273 (5th Cir. 1976). See also *Hernandez v. Spencer*, 780 F.2d 504 (5th Cir. 1986); *Still v. Nichols*, 412 F.2d 778 (1st Cir. 1969). But see *Higley v. Department of Corrections*, 835 F.2d 623 (6th Cir. 1987) (state rule tolling claims during imprisonment is inconsistent with section 1983).

Preiser should not be faulted, for failing to forecast all or even most of the specific issues.

The Supreme Court is at fault, however, for failing to establish a meaningful framework and guidance for resolving the myriad of section 1983—habeas corpus controversies. Fifteen years after *Preiser*, several fundamental questions concerning the scope of federal habeas corpus and the interplay between the section 1983 and habeas corpus remedies remain unresolved. “Core,” “essence,” or “heart” of habeas corpus is not a sufficiently instructive concept when the right to present a federal constitutional claim to a federal court is at stake. As a result, litigators and the lower federal courts have been trapped in a quagmire of confusing and inconsistent case law. This is particularly unfortunate because clarity is so important when the issues are the appropriate federal remedial device to secure redress for a constitutional violation and the steps necessary to secure access to that remedy.

The fault does not lie entirely at the Court’s doorstep. Theoretically, the solution to any *Preiser* puzzle, involving as it does the need to reconcile overlapping federal remedies, should be found in congressional intent. But such intent does not always exist and Congress has shown no inclination to clear the waters. The courts are thus left to speculate as to what Congress thought about issues it did not think about at all. When congressional intent is not available, perhaps the best a court can do is to attempt to determine whether, in a particular case, Congress’s desire to provide immediate access to the federal courts under section 1983, or its concerns for federalism and comity underlying the habeas corpus exhaustion requirement, should prevail.⁵⁵⁹

This Article has attempted to sort out the issues, analyze the case law, identify the trouble spots, and suggest solutions. Fifteen years of uncertainty and confusion is long enough. It is up to Congress and the Supreme Court finally to provide the rosetta stone for solving *Preiser* puzzles.

559. See *Offet v. Solem*, 823 F.2d 1256, 1262 (8th Cir. 1987) (Arnold, J., dissenting).

