

## St. John's Law Review

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Volume 48  
Number 1 *Volume 48, October 1973, Number 1*

Article 3

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August 2012

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#### Recommended Citation

Flannery, John (1973) "Habeas Corpus Bores A Hole In Prisoners' Civil Rights Actions--An Analysis of Preiser v. Rodriquez," *St. John's Law Review*. Vol. 48 : No. 1 , Article 3.

Available at: <https://scholarship.law.stjohns.edu/lawreview/vol48/iss1/3>

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# HABEAS CORPUS BORES A HOLE IN PRISONERS' CIVIL RIGHTS ACTIONS — AN ANALYSIS OF *PREISER v. RODRIGUEZ*

JOHN FLANNERY\*

Jurisdictional questions, while not always interesting unto themselves, can have serious substantive effects. Until recently, both the writ of habeas corpus and the Civil Rights Act of 1871 provided a means for prisoners to challenge unconstitutional prison conditions. Both remedies had evolved from different origins with different purposes but both remedies had arrived at a point of concurrent jurisdiction on condition questions. Although their development suggested no sound basis for putting the constitutional rights protected by one remedy on a higher plane there were definite advantages in resorting to the Civil Rights Act because it was, in terms of scope and speed, a more effective remedy. The Supreme Court in its recent decision, *Preiser v. Rodriguez*,<sup>1</sup> has severely limited a prisoner who challenges certain conditions to one remedy, habeas corpus. The development of these two remedies belies the Court's conclusion, and it is the purpose of this article to discuss the development and implications of this recent ruling.

## I. OUTLINE OF THE ISSUE

The writ of habeas corpus,<sup>2</sup> referred to by Chief Justice Marshall in 1807 as "The Great Writ,"<sup>3</sup> is generally understood, but especially so by prisoners, as a means to attack the legitimacy of one's confinement by attacking the validity of one's sentence or conviction. The relief available is release. There is one significant limitation when employing this device. This limitation is born of comity between the federal and state governments, and is called "exhaustion."<sup>4</sup> If the prisoner applying for this "Great Writ" is a state prisoner, he must first resort to the state courts for relief before the federal court will

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<sup>1</sup> *Preiser v. Rodriguez*, 411 U.S. 475 (1973).

<sup>2</sup> Habeas corpus, originally a writ at common law, is now provided for by statute, enabling state prisoners to obtain relief pursuant to 28 U.S.C. §§ 2241, 2254 (1970), and federal prisoners to obtain relief pursuant to 28 U.S.C. § 2255 (1970), by means of a motion to vacate judgment.

<sup>3</sup> *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 95 (1807).

<sup>4</sup> This requirement was set forth early. *Ex parte Royall*, 117 U.S. 241 (1886). Subsequently, exhaustion as a prerequisite for federal habeas corpus jurisdiction was codified. See 28 U.S.C. § 2254(b)-(c) (1970). See text accompanying notes 24-32 *infra*.

consider his application; the prisoner must "exhaust" available state judicial remedies. The state is therefore first given an opportunity to an exhausting requirement.

A prisoner's concern for release compares only with one other concern — how he is treated while in prison. It is true that the scope of habeas corpus has expanded so that the writ may be used to scrutinize the conditions of confinement; the Civil Rights Act of 1871<sup>5</sup> is however more appropriate to the task. This Act, originally a remedy to post bellum discrimination, has been accepted, albeit reluctantly, as a vehicle to examine questionable prison practices.<sup>6</sup> It provides relief for one who has been deprived "under color" of state law of "any rights, privileges, or immunities secured by the Constitution of the United States."<sup>7</sup> It has dealt with a plethora of prison problems, although these are not its sole concern.<sup>8</sup> The Civil Rights Act recommends itself for, among other reasons, its speed; the statute does not require the exhaustion of state judicial or administrative remedies.<sup>9</sup> Nor does its nature permit abstention.<sup>10</sup> There have been cases in which the prisoners' civil rights petitions were mere shams, when prisoners have challenged the validity of their sentence with the ultimate object of obtaining release without fulfilling the exhaustion requirements.<sup>11</sup> This sham petition is quite different from the one we will be discussing.

In our problem, the prisoner does not challenge the validity of his sentence. He petitions when his individual civil rights have been violated but the appropriate relief includes relief normally associated with the "Great Writ." Confusing the type of relief requested with the circumstances of the injury has caused the problem that is *Preiser*. This confusion results in no small part due to the overlap of the two

<sup>5</sup> Act of April 20, 1871, ch. 22, § 1, 17 Stat. 13, *codified in* 42 U.S.C. § 1983 (1970).

<sup>6</sup> See text accompanying notes 54, 55, 57 *infra*.

<sup>7</sup> The full text of the statute reads as follows:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, 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.

42 U.S.C. § 1983 (1970).

<sup>8</sup> See note 57 *infra*.

<sup>9</sup> See text accompanying notes 62-82 *infra*.

<sup>10</sup> See text accompanying notes 83-93 *infra*.

<sup>11</sup> See *Smartt v. Avery*, 411 F.2d 408 (6th Cir. 1969); *Kalec v. Adamowski*, 406 F.2d 536 (7th Cir. 1969) (*per curiam*); *Peinado v. Adult Authority*, 405 F.2d 1185 (9th Cir.), *cert. denied*, 395 U.S. 968 (1969); *Johnson v. Walker*, 317 F.2d 418 (5th Cir. 1963); *King v. McGinnis*, 289 F. Supp. 466, 468 (S.D.N.Y. 1968).

remedies.<sup>12</sup> A concrete example of this situation would be the case of a prisoner who both had good time withdrawn and was placed in segregation without a prior hearing. He has been denied due process. The remedy in such a case requires a release from solitary and the restoration of good time lost. However the restoration of good time may lead to release. It will certainly shorten the term of confinement. Release is a habeas remedy, and habeas corpus requires exhaustion.

When the Second Circuit considered this question *en banc*, it decided that such a situation was properly challenged in a civil rights action, and in view of an almost contemporaneous Supreme Court decision, *Wilwording v. Swenson*,<sup>13</sup> exhaustion was not required.<sup>14</sup> Subsequently the Supreme Court granted certiorari and reversed the Second Circuit.<sup>15</sup> Speaking through Justice Stewart, the Supreme Court in *Preiser* said that if the appropriate remedy is release, or even the reduction of the term of confinement by the restoration of good time, then the appropriate vehicle is a writ of habeas corpus, not a civil rights complaint, and exhaustion is required.

## II. NATURE OF THE REMEDIES

Both the writ of habeas corpus and the Civil Rights Act of 1871 have been the subject of some discussion.<sup>16</sup> This is not surprising since both remedies have grown beyond their original functions,<sup>17</sup> and since both have been used by state prisoners with increasing frequency.<sup>18</sup>

<sup>12</sup> See notes 41-54 *infra* and accompanying text.

<sup>13</sup> 404 U.S. 249 (1971). In *Wilwording*, state prisoners challenged prison conditions by way of federal habeas corpus after state habeas petitions had been dismissed. While the district court dismissed the petitions as other state remedies, *e.g.*, injunctive relief, still existed, the Supreme Court held the petitioners' claims were cognizable under the Civil Rights Act, and hence exhaustion was not required. *Id.* at 251.

<sup>14</sup> *Rodriguez v. McGinnis*, 456 F.2d 79 (2d Cir. 1972).

<sup>15</sup> *Preiser v. Rodriguez*, 411 U.S. 475 (1973).

<sup>16</sup> The best general works on habeas corpus remain *Developments in the Law—Federal Habeas Corpus*, 83 HARV. L. REV. 1038 (1970); R. SOKOL, *FEDERAL HABEAS CORPUS* (2d ed. 1969); Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441 (1963); see also Brennen, *Federal Habeas Corpus and State Prisoners: An Exercise in Federalism*, 7 UTAH L. REV. 423 (1961); Meador, *The Impact of Federal Habeas Corpus in State Trial Procedures*, 52 U. VA. L. REV. 286 (1966).

The Civil Rights Act has drawn some attention as well. See generally Note, *Prisoner's Rights Under § 1983*, 6 CRIM. L. BULL. 237 (1970); Note, *Limiting the Section 1983 Action in the Wake of Monroe v. Pape*, 82 HARV. L. REV. 1486 (1969); Comment, *Exhaustion of State Remedies under the Civil Rights Act*, 68 COLUM. L. REV. 1201 (1968); Comment, *Section 1983 Jurisdiction: A Reply*, 83 HARV. L. REV. 1352 (1970); Comment, *Beyond the Ken of the Courts: A Critique of Judicial Refusal to Review the Complaints of Convicts*, 72 YALE L.J. 506 (1963).

<sup>17</sup> See text accompanying notes 21-93 *infra*.

<sup>18</sup> See Zeigler, *The Invisible Litigant: An Inside View of Pro Se Actions in the Federal Courts*, 47 N.Y.U.L. REV. 159, 171 n.48 (1972) [hereinafter cited as Zeigler].

Prisoners, usually acting, not without some frustration,<sup>19</sup> as their own counsel,<sup>20</sup> have attempted to decipher the meaning of these two remedies as they apply to them.

It is apparent, from the complicated history of the two remedies and the nature of the dispute in *Preiser*, that the only way either to prepare an intelligent exegesis of *Preiser* or to predict *Preiser's* possible progeny is to consider the history of these two remedies.

### A. *The Writ of Habeas Corpus*

The writ of habeas corpus was inscribed in English Law in the 17th Century<sup>21</sup> and preserved in our American Constitution in the 18th Century.<sup>22</sup> Federal courts were first authorized to release state prisoners in the 19th Century.<sup>23</sup> This last authorization was construed by the states as a threat to the balance of power between the state and federal governments.

1. *Exhaustion.* The potential for conflict between state and federal government was somewhat assuaged when, in 1886, the Supreme Court said in *Ex Parte Royall*<sup>24</sup> that although the federal courts had the power, by means of the writ, to "wrest" a petitioner from the custody of state officers, even in advance of his trial in the state court, the federal court is "not bound in every case to exercise such power."<sup>25</sup> The Supreme Court exhorted federal courts to await the exhaustion of available state judicial remedies rather than disturb relations ". . . by unnecessary conflict between courts [state and federal] equally bound to guard and protect rights secured by the Constitution."<sup>26</sup>

<sup>19</sup> Frustration is apparently not restricted to the illiterate prisoner. One "writ writer," Charles Larsen asked:

Why did I cease to litigate my case? Justice itself an elusive abstraction, is a fiction. It assumes an air of reality only because the majority of people in this country live their lives without being required to seek justice. The unfortunate ones who seek justice find that it exists only in the mind of judges.

Larsen, *A Prisoner Looks at Writ-Writing*, 56 CALIF. L. REV. 343 (1968).

<sup>20</sup> The practice of jailhouse law was sanctioned in *Johnson v. Avery*, 393 U.S. 483 (1969), when a state regulation prohibiting inmates from assisting one another in the drafting of legal papers was invalidated.

<sup>21</sup> 31 Car. 2, c. 2 (1679).

<sup>22</sup> "Preserved" in the sense that it could not be suspended. U.S. CONST. art. I, § 9, cl. 2 reads: "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."

<sup>23</sup> Act of Feb. 5, 1867, ch. 28, 14 Stat. 385.

<sup>24</sup> 117 U.S. 241 (1886).

<sup>25</sup> *Id.* at 251.

<sup>26</sup> *Id.*

Subsequently, in 1948, this exhaustion requirement was codified<sup>27</sup> drawing its *raison d'être* from federal-state comity.<sup>28</sup>

The exhaustion requirement has evolved reasonably in many respects. One need not resort to an ineffective<sup>29</sup> or inappropriate<sup>30</sup> state remedy before applying to the federal court. Nor is a petitioner necessarily barred from seeking habeas corpus relief on the grounds of failure to exhaust state remedies when the petitioner has been barred from further state relief as, for example, where he has failed to make a timely appeal of his conviction. The Supreme Court has said that exhaustion only applies to ". . . state remedies still open to the applicant at the time he files his application of habeas corpus in the federal court."<sup>31</sup> This rule is subject to the important proviso that the federal court has discretion to deny habeas relief to anyone who has "deliberately bypassed" state judicial procedures.<sup>32</sup>

2. *Bargain with the Devil*. One might expect that once a matter has been contested in the state court it would be *res judicata* and therefore barred from consideration in a subsequent habeas corpus action. Prior to the Habeas Corpus Act of 1867,<sup>33</sup> that was the case; there was no re-consideration of state fact finding in a collateral federal proceeding.<sup>34</sup> However in *Brown v. Allen*,<sup>35</sup> it was suggested that in certain cases a *de novo* fact hearing was appropriate.<sup>36</sup> It was left to

<sup>27</sup> Act of June 25, 1948, ch. 646, 62 Stat. 967. This exhaustion provision is today codified at 28 U.S.C. § 2254(b)-(c) (1970). Section 2254 applies to state prisoners only. A federal prisoner can not rely on section 2241 to challenge his conviction unless section 2255 is inadequate or unavailable. 28 U.S.C. § 2255 (1970). It is interesting to note that even section 2255 has an exhaustion requirement, in that the petitioner must complete his direct appeal, except in extraordinary circumstances, before the court will entertain a section 2255 motion. *Bowen v. Johnston*, 306 U.S. 19, 26-27 (1939).

<sup>28</sup> *Fay v. Noia*, 372 U.S. 391, 419-20 (1963); *Darr v. Buford*, 339 U.S. 200 (1950).

<sup>29</sup> 28 U.S.C. § 2254(b) (1970).

<sup>30</sup> See *Williams v. Peyton*, 372 F.2d 216 (4th Cir. 1967) (state prematurity rule precludes collateral relief); *United States ex rel. Michelotti v. Price*, 230 F. Supp. 505 (W.D. Pa. 1964) (no state relief available to parolee).

<sup>31</sup> *Fay v. Noia*, 372 U.S. 391, 399 (1963).

<sup>32</sup> *Id.* at 438. In *Fay v. Noia*, Noia's co-defendants appealed their convictions but were unsuccessful. Subsequently Noia's co-defendants overturned their convictions because their confessions had been coerced. Noia had decided not to appeal after his conviction because he feared that if he appealed he would be subjected to a more severe sentence on remand. The Court held that in view of Noia's "grisly choice," his failure to appeal was not a "deliberate by-pass." *Id.* at 439-40. The "deliberate by-pass" rule also finds application in the case of a motion to vacate made by a federal prisoner pursuant to 28 U.S.C. § 2255 (1970). See *Kaufman v. United States*, 394 U.S. 217, 227 n.8 (1969).

<sup>33</sup> Act of Feb. 5, 1867, ch. 28, 14 Stat. 385.

<sup>34</sup> Facts asserted in response to petitioner's writ had to be accepted despite the petitioner's attempt to controvert them. No federal hearings were held. See *Frank v. Mangum*, 237 U.S. 309, 329-30 (1915).

<sup>35</sup> 344 U.S. 443 (1953).

<sup>36</sup> The Court held that a *de novo* fact hearing was appropriate when there were "un-

*Townsend v. Sain*<sup>37</sup> to describe more explicitly what these categories were.<sup>38</sup> This liberalization of the writ has not been quietly accepted; Congress resisted the *Townsend* categories in 1966<sup>39</sup> and in Congress today there is an attempt to derogate, if not to abrogate, the scope of the writ.<sup>40</sup> These opponents of the expanding writ might agree with Justice Rehnquist, who in a different context, characterized this "liberalizing" as the product of a "bargain with the devil."<sup>41</sup>

3. *Conditions as well as Confinement.* Notwithstanding this resistance to the "new and improved" writ, the writ has expanded in still another way. It may now be used to challenge not only the validity of confinement but also the conditions of confinement.

It has been said in dicta that habeas is only available for the release of prisoners<sup>42</sup> and several circuits have said that habeas corpus is not available to challenge prison conditions.<sup>43</sup> Nevertheless the writ

usual circumstances," 344 U.S. at 463, or the fact finding process in the state court was vitally flawed, 344 U.S. at 506, or where in the judge's discretion an evidentiary hearing seemed merited, 344 U.S. at 463-64.

<sup>37</sup> 372 U.S. 293 (1963).

<sup>38</sup> *Townsend* provided six categories which required a federal evidentiary hearing: (1) inadequate state fact-finding procedures; (2) the prisoner alleges newly discovered evidence; (3) inadequate development of facts in state court; (4) the state finding is not "fairly supported"; (5) the state courts failed to resolve the relevant factual questions; and (6) any other situations which would not provide a full and fair fact hearing. *Id.* at 312-18.

<sup>39</sup> See H.R. REP. NO. 1892, 89th Cong., 2d Sess. (1966). The categories described by the Court in *Townsend* were codified at 28 U.S.C. § 2254(d) (1970). See Note, *Developments in the Law—Federal Habeas Corpus*, 83 HARV. L. REV. 1038, 1122 n.46 (1970). This codification responded to Congressional pressure at least to the extent that the statute accords a presumption of correctness to state determinations.

<sup>40</sup> The Senate bill threatening to do this would take the presumption of correctness previously mentioned, *supra* note 39, one step further. S. 567, 93d Cong., 1st Sess. (1973). This bill would, among other things, make any state determination conclusive subject only to Supreme Court review and it would further require that the alleged violation be related to the reliability of the state fact-finding process such that absent the violation a different result would probably have been reached. *Id.* § 2(a). For a further discussion of this bill, see Note, *Proposed Modification of Federal Habeas Corpus for State Prisoners—Reform or Revocation*, 61 GEO. L.J. 1221 (1973). Cf. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142 (1970).

<sup>41</sup> *Hensley v. Municipal Ct.*, 411 U.S. 345, 355 (1973). In a series of Supreme Court decisions relating to custody, the Supreme Court held that a parolee was under sufficient restraints to constitute custody. *Jones v. Cunningham*, 371 U.S. 236 (1963). Then the Court held that one need only have been in custody at the time the petition is filed; jurisdiction is not defeated by the petitioner's subsequent release. *Carafas v. LaVallee*, 391 U.S. 234 (1968). Finally, the Court found bail sufficient custody within the meaning of the habeas corpus statute, prompting Justice Rehnquist's remark. *Hensley v. Municipal Ct.*, *supra*.

<sup>42</sup> *Fay v. Noia*, 372 U.S. 391, 427 n.38 (1963); *Ex parte Medley*, 134 U.S. 160, 173 (1890).

<sup>43</sup> See *Rhodes v. Craven*, 425 F.2d 265 (9th Cir.), *cert. denied*, 400 U.S. 836 (1970); *Granville v. Hunt*, 411 F.2d 9 (5th Cir. 1969); *Long v. Parker*, 390 F.2d 816 (3d Cir. 1968); *United States ex rel. Knight v. Ragen*, 337 F.2d 425, 426 (7th Cir. 1964), *cert. denied*, 380 U.S. 985 (1965); *United States v. Kniess*, 251 F.2d 669 (7th Cir. 1958); *United States ex rel.*

has been used in cases involving prison conditions. The rationale is that an unlawful restraint of personal liberty may be inquired into through habeas corpus even though the person is in lawful custody.<sup>44</sup> One might conclude that this application of the writ is quite restricted, occurring only when a prisoner has been denied access to the courts. A major portion of the case authority supporting this application of the writ has dealt with that particular problem.<sup>45</sup> If this were the sole authority, one might argue that this exceptional use of the writ exists, in effect, to protect the writ. However, the writ has been used to challenge unjust prison conditions beyond denial of access,<sup>46</sup> and, as recently as 1971, the Supreme Court has affirmed this expanded role.<sup>47</sup>

Some construe this broader role as a temporary existence, filling a void which had been awaiting a more appropriate remedy. It was argued by respondents in *Preiser* that the Civil Rights Act was that more appropriate remedy.<sup>48</sup> The writ, it is true, is in some respects easier for a prisoner to use<sup>49</sup> but, as we shall see, it pales in effectiveness beside the Civil Rights Act.

## B. *The Civil Rights Act of 1871*

1. *A Broad Remedy.* The Civil Rights Act has evolved as a broad tool, one concerned with a great deal more than prison conditions. It has conferred jurisdiction on courts in a number of diverse situations involving welfare,<sup>50</sup> police procedures,<sup>51</sup> education,<sup>52</sup> and public housing.<sup>53</sup> Interference in prisons and prison administration by the federal

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*Collins v. Heinze*, 219 F.2d 233 (9th Cir. 1955); *Williams v. Steele*, 194 F.2d 32 (8th Cir. 1952).

<sup>44</sup> *In re Bonner*, 151 U.S. 242 (1893).

<sup>45</sup> See *Johnson v. Avery*, 393 U.S. 483 (1969) (prison regulation forbidding prisoners from giving each other legal assistance); *Ex parte Hull*, 312 U.S. 546 (1941) (prison regulation requiring prison approval of all legal papers); *Konigsberg v. Ciccone*, 285 F. Supp. 585, 589 (W.D. Mo. 1968), *aff'd*, 417 F.2d 161 (8th Cir. 1969), *cert. denied*, 317 U.S. 963 (1970) (denial of access).

<sup>46</sup> *Covington v. Harris*, 419 F.2d 617 (D.C. Cir. 1969) (transfer from high security section of mental institution to low security section); *Coffin v. Reichard*, 143 F.2d 443 (6th Cir. 1944) (bodily harm and injuries from guards and co-inmates); *Coonts v. Wainwright* 282 F. Supp. 893 (M.D. Fla. 1968), *aff'd*, 409 F.2d 1337 (5th Cir. 1969). In the case of federal prisoners courts are reluctant to use habeas corpus as a remedy and a petitioner's claim is therefore construed as mandamus pursuant to 28 U.S.C. § 1361 (1970). See *Taylor v. Blackwell*, 418 F.2d 199, 201 (5th Cir. 1969) (loss of good time); *Long v. Parker*, 390 F.2d 816, 818-19 (3d Cir. 1967) (religious freedom).

<sup>47</sup> *Wilwording v. Swenson*, 404 U.S. 249 (1971).

<sup>48</sup> *Preiser v. Rodriguez*, 411 U.S. 475, 499 n.15 (1973).

<sup>49</sup> See generally *Zeigler*, *supra* note 17, at 173-87.

<sup>50</sup> *Damico v. California*, 389 U.S. 416 (1967).

<sup>51</sup> *Monroe v. Pape*, 365 U.S. 167 (1961).

<sup>52</sup> *McNeese v. Board of Educ.*, 373 U.S. 668 (1963).

<sup>53</sup> *Holmes v. Housing Authority*, 398 F.2d 262 (2d Cir. 1968).



courts, early eschewed,<sup>54</sup> is no longer a bar to constitutional inquiry under the Civil Rights Act.<sup>55</sup> The writ, by comparison, has had a narrow civil rights application.

The difference between the two remedies is further contrasted by the advantages the Civil Rights Act provides a complainant. The Civil Rights Act does not require exhaustion of state remedies<sup>56</sup> and it allows one to use the liberal discovery techniques of the Federal Rules of Civil Procedure; it also allows one to maintain a class action<sup>57</sup> and to seek broad injunctive relief<sup>58</sup> and damages.<sup>59</sup>

The Civil Rights Act, like the writ, has grown from its original restricted use. Like most post bellum measures, the Civil Rights Act of 1871 was first ignored.<sup>60</sup> However it was used more and more frequently as the Bill of Rights became applicable to the states through the due process clause of the fourteenth amendment. When the 42d Congress originally passed this as the Ku Klux Klan Act, it "was

<sup>54</sup> The hands-off doctrine by federal courts reflected the view that the felon was "the slave of the State." *Ruffin v. Commonwealth*, 62 Va. (21 Gratt) 790 (1871). The hands-off doctrine left federal courts "without power to supervise prison administration or to interfere with the ordinary prison rules or regulations." *Banning v. Looney*, 213 F.2d 771 (10th Cir.), cert. denied, 348 U.S. 859 (1954). See *United States ex rel. Campbell v. Pate*, 401 F.2d 55, 57 (7th Cir. 1968).

<sup>55</sup> See *Wilwording v. Swenson*, 404 U.S. 249 (1971); *Houghton v. Shafer*, 392 U.S. 639 (1968).

<sup>56</sup> See text accompanying notes 62-82 *infra*.

<sup>57</sup> If the requisites of federal rule 23 are met, class actions will be recognized in a number of situations. See *Inmates of Attica v. Rockefeller*, 453 F.2d 12 (2d Cir. 1971) (brutality); *Jackson v. Bishop*, 404 F.2d 571 (8th Cir. 1968) (corporal punishment); *Landman v. Royster*, 333 F. Supp. 621 (E.D. Va. 1971) (prison disciplinary practices); *Rhem v. McGrath*, 326 F. Supp. 681 (S.D.N.Y. 1971) (prison conditions); *Washington v. Lee*, 263 F. Supp. 327 (M.D. Ala. 1966), *aff'd*, 390 U.S. 330 (1968) (racial segregation).

<sup>58</sup> The plaintiff, of course, has the burden of showing irreparable injury in order to obtain a preliminary injunction, e.g., some "cognizable danger of recurrent violation." *United States v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953). Once this is done there is a range of relief available. See *Valvano v. McGrath*, 325 F. Supp. 408 (E.D.N.Y. 1971) (monitors, suspension of reassignment of correctional personnel and prosecution of officers). There is the usual order that the practices shall cease and in some instances a requirement that corrective plans be submitted for the court's approval. See *Jones v. Wittenberg*, 330 F. Supp. 707 (N.D. Ohio 1971), *aff'd sub nom. Jones v. Metzger*, 456 F.2d 854 (6th Cir. 1972). The court is also authorized to issue declaratory judgments which define the rights and obligations of the parties. 28 U.S.C. § 2201 (1970).

<sup>59</sup> Damages may be recovered under section 1983, *Sostre v. McGinnis*, 442 F.2d 178 (2d Cir. 1971), cert. denied, 404 U.S. 1049 (1972), and they may be ordinary tort damages, *Monroe v. Pape*, 365 U.S. 167 (1961), or nominal damages, *Basista v. Weir*, 340 F.2d 74 (3d Cir. 1965), or punitive damages, *Caperci v. Huntoon*, 397 F.2d 799 (1st Cir. 1968). For a comment on how and when to use damages in a civil rights action, see *Hellerstein & Shapiro, Prison Crisis Litigation*, 21 *BUFF. L. REV.* 643, 655-56 (1972).

<sup>60</sup> See generally T. E. EMERSON, D. HABER & N. DORSEN, *POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES* 1447-48 (3d ed. 1967); Gressman, *The Unhappy History of Civil Rights Legislation*, 50 *MICH. L. REV.* 1323, 1336-43 (1952); Note, *The Proper Scope of the Civil Rights Act*, 66 *HARV. L. REV.* 1285 (1953); Note, *The Civil Rights Act: Emergence of an Adequate Federal Civil Remedy?*, 26 *IND. L.J.* 361 (1951).

passed by a partisan vote in a highly inflamed atmosphere. It [its passage] was preceded by spirited debate which pointed out its grave character and susceptibility to abuse . . . ."<sup>61</sup> In later years the question arose as to the applicability of two doctrines which would have seriously curtailed the effectiveness of the Act. A discussion of these two doctrines, exhaustion and abstention, and the decision that they were not applicable in the case of the Civil Rights Act tells us much about the act and further distinguishes the Act from the writ. To begin this discussion we must return to the "spirited debate" which transpired when the Act was initially passed.

2. *The No-Exhaustion Rule.* The situation which compelled President Grant to ask for federal legislation<sup>62</sup> was described by Senator Lowe of Kansas as murder "[s]talking abroad in disguise, while whippings and lynchings and banishment have been visited upon offending American Citizens."<sup>63</sup> Senator Lowe decried the fact that "immunity is given to crime, and the records of the public tribunals are searched in vain for any evidence of effective redress."<sup>64</sup> President Grant had complained that "the power to correct these evils is beyond the control of state authorities" and he therefore asked for ". . . such legislation as in the judgment of Congress shall effectually secure life, liberty, and property, and the enforcement of law in all parts of the United States."<sup>65</sup>

Although the ensuing debate was primarily concerned with the Ku Klux Klan, it is clear that the Civil Rights Act was to afford a broad remedy capable of dealing with much more than the single difficulty of the Klan.<sup>66</sup> It was anticipated that the Act would override conflicting<sup>67</sup> and inadequate state law.<sup>68</sup> And although this result came more slowly in practice, the Act was to afford a "federal right in federal courts." Justice Douglas, speaking about the meaning of the term "under color" of state law in *Monroe v. Pape*,<sup>69</sup> used the phrase "federal right in federal courts"<sup>70</sup> and explained that this right was necessary ". . . because by reason of prejudice, passion, neglect, intolerance

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<sup>61</sup> *Collins v. Hardyman*, 341 U.S. 651, 657 (1951).

<sup>62</sup> CONG. GLOBE, 42d Cong., 1st Sess. 244 [hereinafter cited as GLOBE].

<sup>63</sup> *Id.* at 374.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* at 244.

<sup>66</sup> This can be ascertained by reviewing the comments made in opposition to the Act by Senator Golladay of Tennessee, GLOBE, app. 160; Senator Thurman of Ohio, GLOBE, app. 216; and Senator Voorhees of Indiana, GLOBE, app. 179.

<sup>67</sup> GLOBE, app. 268.

<sup>68</sup> *Id.* at 345.

<sup>69</sup> 365 U.S. 167 (1961).

<sup>70</sup> *Id.* at 180.

or otherwise, state laws might not be enforced."<sup>71</sup> That state laws might not be enforced led Justice Douglas to the expansive corollary that one did not have to resort to a state remedy even if it would give relief if enforced: "[t]he federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked."<sup>72</sup>

The Supreme Court subsequently obtained the same holding in several cases: *McNeese v. Board of Education*,<sup>73</sup> *Damico v. California*,<sup>74</sup> *Houghton v. Shafer*,<sup>75</sup> and *Wilwording v. Swenson*.<sup>76</sup> Despite this trend, several courts have tried to restrict the *Monroe* holding to judicial remedies by stating that exhaustion of state judicial remedies is not required but that exhaustion of state administrative remedies is required when the administrative remedy is sufficiently adequate.<sup>77</sup> *Monroe* and *McNeese* are susceptible to such a narrow interpretation because *Monroe* did not involve administrative remedies and in *McNeese* the administrative remedies were not "sufficiently adequate."<sup>78</sup> However in *Houghton*, the first prisoner case in this series of cases, the Court said that even though to require petitioner to pursue an administrative appeal would be futile, "resort to these [administrative] remedies is unnecessary."<sup>79</sup> Finally, in *Wilwording*, another prisoner case, the Court ignored the question of adequacy and repeated the

<sup>71</sup> *Id.*

<sup>72</sup> *Id.* at 183.

<sup>73</sup> 373 U.S. 668 (1963).

<sup>74</sup> 389 U.S. 416 (1967).

<sup>75</sup> 392 U.S. 639 (1968).

<sup>76</sup> 404 U.S. 249 (1971).

<sup>77</sup> The Second Circuit rule states that, although the prisoner resorts to a civil rights complaint, if there is an adequate administrative procedural safeguard, it must be availed of before going to a federal forum. *Eisen v. Eastman*, 421 F.2d 560-69 (2d Cir. 1969); *Wright v. McMann*, 387 F.2d 519, 527-28 (2d Cir. 1967). In those instances where the administrative remedy gives no assurance of getting the relief requested then it need not be employed. *Eisen v. Eastman*, 421 F.2d at 569. In one case the federal district court even set forth due process standards for prison censorship including notice to the inmates, opportunity to object, and a reliable body to make censorship decisions. *Sostre v. Otis*, 330 F. Supp. 941, 946 (S.D.N.Y. 1971). Cf. *Sostre v. McGinnis*, 442 F.2d 178 (2d Cir. 1971); *Edwards v. Schmidt*, 321 F. Supp. 68 (W.D. Wis. 1971).

<sup>78</sup> In *McNeese* the Court said "it is by no means clear that Illinois law provides petitioners with an administrative remedy sufficiently adequate to preclude prior resort to a federal court for protection of their federal rights." 373 U.S. 668, 674 (1963). However, the Court also noted that "relief under the Civil Rights Act may not be defeated because relief was not first sought under state law which provided a remedy." *Id.* at 671. Subsequently *Damico* cited *McNeese* and added the bracketed phrase, "an administrative," as follows: "Relief under the Civil Rights Act may not be defeated because relief was not first sought under state law which provided [an administrative] remedy" (emphasis added). *Damico v. California*, 389 U.S. 416, 417 (1967), citing *McNeese v. Board of Educ.*, *supra* at 671.

<sup>79</sup> 392 U.S. at 640.

*Houghton* holding that "resort" was "unnecessary."<sup>80</sup> It is interesting to note that Professor Davis, a respected commentator on administrative law who has railed against this apparent exception to the exhaustion doctrine,<sup>81</sup> has grudgingly conceded, even without the benefit of *Wilwording*, that this exception is based on "strong authority."<sup>82</sup>

3. *An Exception to Abstention.* In another vein, seeking the same result, it has been suggested that the federal courts abstain and not consider civil rights questions. The grounds for a federal court abstaining are the possibility that the case may be disposed of by a state court pursuant to state law or other reasons which will not require the federal court to involve itself.<sup>83</sup> A simplification of the abstention doctrine might say that whether the federal court can abstain or not depends on whether the case involves law or equity. Generally speaking, in cases of law, the federal court is unable to decline jurisdiction.<sup>84</sup> However in cases involving an exercise of equitable discretion, federal courts may decline on the ground of federal-state comity.<sup>85</sup>

Such a simplification-distinction as law-equity is not easily applied.<sup>86</sup> One argument which has been pressed on the federal courts in civil rights cases is that the federal court should abstain because the remedy sought is equitable, usually an injunction, and state law would be dispositive of the claim. Abstention in such a case was held improper.<sup>87</sup> Ironically, the abstention doctrine, first enunciated in what might be considered a civil rights case,<sup>88</sup> was rejected in a civil rights case.<sup>89</sup> The court said:

<sup>80</sup> 404 U.S. at 252.

<sup>81</sup> Professor Davis said:

Whatever reasons the Supreme Court may have for this startling result are obfuscated through the pretense that the *Damico* result followed from *McNeese* and the pretense that the *McNeese* result followed from *Monroe*. The holdings seem to be largely in the nature of unreasoned fiat, and the results seem altogether unsatisfactory because they are so clearly contrary to such principles as have heretofore been discernible in exhaustion law.

K. DAVIS, ADMINISTRATIVE LAW TREATISE § 20.10, at 668-69 (Supp. 1970). For a further analysis of this question see *id.* § 20.01, at 642-48; L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 438 n.51, 449 n.106 (1965).

<sup>82</sup> DAVIS, *supra* note 81, § 20.10, at 669.

<sup>83</sup> See generally C. WRIGHT, FEDERAL COURTS § 52, at 196-208 (2d ed. 1970).

<sup>84</sup> See, e.g., *Meredith v. City of Winter Haven*, 320 U.S. 228, 234-36 (1943) (diversity jurisdiction).

<sup>85</sup> See *Stefanelli v. Minard*, 342 U.S. 117, 121-25 (1951). Cf. *Alabama Pub. Serv. Comm'n v. Southern Ry.*, 341 U.S. 341, 350-51 (1951).

<sup>86</sup> See Note, *Federal-Question Abstention: Justice Frankfurter's Doctrine in an Activist Era*, 80 HARV. L. REV. 604 (1967).

<sup>87</sup> *Stapleton v. Mitchell*, 60 F. Supp. 51 (D. Kan.), *appeal dismissed per stipulation*, 326 U.S. 690 (1945).

<sup>88</sup> *Railroad Comm'n v. Pullman Co.*, 312 U.S. 496 (1941) (attempt to exclude black porters from jobs by a state commission regulation).

<sup>89</sup> *Stapleton v. Mitchell*, 60 F. Supp. 51 (D. Kan.), *appeal dismissed per stipulation*, 326 U.S. 690 (1945).

Human rights [as opposed to property rights] under the Federal Constitution are always a proper subject for adjudication, and . . . we have not the right to decline the exercise of that jurisdiction simply because the right asserted may be adjudicated in some other forum.<sup>90</sup>

To make clear exactly when this civil rights exception applied and to avoid the risk of state nullification, Professor Wechsler proposed that the exception should extend to all those cases arising under the various civil rights acts.<sup>91</sup> Almost two decades after his proposal the Supreme Court recognized that when Congress drafted section 1983, Congress chose the federal courts as the primary forum for the vindication of federal rights and the federal courts therefore have a duty to give the suitor's choice of forum "due respect."<sup>92</sup> Thus, it can be said about abstention that "cases involving vital questions of civil rights are the least likely candidates for abstention."<sup>93</sup>

### C. *Alternative Remedies*

A short review of the histories of these two remedies gives us some idea of their nature. The role of habeas has expanded from the narrow objective of curtailing the activities of the Ku Klux Klan into a remedy which, independent of available state judicial or administrative remedies, can be relied on immediately to remedy constitutional violations whether or not the injured party is a prisoner. *Wilwording* represents the point where the meandering paths of these remedies osculated and were recognized as equivalent alternatives, considerations of exhaustion aside, for a prisoner whose constitutional rights have been violated.

## III. PREISER V. RODRIGUEZ

### A. *Three Prisoners*

*Preiser* originally arose out of the complaints of three prisoners, Rodriguez, Kritsky, and Katzoff, who in separate civil rights actions<sup>94</sup>

<sup>90</sup> *Id.* at 55. One basis for this exception, it has been argued, is the federal judiciary's freedom from local prejudice, as evidenced, for example, by the life tenure of federal judges. See Note, *Theories of Federalism and Civil Rights*, 75 YALE L.J. 1007, 1033-37 (1966); *Romero v. Weakly*, 226 F.2d 399, 401 (9th Cir. 1955).

<sup>91</sup> Wechsler, *Federal Jurisdiction and the Revision of the Judicial Code*, 13 LAW & CONTEMP. PROB. 216, 230 (1948). The American Law Institute has recently proposed a more narrow exception to the abstention doctrine. See ALI STUDY OF DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS § 1371(g), comment at 219-20 (Tent. Draft No. 6, 1968).

<sup>92</sup> *Zwicker v. Koota*, 389 U.S. 241, 247-48 (1967).

<sup>93</sup> See *Holmes v. New York City Housing Authority*, 398 F.2d 262, 266 (2d Cir. 1968); *Wright v. McMann*, 387 F.2d 519, 525 (2d Cir. 1967). See also *McNeese v. Board of Educ.*, 373 U.S. 668, 672-74 (1963).

<sup>94</sup> *Kritsky v. McGinnis*, 313 F. Supp. 1247 (N.D.N.Y. 1970); *Rodriguez v. McGinnis*, 307 F. Supp. 627 (N.D.N.Y. 1969).

complained that they had been denied due process in the manner in which they were deprived of good time.<sup>95</sup>

Eugene Rodriguez had with him in his cell five letters from his wife and five nude pictures of her. They were taken from him allegedly because they were contraband. Rodriguez was deprived of good time, "60 days for the letters and 60 days for the pictures,"<sup>96</sup> without notice of the charge<sup>97</sup> or issue of the reason for the disposition.<sup>98</sup> He was then transferred to another prison and segregated for a month.<sup>99</sup>

John Kritsky participated in a peaceful protest; it consisted of prisoners remaining in their cells and refusing to work. Kritsky's protest cost him 590 days of good time after a "hearing" which did not provide even a modicum of due process. At the "hearing," the charge was stated, "advocating insurrection and a revolution and advocating incendiarism." There was a query, "How do you plead?" and Kritsky's response, "Not guilty."<sup>100</sup>

Michael Katzoff, writing in his diary, described a prison official as a "creep" and a "cigar smoking SOB" and in colorful language he described his desire to "couple" with two prison nurses.<sup>101</sup> Katzoff, for his private expressions, lost 30 days good time and was confined in segregation for 57 days (thus losing another 20 days good time since good time cannot be earned while in segregation).

In all three cases the prisoners prevailed in the district court. However separate panels of the Second Circuit reversed the judgments of the district court with respect to *Rodriguez* and *Katzoff*.<sup>102</sup> The reasoning in these two cases was similar and regretfully foreshadowed

<sup>95</sup> Each of the prisoners had elected to participate in the conditional release program which allows a prisoner who is serving an indeterminate sentence to earn up to ten days per month good behavior time credits toward the reduction of the maximum term. N.Y. PENAL LAW §§ 70.30(4)(a), 70.40(1)(a)-(b) (McKinney 1967). One federal district judge considered this to be a "mandatory grant by its term and nature if the prisoner so behaves." *Rodriguez v. McGinnis*, 307 F. Supp. 627, 630 (N.D.N.Y. 1969) (Foley, C.J.). Such good time, however, may be withheld or revoked by the prison "for bad behavior, violation of institutional rules or failure to perform properly in the duties or program assigned." N.Y. CORREC. LAW § 803(1) (McKinney 1968).

<sup>96</sup> 307 F. Supp. at 631.

<sup>97</sup> The district court found that the good time credit was withheld for possession of contraband although "the questioning [by prison authorities] was solely in regard to how he [Rodriguez] got the uncensored letters and photographs into Sing Sing." *Id.*

<sup>98</sup> Although a state statute required the prison to forward its reason for withholding good time to the Commissioner of Correction no such report issued. *Id.*

<sup>99</sup> The district judge found there to be a deprivation of fundamental fairness. *Id.* at 632.

<sup>100</sup> 313 F. Supp. at 1250.

<sup>101</sup> *Katzoff v. McGinnis*, 441 F.2d 558, 559 (2d Cir. 1971).

<sup>102</sup> *Rodriguez v. McGinnis*, 451 F.2d 730 (2d Cir. 1971); *Katzoff v. McGinnis*, 441 F.2d 558 (2d Cir. 1971).

*Preiser*. Judge Hays characterized the *Rodriguez* application as a habeas petition since the restoration of good time would result in parole release.<sup>103</sup> The court decried any sidestep of the exhaustion requirement and thought it was "so absurd as to be laughable" for a federal Court of Appeals to enmesh itself in "solemnly deciding on the penalty in terms of good time a state prisoner should receive for having dirty pictures in his cell (or for refusing to be a tattle tale)."<sup>104</sup> The *Katzoff* reversal was based on similar reasoning.<sup>105</sup> Before a third panel could consider *Kritsky*, the Court of Appeals set all three cases for rehearing en banc.

By a vote of 9 to 3, in eight separate opinions, the court reinstated the judgments of the district courts.<sup>106</sup> The court relied primarily on *Wilwording*. Judge Kaufman in his concurrence did not construe *Wilwording* as "ground breaking" but rather representative of a trend of cases beginning with *Monroe*.<sup>107</sup> He distinguished habeas corpus as a remedy primarily suited to challenging convictions,<sup>108</sup> did not think therefore that section 1983 was properly subsumed by the habeas exhaustion requirement<sup>109</sup> and, in contrast to a previous panel's characterization of the prisoner's claim, regarded the facts before the court as an indication of "callous disregard of his [the prisoner's] basic human and constitutional rights."<sup>110</sup> The Supreme Court granted certiorari and the court's majority opinion was delivered by Justice Stewart.

#### B. Held: "Good time" at the "Core" of the Writ

The Supreme Court noted that the "essence of habeas corpus is an attack by a person in custody upon the legality of that custody and that the traditional function of the writ is to secure release from illegal custody."<sup>111</sup> The Court noted that depriving prisoners of good time caused illegal physical confinement.<sup>112</sup> A prisoner's challenge to

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<sup>103</sup> 451 F.2d at 731-32.

<sup>104</sup> *Id.* at 732.

<sup>105</sup> 441 F.2d 558 (2d Cir. 1971).

<sup>106</sup> 456 F.2d 79 (2d Cir. 1972) (en banc). For comment on the court's en banc decision, see 72 COLUM. L. REV. 1078 (1972); 17 VILL. L. REV. 980 (1972).

<sup>107</sup> 456 F.2d at 82 (Kaufman, J., concurring).

<sup>108</sup> *Id.* at 83.

<sup>109</sup> Judge Kaufman said:

I see no basis for radically expanding the impact of § 2254(b) or, to put it another way, for concluding that Congress intended to carve out an exception to § 1983 for state prisoners challenging an invasion of their constitutional rights during confinement and stating a valid claim for equitable relief.

<sup>110</sup> *Id.* at 82-83.

<sup>111</sup> *Preiser v. Rodriguez*, 411 U.S. 475, 484 (1973) (emphasis added).

<sup>112</sup> *Id.* at 487.

the validity of the "fact or duration" of this illegal confinement was held ". . . as close to the *core of habeas corpus* as an attack on the prisoner's conviction."<sup>113</sup> The Court conceded that section 1983 was literally applicable to the cases before the Court; however, Justice Stewart held the more "specific" statute, habeas, to be the exclusive remedy.<sup>114</sup> That this was indeed true was buoyed, in the Court's opinion, by the writ's exhaustion requirement which demonstrated "a proper respect for state functions" whether administrative or judicial.<sup>115</sup> Justice Stewart said that of course exhaustion was not required to the extent that the state remedy was inadequate or unavailable.<sup>116</sup> To the query, "How will a prisoner obtain damages when his rights have been violated?", the Court responded that, while it was true "habeas corpus is not an appropriate or available federal remedy," in those instances where damages were sought by prisoners they must be sought pursuant to a civil rights complaint.<sup>117</sup> This complaint for damages would be in addition to a habeas application for "good time."

### C. Dissent Faults "*Faulty Analytic Foundation*"

The majority decision exhibits two major faults: A failure to appreciate the nature of the two remedies it discussed, a failure not surprisingly based on a confusion between the habeas exhaustion rule and the civil rights no-exhaustion, no-abstention rules; and the unmanageability of the proposed litigation scheme.

1. "*Good time*" and *Habeas Corpus*. Previously, the restoration of good time was a proper remedy afforded by the Civil Rights Act.<sup>118</sup> It is certainly surprising to find that the "core of habeas corpus," to the exclusion of the Civil Rights Act, is concerned with cases which arise when a man criticizes prison officials either in his diary or in a letter to his parents.<sup>119</sup>

It is discouraging that *Preiser* may be abused. The loss of good

<sup>113</sup> *Id.* at 489.

<sup>114</sup> *Id.* at 490.

<sup>115</sup> *Id.* at 491, citing *Younger v. Harris*, 401 U.S. 37, 44 (1971).

<sup>116</sup> *Id.* at 493.

<sup>117</sup> *Id.* at 493-94.

<sup>118</sup> See *Wright v. McMann*, 460 F.2d 126 (2d Cir. 1972); *United States ex rel. Campbell v. Pate*, 401 F.2d 55 (7th Cir. 1968); *Landman v. Royster*, 333 F. Supp. 621 (E.D. Va. 1971); *Carothers v. Follette*, 314 F. Supp. 1014 (S.D.N.Y. 1970); *contra*, *Douglas v. Sigler*, 386 F.2d 684 (8th Cir. 1967).

<sup>119</sup> In *Preiser*, prisoner Katzoff lost good time because he had described a prison official as a "creep" and in *Carothers v. Follette*, 314 F. Supp. 1014 (S.D.N.Y. 1970), a prisoner lost sixty days good time when he criticized prison officials in a letter to his parents. See *Wright v. McMann*, 460 F.2d 126 (2d Cir. 1972) (loss of good time for failure to sign waiver sheet).



time may become a more frequently imposed sanction to insulate the prisoner from relief. Unclear as the definition of "core" is the impact of *Preiser* upon other disciplinary suits. Will all of them be within the "core"?<sup>120</sup> Justice Brennan said in his dissent that at the nub of the problem was the majority's "essentially ethereal concept, the 'core of habeas corpus'."<sup>121</sup> Our discussion of these two remedies has indicated that, if one were to choose between remedies (and prior to *Preiser* one did not have to choose),<sup>122</sup> the violations here in question seem particularly well-suited to the nature of section 1983 in contrast with, as Justice Brennan refers to it, the majority's "faulty analytic foundation"<sup>123</sup> for habeas selection.

2. *Specificity and Habeas Corpus.* The Court rejected the Civil Rights Act primarily for lack of specificity and in reliance on the policy supporting the habeas exhaustion requirement.

It is ironic that Justice Stewart should refer to the "broad language"<sup>124</sup> of section 1983 and decide that the habeas statute was preferable for specificity. The writ's language, ". . . in custody in violation of the constitution,"<sup>125</sup> arguably enables a prisoner to rely on the writ whenever his constitutional rights are violated. Before *Preiser* a federal court did not construe the expansion of the writ as the contraction of section 1983. Previously both remedies were available to prisoners.

3. *Exhaustion and Habeas and the Civil Rights Act.* In view of the majority's reliance on exhaustion, Justice Brennan made several distinctions about the exhaustion requirement, some more telling than others.<sup>126</sup> He contended that exhaustion was a requirement born of the respect between state and federal *judiciaries* and was a concept inapplicable to the state administrative process. The question before the Court involved a state administrative process and the Civil Rights Act had a long history of dealing with administrative abuses. Thus, of the two remedies, the Civil Rights Act was especially well-suited for the task. In making this contention, however, Justice Brennan ignored the Supreme Court's inquiry in *Morrissey v. Brewer*<sup>127</sup> into ad-

<sup>120</sup> For a tentative response to this question, see text accompanying notes 134-47 *infra*.

<sup>121</sup> 411 U.S. at 506. (Brennan, J., dissenting).

<sup>122</sup> See notes 15-91 *supra* and accompanying text.

<sup>123</sup> 411 U.S. at 512.

<sup>124</sup> *Id.* at 489. Justice Brennan in his dissent criticized this analysis by taking the "broad language" of section 1983 to its extreme. He says, "every application by a state prisoner for federal habeas corpus relief against his jailers could as a matter of logic and semantics be viewed as an action under the Ku Klux Act." *Id.* at 504.

<sup>125</sup> 28 U.S.C. § 2254(a) (1970).

<sup>126</sup> 411 U.S. at 512-24.

<sup>127</sup> 408 U.S. 471 (1972).

ministratively imposed parole revocations and its determination that exhaustion applied in those cases.

More to the point was Justice Brennan's query, why if interference is the concern of the majority, does the Court stop here in precluding section 1983 jurisdiction? Why indeed, since section 1983 interferes with the state in so many areas besides prison problems?

Finally Justice Brennan confronts the majority's exhaustion rationale by explaining that, unlike the federal habeas statute, the Civil Rights Act does not genuflect to state or administrative process because to do so would frustrate the Act's Congressional mandate.<sup>128</sup>

4. *Two Forums for One Injury.* Justice Brennan called the majority opinion an "ungainly and irrational scheme."<sup>129</sup> He chose to illustrate the unmanageability of the majority decision by posing the question of what will happen when a case falls outside the "core of habeas corpus," when a prisoner challenges the condition of confinement and not the fact or duration of confinement.<sup>130</sup> Assuming solitary confinement to be without the "core of habeas corpus" (an assumption which should not be lightly taken in view of the majority's language),<sup>131</sup> Brennan proposed a fact situation in which a prisoner was both deprived of good time and placed in solitary. Relying on *Wilwording*, he expected that those questions without the core of habeas corpus could be raised by either remedy and he implicitly anticipated that a prisoner with a choice would choose the Civil Rights Act. He therefore foresaw a situation in which a prisoner litigated both in state court (to recover lost time) and in federal court (to obtain injunctive relief to remedy confinement and to recover damages) and whichever court reached its decision first would settle the question for the other forum by reason of *res judicata*.<sup>132</sup> Justice Brennan understated, "[t]his is plainly

<sup>128</sup> 411 U.S. at 516-21.

<sup>129</sup> *Id.* at 504.

<sup>130</sup> *Id.* at 506-12.

<sup>131</sup> See text accompanying notes 134-47 *infra*.

<sup>132</sup> 411 U.S. at 511. The prisoner would initiate his state action to satisfy the exhaustion requirement (implicit is the assumption that there is an available and adequate state remedy) and the federal action reflects an informed choice on the part of the prisoner concerning the effectiveness of section 1983. A course of action that suggests itself is that the prisoner should always initiate the section 1983 action first. This would bind the state court by reason of *res judicata*. Although in Justice Brennan's example, the habeas corpus re-litigation rules were not operable, 411 U.S. at 509 n.14, it is clear that when the federal habeas application is filed the facts can be re-litigated pursuant to *Townsend*. It is doubtful, however, that the prior findings in the section 1983 action would be rejected as the product of "inadequate procedure." Cf. *Kaufman v. United States*, 394 U.S. 217 (1969) (presumed adequacy of section 2255 fact finding procedures). If the state should make its decision first Justice Brennan suggests that although there is case law that says *res judicata* applies to section 1983, the policy of section 1983 may not comport with this bar to re-litigation and these lower courts "may well be in error." 411 U.S. at 509 n.14.

a curious prescription for improving relations between state and federal courts,"<sup>133</sup> critically referring to the majority's policy rationale of federal-state comity.

#### D. *The Limits of the Core?*

The question left after *Preiser* is what is outside the core of habeas corpus? Or conversely, to what extent is the Civil Rights Act when relied on by prisoners now constricted? The answer to this question, it seems, is dependent on the meaning of the term release.

Even as a person remains in custody he suffers varying deprivations of liberty. The spectrum of liberty while in custody proceeds from solitary confinement to segregation to maximum security to low security to parole. In each circumstance the individual remains in custody, yet his position proceeds from least desirable to most desirable.

A case that is useful in discussing this liberty spectrum is *Morrissey v. Brewer*.<sup>134</sup> *Morrissey* held that parole revocation is a deprivation of liberty within the meaning of the due process clause. Although this holding of itself is not particularly helpful, the reasoning that led to it is. *Morrissey* observed that even though one was in "custody," whether a parolee or an inmate, there was a substantial difference between the "conditional freedom" of parole and a "mere anticipation of hope of freedom."<sup>135</sup> Custody and liberty, as we have observed, are therefore not mutually exclusive. Parole is custody. However, parole is considered a return to useful life.<sup>136</sup> Time spent on parole is not credited<sup>137</sup> as time served, no doubt largely because parole "enables . . . [the parolee] to do a wide range of things open to persons who have never been convicted of any crime."<sup>138</sup>

The kind of liberty described in *Morrissey* is easy to appreciate, "out" versus "in" prison. However, what about the spectrum of liberty as above described? The calipers used to measure freedom have apparently become more sensitive as evidenced by a recent Seventh Circuit decision. In *United States ex rel. Miller v. Twomey*,<sup>139</sup> decided

<sup>133</sup> *Id.* at 511.

<sup>134</sup> 408 U.S. 471 (1972).

<sup>135</sup> See *United States ex rel. Bey v. Connecticut State Bd. of Parole*, 443 F.2d 1079 (2d Cir. 1971).

<sup>136</sup> See generally Note, *Parole Revocation in the Federal System*, 56 GEO. L.J. 705 (1968); Note, *Parole: A Critique of Its Legal Foundations and Conditions*, 38 N.Y.U.L. REV. 702 (1963); Comment, *Freedom and Rehabilitation in Parole Revocation Hearings*, 72 YALE L.J. 368 (1962).

<sup>137</sup> See Arluke, *A Summary of Parole Rules—Thirteen Years Later*, 15 CRIME & DELINQ. 267, 271 (1969); Note, *Parole Revocation in the Federal System*, 56 GEO. L.J. 705, 733 (1968).

<sup>138</sup> *Morrissey v. Brewer*, 408 U.S. 471, 482 (1972).

<sup>139</sup> 479 F.2d 701 (7th Cir. 1973).

after *Preiser*,<sup>140</sup> several prisoners attacked, on due process grounds, the loss of good time and punitive segregation. The court found the loss of good time was a "grievous loss" because it affected the timing of the prisoner's release. In the sense that the question was release, *Miller* closely parallels *Morrissey*. The court's decision is also not unlike the *Preiser* view of good time. The more interesting aspect of the case, for our purposes, is the court's reasoning with respect to the question of punitive segregation. Punitive segregation, while it did not comport with the *Morrissey* analysis of liberty, *i.e.*, parole freedom, was also held to be a "grievous loss." The standard for a "grievous loss" of liberty, the court explained, is an "additional punishment inflicted upon an inmate . . . sufficiently severe, and [which] represent[s] a sufficiently drastic change from the custodial status theretofore enjoyed . . . ."<sup>141</sup> Relief for this loss might be considered to be release. Release is a question which *Preiser* addressed and the implications of the *Miller* analysis should be apparent. Thus we have another question: was Justice Brennan correct in his dissent when he suggested that solitary could be remedied by injunctive relief in a section 1983 complaint?<sup>142</sup>

Heretofore, questions of solitary were properly raised in a civil rights complaint, although some might argue the only appropriate relief was monetary damages.<sup>143</sup> At least one circuit held before *Preiser* that an attack on solitary was a question properly raised in a writ and not in a complaint.<sup>144</sup> In questions of solitary confinement,

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<sup>140</sup> As indicated, the prisoners sought among other relief the restoration of good time. The court in *Miller* said, in view of *Preiser*, that the remedy was by way of habeas. *Id.* at 703.

<sup>141</sup> *Id.* at 717.

<sup>142</sup> In Justice Brennan's hypothetical, he suggests solitary could be remedied by injunctive relief sought pursuant to section 1983. See text accompanying notes 129-33 *infra*.

<sup>143</sup> See *Haines v. Kerner*, 404 U.S. 519 (1971). *Haines* is often cited for the proposition that section 1983 provides a means to remedy confinement imposed without due process safeguards. It is interesting to note that the prisoner at the time of the complaint in *Haines* was not in solitary (he was only in solitary for fifteen days). His claim was solely for damages. See *Haines v. Kerner*, 427 F.2d 71 (7th Cir. 1970). There are other section 1983 complaints with similar fact situations. See *United States ex rel. Jones v. Rundle*, 453 F.2d 147 (3d Cir. 1971) (solitary confinement and denial of right to practice religion but relief sought for damages); *Adams v. Pate*, 445 F.2d 105, 107 (7th Cir. 1971) (attack at lost privileges while in solitary, not solitary confinement itself, and relief sought was restoration of privileges and damages).

<sup>144</sup> *Jones v. Decker*, 436 F.2d 954 (5th Cir. 1970) (per curiam). In *Jones*, the prisoner sought to be free from solitary but his claim was not cognizable under section 1983. His application was treated as a petition for a writ and dismissed for failure to exhaust. It is interesting that the court held that it had jurisdiction to consider the prisoner's damage claim. See text accompanying notes 129-33, 140 *supra*. The court cited as authority for its holding rejecting petitioner's claim another Fifth Circuit case which involved a prisoner's collateral attack. *Johnson v. Walker*, 317 F.2d 418 (5th Cir. 1963).

section 1983, if not previously restricted in terms of relief to damages, may be from now on in view of the *Miller* analysis.

So may questions raised regarding other prison disciplinary procedures. On our spectrum we indicated a prisoner might be in custody in a maximum security or low security area. While neither status of itself suggests a possible application of *Miller*, if the prisoner were transferred from low to high without due process protection he might suffer a "grievous loss." As a rule the transfer from one institution to another is "peculiarly within the scope of the administration of the state penal system."<sup>145</sup> Certainly, a priori, a transfer within the same institution would be within the scope of administration as well. However, a prisoner, who was committed by defective proceedings to a high security prison and sought transfer to a less restrictive area, was held to state a due process claim in view of the "substantial difference" between the two forms of custody.<sup>146</sup> It is not clear whether such a claim, even before *Preiser*, would be cognizable under section 1983; the transfer claim recognized by the court was the gravamen of a writ.<sup>147</sup> However, in view of the susceptibility of this example to a *Miller* analysis, it is suggested that before long, transfers as well as solitary confinement may find themselves within the exclusive confines of the "core of habeas corpus."

#### IV. CONCLUSION

Where there were two remedies, one remains. This has occurred because the Court has misunderstood the nature of the remedies and their concomitant exhaustion and no-exhaustion doctrines. Even if *Preiser* is restricted to good time questions, it will encourage abuse by prison officials and deny a prisoner the speedy relief for which an act of Congress provided.

*Preiser's* scheme is irrational. The *Preiser* Court, apparently relying on the rationale of comity, proffered a bifurcated remedy that Justice Brennan has aptly characterized as ". . . a curious prescription for improving relations between state and federal courts."<sup>148</sup>

If the *Miller* analysis is applicable, *Preiser* may henceforth be read

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<sup>145</sup> United States *ex rel.* Verde v. Case, 326 F. Supp. 701, 704, (E.D. Pa. 1971). See United States *ex rel.* Thomas v. Bookbinder, 330 F. Supp. 1125 (E.D. Pa. 1971); United States *ex rel.* Stuart v. Yeager, 293 F. Supp. 1079 (D.N.J. 1968), *aff'd*, 419 F.2d 126 (3d Cir. 1969), *cert. denied*, 397 U.S. 1055 (1970).

<sup>146</sup> See Covington v. Harris, 419 F.2d 617 (D.C. Cir. 1969).

<sup>147</sup> *Id.* This case has been cited for the proposition that it expands the scope of habeas corpus. See note 46 *supra*. The nature of this claim is a due process claim which formed the common ground occupied by both remedies prior to *Preiser*.

<sup>148</sup> 411 U.S. 475, 511 (1973) (Brennan, J., dissenting).

as applying more broadly than simply to good time questions. For where the prisoner's interest is sufficient to require due process, there may exist a circumstance where the remedy is considered equivalent to release, thereby limiting a prisoner's relief to the writ. Solitary confinement and certain transfers strike one as amenable to such an interpretation. The *Preiser* decision therefore may seriously restrict the scope of section 1983, and possibly preclude it, in matters of prison discipline.

Finally, the Court has thrown away an opportunity. *Preiser* has been cast upon a landscape of confused law and complicated remedies and served only to further confound the difficulty. The Court has done this at a time of crisis in the prisons when clarification, not confusion, is needed.