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# Beyond Custody: Expanding Collateral Review of State Convictions

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# BEYOND CUSTODY: EXPANDING COLLATERAL REVIEW OF STATE CONVICTIONS

Federal district courts protect substantive constitutional rights against state encroachment in part by utilizing a writ of habeas corpus,[1] the traditional procedure for collateral review of state criminal convictions.[2] This safeguard for federally guaranteed rights, however, cannot be invoked by all parties alleging constitutional[3] deprivations in the state criminal process. Only petitioners in custody can avail themselves of habeas corpus relief; those not in custody must rely upon direct appeal for vindication of their constitutional rights. Direct appeal, though, may be insufficient to check state intrusions upon federal rights, leaving defendants not in custody without an adequate federal forum for their constitutional claims.

In *Hanson v. Circuit Court*,[4] for example, inadequate direct review produced serious consequences for defendant Hanson. Hanson had been convicted on an Illinois weapons charge. His *pro se* direct appeal of the conviction lapsed after he could not obtain a trial transcript or appointed counsel, despite his assertion of indigency. Hanson was subsequently imprisoned in California on another charge; when he applied for parole, he concluded that state law mandated the parole board to consider the

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[1] *See* 28 U.S.C. §§ 2241-2254 (1976).

[2] Habeas corpus review is a constitutional imperative: "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." U.S. CONST. art. I, § 9, cl. 2. Until 1867, however, state prisoners could not invoke habeas corpus relief in federal courts. *See* Mayers, *The Habeas Corpus Act of 1867: The Supreme Court as Legal Historian*, 33 U. CHI. L. REV. 31 (1965).

[3] Some nonconstitutional federal claims also are cognizable in habeas corpus. *See* notes 55-58 and accompanying text *infra*. Moreover, habeas corpus will not lie to redress Fourth Amendment violations. Stone v. Powell, 428 U.S. 465 (1976). *See* note 138 *infra*.

This article concerns itself primarily with collateral attacks alleging constitutional error, excepting Fourth Amendment claims, in the state process. Not only is there a lesser scope of habeas corpus relief available for claims of nonconstitutional error, but further, "it is the rare criminal appeal that does *not* involve a 'constitutional' claim." Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142, 156 (1970).

[4] 591 F.2d 404 (7th Cir.), *cert. denied*, 444 U.S. 907 (1979).

prior weapons conviction.[5] Hanson sought collateral review to avert this detrimental consequence of the prior allegedly unconstitutional conviction, but could not satisfy the habeas custody requirement.[6] Instead, he pursued collateral review under the Civil Rights Act of 1871, 42 U.S.C. § 1983.[7] The lower courts, however, refused to consider Hanson's claim under section 1983, and the Supreme Court, over Justice White's dissent, denied certiorari.[8]

Lower federal courts are split[9] over the availability of collateral review under section 1983 where habeas corpus does not lie.[10] A pressing question, then, concerns whether collateral review should span beyond the bounds of the habeas corpus custody requirement. This article advocates extension of collateral

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[5] 591 F.2d at 408 n.9.

[6] The writ of habeas corpus requires that custody arise from the conviction under collateral attack. Thus Hanson's imprisonment did not constitute custody for the purposes of a habeas action seeking declaratory and injunctive relief against Illinois officials. The Circuit Court, however, suggested strongly that Hanson seek habeas relief against the California parole authorities, *id.* at 412, reasoning that habeas corpus can be invoked against present custodians to challenge a prior conviction prolonging the period of confinement. *Id.* at 408.

[7] The statute provides:

> 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 (1976). Although the Civil Rights Act has existed in its present statutory form since 1867, its use has burgeoned in the past twenty years. *See generally* Coffin, *Justice and Workability:* Un Essai, 5 SUFFOLK U.L. REV. 567, 569-70 (1971); *Developments in the Law — Section 1983 and Federalism,* 90 HARV. L. REV. 1133, 1172 (1977) [hereinafter cited as *Section 1983 Developments*].

Collateral review is also available to federal prisoners attacking the constitutionality of their confinement. 28 U.S.C. § 2255 (1976). "Collateral review" as used in this article refers to federal court review of state criminal convictions, which raises fundamentally different issues from § 2255 collateral attacks upon prior criminal judgments originating in the federal system. For further illumination regarding § 2255 collateral review, *see generally* United States v. Hayman, 342 U.S. 205 (1952); *Developments in the Law — Federal Habeas Corpus,* 83 HARV. L. REV. 1038, 1062-66 (1970) [hereinafter cited as *Habeas Corpus Developments*].

[8] Hanson v. Circuit Court, 444 U.S. 907 (1979).

[9] Two courts have endorsed § 1983 as a vehicle for collateral attack on state criminal convictions, *see* Shipp v. Todd, 568 F.2d 133 (9th Cir. 1978) (per curiam); Pueschel v. Leuba, 383 F. Supp. 576 (D. Conn. 1974) (dictum), while three other courts have rejected collateral review under § 1983. *See* Waste Management of Wis., Inc. v. Fokakis, 614 F.2d 138 (7th Cir.), *cert. denied,* 101 S. Ct. 782 (1980); 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) (dictum).

[10] *See* 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 state criminal convictions.").

review to embrace all parties alleging deprivation of federally guaranteed rights in the state criminal process, regardless of whether the party fulfills the habeas corpus custody requirement. Part I assesses the sufficiency of Supreme Court certiorari jurisdiction to monitor adequately state adjudications of federal constitutional rights, coupled with an evaluation of the technical competency and institutional posture of state courts. Part II examines the significance of the custody limitation on collateral review, both as a substantive element of habeas corpus relief and as a mechanism for funnelling limited judicial resources. Part III presents two alternative means for expanding the scope of collateral review of state convictions: legislation eliminating the statutory habeas corpus custody requirement, or use of section 1983 as a vehicle for collateral review given the unavailability of habeas corpus. Part III also discusses the suitability of section 1983 as an instrument for expanding collateral relief beyond the habeas custody requirement, concluding that such an expansion is essential to the effectuation of substantive federal constitutional principles.

## I. THE NECESSITY FOR COLLATERAL REVIEW

Petitioners in custody[11] who exhaust state judicial remedies[12] have traditionally obtained collateral review of their state convictions through a writ of habeas corpus.[13] Habeas corpus serves as an institutional safeguard to supervise state enforcement of federal rights, ensuring that the federal courts are installed as final arbiters of constitutional principles.[14] As such, habeas corpus represents a critical procedural complement to the expansion of substantive federal rights.[15] Habeas corpus relief, however, is limited to claimants in custody. The habeas custody

[11] 28 U.S.C. § 2254(a) (1976). *See* note 16 and accompanying text *infra*.

[12] 28 U.S.C. § 2254(b) (1976). *See* note 98 and accompanying text *infra*.

[13] 28 U.S.C. §§ 2241-2254 (1976). *See generally Habeas Corpus Developments, supra* note 7.

[14] *See, e.g.*, McCormack, *Federalism and Section 1983: Limitations on Judicial Enforcement of Constitutional Claims* (pt. II), 60 VA. L. REV. 250, 259 (1974); Reitz, *Federal Habeas Corpus: Postconviction Remedy for State Prisoners*, 108 U. PA. L. REV. 461, 464 (1960); *Habeas Corpus Developments, supra* note 7, at 1061-62; *see* notes 59-60 and accompanying text *infra*.

[15] Spritzer, *Criminal Waiver, Procedural Default and the Burger Court*, 126 U. PA. L. REV. 473, 473 (1978); Wright & Sofaer, *Federal Habeas Corpus for State Prisoners: The Allocation of Fact-Finding Responsibility*, 75 YALE L.J. 895, 896 (1966). *See also* Cover & Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 YALE L.J. 1035, 1041 (1977).

requirement, although liberally construed to include situations other than incarceration,[16] nonetheless has made habeas corpus "largely the exclusive prerogative of long-term felony convictions claiming trial error."[17]

A broad class of defendants thus are barred from collateral review of their convictions. State criminal defendants subject to fine without imprisonment,[18] state prisoners unconditionally released after discharging their prison sentences,[19] and corporate criminal defendants,[20] for example, stand outside the contours of the custody requirement and cannot invoke the writ of habeas. These defendants, while not incarcerated or subject to the deprivations traditionally associated with custody, still have ample reason to seek expungement of their conviction records.[21] Courts often acknowledge the "substantial stake in the judgment of conviction which survives the satisfaction of the sentence."[22] Detrimental legal consequences flow from a criminal conviction: a person with a criminal record may be subject to impeachment in future criminal trials, be denied parole on the basis of previ-

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[16] "Custody" ranges beyond actual physical confinement, to embrace all restraints which prevent the habeas petitioner from doing "the things which in this country free men are entitled to do." Jones v. Cunningham, 371 U.S. 236, 243 (1963). *See, e.g.*, Hensley v. Municipal Court, 411 U.S. 345 (1973) (release on recognizance satisfies the habeas custody requirement); Braden v. 30th Judicial Circuit Court, 410 U.S. 484 (1973) (petitioner could invoke habeas corpus to attack a Kentucky detainer while imprisoned in Alabama); Carafas v. LaVallee, 391 U.S. 234 (1968) (prisoner unconditionally released prior to grant of habeas relief nonetheless "in custody" where habeas petition filed before release); Peyton v. Rowe, 391 U.S. 54 (1968) (prisoner could seek habeas relief even though not yet serving sentence for conviction to be collaterally attacked); Benson v. California, 328 F.2d 159 (9th Cir. 1964) (parolee considered "in custody" for habeas corpus purposes).

[17] Amsterdam, *Criminal Prosecutions Affecting Federally Guaranteed Civil Rights: Federal Removal and Habeas Corpus Jurisdiction to Abort State Court Trial*, 113 U. PA. L. REV. 793, 803 (1965).

[18] *See, e.g.*, Hanson v. Circuit Court, 591 F.2d 404 (7th Cir.) (petitioner sought habeas corpus review of weapons charge for which he had been fined $150), *cert. denied*, 444 U.S. 907 (1979).

[19] *See, e.g.*, Cavett v. Ellis, 578 F.2d 567 (5th Cir. 1978) (state prisoner had fully discharged the sentences resulting from five convictions he alleged were constitutionally invalid).

[20] *See, e.g.*, Waste Management of Wis., Inc. v. Fokakis, 614 F.2d 138 (7th Cir.) (corporation, convicted of violating state antitrust law and fined $4000, sought declaration of unconstitutionality of the conviction), *cert. denied*, 101 S. Ct. 782 (1980).

[21] Expungement of the record of conviction is an equitable remedy invoked whenever necessary to preserve fundamental rights or to vindicate constitutional principles. Menard v. Saxbe, 498 F.2d 1017, 1023 (D.C. Cir. 1974); Sullivan v. Murphy, 478 F.2d 938, 968 (D.C. Cir. 1973). Recoupment of fines paid in satisfaction of a criminal conviction runs afoul of the Eleventh Amendment prohibition of damage or equitable remedies drawn from state coffers. Edelman v. Jordan, 415 U.S. 651, 663 (1974); *Section 1983 Developments*, *supra* note 7, at 1346 n.71.

[22] Fiswick v. United States, 329 U.S. 211, 222 (1946).

ous convictions, or incur the sanctions of recidivism statutes.[23] Additionally, civil disabilities attach to a criminal record; for instance, some states have statutorily disenfranchised felons, and have denied public office, positions of public trust, and jury service to persons with felony convictions.[24] Aside from formal statutory disabilities, the social stigma of a criminal conviction will have deleterious effects upon the convict seeking employment, or otherwise attempting to live as a responsible citizen. Similarly, a corporation convicted of criminal wrongdoing may suffer a tarnished public reputation, diminishing its opportunities to attract individual and institutional investors.

Notwithstanding the interests of out-of-custody claimants in seeking expungement of the record of conviction, the limited scope of collateral review causes concern only if (1) Supreme Court certiorari review cannot sufficiently vindicate federal constitutional claims, and (2) federal collateral review, if granted to parties not in custody, would offer protections not afforded by state courts. The following sections examine these two propositions.

### A. *The Insufficiency of Certiorari Jurisdiction to Supervise State Constitutional Adjudications*

Judges and commentators have argued that direct review amply oversees state court adjudications of federally guaranteed rights.[25] Supreme Court certiorari jurisdiction, however, cannot provide adequate assurance that state criminal proceedings will adhere to federal constitutional norms.[26] Given the overwhelm-

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[23] *See* Sibron v. New York, 392 U.S. 40, 55 (1968) ("the obvious fact of life that most criminal convictions do in fact entail adverse collateral legal consequences"); Harrison v. Indiana, 597 F.2d 115, 118 (7th Cir. 1979); 4 ABA STANDARDS FOR CRIMINAL JUSTICE 22.24 (2d ed. 1980).

[24] Note, *Civil Disabilities of Felons*, 53 VA. L. REV. 403, 404 (1967). *See generally* Project, *The Collateral Consequences of a Criminal Conviction*, 23 VAND. L. REV. 929 (1970).

[25] Hanson v. Circuit Court, 591 F.2d 404, 411 (7th Cir.) (Supreme Court review of state decisions "is sufficient to preserve the role of the federal courts as the ultimate guardian of federally guaranteed rights"), *cert. denied*, 444 U.S. 907 (1979); Currie, *Res Judicata: The Neglected Defense*, 45 U. CHI. L. REV. 317, 333 (1978) ("Supreme Court review, not collateral attack, is the avenue of relief from errors of state law."); *cf.* Monroe v. Pape, 365 U.S. 167, 237 (1961) (Frankfurter, J., dissenting) ("The jurisdiction which Article III of the Constitution conferred on the national judiciary reflected the assumption that the state court, not the federal courts, would remain the primary guardians" of fundamental rights.), *overruled in part on other grounds*, Monell v. New York City Dept. of Social Services, 436 U.S. 658, 663 (1978).

[26] Stone v. Powell, 428 U.S. 465, 534 (1976) (Brennan, J., dissenting) ("our certiorari

ing mass of certiorari petitions passing before the Court each term, particularized review of the constitutional claims alleged is more fiction than fact.[27] Moreover, the nature of certiorari jurisdiction is not wholly suited to vindication of constitutional rights. Relitigation of factual matters, far more available in collateral actions[28] than on direct review,[29] may often be critical to adjudicating a constitutional claim.[30] The many claims found meritorious in federal habeas corpus proceedings following denial of certiorari amply support the hypothesis that Supreme Court review inadequately vindicates federally guaranteed rights.[31]

### B. *Justifications for Relitigation of State Decisions by Lower Federal Courts*

Relitigation of state decisions by lower federal courts cannot be justified absent some preference for federal court adjudication of constitutional questions. Any model of judicial review must recognize the inherent possibility of error in the process.[32]

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jurisdiction is inadequate for containing state criminal proceedings within constitutional bounds"); Stolz, *Federal Review of State Court Decisions of Federal Questions: The Need for Additional Appellate Capacity*, 64 CAL. L. REV. 943, 959 (1976) (the Supreme Court cannot "maintain more than token supervision of the resolution of federal law questions by the state courts").

[27] *See* Hart, *Foreword: The Time Chart of the Justices, The Supreme Court, 1958 Term*, 73 HARV. L. REV. 84, 96 (1959); McCormack, *supra* note 14, at 257; *Habeas Corpus Developments*, *supra* note 7, at 1061; Note, *Protecting Fundamental Rights in State Courts: Fitting a State Peg to a Federal Hole*, 12 HARV. C.R.-C.L.L. REV. 63, 87 (1977).

[28] 28 U.S.C. § 2254(d) (1976); *see* Townsend v. Sain, 372 U.S. 293, 313 (1963).

[29] *See generally* 16 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4033 (1977).

[30] *See* Beck v. Ohio, 379 U.S. 89, 101 (1964) (Harlan, J., dissenting) ("Federal habeas corpus, which allows a federal court in appropriate circumstances to develop a fresh record . . . provides a far more satisfactory vehicle [than Supreme Court review] for resolving such unclear issues, for the judge can evaluate for himself the on-the-spot considerations which no appellate court can estimate with assurance on a cold record."); Mishkin, *The Federal "Question" in the District Courts*, 53 COLUM. L. REV. 157, 171 (1953) ("the trial of an issue of fact may be as important a factor in the *vindication* of a federal right as the determination of the legal content of that right"); Reitz, *supra* note 14, at 465.

[31] *See* Reitz, *supra* note 14, at 481-503 (examination of thirty-five petitions for certiorari which demonstrate the acute importance of habeas corpus); Amsterdam, *supra* note 17, at 793-99 (arguing that federal appellate review of state decisions cannot adequately protect civil rights). *See also* Stone v. Powell, 428 U.S. 465, 530-33 (1976) (Brennan, J., dissenting) (discussing facially apparent Fourth Amendment violations not redressed by appellate review).

[32] Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 453 (1963).

Lest judicial review deteriorate into an endless search for "ultimate truth," the process at some juncture must assign "final competence to determine legality."[33] If the reviewing court offers no greater expertise in considering the matters litigated previously, judicial review becomes merely repetitious litigation.

Significant differences exist, however, between federal and state court adjudications of federal constitutional claims. Lower federal courts are more likely than state courts to make astute, perceptive applications of federal law.[34] This may stem in part from a disparity in competency between state trial courts and federal district courts.[35] Federal district court judges are drawn from a more highly qualified applicant pool, through a process often based more upon merit, than their state trial court counterparts.[36] Once selected, moreover, federal district judges enjoy superior support staffs and lighter caseloads than state trial judges.[37]

More importantly, the state judiciary differs vastly from the federal bench in institutional orientation.[38] Justice Brennan ob-

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[33] *Id.* at 451. *See also* H.L.A. HART, THE CONCEPT OF LAW 138-41 (1961).

[34] ALI STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS 166 (1969) ("it is difficult to avoid concluding that federal courts are more likely to apply federal law sympathetically and understandingly than are state courts"). *See also* Chevigny, *Section 1983 Jurisdiction: A Reply,* 83 HARV. L. REV. 1352, 1356-58 (1970); McCormack, *supra* note 14, at 262-64; Neuborne, *The Myth of Parity,* 90 HARV. L. REV. 1105 (1977); Note, *The Preclusive Effect of State Judgments on Subsequent 1983 Actions,* 78 COLUM. L. REV. 610, 611 (1978) [hereinafter cited as *The Preclusive Effect of State Judgments*].

[35] In contrast, a substantially lesser disparity exists between state appellate court and federal district court judges. Neuborne, *supra* note 34, at 1116 n.45; *see* Brennan, *State Constitutions and the Protection of Individual Rights,* 90 HARV. L. REV. 489, 495 (1977); Howard, *State Courts and Constitutional Rights in the Day of the Burger Court,* 62 VA. L. REV. 873, 874 (1976). To the extent that appellate courts oversee state trial court applications of federal law, as in collateral actions requiring exhaustion of state remedies, *see* notes 98-116 and accompanying text *infra,* the hypothesized disparity in competency between state trial and federal district courts will be mitigated. Nonetheless, state trial court competency is relevant to evaluating the necessity for federal collateral review to effectuate constitutional rights because factual determinations, often critical to the adjudication of constitutional claims, are more subject to relitigation on collateral attack than in direct review proceedings. *See* notes 28-30 and accompanying text *supra*; Neuborne, *supra* note 34, at 1116 n.45. State appellate courts cannot create the buffer of protection for constitutional rights provided by federal district courts on collateral review.

[36] Neuborne, *supra* note 34, at 1121-22.

[37] *Id.* at 1122.

[38] Several federal judges have rejected the suggestion of a disparity in competency between state and federal judges. *See, e.g.,* Aldisert, *Judicial Expansion of Federal Jurisdiction: A Federal Judge's Thoughts on Section 1983, Comity and the Federal Caseload,* 1973 LAW & SOC. ORD. 557, 559; Lay, *Modern Administrative Proposals for Federal Habeas Corpus: The Rights of Prisoners Preserved,* 21 DE PAUL L. REV. 701, 716 (1972) (it would be presumptuous "to claim that federal judges are more competent,

serves: "My state court responsibility, while it included jurisdiction over federal questions and federal-state conflicts, was inevitably colored by the fact that I was, after all, a state judge."[39] State courts cannot be expected to weigh the extra-territorial consequences of constitutional adjudication in the manner incumbent upon federal courts, or to strive as mightily as federal courts for uniform application of constitutional principles.[40] The state judge — who, more than the federal judge, interacts with law enforcement agencies and problems of lawlessness at a local level — may give undue weight to the substantive goals of state criminal law at the expense of federally guaranteed rights.[41] Furthermore, life tenure effectively insulates federal judges from the majoritarian pressures imposed on most state judges through the election process.[42] Given the "countermajoritarian and undemocratic"[43] nature of the Bill of Rights, such pressures may sway state judges from stringent enforcement of constitutional rights.[44]

Recent decisions, however, have refused to recognize a disparity between state and federal courts.[45] This opposition may stem largely from the judiciary's "understandable wish" for parity, rather than a deeply rooted perception that state and federal courts are equally qualified to adjudicate federal rights.[46]

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conscientious, or learned than their state brethren in the area of federal rights"). Judge Friendly's experiences do not "suggest that federal determination of [constitutional] questions is notably better" than state adjudications. Friendly, *supra* note 3, at 165 n.125. Yet even assuming no distinction in competency between federal and state benches, the difference in institutional orientation creates a disparity transcending relative abilities. *See* Lay, *supra*, at 717.

[39] Brennan, *Some Aspects of Federalism*, 39 N.Y.U. L. REV. 945, 948 (1964).

[40] Chevigny, *supra* note 34, at 1357-58.

[41] Bator, *supra* note 32, at 510; *Habeas Corpus Developments*, *supra* note 7, at 1060. *See also* THE FEDERALIST No. 81, at 506 (A. Hamilton) (Lodge ed.) ("the most discerning cannot foresee how far the prevalency of a local spirit may be found to disqualify the local tribunals for the jurisdiction of national causes").

[42] Neuborne, *supra* note 34, at 1116 n.45, 1127-28. *See also* Bator, *supra* note 32, at 510.

[43] Oakes, *The Proper Role of the Federal Courts in Enforcing the Bill of Rights*, 54 N.Y.U. L. REV. 911, 916 (1979).

[44] Neuborne, *supra* note 34, at 1127-28.

[45] *See, e.g.*, Allen v. McCurry, 101 S. Ct. 411, 420 (1980); Stone v. Powell, 428 U.S. 465, 494 n.35 (1976).

[46] Neuborne, *supra* note 34, at 1105. *See also* Amsterdam, *supra* note 17, at 802:

> [T]he probability is that the popular organs of state prosecution will never effectively protect federal civil liberties; that they will remain instruments for harassment, not vindication, of persons who dare to exercise freedoms to which the United States is Constitutionally committed, but which its majorities who speak in the state process are not constitutionally built to accept.

In Stone v. Powell, 428 U.S. 465, 494 n.35 (1976), the Supreme Court found itself "unwilling to assume that there now exists a general lack of appropriate sensitivity to

## II. CUSTODY AS A PREREQUISITE TO COLLATERAL REVIEW

Despite the indispensability of collateral relief for vindication of federal constitutional principles, habeas corpus review of state criminal proceedings remains limited to persons in custody.[47] Parties not in custody, however, cannot be presumed to present less meritorious or significant constitutional claims than persons in custody. In fact, "many deep and abiding constitutional problems" in the criminal process evolve from prosecutions for relatively minor offenses frequently beyond the scope of habeas relief.[48] Parties not meeting the habeas corpus custody requirement may present substantial constitutional questions; significant state infringements upon federal constitutional rights may not be checked if custody determines the availability of collateral review.[49]

### A. *Habeas Corpus Review: A Mechanism for Effectuating Federal Constitutional Rights*

Decisions rejecting extension of collateral review beyond the confines of habeas corpus have been founded traditionally upon the significance of custody as an element of collateral relief.[50]

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constitutional rights" in the state courts. It is not inconsistent, however, to perceive no "lack of appropriate sensitivity to constitutional rights" among state courts while recognizing that constitutional rights may not be fully vindicated in those courts. The disparity between state and federal court enforcement of federal rights stems not from overt state antipathy but rather from differences in competency and institutional orientation that subtly color state court judgments. The murkiness of the constitutional waters makes possible a disparity between state and federal court vindication of constitutional rights without abdication of the judicial oath by the state bench. *See* Maroney & Braveman, *"Averting the Flood:" Henry J. Friendly, The Comity Doctrine, and the Jurisdiction of the Federal Courts—Part II*, 31 SYRACUSE L. REV. 469, 508-09 (1980); *cf.* Kaufman v. United States, 394 U.S. 217, 225-26 (1969) (the disparity between federal and state court enforcement of federal constitutional rights creates a greater necessity for collateral review of state prisoner claims than those of federal prisoners); McCormack, *supra* note 14, at 263 (habeas corpus jurisdiction impliedly rejects the notion of parity between state and federal courts).

[47] *See* notes 16-21 and accompanying text *supra*.

[48] Sibron v. New York, 392 U.S. 40, 52-53 (1968). *See also* Argersinger v. Hamlin, 407 U.S. 25, 33 (1972) (vagrancy cases, subject only to brief sentences of imprisonment or small fines, "often bristle with thorny constitutional questions").

[49] *See The Preclusive Effect of State Judgments*, *supra* note 34, at 615 (there is a "significant category of constitutional rights that cannot be protected by habeas corpus").

[50] *See, e.g.*, Waste Management of Wis., Inc., v. Fokakis, 614 F.2d 138 (7th Cir.), *cert. denied*, 101 S. Ct. 782 (1980); 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) (dictum).

Frequently, these decisions perceive the custody requirement as a substantive element of habeas corpus review rather than merely a jurisdictional prerequisite.[51] The Supreme Court, reasoning that the writ essentially "enable[s] those unlawfully incarcerated to obtain their freedom,"[52] has characterized the core of habeas corpus as being a challenge to the constitutionality of the "physical confinement itself."[53]

Two components of habeas corpus procedure dispel the premise that the writ serves only to remedy unjust imprisonment. First, the Supreme Court has held that habeas corpus jurisdiction attaches when the petitioner files for habeas relief while in custody, even should the petitioner be unconditionally released subsequent to filing the habeas petition but prior to obtaining relief.[54] A grant of habeas relief after unconditional release seems fundamentally opposed to the depiction of habeas corpus solely as a remedy for unjust imprisonment. Second, petitioners alleging nonconstitutional federal error in the state process enjoy less access to federal habeas corpus than those who assert constitutional deprivations. Habeas corpus relief is available to vindicate nonconstitutional federal claims only where the alleged error of law signifies "a fundamental defect which inherently results in a complete miscarriage of justice."[55] Federal habeas re-

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[51] *See, e.g.*, Allen v. McCurry, 101 S.Ct. 411, 417 n.12 (1980) ("the unique purpose of habeas corpus — to release the applicant for the writ from unlawful confinement"); Hensley v. Municipal Court, 411 U.S. 345, 351 (1973) (habeas corpus is "a remedy for severe restraints on individual liberty"). *See also* Meador, *The Impact of Federal Habeas Corpus on State Trial Procedures*, 52 VA. L. REV. 286, 286 (1966) (federal habeas corpus provides another layer of review for state criminal cases *because* they result in custody); *Section 1983 Developments, supra* note 7, at 1337 ("federal habeas corpus rests on the paramount importance of freedom from unlawful restraint").

[52] Johnson v. Avery, 393 U.S. 483, 485 (1969).

[53] Preiser v. Rodriguez, 411 U.S. 475, 489 (1973).

[54] Carafas v. LaVallee, 391 U.S. 234 (1968). The habeas relief at issue in *Carafas* was apparently limited to expungement of the record of conviction, as the Court discussed extensively the collateral consequences attaching to a criminal record despite the unconditional release of the habeas petitioner. *Id.* at 237-38. Expungement of the record of conviction is precisely the remedy sought on collateral review by parties not in custody, *see* note 21 *supra;* it seems incongruous to enable a petitioner filing a habeas petition one day before being unconditionally released to seek expungement of the record of conviction while denying relief to a party not in custody.

A result similar to *Carafas* was reached in Thomas v. Cunningham, 335 F.2d 67 (4th Cir. 1964), where the habeas petitioner obtained collateral review of six sentences fully served by the time of the habeas proceedings. *See also* Jones v. Cunningham, 371 U.S. 236 (1963) (habeas petition brought by a prisoner released on parole).

[55] Davis v. United States, 417 U.S. 333, 346 (1974) (conviction for draft evasion challenged on basis that the induction order was invalid under the Selective Service Act) (quoting Hill v. United States, 368 U.S. 424, 428 (1962) (collateral review proceedings alleging that the trial judge had violated the Federal Rules of Criminal Procedure)). Both *Davis*, 417 U.S. at 341, and *Hill*, 368 U.S. at 425, involved federal nonconstitutional

lief for constitutional claims, on the other hand, does not fall within such strictures.[56] This differentiation cannot be reconciled with a characterization of the custody requirement as "designed to preserve the writ of habeas corpus as a remedy for severe restraints on individual liberty."[57] "Severe restraints" could as easily be the result of encroachments upon federal law as the product of federal constitutional violations.[58]

The most accurate depiction, therefore, portrays habeas corpus review as a means to vindicate federal constitutional principles rather than as a remedy for unjust imprisonment.[59] The elasticity of the custody requirement has transformed the writ from its common law origins — when habeas corpus could not issue unless it would effect petitioner's "release from custody"[60] — to a device ensuring state court adherence to federally guaranteed rights.

### B. *Costs Involved in Expanding Collateral Review*

The custody requirement, some argue, prevents collateral review from imposing undue strains on the judicial system.[61]

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claims tendered by federal prisoners under 28 U.S.C. § 2255. *See* note 7 *supra.* But the Court has made clear that § 2254, the federal habeas corpus statute, and § 2255 are of identical scope. *Davis,* 417 U.S. at 343. *See* Fasano v. Hall, 615 F.2d 555, 557-58 (1st Cir. 1980) (habeas petitioner asserted that his conviction had been obtained through breach of the Interstate Agreement on Detainers Act); Losinno v. Henderson, 420 F. Supp. 380, 384-85 (S.D.N.Y. 1976) (habeas corpus would lie if petitioner could demonstrate that the wiretap and search warrant leading to his conviction violated the Omnibus Crime Control Act).

[56] Kaufman v. United States, 394 U.S. 217, 223 (1969); Sunal v. Large, 332 U.S. 174, 182 (1947). All federal constitutional claims presented by state petitioners are cognizable in habeas corpus, Brown v. Allen, 344 U.S. 443 (1953), with the exception of Fourth Amendment allegations. Stone v. Powell, 428 U.S. 426 (1976); *see* note 138 *infra.*

[57] Hensley v. Municipal Court, 411 U.S. 345, 351 (1973).

[58] *See* 59 MINN. L. REV. 633, 644 (1975) ("Certainly there is no ineluctable relationship between the constitutional nature of the claim raised and the degree of prejudice suffered. A petitioner may indeed be more prejudiced by a nonconstitutional error than by one of a constitutional nature.").

[59] *See* McCormack, *supra* note 14, at 290 ("The vindication of constitutional rights has been seen by most courts as the most important aspect of habeas corpus relitigation, restraint on liberty being regarded as something like a sine qua non of standing."); Reitz, *Federal Habeas Corpus: Impact of an Abortive State Proceeding,* 74 HARV. L. REV. 1315, 1344 (1961) (writ of habeas corpus exists to provide "a forum for the vindication of constitutional rights whenever violated"); *Habeas Corpus Developments, supra* note 7, at 1060-61 (habeas corpus jurisdiction is "an institutional device for the supervision of state enforcement of federal rights").

[60] Fay v. Noia, 372 U.S. 391, 427 n.38 (1963).

[61] *See* Waste Management of Wis., Inc. v. Fokakis, 614 F.2d 138, 140-41 (7th Cir.) (custody requirement "represents the balance Congress struck between the interest of the individual in remaining free of unlawful intrusion on his physical freedom and the

Under this view, the custody requirement provides a convenient benchmark, limiting habeas relief to cases presenting putatively unjust imprisonment, beyond which the costs of collateral review will not be incurred.[62] In extending collateral review beyond the custody requirement, the crucial question concerns whether the costs of collateral review outweigh the benefits of enabling parties not in custody to present their federal constitutional claims in "the more sympathetic and competent forum."[63]

*1. The additional burden on federal courts*— Increasing the federal court caseload represents one obvious concern with expanding the availability of collateral review.[64] Justice Jackson cautioned that "[i]t must prejudice the occasional meritorious application to be buried in a flood of worthless ones."[65] Habeas corpus has been decried as "a plaything of penitentiary inmates to accomplish temporary vacation visits to the federal courts";[66] section 1983 actions are deprecated for making "the federal court a nickel and dime court."[67] Eliminating the custody prerequisite to collateral attacks on state convictions, however, will not obviously increase substantially the caseload burden of federal courts.[68] This article's proposed exhaustion requirement[69]

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state courts' interest in remaining free of federal interference with their final judgments"), *cert. denied*, 101 S. Ct. 782 (1980).

[62] There cannot be an absolutist pursuit of proper adjudication of constitutional matters at the expense of other systemic values. Justice Holmes counseled:

> All rights tend to declare themselves absolute to their logical extreme. Yet all in fact are limited by the neighborhood of principles of policy which are other than those on which the particular right is founded, and which become strong enough to hold their own when a certain point is reached.

Hudson County Water Co. v. McCarter, 209 U.S. 349, 355 (1908). There are limits to the procedural protections to be established to ensure adequate adjudication of constitutional rights, Wright & Sofaer, *supra* note 15, at 915; "citizens may not have a constitutional right to be wholly free of injury at the hands of the state . . . ." *Section 1983 Developments, supra* note 7, at 1228; *see* Address by Chief Justice Burger, ABA Winter Convention (Feb. 8, 1981), *excerpted in* N.Y. Times, Feb. 9, 1981, at 11, col. 1 (midw. ed.) ("The idealistic search for perfect justice has led us on a course found nowhere else in the world . . . [T]he judicial process becomes a mockery of justice if it is forever open to appeals and retrials for errors in the arrest, the search or the trial.").

[63] Neuborne, *supra* note 34, at 1118.

[64] *See, e.g.*, Schneckloth v. Bustamonte, 412 U.S. 218, 259 (1973) (Powell, J., concurring); Friendly, *supra* note 3, at 148-49.

[65] Brown v. Allen, 344 U.S. 443, 537 (1953) (Jackson, J., concurring).

[66] Goodman, *Use and Abuse of the Writ of Habeas Corpus*, 7 F.R.D. 313, 314 (1947). *See also* Friendly, *supra* note 3, at 143-44.

[67] Aldisert, *supra* note 38, at 569. *See also* Note, *Limiting the 1983 Action in the Wake of* Monroe v. Pape, 82 HARV. L. REV. 1486, 1493 (1969) [hereinafter cited as *Limiting Section 1983*].

[68] *See* Chevigny, *supra* note 34, at 1354 (most § 1983 claims pose little time problem for the federal courts); *Habeas Corpus Developments, supra* note 7, at 1041 (the burden of habeas petitions on the federal courts is easily overstated).

should deflect any potential onslaught of actions from parties not in custody seeking collateral relief. Additionally, persons not in custody pursuing the arduous process of collateral review presumably sacrifice more alternative endeavors than do prisoners who file habeas petitions "as a form of occupational therapy."[70]

Even assuming that expansion of collateral review imposes substantial new burdens on federal courts, that alone cannot compel maintenance of the custody prerequisite to collateral review. Concerns for judicial efficiency pale in comparison to the necessity for vindication of federal constitutional rights.[71] Misuse, abuse or overuse of a judicial process should not warrant its denial or suspension. No assurance exists that making collateral review less accessible will effectively screen out frivolous actions while still enabling relief for meritorious allegations of constitutional infringements.[72]

2. *Undermining the finality of state court decisions*— Some argue that expanding the scope of collateral review to parties not in custody will compromise the finality of state adjudications.[73] Yet, finality, while promoting authoritative and responsible decisionmaking in the state process, should not be a more valued objective than vindication of constitutional rights.[74] Further-

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[69] *See* notes 105-07 and accompanying text *infra*.

[70] 17 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4261, at 588 (1978).

[71] Judge Bazelon observes: "Efficiency is nice, but it's really beside the point. The true measure of the quality of a judicial system is how many hidden problems it brings into public view and how well it stimulates the responsible officials and agencies into doing something about these problems." Bazelon, *New Gods for Old: "Efficient" Courts in a Democratic Society*, 46 N.Y.U. L. REV. 653, 655 (1971). *See also* Sunal v. Large, 332 U.S. 174, 189 (1947) (Rutledge, J., dissenting) ("considerations of economy of judicial time and procedure, important as they undoubtedly are, become comparatively insignificant" beside the great object of the writ of habeas corpus); H. FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW 90 (1976) ("It is hard to conceive a task more appropriate for federal courts than to protect civil rights guaranteed by the Constitution against invasion by the states."); Reitz, *supra* note 59, at 1349 ("difficult to discover exactly where and how and to what extent the system would be so severely periled as to permit violations of the Constitution to go unexamined and unredressed").

[72] Smith, *Federal Habeas Corpus: State Prisoners and the Concept of Custody*, 4 U. RICH. L. REV. 1, 51-52 (1968).

[73] *See, e.g.*, Schneckloth v. Bustamonte, 412 U.S. 218, 259 (1973) (Powell, J., concurring); Friendly, *supra* note 3, at 149.

[74] *See* Fay v. Noia, 372 U.S. 391, 424 (1963) ("conventional notions of finality in criminal litigation cannot be permitted to defeat the manifest federal policy that federal constitutional rights of personal liberty shall not be denied without the fullest opportunity for plenary federal judicial review"); McCormack, *supra* note 14, at 257; Pollack, *Proposals to Curtail Federal Habeas Corpus for State Prisoners: Collateral Attack on the Great Writ*, 66 YALE L.J. 50, 65 (1956) ("where a personal liberty is involved, a democratic society employs a different arithmetic and insists that it is less important to reach an unshakeable decision than to do justice").

more, state courts can achieve a substantial degree of finality in the criminal process by studious adherence to federal constitutional norms.[75] To the extent that state courts correctly decide federal questions, expanded collateral review can vindicate the state process rather than undermine its finality.[76]

3. *Exacerbating federal-state tensions*— Eliminating the custody prerequisite creates a further concern. Increasing the scope of district court involvement in cases passing muster in state appellate processes might magnify federal-state tensions.[77] Heightened tensions between federal and state courts, though, need not be dysfunctional.[78] "Conflict" engendered by collateral review can create a dialogue which articulates and defines individual rights. This dialogue may serve a critical function in the clarification of constitutional rights. The Supreme Court often imposes an open-ended solution for constitutional questions and awaits subsequent resolution by the lower courts. The Court thus defines a starting point of "discussion" between state and lower federal courts, with the ensuing dialogue profoundly influencing the development of constitutional law.[79]

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[75] "[I]n a real sense there are right and wrong answers" to constitutional questions, *Habeas Corpus Developments*, *supra* note 7, at 1057, at least following the unsettled interlude when lower federal courts search for resolution of the legal issue. *See* notes 78-79 and accompanying text *infra*.

[76] Stone v. Powell, 428 U.S. 465, 529-30 (1976) (Brennan, J., dissenting); Brennan, *supra* note 39, at 958; Meador, *supra* note 51, at 291. This analysis defines "finality" not as a desire to foreclose relitigation but as the ability to prevent reversal of state decisions. In this sense "finality" relates closely to the minimization of federal-state tensions.

An alternative conception of "finality" would emphasize the foreclosure of relitigation rather than whether the state judgment will ultimately be vindicated in federal court. This orientation focuses upon generating repose and conserving judicial resources. Repose should not, however, be as significant an objective in criminal as opposed to civil adjudications. More important than repose is the need to convince the defendant of the justice of sanction. *See* note 80 *infra*. Moreover, if the desire for "finality" intends to channel limited judicial resources, this concern does not warrant restricting the scope of collateral review. *See* notes 64-72 and accompanying text *supra*.

[77] *See, e.g.*, Schneckloth v. Bustamonte, 412 U.S. 218, 259 (1973) (Powell, J., concurring).

[78] Cover & Aleinikoff, *supra* note 15, at 1047.

[79] *Id.* at 1065. Cover and Aleinikoff argue that state courts are likely to adopt a pragmatic stance in the dialogue, while lower federal courts will incline toward a more utopian perspective. *Id.* at 1050-51. *But cf. Section Developments*, *supra* note 7, at 1182 ("national community adhering to national constitutional values has effectively stripped the states of much of their function in the definition of civil rights").

## III. BEYOND CUSTODY: PROVIDING COLLATERAL REVIEW WHEN HABEAS CORPUS IS UNAVAILABLE

Because vindication of federal constitutional rights provides the true rationale for collateral review of state convictions, custody should not be a prerequisite to relief. The costs of eliminating custody as an element of collateral review do not outweigh the interest in adjudicating constitutional principles in a federal forum.[80] Direct review of state criminal adjudications inadequately polices the application of federal law in state courts "which have arguably demonstrated their unfitness" for the task.[81] Absent expansion of collateral review beyond the habeas corpus custody requirement, parties not in custody who allege constitutional deprivations in the state process cannot be assured of full enforcement of their federal rights.

### A. *The Legislative Solution*

The habeas corpus custody requirement could be eliminated by legislative fiat. Although the Constitution mandates the existence of habeas corpus,[82] the common law defines its particulars which to some extent are subject to legislative definition.[83] There have been substantial legislative inroads made into the custody prerequisite for *state* collateral review of state criminal convictions. Oregon, for example, has adopted a post-conviction act eliminating the custody requirement for collateral attacks on

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[80] Judge Friendly identifies two other costs of collateral review, not relevant here to evaluating whether collateral relief should be available beyond custody. First, collateral review interferes with the rehabilitative process, by delaying the prisoner's recognition of the justice of sanction. Friendly, *supra* note 3, at 146. *See also* Bator, *supra* note 32, at 452 ("swiftly and certainly become subject to punishment"). It may be argued, however, that rehabilitation is best served when prisoners are convinced their claims have been heard and considered adequately by the legal system. Wulf, *Limiting Prisoner Access to Habeas Corpus — Assault on the Great Writ*, 40 BROOKLYN L. REV. 253, 254 (1973). Furthermore, the force of a rehabilitative ideals argument is minimal regarding parties not in custody who seek collateral attack on their conviction *following* the imposition of sanctions. Friendly's second concern is with the delay caused by collateral review in final resolution of factual disputes, making the state prosecutorial task more difficult. Friendly, *supra* note 3, at 147. To the extent this argument has force it redounds against collateral review per se, not against extending collateral review to parties unable to satisfy the habeas custody requirement.

[81] Wright & Sofaer, *supra* note 15, at 902.

[82] *See* note 2 *supra*.

[83] Bator, *supra* note 32, at 444 n.6; Note, *Federal Habeas Corpus for State Prisoners: The Isolation Principle*, 39 N.Y.U. L. REV. 78, 78 n.6 (1964).

state convictions,[84] mirroring the approach of the Uniform Post-Conviction Procedure Act[85] and the suggested ABA standards on collateral review.[86] There has been, however, no congressional inclination to eliminate the federal habeas corpus custody requirement.

### B. *Section 1983 as a Vehicle for Collateral Review*

Given that legislative elimination of the habeas custody requirement appears unlikely, extension of collateral relief to parties not in custody must occur through judicial initiative. Judicial action can expand the scope of collateral review in the absence of legislation.[87] Several courts[88] indeed have taken such action, enabling collateral attacks on state convictions under section 1983 of the Civil Rights Act where the plaintiff, seeking expungement of the record of conviction, cannot satisfy the habeas corpus custody requirement. Congress enacted section 1983 as an element of a broad design to install the federal government as ultimate guardian of basic federal rights against state encroachment.[89] As such, section 1983 serves as an appro-

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[84] OR. REV. STAT. § 138.510 (1979); *see* Morasch v. State, 261 Or. 299, 493 P.2d 1364 (1972) (petitioner seeking collateral review of a 1932 misdemeanor conviction); Collins & Neil, *The Oregon Postconviction-Hearing Act*, 39 OR. L. REV. 337 (1960).

[85] UNIFORM POST-CONVICTION PROCEDURE ACT § 1.

[86] 4 ABA STANDARDS FOR CRIMINAL JUSTICE std. 22-2.3 (2d ed. 1980). Approaches regarding *state* collateral review do not generalize fully to the question of *federal* collateral review of state convictions. State post-conviction relief is motivated by concerns different from those of federal collateral review, which presumes inadequate adherence to federal rights in the state criminal process. Nonetheless, commentary accompanying the ABA guidelines argues that elimination of the custody requirement is necessary because parties not in custody still incur the adverse consequences of a criminal conviction. *Id.* at 22.24; *see* notes 21-24 and accompanying text *supra*.

[87] It could be argued that the congressional silence bars abandonment of the custody prerequisite. *See, e.g.*, Hanson v. Circuit Court, 591 F.2d 404, 412 (7th Cir.) ("abandonment of the custody requirement is a matter for legislative, not judicial action"), *cert. denied*, 444 U.S. 907 (1979). Justice Cardozo noted, though, that "[l]egislatures have sometimes disregarded their own responsibility, and passed it on to the courts." B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 93 (1921). Moreover, judicial action may be most appropriate where necessary, as here, to vindicate constitutional principles. If the Constitution is "antidemocratic," Choper, *On the Warren Court and Judicial Review*, 17 CATH. U.L. REV. 20, 38 (1967), the legislature might be expected not to act so to ensure full vindication of constitutional principles, warranting forceful judicial action. *See* Oakes, *supra* note 43, at 946 ("I suspect that much of the opposition to federal courts generally . . . is really based upon an underlying opposition to recognition of the rights in the first instance.").

[88] *See* Shipp v. Todd, 568 F.2d 133 (9th Cir. 1978) (per curiam); Pueschel v. Leuba, 383 F. Supp. 576 (D. Conn. 1974) (dictum).

[89] *See* Mitchum v. Foster, 407 U.S. 225, 242 (1972); Monroe v. Pape, 365 U.S. 167, 180 (1961), *overruled in part on other grounds*, Monell v. New York City Dept. of Social

priate vehicle for expanding the scope of collateral relief to include parties not in custody. Implicit in the statute are the presumed inadequacy of the state forum for enforcing federal constitutional rights,[90] and the perceived necessity for adjudication of federal rights in a forum insulated from state influence.[91]

The writ of habeas corpus serves similar systemic functions.[92] A clear analogy exists between habeas corpus and section 1983: both devices serve to prevent erosion of federal rights in state courts.[93] Positing section 1983 as a means to expand the scope of collateral review, therefore, does not conflict with the purposes underlying either the Civil Rights Act or the "Great Writ."[94]

The analogy between habeas corpus and section 1983, though, is imprecise at certain points. The broad contours of section 1983[95] contrast with the specific provisions of the habeas corpus statute.[96] Acceptance of section 1983 as a vehicle for collateral review mandates special consideration of the exhaustion of state judicial remedies and the preclusive effect of state judgments — two areas where the Civil Rights Act diverges markedly from habeas corpus procedure.[97]

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Services, 436 U.S. 658, 663 (1978); *Section 1983 Developments, supra* note 7, at 1150; Note, *State Prisoners' Suits Brought on Issues Dispositive of Confinement: The Aftermath of* Preiser v. Rodriguez *and* Wolff v. McDonnell, 77 COLUM. L. REV. 742, 766 (1977) [hereinafter cited as *State Prisoners' Suits*].

[90] Theis, *Res Judicata in Civil Rights Act Cases: An Introduction to the Problem,* 70 NW. U.L. REV. 859, 868 (1976); Weinberg, *The New Judicial Federalism,* 29 STAN. L. REV. 1191, 1214 (1977); *see* notes 34-44 and accompanying text *supra.*

[91] Mitchum v. Foster, 407 U.S. 225, 242 (1972); Chevigny, *supra* note 34, at 1358; Wechsler, *Federal Courts, State Criminal Law and the First Amendment,* 49 N.Y.U. L. REV. 740, 852-53 (1974); Note, *The Collateral Estoppel Effect of State Criminal Convictions in Section 1983 Actions,* 1975 U. ILL. L.F. 95, 99 [hereinafter cited as *Section 1983 Actions*].

[92] *See* notes 14-15 and accompanying text *supra.*

[93] This analogy was acknowledged by the Supreme Court in Fay v. Noia, 372 U.S. 391, 428 (1963) (dictum) (the habeas corpus statute, "like the Civil Rights Act, was intended to furnish an independent, collateral remedy for certain privations of liberty"). *See also* Preiser v. Rodriguez, 411 U.S. 475, 504 (1973) (Brennan, J., dissenting) ("every application by a state prisoner for federal habeas corpus relief . . . could, as a matter of logic and semantics," be viewed as an action under the Civil Rights Act); McCormack, *supra* note 14, at 259 ("analogy between habeas corpus and section 1983 cases rests on their both being aimed primarily at vindication of principle"); Torke, *Res Judicata in Federal Civil Rights Actions Following State Litigation,* 9 IND. L. REV. 543, 566 (1976).

[94] *Ex parte* Bollman, 8 U.S. (4 Cranch) 75, 95 (1807) (Marshall, C.J.).

[95] *See, e.g., Limiting Section 1983, supra* note 67, at 1488 ("The bare words of the statute are so broad as to be of little use in articulating purposes beyond making apparent the aim of protecting federal rights against state action.").

[96] *See* 28 U.S.C. §§ 2241-2254 (1976).

[97] A further distinction between § 1983 and habeas corpus lies in the applicability of the Federal Rules of Civil Procedure. Collateral attacks on state convictions are civil proceedings rather than elements of the original criminal prosecution. Browder v. Director, Dept. of Corrections, 434 U.S. 257, 269 (1978); Fisher v. Baker, 203 U.S. 174, 181

*1. Exhaustion of state remedies*— The disparity between section 1983 and federal habeas corpus regarding the exhaustion of state judicial remedies presents an obstacle to collateral attacks on state criminal convictions under section 1983. Federal habeas corpus relief generally cannot be employed by the petitioner who fails to exhaust state remedies.[98] In contrast, the Civil Rights Act is not subject to an exhaustion requirement,[99] leading the Supreme Court to remark on the "continuing illogic of treating federal habeas corpus and § 1983 as fungible remedies for constitutional violations."[100] Indeed, the Court has expressly rejected section 1983 as a means for state prisoners having available habeas relief to seek release from confinement, concluding that such section 1983 actions would effectively bypass and circumvent the habeas exhaustion policy.[101]

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(1906). Presumably the Federal Rules of Civil Procedure would have full force in a § 1983 action seeking collateral review of a state judgment. *See* Preiser v. Rodriguez, 411 U.S. 475, 496 (1973); *State Prisoners' Suits*, *supra* note 89, at 765 n.159. In contrast, application of the Civil Rules to habeas corpus petitions rests within the discretion of the court, to the extent that the Rules do not conflict with those governing habeas actions. 28 U.S.C. § 2254 R. 11 (1976). *See generally* 17 C. Wright, A. Miller & E. Cooper, Federal Practice & Procedure § 4268 (1978). This distinction may be, however, more form than substance; many aspects of the Civil Rules are applicable to habeas corpus proceedings. *See* Browder v. Director, Dept. of Corrections, 434 U.S. at 271; Harris v. Nelson, 394 U.S. 286, 294 n.5 (1969). Furthermore, although habeas corpus proceedings provide for more limited discovery, 28 U.S.C. § 2254 R. 6 (1976), than do the Civil Rules, Fed. R. Civ. P. 26-37, this should not diminish the suitability of § 1983 as a vehicle for collateral review. The discretion vested in the court under the Civil Rules would prevent abuse of discovery in § 1983 collateral proceedings.

[98] The habeas corpus exhaustion requirement had its origins in *Ex parte* Royall, 117 U.S. 241 (1886), as a judge-made policy of restraint, not becoming part of the statutory scheme until 1948. 28 U.S.C. § 2254(b) (1976). The sole exception to the exhaustion requirement is where 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 Habeas Corpus Developments*, *supra* note 7, at 1097.

A different issue arises where the habeas petitioner presents both unexhausted and exhausted claims for relief in one action. A prisoner may have fully appealed one claim while failing to raise others on appeal. *See* Comment, *Habeas Petitions with Exhausted and Unexhausted Claims Dismissed for Failure to Exhaust State Remedies* — Gonzales v. Stone, 52 N.Y.U. L. Rev. 1428 (1977); Note, *Habeas Petitions with Exhausted and Unexhausted Claims: Speedy Release, Comity, and Judicial Efficiency*, 57 B.U. L. Rev. 864 (1977). Here it will be assumed that any claim for relief is either wholly exhausted or entirely unexhausted.

[99] McNeese v. Board of Education, 373 U.S. 668, 671 (1963); Monroe v. Pape, 365 U.S. 167, 183 (1961), *overruled in part on other grounds*, Monell v. New York City Dept. of Social Services, 436 U.S. 658, 663 (1978).

[100] Allen v. McCurry, 101 S. Ct. 411, 420 n.24 (1980). *But see* notes 152-59 and accompanying text *infra*.

[101] Preiser v. Rodriguez, 411 U.S. 475 (1973). The Court found habeas corpus to be solely the "appropriate remedy for state prisoners attacking the validity of the fact or length of their confinement. . . . " *Id.* at 490. Because the § 1983 plaintiff was in custody, however, this decision did not reach the issue at hand.

The Court's concern with preserving the integrity of the habeas corpus exhaustion requirement reflects more than mere formalism. The habeas exhaustion requirement embodies federal-state comity principles, dictating the appropriate exercise by the federal judiciary of conferred power.[102] Requiring exhaustion of state remedies prior to habeas relief promotes the involvement of state courts in the application of federal law[103] and avoids unnecessary friction between federal and state courts.[104] Furthermore, the exhaustion rule enables the state appellate process to oversee trial court applications of federal law and to press for uniform results from those courts.[105]

The policy considerations underlying the habeas corpus exhaustion requirement apply with equal force where the state defendant not in custody seeks collateral relief.[106] Consequently, this article proposes that federal courts abstain from entertaining collateral attacks under section 1983 where habeas corpus is unavailable until the plaintiff has first brought an appeal through the state system.[107] An exhaustion requirement for section 1983 actions seeking collateral relief would preserve the bal-

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[102] Picard v. Connor, 404 U.S. 270, 275 (1971); Fay v. Noia, 372 U.S. 391, 419-20 (1963). *See also State Prisoners' Suits, supra* note 89, at 773.

[103] *See* Amsterdam, *supra* note 17, at 830 ("leaving federal defensive issues to the state criminal courts in the first instance gives those courts a promising opportunity for partnership in the administration of federal law"); *Habeas Corpus Developments, supra* note 7, at 1093-94.

[104] *See* Darr v. Burford, 339 U.S. 200, 204 (1950) ("[I]t would be unseemly in our dual system of government for a federal district court to upset a state court conviction without an opportunity to the state courts to correct a constitutional violation. . . ."), *overruled in part on other grounds*, Fay v. Noia, 372 U.S. 391, 435 (1963).

[105] *Habeas Corpus Developments, supra* note 7, at 1094. *See also State Prisoners' Suits, supra* note 89, at 762-63, 763 n.150 ("Since the state, under federal exhaustion doctrine, has no final power *not* to release, the state interests protected by exhaustion thus seem in large part to be systemic, not substantive."). *Contra*, Comment, *Exhaustion of State Remedies Under the Civil Rights Act*, 68 COLUM. L. REV. 1201, 1205-06 (1968) ("[T]here is no sound policy reason for requiring the exhaustion of state judicial remedies. . . . [T]he question is simply whether one court or another is going to decide the case.").

[106] *Cf. State Prisoners' Suits, supra* note 89, at 765 n.156 ("[W]hen a state prisoner seeks relief other than release in federal court on an issue dispositive of state confinement the interests protected by comity are as much jeopardized as when he seeks release.").

[107] The federal habeas corpus rule requires only that the habeas petitioner have pursued one avenue of state relief; the petitioner who has brought a direct appeal through the state system need not seek state collateral remedies prior to obtaining a writ of habeas corpus in federal court. Brown v. Allen, 344 U.S. 443, 448 n.3 (1953). Furthermore, the habeas petitioner is not obliged to pursue direct review in the United States Supreme Court before obtaining habeas corpus relief. Fay v. Noia, 372 U.S. 391, 435-36 (1963). The proposed exhaustion requirement for § 1983 collateral attacks upon state convictions should conform to the contours of the habeas corpus exhaustion requirement.

ance struck by the habeas exhaustion requirement between state and federal interests. Such a requirement would concurrently prevent the section 1983 plaintiff, unable to satisfy the habeas corpus custody requirement, from enjoying a more expedient and favorable remedy in federal courts than the habeas petitioner.[108]

An objection to stipulating an exhaustion requirement[109] might arise because the general no-exhaustion rule for section 1983 suits plays a critical role in the statutory scheme.[110] Perhaps the imposition of an exhaustion requirement disregards a contrary congressional intent.[111] But the habeas corpus exhaustion requirement, initially judicially self-imposed, became a statutory requirement only within the past thirty-five years.[112] The habeas exhaustion doctrine thus resulted from a judicial election, grounded in notions of comity, to decline an unmistakable congressional grant of jurisdiction.[113] Similarly, comity concerns dictate the exercise of judicial discretion in abstaining from consideration of section 1983 collateral attacks on state convictions pending exhaustion of state judicial remedies.[114] Stipulation of

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[108] *See State Prisoners' Suits*, *supra* note 89, at 765 (urging that there be an "exhaustion requirement parallel to federal habeas exhaustion, which would apply when a state prisoner brings a civil rights suit for remedies other than release on an issue dispositive of his confinement"); Note, *The Collateral-Estoppel Effect to be Given State-Court Judgments in Federal Section 1983 Damage Suits*, 128 U. PA. L. REV. 1471, 1500 (1980) [hereinafter cited as *Collateral-Estoppel Effect*] (arguing for an exhaustion requirement in § 1983 damage actions).

[109] *See, e.g.*, Clay v. Sun Ins. Office, 363 U.S. 207, 228 (1960) (Douglas, J., dissenting) (Many litigants "can hardly afford one lawsuit, let alone two. Shuttling the parties between state and federal tribunals is a sure way of defeating the ends of justice."); Amsterdam, *supra* note 17, at 834 ("the state criminal defendant is exhausted before his state court remedies are").

[110] *See* McNeese v. Board of Educ., 373 U.S. 668 (1963); Monroe v. Pape, 365 U.S. 167 (1961), *overruled in part on other grounds*, Monell v. New York City Dept. of Social Services, 436 U.S. 658, 663 (1978).

[111] *See, e.g.*, *Exhaustion of State Remedies Under the Civil Rights Act*, *supra* note 105, at 1206. A proposed amendment to § 1983 which died in committee might have barred stipulation of an exhaustion requirement. The Civil Rights Improvement Act of 1979, S. 1983, 96th Cong., 1st Sess., 125 CONG. REC. S15,994 (daily ed. Nov. 6, 1979), provided that no court would stay or dismiss any § 1983 action on the ground that the party seeking relief had failed to exhaust state judicial remedies. *Id.* § 2(e)(2).

[112] *See* note 98 *supra*.

[113] Amsterdam, *supra* note 17, at 900-01.

[114] *See, e.g.*, Martin v. Creasy, 360 U.S. 219, 224 (1959) ("Reflected among the concerns which have traditionally counseled a federal court to stay its hand are the desirability of avoiding unseemly conflict between two sovereignties [and] the unnecessary impairment of state functions . . . ."); Miller v. Miller, 423 F.2d 145, 148 (10th Cir. 1970) ("abstention is proper when the exercise of federal jurisdiction might unnecessarily interfere with federal-state relations"); Monongahela Connecting R.R. Co. v. Pennsylvania Pub. Util. Comm'n, 373 F.2d 142, 146 (3d Cir. 1967) ("discretionary abstention" by federal court pending exhaustion of state appellate remedies).

an exhaustion requirement is appropriate where, as here, the section 1983 action resembles closely the writ of habeas corpus both in terms of remedies sought[115] and questions presented.[116]

2. *The preclusive effect of state judgments*— Stipulation of an exhaustion requirement for section 1983 collateral attacks must be accompanied by consideration of the res judicata effect to be afforded the prior state judgment in the section 1983 action.[117] Res judicata principles are not applicable to habeas

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[115] *See* note 54 *supra*.

[116] *Cf.* Rimmer v. Fayetteville Police Dept., 567 F.2d 273, 275 (4th Cir. 1977) (dictum) (a § 1983 damage action bearing upon the validity of a state court conviction "so closely resembles an action for a federal writ of habeas corpus that a requirement of exhaustion of available state remedies may seem reasonable"); Wallace v. Hewitt, 428 F. Supp. 39, 44 (M.D. Pa. 1976) (abstention in § 1983 action until plaintiff has exhausted state equitable judicial processes). A series of cases in the Fifth Circuit has required state prisoners to exhaust state remedies before bringing a § 1983 damage action in federal court on an issue going to the constitutionality of confinement, to prevent a "thinly disguised circumvention of state remedies." Fulford v. Klein, 529 F.2d 377, 381 (5th Cir. 1976), *aff'd en banc*, 550 F.2d 342 (5th Cir. 1977). *See* Meadows v. Gabrel, 563 F.2d 1231, 1232 (5th Cir. 1977); Meadows v. Evans, 529 F.2d 385, 386 (5th Cir. 1976), *aff'd en banc*, 550 F.2d 345 (5th Cir.), *cert. denied*, 434 U.S. 969 (1977).

[117] "Res judicata" encompasses the distinct equitable principles of claim and issue preclusion. Claim preclusion, or merger and bar, prevents relitigation between parties on all matters subsumed within the same cause of action, regardless of whether those matters were actually litigated. Issue preclusion, or collateral estoppel, gives binding effect in a subsequent action to issues actually litigated and necessarily decided in a previous case involving the party to be estopped, where that party had opportunity and incentive to litigate the issue. *See generally* Cromwell v. County of Sac, 94 U.S. 351, 353 (1876); 1B MOORE'S, FEDERAL PRACTICE ¶¶ 0.405-.448 (2d ed. 1980); RESTATEMENT (SECOND) OF JUDGMENTS §§ 68-68.1 (Tent. Draft No. 4, 1977); RESTATEMENT (SECOND) OF JUDGMENTS §§ 47, 48-48.1, 61.2 (Tent. Draft No. 1, 1973).

A different approach to the preclusion question, relying on Rooker v. Fidelity Trust Co., 263 U.S. 413 (1923), would disallow federal district courts, as courts of original jurisdiction, to sit in appellate review of state decisions. *See, e.g.*, Tang v. Appellate Div., 487 F.2d 138, 141 (2d Cir. 1973), *cert. denied*, 416 U.S. 906 (1974); Brown v. Chastain, 416 F.2d 1012, 1013 (5th Cir. 1969), *cert. denied*, 397 U.S. 951 (1970). The crux of the *Rooker* doctrine is that exclusive jurisdiction is vested in the Supreme Court to review state court adjudications, which implies that district courts should not be enabled to undermine the congressional allocation of appellate judicial power. Chang, *Rediscovering the* Rooker *Doctrine: Section 1983, Res Judicata and the Federal Courts*, 31 HASTINGS L.J. 1337, 1342-50 (1980); Currie, *supra* note 25, at 322.

Despite strident appeals from Chang and Currie, most commentators have summarily rejected the *Rooker* doctrine, arguing from the authority of Bell v. Hood, 327 U.S. 678 (1946), that federal district courts have jurisdiction whenever a federal question is presented on the face of the complaint even if the claim is precluded by res judicata principles. *See, e.g.*, 88 HARV. L. REV. 453, 455 n.16 (1974); *The Preclusive Effect of State Judgments*, *supra* note 34, at 618 n.40; *Section 1983 Developments*, *supra* note 7, at 1334 n.14. Moreover, the *Rooker* doctrine cannot be fully apposite to the question at issue here. Federal habeas corpus review is one instance where federal district courts have regularly engaged in review of state decisions. Currie, *supra* note 25, at 323 n.50. Collateral attacks on state convictions cannot be subject to the rigid strictures on relitigation urged by Currie, *supra* note 25, at 323-24, and Chang, *supra*, at 1353-56.

corpus proceedings.[118] The effectiveness of section 1983 as a vehicle for expanding habeas review, therefore, turns in large part upon the extent to which issue preclusion will bar relitigation in a section 1983 collateral attack of constitutional defenses adjudicated in the state process.[119]

In general, federal courts apply res judicata principles to preclude relitigation of issues or claims previously decided by state courts.[120] Federal deference to state court proceedings stems from two sources. First, common law preclusion principles dictate the application of res judicata to foster conclusive resolution of disputes[121] and to "promote the comity between state and federal courts that has been recognized as a bulwark of the federal system."[122] Second, the full faith and credit statute, 28

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[118] Wainwright v. Sykes, 433 U.S. 72, 80 (1977); Fay v. Noia, 372 U.S. 391, 423 (1963); Brown v. Allen, 344 U.S. 443, 458 (1953). This "traditional exception" to res judicata derives from the "unique purpose of habeas corpus — to release the applicant for the writ from unlawful confinement." Allen v. McCurry, 101 S.Ct. 411, 417 n.12 (1980). *But see* notes 59-60 and accompanying text *supra*.

[119] *See* Ellis v. Dyson, 421 U.S. 426, 440 (1975) (Powell, J., dissenting) (the extent to which res judicata barred relitigation of constitutional issues decided in state proceedings would determine whether § 1983 could be invoked for collateral review of state criminal convictions). *See generally* Vestal, *State Court Judgment as Preclusive in Section 1983 Litigation in Federal Court*, 27 OKLA. L. REV. 185 (1974); Note, *Res Judicata and Section 1983: The Effect of State Court Judgments on Civil Rights Actions*, 27 U.C.L.A. L. REV. 177 (1979) [hereinafter cited as *Res Judicata and Section 1983*].

As implicit in decisions giving issue-preclusive effect to state criminal convictions in subsequent § 1983 federal actions, *see, e.g.*, Wiggins v. Murphy, 576 F.2d 572, 573 (4th Cir. 1978), *cert. denied*, 439 U.S. 1091 (1979); Mastracchio v. Ricci, 498 F.2d 1257, 1258 (1st Cir. 1974); Thistlethwaite v. City of New York, 497 F.2d 339, 341 (2d Cir. 1974), claim preclusion is inapplicable to collateral attacks on state convictions. Collateral proceedings do not constitute the same cause of action — the parties on collateral review differ from those involved in the state adjudication. *See* Martin v. Delcambre, 578 F.2d 1164, 1165 (5th Cir. 1978); Rimmer v. Fayetteville Police Dept., 567 F.2d 273, 276 (4th Cir. 1977); Graves v. Olgiati, 550 F.2d 1327, 1329 (2d Cir. 1977). Cases which facially suggest application of claim preclusion in a § 1983 suit subsequent to a state criminal conviction, *see, e.g.*, Rhodes v. Meyer, 334 F.2d 709, 712-13 (8th Cir. 1964); Goss v. Illinois, 312 F.2d 257, 259 (7th Cir. 1963); *cf.* Turco v. Monroe County Bar Ass'n, 554 F.2d 515, 520-21 (2d Cir. 1977) (constitutional challenge under § 1983 to state disbarment procedure), *cert. denied*, 434 U.S. 834 (1977), appear to have blurred together issue and claim preclusion in situations where the "actually litigated" distinction between the two doctrines was not critical because all matters had been fully and actually litigated in the state proceedings.

[120] *See, e.g.*, Huron Holding Corp. v. Lincoln Mine Operating Co., 312 U.S. 183, 194 (1941); American Surety Co. v. Baldwin, 287 U.S. 156, 166-67 (1932).

[121] Montana v. United States, 440 U.S. 147, 153-54 (1979) ("To preclude parties from contesting matters that they have had a full and fair opportunity to litigate protects their adversaries from the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions.").

[122] Allen v. McCurry, 101 S.Ct. 411, 415 (1980); *see* Doescher v. Estelle, 454 F. Supp. 943, 948 (N.D. Tex. 1978) ("Judicial comity is the principle in accordance with which the courts of one jurisdiction will give effect to the laws and judicial decisions of another

U.S.C. § 1738,[123] embodies an express command that federal courts give the same res judicata effect to a state decision as would other courts of that state.[124]

Federal courts, however, are not faced with an ineluctable mandate to give preclusive effect to matters previously decided in state courts. Rather, both the common law principles of res

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jurisdiction, not as a matter of obligation but out of deference and respect."), *aff'd in part, vacated in part, remanded,* 616 F.2d 205 (5th Cir. 1980); *Collateral-Estoppel Effect, supra* note 108, at 1482-83.

[123] The statute provides in part: "Acts, records and judicial proceedings . . . shall have the same full faith and credit in every court within the United States . . . as they shall have by law or usage in the courts of such State . . . from which they are taken." 28 U.S.C. § 1738 (1976). The constitutional full faith and credit clause, U.S. CONST. art. IV, § 1, is applicable only between the states.

The commentators disagree whether § 1738 even applies to § 1983 actions seeking relitigation of matters previously decided in state courts. *Compare* Averitt, *Federal Section 1983 Actions After State Court Judgment,* 44 U. COLO. L. REV. 191, 203 (1972), *and* Theis, *supra* note 90, at 876 (arguing that § 1738 is not applicable to federal § 1983 actions following state proceedings, because no state court ever considers the appropriateness of relitigating state decisions in a putatively more sympathetic federal forum), *with* P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 244 (2d ed. Supp. 1981), *and* Currie, *supra* note 25, at 332 (contending that the full faith and credit statute mandates giving preclusive effect to state judgments in § 1983 actions). The discussion may nonetheless be largely academic; if § 1738 does not control, the policy concerns underlying application of common law res judicata principles between federal and state courts are similar if not identical. *See* note 124 *infra.*

[124] *See* Davis v. Davis, 305 U.S. 32, 40 (1938); Wayside Transp. Co., Inc. v. Marcell's Motor Express, Inc., 284 F.2d 868, 870-71 (1st Cir. 1960).

Whether § 1738 and common law preclusion principles are divisible concepts is uncertain. While some courts and commentators perceive § 1738 as merely the statutory embodiment of res judicata principles, *see, e.g.,* Kremer v. Chemical Constr. Corp., 464 F. Supp. 468, 471 (S.D.N.Y. 1978), *aff'd,* 623 F.2d 786 (2d Cir. 1980); *Section 1983 Actions, supra* note 91, at 96 n.9, others see res judicata as a distinct and perhaps more expansive principle than the statutory command of § 1738. *See, e.g.,* Winters v. Lavine, 574 F.2d 46, 55 (2d Cir. 1978); *Collateral-Estoppel Effect, supra* note 108, at 1482. Compounding the uncertainty is a welter of cases which fail to mention § 1738, while discussing whether collateral estoppel should bar relitigation of a constitutional issue previously decided in a state court. *See, e.g.,* Montana v. United States, 440 U.S. 147, 153 (1979); Lombard v. Board of Educ. 502 F.2d 631, 636-37 (2d Cir. 1974); Metros v. United States District Court, 441 F.2d 313, 317 (10th Cir. 1971); Kauffman v. Moss, 420 F.2d 1270, 1273-74 (3d Cir. 1970). "[T]his phenomenon of apparent disregard of the requirements of § 1738 has never been comprehensively explored or explained . . . ." Winters v. Lavine, 574 F.2d at 55; *see* 88 HARV. L. REV. 453, 455-56 (1974). Whatever the ultimate resolution of this uncertainty, for purposes of the present analysis, § 1738 and common law res judicata principles can safely be treated as one. Both are motivated by a solicitude for repose of state court decisions, and the competing policy considerations which would warrant relaxation of res judicata principles should also justify easing the statutory mandate of § 1738. *See* notes 125-26 and accompanying text *infra.* In fact, the most recent Supreme Court pronouncement on the res judicata effect to be given state decisions, Allen v. McCurry, 101 S.Ct. 411 (1980), persistently treats the two concepts as fungible, at least for policy analysis. *Id.* at 416, 417.

judicata[125] and the statutory command of section 1738[126] can yield to competing policy considerations flowing from federal statutory or constitutional precepts. Section 1983, intended "to interpose the federal courts between the States and the people,"[127] arguably presents precisely such countervailing policy concerns. Many commentators[128] and several courts[129] have urged that state court criminal proceedings not be accorded preclusive effect in subsequent section 1983 actions.[130] The criminal defendant has not elected the state forum;[131] giving preclu-

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[125] England v. Board of Medical Examiners, 375 U.S. 411, 429 (1964) (Douglas, J., concurring) ("res judicata is not a constitutional principle"); Angel v. Bullington, 330 U.S. 183, 202 (1947) (Rutledge, J., dissenting) ("Res judicata is a generally sound but by no means unlimited policy of judicial action."); Vestal, *Preclusion/Res Judicata Variables: Criminal Prosecutions*, 19 VAND. L. REV. 683, 718 (1966) (other societal interests may force the rules of preclusion to give way).

[126] American Mannex Corp. v. Rozands, 462 F.2d 688, 690 (5th Cir.) ("Other well-defined policies, statutory or constitutional, may compete with those policies underlying section 1738."), *cert. denied*, 409 U.S. 1040 (1972); Porter v. Nossen, 360 F. Supp. 527, 528 (M.D. Pa. 1973) ("certain federal policies may mandate refusal to follow the letter of the statutory command" of § 1738), *aff'd*, 511 F.2d 1395 (3d Cir. 1975); *see* Batiste v. Furnco Constr. Corp., 503 F.2d 447, 450 (7th Cir. 1974) ("strong Congressional policy that plaintiffs not be deprived of their right to resort to the federal courts for adjudication of their federal claims under Title VII" held to outweigh policies underlying § 1738), *cert. denied*, 420 U.S. 928 (1975).

[127] Mitchum v. Foster, 407 U.S. 225, 242 (1972).

[128] Averitt, *supra* note 123, at 195; McCormack, *supra* note 14, at 276; Theis, *supra* note 90, at 882; *Section 1983 Developments*, *supra* note 7, at 1338-43; 88 HARV. L. REV. 453, 460 (1974). *Contra*, Currie, *supra* note 25, at 329 ("The general legislative distrust of state courts evinced by section 1983 can be given considerable compass without disturbing section 1738.").

[129] Henry v. First Nat'l Bank, 595 F.2d 291, 298 n.1 (5th Cir. 1979) (dictum); Ney v. California, 439 F.2d 1285, 1288 (9th Cir. 1971) (dictum); Moran v. Mitchell, 354 F. Supp. 86, 88 (E.D. Va. 1973) (dictum).

Most cases confronted with the issue have held issue preclusion fully applicable to § 1983 actions subsequent to state criminal convictions. *See, e.g.*, Meadows v. Evans, 529 F.2d 385, 386 (5th Cir. 1976), *aff'd en banc*, 550 F.2d 345 (5th Cir.), *cert. denied*, 434 U.S. 969 (1977); Metros v. United States District Court, 441 F.2d 313, 317 (10th Cir. 1971); Kauffman v. Moss, 420 F.2d 1270, 1274 (3d Cir.), *cert. denied*, 400 U.S. 846 (1970); Mulligan v. Schlachter, 389 F.2d 231, 233 (6th Cir. 1968) (dictum).

[130] Under a proposed but unsuccessful amendment to § 1983, the Civil Rights Improvement Act of 1979, S. 1983, 96th Cong., 1st Sess., 125 Cong. Rec. S15,994 (daily ed. Nov. 6, 1979), issue-preclusive effect could not have been given to a state adjudication in a subsequent § 1983 action. Relitigation of matters previously decided in state court would have been constrained by principles of claim preclusion only where the federal § 1983 plaintiff had previously been the plaintiff in state court. *Id.* § 2(f). Thus no state criminal proceeding would have been accorded preclusive effect in subsequent § 1983 litigation.

[131] The commentators have advocated, more precisely, an exception to normal preclusion principles whenever the § 1983 plaintiff was an "involuntary litigant" in the state proceedings. In all but the most unusual circumstances, the state criminal defendants under consideration here, *see* notes 18-20 and accompanying text *supra*, fall within the sphere of "involuntary" state litigants. Theis, *supra* note 90, at 868; 88 HARV. L. REV. 453, 463 (1974). Only in an uncommon situation such as that presented in Thistlethwaite

sive effect to the state judgment compels acceptance of state court resolution of constitutional matters.[132] According finality to such resolutions contradicts the central premise of section 1983 — that the state forum cannot adequately enforce federal constitutional rights[133] — thereby "effectively frustrat[ing] the Congressional intent that section 1983 serve as a safeguard against the infringement of federally protected rights by a state's judiciary."[134]

*a. The* Allen v. McCurry *barrier*— A recent Supreme Court decision, *Allen v. McCurry*,[135] rejected definitively the general notion that state criminal proceedings should never be given preclusive effect in subsequent section 1983 damage actions. Plaintiff McCurry had been convicted in state court of possession of heroin and assault with intent to kill.[136] He subsequently filed a section 1983 claim in federal court seeking damages from several arresting police officers and the Saint Louis police department for an allegedly unconstitutional search and seizure.[137] The Eighth Circuit rejected the police officers' argument that issue preclusion barred relitigation of the search and seizure claim previously decided adversely to McCurry in state court. The court reasoned that "the special role of federal courts in protecting civil rights" required preclusive effect not be given the prior criminal conviction where as a result McCurry would be denied a federal forum for airing his constitutional claim.[138] The Supreme Court reversed, finding res judicata principles wholly ap-

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v. City of New York, 497 F.2d 339 (2d Cir. 1974), where the defendant was given the opportunity to "drop the whole matter," *id.* at 342, but declined, might the criminal defendant be said to have "elected" the state forum.

[132] *See* Averitt, *supra* note 123, at 192; McCormack, *supra* note 14, at 260; 88 HARV. L. REV. 453, 460 (1974); *cf.* England v. Board of Medical Examiners, 375 U.S. 411, 415 (1964) ("fundamental objections to any conclusion that a litigant who has properly invoked the jurisdiction of a Federal District Court to consider federal constitutional claims can be compelled, without his consent and through no fault of his own, to accept instead a state court's determination of those claims").

[133] *See* note 90 and accompanying text *supra*.

[134] Henry v. First Nat'l Bank, 595 F.2d 291, 298 n.1 (5th Cir. 1979) (dictum). *See also* Ney v. California, 439 F.2d 1285, 1288 (9th Cir. 1971) (dictum) (§ 1983 "would, in many cases, be a dead letter" if res judicata effect were given to a successful state prosecution.); McCormack, *supra* note 14, at 251; *Section 1983 Developments*, *supra* note 7, at 1333.

[135] 101 S. Ct. 411 (1980).

[136] McCurry v. Allen, 606 F.2d 795, 796 (8th Cir. 1979), *rev'd*, 101 S. Ct. 411 (1980).

[137] 606 F.2d at 797.

[138] *Id.* at 799. Although McCurry was imprisoned, he had available no other federal collateral relief, because Fourth Amendment claims are not cognizable in habeas corpus where there has been full and fair litigation of the issue in state criminal proceedings. Stone v. Powell, 428 U.S. 465 (1976).

plicable to McCurry's section 1983 suit.[139] The Court discerned nothing in the language or legislative history to warrant unrestricted relitigation of matters previously decided in state court, even if the section 1983 plaintiff had been an involuntary state litigant.[140]

The Court grounded its decision upon the determination that the legislative history surrounding the 1871 enactment of section 1983 manifested no "congressional intent to deny binding effect to a state court judgment."[141] The Court's reliance upon the silence of the 1871 Congress, however, is disingenuous. The 1871 Congress could not have perceived preclusion principles as significant in civil proceedings following state criminal convictions,[142] due to the operation of the doctrine of mutuality of estoppel.[143] No criminal prosecution in 1871 could have issue-

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[139] 101 S. Ct. at 420.

[140] *Id.* The Court found no "reason to believe that Congress intended to provide a person claiming a federal right an unrestricted opportunity to relitigate an issue already decided in state court simply because the issue arose in a state proceeding in which he would rather not have been engaged at all." *Id.* It discovered no authority for the "generally framed principle that every person asserting a federal right is entitled to one unencumbered opportunity to litigate that right in a federal district court." *Id.* at 419. There would be no relaxation of traditional preclusion principles in § 1983 actions where the state court "has given the parties a full and fair opportunity to litigate federal claims, and thereby has shown itself willing and able to protect federal rights." *Id.* at 420.

Thus the Court equated "a full and fair opportunity to litigate" with the state court's being "willing and able" to protect federal rights. But given the respective institutional postures of state and federal courts, *see* notes 38-44 and accompanying text *supra*, "full" adjudication in state courts may not necessarily be synonymous with full vindication of constitutional rights, even where the state court faithfully adheres to the judicial oath. *See* note 46 *supra*.

[141] 101 S. Ct. at 419-20.

[142] The Court gave little weight to this issue in *McCurry:*

> Because the requirement of mutuality of estoppel was still alive in the federal courts until well into this century . . . [the § 1983 drafters] may have had less reason to concern themselves with rules of preclusion than a modern Congress would. Nevertheless, in 1871 res judicata and collateral estoppel could certainly have applied in federal suits following state-court litigation between the same parties or their privies . . . .

*Id.* at 416. Federal suits "between the same parties or their privies," however, are inapposite to the *McCurry* situation or to § 1983 plaintiffs who seek collateral review of state convictions, because the parties in the § 1983 action differ from the parties in the state criminal proceeding. *See* note 119 *supra*.

[143] *See, e.g.*, Bigelow v. Old Dominion Copper Mining & Smelting Co., 225 U.S. 111 (1912). Mutuality of estoppel dictates that a party cannot be bound by a prior judgment unless the other party to the present action would also be bound by that judgment. Thus a party to the second action who was a stranger to the first action could not invoke issue preclusion to bar relitigation in the second action of a matter determined adversely to another party in the first action. The leading case rejecting mutuality of estoppel was Bernhard v. Bank of America, 19 Cal. 2d 807, 810-13, 122 P.2d 892, 894-95 (1942). The Supreme Court followed suit in Blonder-Tongue Labs, Inc. v. University of Ill. Foundation, 402 U.S. 313, 320-27 (1971). *See also* Parklane Hosiery Co. v. Shore, 439 U.S. 322

preclusive effect in subsequent civil proceedings.[144] This explanation of the 1871 Congress' silence undermines the essential premise of the *McCurry* decision. Buttressing this explanation is the underlying legislative purpose of section 1983 to "interpose the federal courts between the States and the people."[145] This purpose, though susceptible of differing interpretations,[146] seems fundamentally opposed to stringent application of preclusion principles to section 1983 actions. If the 1871 Congress perceived state courts as "antipathetic" to the vindication of federally created rights,[147] it appears illogical to suggest that Congress intended federal courts to give preclusive effect in federal matters to the judgments of those selfsame courts.[148]

The *McCurry* holding creates an acute dilemma for the state defendant. Accepting the Court's view that preclusion principles should apply fully in federal civil rights actions, the state criminal adjudication still will be accorded only issue-, not claim-preclusive effect in the subsequent section 1983 suit.[149] Thus a state defendant may assert a constitutional defense in the state proceeding and be precluded from relitigating that issue in an

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(1979).

[144] Allen v. McCurry, 101 S.Ct. 411, 425 (1980) (Blackmun, J., dissenting). *See also Section 1983 Developments*, *supra* note 7, at 1339 n.39 ("Since collateral estoppel has been narrowly applied until quite recently, the Reconstruction Congress could not have anticipated the impediment that a more liberal usage would be to § 1983 suits.").

[145] Mitchum v. Foster, 407 U.S. 225, 242 (1972).

[146] *Compare* Allen v. McCurry, 101 S. Ct. 411, 417-18 (1980), *with id.* at 421-24 (Blackmun, J., dissenting). *See generally* Avins, *The Klu Klux Klan Act of 1871: Some Reflected Light on State Action and the Fourteenth Amendment*, 11 ST. LOUIS U.L.J. 331 (1967).

[147] Mitchum v. Foster, 407 U.S. 225, 242 (1972).

[148] Allen v. McCurry, 101 S. Ct. 411, 423 (1980) (Blackmun, J., dissenting). *See also The Preclusive Effect of State Judgments*, *supra* note 34, at 623 ("It would seem illogical . . . to suppose that Congress intended the federal courts to accord full faith and credit to the judgments of the very tribunals that it feared were subverting federal rights.").

The Court in *McCurry* failed to respond satisfactorily to the concern expressed in Ney v. California, 439 F.2d 1285, 1288 (9th Cir. 1971), that strict application of issue preclusion to § 1983 actions could make the Civil Rights Act a "dead letter." *See* note 134 and accompanying text *supra*. The Court argued only that this concern was dictum — that the underlying constitutional claim had not been decided in the state court, thus issue preclusion could not bar the § 1983 action. 101 S. Ct. at 419 n.18. But this hardly addresses the underlying consideration in *Ney* that § 1983 would be a hollow means for redressing federal constitutional deprivations if preclusion rules could bar relitigation of issues determined adversely to the § 1983 plaintiff in state court.

[149] *See* note 119 *supra*. Although the dissent in *McCurry* suggested that under the Court's reasoning the § 1983 litigant would be precluded from relitigating any issue potentially as well as actually litigated, 101 S.Ct. at 424-25 n.12 (Blackmun, J., dissenting), the majority clearly indicated that collateral estoppel applies only to issues actually decided, *id.* at 418, stressing that it was not fashioning a novel doctrine of collateral estoppel. *Id.* at 415 n.7.

ensuing section 1983 action should the state court reject the defense. The defendant may reserve the constitutional claim only by not raising it during the state proceedings, thereby incurring a greater risk of state conviction.[150] This places an onerous burden on the state defendant: a section 1983 hearing comes at the price of an enhanced probability of conviction in state court.[151]

*b. The viability of collateral review under section 1983 following* McCurry— Ample basis exists for disputing the holding in *McCurry*. Yet the feasibility of section 1983 as a vehicle for col-

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[150] *See* Johnson v. Mateer, 625 F.2d 240, 244 (9th Cir. 1980); Moran v. Mitchell, 354 F. Supp. 86, 88 (E.D. Va. 1973).

Whether many state criminal defendants will forego constitutional defenses in state courts in contemplation of subsequent § 1983 litigation is not clear. *Compare Section 1983 Developments, supra* note 7, at 1340 (reserving the constitutional defense and increasing the risk of adverse state judgment "will often seem the lesser of two evils to state defendants"), *with Section 1983 Actions, supra* note 91, at 97 (the state criminal defendant has little choice as a practical matter "for the urgency of avoiding conviction requires that he assert all possible defenses during the state trial"). It seems less likely that the defendant will withhold constitutional arguments where the § 1983 suit thereby preserved is a damage claim than where the defendant can reserve a § 1983 collateral attack upon the state conviction. In most instances the prospect of a civil damage remedy will not justify the increased danger of criminal conviction and potential incarceration. *See* Allen v. McCurry, 101 S. Ct. 411, 420 n.23 (1980). It might also be expected that the state defendant would be more willing to risk an adverse state decision in, for instance, a misdemeanor prosecution where the potential sanctions are insubstantial.

Two procedural considerations counsel against the state defendant's preserving a § 1983 action by withholding constitutional defenses in state court. Any possibility of discretionary Supreme Court review of the defendant's constitutional claim is foreclosed if those claims are not asserted in the state adjudication. Cardinale v. Louisiana, 394 U.S. 437, 438 (1969). More important, failure to assert a constitutional defense may work a waiver of the claim. Absent a showing of "cause" and "actual prejudice," nonadherence to state procedural rules requiring contemporaneous objections may bar subsequent collateral relief based upon such potential objections. *See* Allen v. McCurry, 101 S.Ct. at 426 (Blackmun, J., dissenting) (the § 1983 plaintiff faces uncertainty in foregoing litigation on any issue during the state trial, "for there is the possibility that he will be held to have waived his right to appeal on that issue"). *See generally* Hill, *The Forfeiture of Constitutional Rights in Criminal Cases*, 78 COLUM. L. REV. 1050 (1978); Spritzer, *Criminal Waiver, Procedural Default and the Burger Court*, 126 U. PA. L. REV. 473 (1978); Westen, *Away from Waiver: A Rationale for the Forfeiture of Constitutional Rights in Criminal Procedure*, 75 MICH. L. REV. 1214 (1977).

[151] *See* Johnson v. Mateer, 625 F.2d 240, 244 (9th Cir. 1980) (the price of the state criminal defendant's "constitutional claim in federal court should not be a heightened risk of conviction in state court"); Moran v. Mitchell, 354 F. Supp. 86, 88 (E.D. Va. 1973) (state defendant faces a "Hobson's choice"); 88 HARV. L. REV. 453, 462 (1974).

To the extent state defendants forego constitutional defenses, the rationale for strict application of preclusion principles is compromised. Failure to submit valid constitutional defenses to state adjudication diminishes the finality of the proceedings; "the just prosecution of state laws is not enhanced by a system which discourages the litigation of constitutional defenses." *Section 1983 Developments, supra* note 7, at 1340. Moreover, a primary premise underlying the stipulation of an exhaustion requirement, promotion of uniformity and involvement of state courts in the application of federal law, *see* notes 102-05 and accompanying text *supra*, would be weakened.

lateral review need not rest upon a conclusion that the *McCurry* result is erroneous. A section 1983 damage action such as that presented in *McCurry* may not warrant departure from standard preclusion principles. The essential purpose of the section 1983 cause of action for damages, accomplished derivatively through monetary awards for consequential injury,[152] is to deter encroachment upon federal rights by local officials.[153] Deterrence of constitutional violations, albeit a salutary systemic objective, may be achieved without relaxation of preclusion principles. The deterrent "message" from section 1983 actions stems from a cumulative effect not dependent upon any specific case. Local officials can be deterred adequately from transgressing constitutional bounds by the enforcement of section 1983 claims in cases other than those brought after successful state prosecutions. The deterrence rationale does not warrant relitigation of constitutional matters previously decided adversely to the section 1983 plaintiff in state court, provided other section 1983 actions produce a sufficient deterrent message.[154]

In contrast, collateral review of state criminal convictions acts as a safeguard for personal liberty interests. Liberty interests are crucially implicated whether the collateral proceedings seek release from custody or expungement of the record of convic-

[152] *See* Carey v. Piphus, 435 U.S. 247, 255 (1978) (§ 1983 damage awards should be determined in accordance with tort principles of compensation for identifiable injury). *But cf.* Newman, *Suing the Lawbreakers: Proposals to Strengthen the Section 1983 Damage Remedy for Law Enforcers' Misconduct*, 87 YALE L.J 447, 465 (1978) (suggesting liquidated damages for deprivation of the constitutional right itself, in addition to compensatory damages for actual loss); Note, *Damage Awards for Constitutional Torts: A Reconsideration After* Carey v. Piphus, 93 HARV. L. REV. 966, 967 (1980) [hereinafter cited as *Damage Awards*] ("[T]he purpose of [§ 1983] . . . remedies is not merely compensation for the consequential injuries that accompany a constitutional violation, but more fundamentally redress for the abridgement of the constitutional right itself.").

[153] *See* Imbler v. Pachtman, 424 U.S. 409, 442 (1976) (White, J., concurring) (deterrence of unconstitutional or otherwise illegal conduct "was precisely the proposition upon which § 1983 was enacted"); Nahmod, *Section 1983 and the "Background" of Tort Liability*, 50 IND. L.J. 5, 10-11 (1974); Whitman, *Constitutional Torts*, 79 MICH. L. REV. 5, 56 (1980); *Damage Awards*, *supra* note 152, at 981.

[154] Furthermore, the deterrent value of the successful resolution of a constitutional claim such as that presented in Allen v. McCurry, 101 S.Ct. 411 (1980), is unclear. Deterrence derives from firm statements to "the constable [who] has blundered," People v. Defore, 242 N.Y. 13, 21, 150 N.E. 585, 587, *cert. denied*, 270 U.S. 657 (1926) (Cardozo, J.), regarding the permissibility of past conduct. No such firm statement emanates from inconsistent federal and state adjudications. A state criminal conviction rejecting the constitutional claim and incarcerating the defendant, juxtaposed against a § 1983 action adjudging the claim meritorious and awarding damages, surely must present a quandary for local police. *Cf.* Stone v. Powell, 428 U.S. 465, 493-95 (1976) (enforcement of Fourth Amendment exclusionary rule on collateral review so attenuated from the constitutional violation as to have only minimal deterrent effect upon police conduct).

tion.[155] A damage action, although arguably less intrusive upon state processes and comity interests than collateral review of a state conviction,[156] also serves a less important function. A successful resolution of McCurry's section 1983 damage suit, for instance, would have no effect upon his liberty interests.[157]

A higher order of individual rights, therefore, is at stake on collateral attack than in the section 1983 damage action. Indeed, the importance of the personal liberty interests involved provides the basis for the traditional exception to normal rules of preclusion for habeas corpus review.[158] Similarly, preclusion principles should not bar relitigation in section 1983 collateral attacks on state convictions, given the nature of the interests involved and the tightly drawn analogy to habeas corpus relief.[159]

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[155] Carafas v. LaVallee, 391 U.S. 234, 237-38 (1968); *see* notes 23-24 and accompanying text *supra*. The relief sought through a writ of habeas corpus at times may be identical to that sought on § 1983 collateral review where the plaintiff is not in custody. *See* note 54 *supra*.

[156] *See, e.g., Section 1983 Developments, supra* note 7, at 1339 ("[T]he integrity of the prior judgment and the parties' reliance thereon are not jeopardized to the same extent when the federal court is engaged in relitigation of particular issues of law and fact rather than in reexamination and possible nullification of that judgment."); *Collateral-Estoppel Effect, supra* note 108, at 1494 ("there can be no claim that the federal courts are undoing the efforts of the state criminal-justice system" through a § 1983 suit for damages).

Reference to the specifics of Allen v. McCurry, 101 S. Ct. 411 (1980), however, demonstrates that § 1983 damage actions can effectively intrude as fully as collateral review upon state interests. McCurry alleged an unconstitutional search in his § 1983 damage suit; successful resolution of the claim would necessarily reflect upon his conviction for possession of heroin discovered through the search. *Id.* at 413-14; *see* notes 136-37 and accompanying text *supra*. Although McCurry could not seek release from custody even if successful on the merits of his Fourth Amendment claim, *see* note 138 *supra*, the federal adjudication would nonetheless "undo the efforts of the state criminal-justice system" in essence if not in fact. *See also* Rimmer v. Fayetteville Police Dept., 567 F.2d 273 (4th Cir. 1977) (§ 1983 damage action which effectively challenged the validity of the state court convictions). *Cf.* Whitman, *supra* note 153, at 30 ("insidious" displacement of state law through constitutional tort actions under § 1983).

[157] Even for the § 1983 plaintiff not in custody, compensatory damages could never embrace all the myriad collateral disabilities flowing from the record of conviction. *See* notes 21-24 and accompanying text *supra*.

[158] Allen v. McCurry, 101 S. Ct. 411, 417 n.12 (1980).

[159] *See* Brown v. Chastain, 416 F.2d 1012, 1021 (5th Cir. 1969) (Rives, J., dissenting) (relitigation should be available in § 1983 cases "significantly involving human liberty"); McCormack, *supra* note 14, at 284 ("[i]n view of the affinity between habeas corpus and section 1983 actions," relitigation should be available under § 1983); Theis, *supra* note 90, at 872-73; *Res Judicata and Section 1983, supra* note 119, at 212 (liberty interests are treated more favorably than property interests in the application of res judicata).

## CONCLUSION

The effectuation of federal rights depends critically upon collateral review of state criminal convictions. If habeas corpus procedure cabins the scope of collateral review, parties not in custody who allege constitutional deprivations in the state criminal process will not enjoy full consideration of their federal claims. The habeas corpus custody prerequisite to collateral relief should be eliminated, either through legislation or by judicial adoption of the Civil Rights Act as a vehicle for collateral review of state convictions. Custody simply does not provide a suitable touchstone for delimiting federal court involvement in the vindication of federally guaranteed rights.

*—Timothy C. Hester*