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Maureen A. Dowd

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## A Comparison of Section 1983 and Federal Habeas Corpus in State Prisoners' Litigation

The recent increase in crime has led to a rise in criminal trials, appeals from convictions, and petitions for postconviction relief.<sup>1</sup> Two federal remedies are available to state prisoners for postconviction complaints: section 1983<sup>2</sup> and habeas corpus.<sup>3</sup> Although state prisoners have used both section 1983 and habeas corpus almost interchangeably in postconviction litigation, the statutes involved differ markedly. Section 1983 provides a remedy for a broad range of violations of constitutional rights under "color of" state law.<sup>4</sup> However, the federal habeas corpus statute for state prisoners is narrower, remedying only "custody in violation of the Constitution or laws or treaties of the United States."<sup>5</sup> In the last two decades, federal courts have struggled to delineate the boundaries of each remedy and to establish their proper roles.

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1 Some commentators note the increase with alarm; e.g., Friendly, *Averting the Flood by Lessening the Flow*, 59 CORNELL L. REV. 634 (1974); Haynsworth, *Improving the Handling of Criminal Cases in the Federal Appellate System*, 59 CORNELL L. REV. 597, 597-98, 603 (1974); Rosenberg, *Planned Flexibility to Meet Changing Needs of the Federal Appellate System*, 59 CORNELL L. REV. 576, 578-81 (1974). But other commentators see the alarm as unfounded and exaggerated; e.g., Olsen, *Judicial Proposals to Limit the Jurisdictional Scope of Federal Postconviction Habeas Corpus Consideration of the Claims of State Prisoners*, 31 BUFFALO L. REV. 301 (1982); *Developments in the Law—Federal Habeas Corpus*, 83 HARV. L. REV. 1040, 1041 (1970) [hereinafter cited as *Developments*].

2 42 U.S.C. § 1983 (Supp. V 1981). For a discussion of the history of § 1983, see notes 9-24 *infra* and accompanying text. For a discussion of state prisoners' § 1983 claims, see notes 88-101 *infra* and accompanying text.

3 For a discussion of the history of federal habeas corpus, see notes 25-58 *infra* and accompanying text. For a discussion of state prisoners' habeas corpus claims, see notes 76-87 *infra* and accompanying text. For a discussion of the overlap between § 1983 and federal habeas corpus, see notes 102-12 *infra* and accompanying text.

4 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 proceeding for redress.

42 U.S.C. § 1983 (Supp. V 1981).

5 The pertinent section of the statute provides that federal courts:

[S]hall entertain an application for habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

28 U.S.C. § 2254 (1976).

Several considerations may assist courts in properly classifying state prisoner postconviction actions. The history and purpose of each remedy reveal similarities and differences which courts have used in analyzing their proper application.<sup>6</sup> In addition, the Supreme Court has established a general framework to guide the federal courts in determining whether section 1983 or habeas corpus provides the appropriate relief.<sup>7</sup> Unfortunately, the Court's guidance has proved, in practical application, to be somewhat confusing and of limited use to courts in eliminating the overlap between the two remedies.<sup>8</sup>

In an attempt to illuminate the difficulties courts have with this issue, this note will focus on the postconviction relief available in federal courts for state prisoners. Section I explores the histories of section 1983 and habeas corpus. Section II analyzes the relationship between section 1983 and habeas corpus in state prisoners' litigation, and then traces the overlap and the distinctions drawn between the two remedies. Section III lists the problems with the current guidelines for classifying state prisoners' suits and suggests a legislative solution.

## I. The Development of Section 1983 and Habeas Corpus

### A. Section 1983

Section 1983 originated as section one of the Civil Rights Act of 1871,<sup>9</sup> which was aimed at curbing the excesses of the Ku Klux Klan.<sup>10</sup> Congress designed the Civil Rights Act both to correct

6 See notes 9-58 *infra* and accompanying text.

7 See notes 67-75 *infra* and accompanying text.

8 See notes 113-20 *infra* and accompanying text.

9 Act of April 2, 1871, ch. 22, § 1, 17 Stat. 13 (1871).

10 Statements made during the debates over the Act indicate congressional outrage at continuing Klan atrocities and at state government and judicial inaction. Congressman Lowe of Kansas stated:

While murder is stalking abroad in disguise, while whippings and lynchings and banishment have been visited upon unoffending American citizens, the local administrations have been found inadequate or unwilling to apply the proper corrective. Combinations, darker than the night that hides them, conspiracies, wicked as the worst of felons could devise, have gone unwhipped of justice. Immunity is given to crime, and the records of the public tribunals are searched in vain for any evidence of effective redress.

Monroe v. Pape, 365 U.S. 167, 175 (1961) (quoting CONG. GLOBE, 42d Cong., 1st Sess. 374). Senator Osborn noted the inability or unwillingness to enforce state law:

That the State courts in the several States have been unable to enforce the criminal laws of their respective States or to suppress the disorders existing, and in fact that the preservation of life and property in many sections of the country is beyond the power of the State government, is a sufficient reason why Congress

abuses left untouched by the thirteenth amendment and previous civil rights legislation and to strengthen the fourteenth amendment's enforcement of the Bill of Rights.<sup>11</sup> Section one of the Civil Rights Act was specifically designed to eliminate civil rights violations "under color of state law."<sup>12</sup> However, for many years, section one remained unused.<sup>13</sup>

In the late 1800s and early 1900s, the Supreme Court limited the effectiveness of the Civil Rights Act as a remedy for violations of constitutional rights.<sup>14</sup> In addition, lower federal courts adopted a

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should, so far as they have authority under the Constitution, enact the laws necessary for the protection of citizens of the United States.

*Id.* at 176 (quoting CONG. GLOBE, *supra*, at 653).

11 The thirteenth amendment abolished slavery and gave Congress the power to enforce its provisions: "Neither slavery nor involuntary servitude, except as a punishment for crime . . . shall exist within the United States . . ." U.S. CONST. amend. XIII, § 1. Even after the states ratified the thirteenth amendment in 1865, atrocities against blacks in the South continued. The "Black Codes" of the South effectively limited the freedom of blacks. In response, Congress enacted the Civil Rights Act of 1866, Act of April 9, 1866, ch. 31, 14 Stat. 27, and the Freedman's Bureau Bill, Act of March 3, 1865, ch. 90, 13 Stat. 507, under the auspices of the thirteenth amendment. However, Congress' power to enact the Acts was questioned. Therefore, Congress adopted the fourteenth amendment which the states subsequently ratified. The fourteenth amendment provides in part:

No State shall make or enforce any law which shall abridge the privileges or immunities of any citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1. The Civil Rights Act of 1871 was enacted under the enforcement power of the fourteenth amendment to eradicate abuses remaining after adoption of the thirteenth amendment and of previous civil rights legislation. The title indicates its purpose: "An Act to Enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States . . ." 17 Stat. 13 (1871). See generally *Developments in the Law—Section 1983*, 90 HARV. L. REV. 1133, 1141-56 (1977).

12 Act of April 2, 1871, ch. 22, § 1, 17 Stat. 13 (1871).

13 Initially, attention centered around litigation against private individuals who conspired to violate constitutional rights, prohibited by the second section of the Civil Rights Act of 1871. This broad conspiracy provision raised a storm of controversy which led Congress to narrow its scope. *Monroe v. Pape*, 365 U.S. at 180-81.

14 First, the Court narrowly defined the substantive rights protected by the fourteenth amendment which the Act enforced. The Court limited fourteenth amendment protection to rights related to the national government. *Slaughterhouse Cases*, 83 U.S. (16 Wall.) 36 (1873). Second, the Court restricted the circumstances which would support a finding of state action, a prerequisite for an action under the fourteenth amendment. The Court held that conduct of state officials in violation of their authority was not state action. *Barney v. City of New York*, 193 U.S. 430, 438 (1904) ("it is for the state courts to remedy acts of state officers done without the authority of or contrary to state law"). Third, the Court refused to allow Congress to proscribe purely private conduct. *Civil Rights Cases*, 109 U.S. 3, 13 (1883) (private wrongs unrelated to state action not within deprivation of rights under fourteenth amendment); see *United States v. Harris*, 106 U.S. (16 Otto) 629 (1883); *United States v. Cruikshank*, 92 U.S. (2 Otto) 542 (1876).

Gradually the Court's attitude toward the Civil Rights Act became less restrictive. In

“hands-off”<sup>15</sup> attitude toward state prisoner suits challenging prison conditions under the Civil Rights Act.<sup>16</sup> These courts were generally reluctant to interfere with state prison administration and deferred this task to state courts and correctional authorities.<sup>17</sup>

However, in 1961, the Supreme Court began to eliminate the basis for the “hands-off” doctrine. In *Monroe v. Pape*,<sup>18</sup> the Supreme Court allowed the plaintiffs to recover under section 1983 from local police officers who physically abused them during a search and seizure.<sup>19</sup> The Court listed the three basic purposes of section 1983: 1) to override discriminatory state laws; 2) to provide a remedy where state law was inadequate; and 3) to provide a federal remedy where the state remedy, although adequate in theory, was not available in practice.<sup>20</sup> Although *Monroe* did not involve a state prisoner claim, the Supreme Court clearly established that federal courts had jurisdiction over cases where state officials infringed upon federally-protected rights.<sup>21</sup> The Court also emphasized that federal courts should exercise this jurisdiction even though the section 1983 plaintiff

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the 1940's, although still requiring state action to find a violation of the fourteenth amendment, the Court began to relax the concept of state action to include actions of private persons sufficiently linked to the activities of state government. J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 501 (2d ed. 1983).

15 The term “hands off doctrine” originally appeared in a document prepared for the Federal Bureau of Prisons. Goldfarb & Singer, *Redressing Prisoners' Grievances*, 39 GEO. WASH. L. REV. 175, 181 (1970) (citing FRITCH, CIVIL RIGHTS OF FEDERAL PRISON INMATES 31 (1961)). The United States Court of Appeals for the Tenth Circuit described in this way its discretionary “hands off” approach to state prisoners' litigation: “Courts are without power to supervise prison administration or to interfere with ordinary prison rules or regulations.” *Banning v. Looney*, 213 F.2d 771, 771 (10th Cir.), cert. denied, 348 U.S. 859 (1954). However, other federal courts have linked the “hands off doctrine” to a lack of jurisdiction. *Garcia v. Steele*, 193 F.2d 276, 278 (8th Cir. 1951) (no court supervisory jurisdiction over the conduct of various institutions). For other descriptions of the doctrine, see Note, *Beyond the Ken of the Courts: A Critique of Judicial Refusal to Review the Complaints of Convicts*, 72 YALE L.J. 506, 508 n.12 (1963).

16 *E.g.*, *United States ex rel Wagner v. Ragen*, 213 F.2d 294, 295-96 (7th Cir. 1954) (federal courts have no control over ordinary prison management and discipline); *Siegel v. Ragen*, 180 F.2d 785, 788 (7th Cir. 1950) (regulation of prisons left to states).

17 Courts and commentators have offered several reasons for the “hands off doctrine”: 1) the separation of powers; 2) the lack of judicial expertise in penology; 3) the fear that court intervention will subvert prison discipline; 4) the inapplicability of the eighth amendment's cruel and unusual punishment prohibition to the states; and 5) the need to initially use state remedies. *Wright v. McMann*, 387 F.2d 519, 522 (2d Cir. 1967). See also Goldfarb & Singer, *supra* note 15, at 181-82.

18 365 U.S. 167 (1961).

19 *Id.* at 169-70, 192.

20 *Id.* at 173-74.

21 *Id.* at 180-83.

had not exhausted state remedies.<sup>22</sup>

Three years later, the Court further eroded the "hands-off" doctrine by holding that a state prisoner could sue prison officials under section 1983.<sup>23</sup> Today, although still reluctant to interfere in state prison administration, federal courts will intervene when an important federal constitutional or statutory right is at stake.<sup>24</sup>

### B. *Federal Habeas Corpus*

The writ of habeas corpus<sup>25</sup> has always occupied a celebrated place in American jurisprudence.<sup>26</sup> The Constitution specifically provides that "[t]he Privilege of the Writ of Habeas Corpus shall not

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22 The Court stated: "It is no answer that the State has a law which if enforced would give relief. The federal remedy [§ 1983] is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked." *Id.* at 183.

23 *Cooper v. Pate*, 378 U.S. 546 (1964).

24 *E.g.*, *Wright v. McMann*, 387 F.2d at 522 (clear that state prisoner can sue under Civil Rights Act); *Smartt v. Avery*, 370 F.2d 788, 790 (6th Cir. 1967) (state cannot discourage prisoner's exercise of right to petition for federal habeas corpus). In *Johnson v. Avery*, 393 U.S. 483 (1969), the Supreme Court commented on federal court involvement in state prisoners' actions:

There is no doubt that discipline and administration of state detention facilities are state functions. They are subject to federal authority only where paramount federal constitutional or statutory rights supervene. It is clear, however, that in instances where state regulations applicable to inmates of prison facilities conflict with such rights, the regulations may be invalidated.

*Id.* at 486; *see also* *Bell v. Wolfish*, 441 U.S. 520, 562 (1979) (recently federal courts discarded "hands-off" approach to prison administration and "waded into this complex area"). The *Bell* Court applauded the abandonment of the doctrine, but advised against undue interference. *See* note 116 *infra*. *See generally* Justice, *Prisoners' Litigation in the Federal Courts*, 51 *TEX. L. REV.* 707, 712-20 (1973).

25 The words "habeas corpus" literally mean "you have the body." *BLACK'S LAW DICTIONARY* 638 (5th ed. 1979). The writ was originally used as early as the eleventh century in England to compel appearance before the King's courts. Through the centuries, the writ developed into a means to obtain freedom from detention. For a discussion of the development of habeas corpus in the English common law, *see* W. DUKER, *A CONSTITUTIONAL HISTORY OF HABEAS CORPUS* 12-62 (1980).

Today courts generally employ three forms of the common law writ of habeas corpus: 1) *habeas corpus ad testificandum* (secure prisoner's appearance as witness); 2) *habeas corpus ad prosequendum* (deliver prisoner for trial); and 3) *habeas corpus ad subjiciendum* (inquire into the legality of detention). Use of the term "habeas corpus" alone refers to *habeas corpus ad subjiciendum*. *Preiser v. Rodriguez*, 411 U.S. 475, 484 n.2 (1973).

26 In *Fay v. Noia*, 372 U.S. 391 (1963), the Supreme Court expounded on the role of habeas corpus in American history. The Court stated: "We do well to bear in mind the extraordinary prestige of the Great Writ, *habeas corpus ad subjiciendum*, in Anglo-American jurisprudence . . ." *Id.* at 399-400 (footnote omitted). The Court continued:

It is no accident that habeas corpus has time and again played a central role in national crises, wherein the claims of order and liberty clash most acutely, not only in England in the seventeenth century, but also in America from our very beginnings, and today. Although in form the Great Writ is simply a mode of procedure,

be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."<sup>27</sup>

The Judiciary Act of 1789 first authorized federal courts to issue the writ of habeas corpus for federal prisoners.<sup>28</sup> The Supreme Court interpreted the original statute to limit the federal courts' habeas corpus authority to cases challenging confinement by a court without jurisdiction or by a nonjudicial authority without due process.<sup>29</sup> Years later, during Reconstruction, Congress feared that the states might resist the postwar constitutional amendments and challenge the federal court authority in criminal procedure.<sup>30</sup> Therefore, in 1867, Congress expanded the federal habeas corpus statute to include the power to grant relief "*in all cases* where any person may be restrained of his or her liberty, in violation of the Constitution, or of any treaty or law of the United States."<sup>31</sup> By omitting the 1789 statute's requirement of federal custody,<sup>32</sup> Congress conferred upon federal courts additional habeas corpus jurisdiction over state prisoners held in violation of the federal Constitution or statutes.<sup>33</sup>

Despite Congress' broad expansion of federal habeas corpus, the Supreme Court continued to restrictively interpret federal habeas corpus authority, allowing inquiry only into convictions by state

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its history is inextricably intertwined with the growth of fundamental rights of personal liberty.

*Id.* at 401 (footnotes omitted). Commentators have reflected upon the use of habeas corpus as a symbol, not just a remedy.

[H]abeas corpus was used in England as the testing ground between Parliament and the Crown and in America it became, in microcosm, a symbol of the ebb and flow of power between the federal government and the states. It could be said that the history of federalism is reflected in the development of habeas corpus.

Miller & Shepherd, *New Looks at an Ancient Writ: Habeas Corpus Reexamined*, 9 U. RICH. L. REV. 49, 68 (1974) (footnote omitted).

27 U.S. CONST. art. I, § 9, cl. 2.

28 Act of Sept. 24, 1789, ch. 20, § 14, 1 Stat. 73. The Act provided that "writs of *habeas corpus* shall in no case extend to prisoners in jail, unless where they are in custody, under or by colour of the authority of the United States." *Id.* at 81-82.

29 The Supreme Court followed the common law limitations on the writ. *See, e.g., Ex parte Wells*, 59 U.S. (18 How.) 307 (1855) (writ available to inquire into executive detention); *Ex parte Kearney*, 20 U.S. (7 Wheat.) 38 (1822) (writ not available to attack conviction by court of competent jurisdiction).

30 L. YACKLE, *POSTCONVICTION REMEDIES* 85-86 (1981). *See also* 17 C. WRIGHT, A. MILLER & E. COOPER, *FEDERAL PRACTICE AND PROCEDURE* § 4261, at 590-91 (1978).

31 Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385 (codified at 28 U.S.C. § 2241(c)(3) (1976)).

32 For language of the Act of 1789, see note 28 *supra*.

33 *Ex parte Royall*, 117 U.S. 241, 247-48 (1886). *See also Developments, supra* note 1, at 1048. *But see* L. YACKLE, *supra* note 30, at 86-90 (debate over the interpretation and scope of the 1867 statute).

courts without jurisdiction.<sup>34</sup> In 1886, the Court also began requiring that state prisoners exhaust state remedies before a federal court could exercise its jurisdiction.<sup>35</sup> Then, in 1942, the Court broadened the scope of federal habeas corpus inquiry by holding that a state prisoner could raise constitutional questions beyond that of the trial court's jurisdiction.<sup>36</sup> In 1948, Congress codified the existing practice of federal habeas corpus, incorporating previous Supreme Court decisions.<sup>37</sup>

In 1953, in the landmark case of *Brown v. Allen*,<sup>38</sup> the Supreme Court examined the effect of the 1948 statutes and established the modern practice for federal habeas corpus involving state prisoners. In *Brown*, the Supreme Court enunciated the following guidelines for federal habeas corpus proceedings: 1) a district court may inquire into all federal constitutional questions; 2) the district court may inquire into fact issues as well as law; and 3) a state court's prior judgment on the question does not bind the federal court.<sup>39</sup> The Court thus transformed the federal habeas corpus remedy from a rather limited vehicle into a general postconviction remedy allowing state prisoners to raise constitutional issues in a federal court.<sup>40</sup>

34 The Supreme Court decision in *Frank v. Magnum*, 238 U.S. 509 (1915), illustrated the Court's reluctance to exercise the broad habeas corpus jurisdiction granted by Congress. In *Frank*, the Court found that the prisoner could have federal habeas corpus relief for his claim that a mob dominated his trial only if such mob control took away the court's jurisdiction. *Id.* at 327. Later, in *Moore v. Dempsey*, 261 U.S. 86, 91-92 (1923), the Court overruled part of the *Frank* decision. The *Moore* Court held that a district court on a habeas corpus petition must determine the facts even though the state court had already rendered judgment. However, the Court affirmed that federal habeas corpus was available to state prisoners only if the convicting court lacked jurisdiction. See also *Johnson v. Zerbst*, 304 U.S. 458, 468 (1938) (violation of constitutional right to counsel robs the trial court of jurisdiction).

35 *Ex parte Royall*, 117 U.S. 241, 251 (1886) (denying federal writ until state trial proceedings finished). See also *Ex parte Fonda*, 117 U.S. 516, 518 (1886) (exhaustion of state appellate remedies); *Pepke v. Cronan*, 155 U.S. 100 (1894) (exhaust state postconviction remedies); *Darr v. Burford*, 339 U.S. 200 (1950) (seek writ of certiorari to Supreme Court before federal habeas corpus). In *Fay v. Noia*, 372 U.S. 391 (1963), the Court abandoned the *Burford* holding. Although Congress codified the exhaustion doctrine in 1948, see note 37 *infra*, the doctrine still is based on the policy of federal-state comity and does not impose a jurisdictional requirement on federal courts. 17 C. WRIGHT, *supra* note 30, at 651-54.

36 *Waley v. Johnston*, 316 U.S. 101 (1942).

37 28 U.S.C. §§ 2241-2254 (1976). The 1948 revision of the Judicial Code merely codified existing judicial practice. The codification incorporated a limited res judicata effect for successive petitions. 28 U.S.C. § 2244(b) (1976). The statute also codified the exhaustion doctrine from *Ex parte Royall*. 28 U.S.C. § 2254 (1976).

38 344 U.S. 443 (1953).

39 *Id.* at 458-61.

40 L. YACKLE, *supra* note 30, at 91. See also Cobb, *The Search for a New Equilibrium in Habeas Corpus Review: Resolution of Conflicting Values*, 32 U. MIAMI L. REV. 637, 642-45 (1978); *Developments*, *supra* note 1, at 1056-57.



Recently, however, due to the increase in prisoner postconviction litigation, the Supreme Court has again narrowed the scope of federal habeas corpus, thereby limiting state prisoners' postconviction access to federal court. The Supreme Court has accomplished this by: 1) applying the independent and adequate state ground rule in habeas corpus;<sup>41</sup> 2) restricting the availability of federal habeas corpus in guilty plea cases;<sup>42</sup> and 3) limiting the type of issues that can be raised in federal habeas corpus proceedings.<sup>43</sup> The cumulative effect of these changes may be to limit relitigation of state prisoners' constitutional claims and to make federal habeas corpus proceedings more like an appellate review than a collateral remedy.

Commentators have suggested several reasons for the apparent shift in federal habeas corpus doctrine.<sup>44</sup> First, federal habeas corpus compromises finality of state criminal convictions by allowing collateral review of state convictions and possibly even relitigation of factual issues.<sup>45</sup> By upsetting state criminal convictions, federal courts infringe upon the state's interest in enforcing its criminal laws and in administering its prisons.<sup>46</sup> Additionally, skyrocketing crime rates

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41 The dissenting opinion in *Irvin v. Dowd*, 359 U.S. 394, 407-08 (1959), stated that if a state judgment rested on an adequate and independent state ground, then both federal direct and habeas corpus review would be foreclosed. However, in *Fay v. Noia*, 372 U.S. 391 (1963), the Court reversed a district court's denial of habeas relief on the basis of procedural default in the state trial. The Court stated that "the adequate state-ground rule is a function of the limitations of *appellate* review," not federal habeas corpus. *Id.* at 429. But recently, in *Wainwright v. Sykes*, 433 U.S. 72 (1977), the Court barred federal habeas corpus review of a state conviction based on an independent and adequate state procedural ground. *Id.* at 86-87. The Court found that the state criminal defendant's failure to make a timely objection to the admission of his confession constituted an independent state ground. *Id.* The Court barred federal habeas corpus review of the admission of the confession because the petitioner did not show "cause" for the waiver of his objection and "prejudice" from the admitted evidence. *Id.* at 87.

42 *E.g.*, *Tollett v. Henderson*, 411 U.S. 258 (1973) (state criminal defendant who plead guilty may only attack guilty plea itself in federal habeas corpus proceeding); *Brady v. United States*, 397 U.S. 742 (1970) (federal postconviction relief denied because state prisoner's guilty plea was voluntary).

43 *Stone v. Powell*, 428 U.S. 465, 494 (1976) (fourth amendment claims where the state provided an opportunity for full and fair litigation not appropriate for federal habeas corpus relief).

44 *See* *Schneekloth v. Bustamonte*, 412 U.S. 218, 259-65 (1973) (Powell, J., concurring); *see also* The Finality of Criminal Judgments Improvements Act, S.R. 2638, 97th Cong., 2d Sess., 128 CONG. REC. S118-51 (daily ed. Sept. 21, 1982); L. YACKLE, *supra* note 30, at 102-06; Miller & Shepherd, *supra* note 26, at 68-76.

45 The federal habeas corpus statute sets out the circumstances in which a federal court may hold an evidentiary hearing to review a state court's factual determination. 28 U.S.C. § 2254(d) (1976).

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

have increased the public's concern for criminal law enforcement and punishment. Endless appeals and avenues of collateral relief may undermine public respect for the criminal system. Moreover, this apparent lack of finality may inhibit the prisoner's rehabilitation by distracting him from the purpose of his confinement.<sup>47</sup>

A second reason for the Court's recent restrictions on habeas corpus may be the impact of habeas corpus on federalism and state autonomy. The previous expansion of habeas corpus was based in part upon distrust of state courts and the state judicial process.<sup>48</sup> However, in *Stone v. Powell*,<sup>49</sup> the Court suggested that evidentiary issues are more appropriately settled in state court than in federal court.<sup>50</sup> Since the state trial judge has observed the demeanor of the witnesses, he is in a better position to assess the credibility of testimony than is a federal district court judge reading the record on a habeas corpus petition.<sup>51</sup> The Supreme Court's restrictive attitude in *Powell* and other recent decisions<sup>52</sup> may signal a change in attitude toward state courts. The decisions suggest that the Court wants to avoid unnecessary friction with state courts<sup>53</sup> and is willing to place

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47 Haynsworth, *supra* note 1, at 602-03. Haynsworth describes the relationship between jailhouse lawyers and their "clients" (prisoners) as often producing negative results. The prisoners depend on the advice of these "lawyers" who:

[H]ave a little learning in the law, but because they are not trained professionals, they engender false hopes that produce great frustrations. However guilty a prisoner may be of the substantive offense, denial of his false hopes leaves him with a sense that his constitutional rights have been ignored and that justice has not been done.

*Id.* at 602. This situation hinders rehabilitation because the prisoner looks to the judicial system, not to the penal system, for release. "[A] prisoner with pending petitions on review procedures has his hope in judicial release—not parole." *Id.* at 603.

48 See note 30 *supra* and accompanying text. For a general discussion of the motivation behind the 1867 statute, see L. YACKLE, *supra* note 30, at 85-87.

49 428 U.S. 465 (1976).

50 *Id.* at 493-94.

51 C. Torbert, *The Overly-Broad Application of Federal Habeas Corpus*, 43 ALA. LAW. 22, 23 (1982).

52 For a discussion of several of these decisions, see C. WHITEBREAD, *CRIMINAL PROCEDURE* 578-90 (1980).

53 The potential for friction between state and federal courts exists because of the procedural requirements of federal habeas corpus. A state prisoner must directly appeal his federal claim through the state courts and petition in the state courts for habeas corpus before petitioning in a federal court. See note 65 *infra*. Thus, a federal district court may review or overturn the judgment of the highest court of a state. Although theoretically the federal court only reviews the legality of the prisoner's detention—and not the underlying conviction—a federal habeas court's order to release the state prisoner or to hold a new state trial essentially attacks the conviction. However rarely this occurs, the possibility of the combined decision of several state courts being overturned by a single federal trial court judge has caused consternation. 17 C. WRIGHT, *supra* note 30, at 600 (this results in an "affront to state court sensibili-

greater trust in state criminal procedures.<sup>54</sup>

A third possible reason for restricting the scope of federal habeas corpus is reduction of the federal caseload. Although this reason may not be persuasive by itself,<sup>55</sup> its validity increases when coupled with increased state court competence in dealing with federal constitutional law.<sup>56</sup> Although opinion differs about the burden habeas corpus petitions place on federal courts,<sup>57</sup> state prisoner litigation in federal courts has risen significantly and constitutes a major portion of the federal court workload.<sup>58</sup> This increase, combined with a gen-

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ties"); Torbert, *supra* note 51, at 23. Concern for federalism dictates that federal courts respect state court decisions and refrain from undue interference in such important areas as criminal proceedings and prison administration.

54 In *Stone v. Powell*, 428 U.S. 465 (1976), the Supreme Court stated: "We are unwilling to assume that there now exists a general lack of sensitivity to federal rights" in state courts. *Id.* at 493 n.35. With the advent of constitutional procedural decisions such as *Mapp v. Ohio*, 367 U.S. 643 (1961), state courts have gained experience in routinely applying federal constitutional law. Torbert, *supra* note 51, at 23. See generally Aldisert, *Judicial Expansion of Federal Jurisdiction: A Federal Judge's Thoughts on Section 1983, Comity, and the Federal Caseload*, 1973 LAW & SOC. ORD. 557, 558-59 (1973); Hopkins, *Federal Habeas Corpus: Easing the Tension Between State and Federal Courts*, 44 ST. JOHN'S L. REV. 660 (1970).

However, the existence of institutional differences between state and federal courts weighs against wholesale abdication of federal jurisdiction over prisoner's constitutional claims against state officials. Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105 (1977). Even though the federal district court usually sits in the same geographic location as the state trial court, the federal judge is removed from some of the pressures facing a state judge. *Id.* at 1120. For instance, the federal judge is isolated from the atmosphere and the pressures of public opinion which often accompany criminal trials. *Id.* at 1125. In addition, the federal judge, unlike the state judge, is appointed for life and is not subject to the political pressure of reelection. *Id.* at 1127-28.

55 See C. WRIGHT, *FEDERAL COURTS* 345 (4th ed. 1983). Wright sums up the conflicting views on the burden of state prisoner habeas corpus petitions:

The great bulk of these applications are utterly unjustified, and it is easy to say . . . that "he who must search a haystack for a needle is likely to end up with the attitude that the needle is not worth the search." To that attitude the classic answer has been . . . "it is not a needle we are looking for in these stacks of paper, but the rights of a human being."

*Id.* (footnotes omitted).

56 See note 54 *supra* and accompanying text.

57 See C. WRIGHT, *supra* note 55, at 345; Haynsworth, *supra* note 1, at 597-98; Rosenberg, *supra* note 1, at 578-83. But see Justice, *supra* note 24, at 708-09; Olsen, *supra* note 1, at 306-11; *Developments*, *supra* note 1, at 1041.

58 Prisoner petitions regularly represent a major part of the civil litigation in the federal courts. In 1982, prisoner petitions made up 14% of all civil suits filed. State prisoner petitions alone represented 12% of civil suits filed. State prisoner petitions made up 85% of all 1982 prisoner petitions. The greatest increase in state prisoner petition litigation was in prisoner civil rights suits. *Johnson v. Baskerville*, 568 F. Supp. 853, 855 n.5 (E.D. Va. 1983) (quoting ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 102 (1982)).

Prisoners' suits challenging the validity of state conviction in federal habeas corpus proceedings rose nearly 700% from 1961 to 1982. A report by the Department of Justice notes

eral rise in the number and complexity of civil cases, may reduce the quality of federal court decision-making.

In summary, although legitimate interests dictate that federal courts must remain accessible to prevent abuse of state prisoners' constitutional rights, prisoner litigation should not monopolize federal court dockets. State courts should play a larger role in ensuring protection of these prisoners' rights. Consequently, in implementing section 1983 and federal habeas corpus, federal courts should strike a balance between state and federal concerns and prisoners' rights. The following section explores the differences between the two remedies and examines the proper role of each in balancing federal, prisoner, and state concerns.

## II. Current Guidelines on Application of Section 1983 and Habeas Corpus in State Prisoners' Litigation

The federal habeas corpus and section 1983 statutes overlap. The federal habeas corpus statute allows a federal court to entertain a habeas corpus petition by a state prisoner "only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States."<sup>59</sup> In comparison, section 1983 permits any person to recover for the "deprivation of any rights, privileges or immunities secured by the Constitution and [federal] laws."<sup>60</sup> Section 1983's broad scope conceivably envelops all habeas corpus petitions to federal courts by state prisoners. As mentioned previously,<sup>61</sup> this potential for overlap did not create a problem until the 1960's when section 1983 became a more widely recognized remedy for constitutional violations. Since that time, state prisoners have gradually turned to the broad language of section 1983 as an alternative to habeas corpus relief. Federal courts therefore need clarification of the situations in which relief is appropriate under each remedy.

District courts must differentiate the parameters of section 1983 and habeas corpus because of the different elements,<sup>62</sup> procedures,<sup>63</sup>

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the demand state prisoner habeas corpus petitions place on the federal court system. In 40% of the cases, the district court prepared either a memorandum or an opinion. The district court referred the petition to a magistrate in 45% of the cases. In 26% of the cases, the prisoner appealed the federal habeas corpus decision. U.S. DEPT OF JUSTICE, *Advance Release to SPECIAL REPORT NCJ-92948, HABEAS CORPUS — FEDERAL REVIEW OF STATE PRISONER PETITIONS* at 1, 3 (March 18, 1984) (available from Criminal Justice Reference Service, Rockville, Md.).

59 28 U.S.C. § 2254(a) (1976).

60 42 U.S.C. § 1983 (Supp. V 1981).

61 See notes 18-24 *supra* and accompanying text.

62 There are two basic elements to a § 1983 action. First, the plaintiff must claim that a

and remedies<sup>64</sup> under each statute. The most crucial of these differences is the procedural "exhaustion requirement": to petition under the federal habeas corpus statute, a state prisoner must first "exhaust" all available state judicial and administrative remedies.<sup>65</sup> If a state prisoner petitions a federal district court for habeas corpus relief without having exhausted available remedies, the district court will dismiss the petition. However, section 1983 has no comparable requirement.<sup>66</sup> Therefore, a state prisoner proceeding under section

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person has deprived him of a federal right. Second, the plaintiff must allege that the person acted under color of state law. *See, e.g.*, *Gomez v. Toledo*, 446 U.S. 635, 640 (1980). On the other hand, a petition for federal habeas corpus for a state prisoner must allege that the petitioner is in custody and that the detention violates the federal Constitution or statute. 28 U.S.C. § 2254 (1976).

63 *See* notes 65-66 *infra* and accompanying text.

64 Section 1983 authorizes federal courts to grant any form of legal and equitable relief to redress the violation of constitutional rights. 42 U.S.C. § 1983 (Supp. V 1981). Federal habeas corpus relief is directed at relieving unconstitutional detention through an injunction ordering release of the state prisoner or a new trial. C. WRIGHT, *FEDERAL COURTS* 332 (4th ed. 1983).

65 28 U.S.C. § 2254(b), (c) (1976). The statute provides:

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

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

The prisoner must raise his claim in any grievance procedure the prison offers and then in the state courts, up to the highest state court. *Ex Parte Hawk*, 321 U.S. 114, 116-17 (1944) (the exhaustion requirement the Supreme Court enunciated in *Hawk* was later codified at 28 U.S.C. § 2254). However, the exhaustion requirement has limitations. For example, in *Fay v. Noia*, 372 U.S. 391, 435 (1963), the Supreme Court ruled that the prisoner need not petition for certiorari to the Supreme Court before petitioning a district court for a writ of habeas corpus. This decision overruled the Court's contrary holding in *Darr v. Burford*, 339 U.S. 200 (1950).

66 In 1980, Congress passed the Civil Rights of Institutionalized Persons Act, 42 U.S.C. § 1997 (Supp. V 1981), that, among other things, outlines grievance procedures which a district court may require a state prisoner bringing a § 1983 action to exhaust. 42 U.S.C. § 1997e (Supp. V 1981). However, requiring exhaustion in these cases remains in the district court's discretion. The statute allows the court to continue—but not dismiss—a prisoner's § 1983 action for 90 days to require exhaustion of "such plain, speedy, and effective administrative remedies as are available." 42 U.S.C. § 1997e(a)(1) (Supp. V 1981). In addition, the Attorney General must certify that the administrative remedies satisfy the requirements set out in § 1997e and the standards promulgated by the Attorney General. 42 U.S.C. § 1997e(a)(2), (b)(2) (Supp. V 1981). *See also* Standards for Inmate Grievance Procedures, 28 C.F.R. § 40 (1981) (implementing the minimum standards of § 1997e).

The impact of § 1997e is still being determined. *See, e.g.*, *McKeever v. Israel*, 689 F.2d 1315 (7th Cir. 1982) (remanded to district court in light of § 1997e); *Kennedy v. Hershcler*,

1983 can bypass state remedies and immediately present his federal question to the federal court. This immediate access, combined with the perception that their claims would receive more sympathetic hearings in federal court, may induce state prisoners to purposefully characterize their claims as section 1983 actions.

In 1973, responding to the lower courts' need for guidance in classifying section 1983 and habeas corpus suits, the Supreme Court enunciated a basic distinction between the two remedies and provided an analytic framework for their proper classification. In *Preiser v. Rodriguez*,<sup>67</sup> three state prisoners brought an action in federal court against the New York Department of Correctional Services and combined a section 1983 claim with a petition for habeas corpus.<sup>68</sup> The prisoners alleged that the prison officials had unconstitutionally deprived them of good-time credits. They therefore sought an injunction under section 1983 to compel the state to restore their credits. Restoration of these credits would have resulted in their immediate release from prison.<sup>69</sup> The district court treated the prisoners' habeas corpus petitions as ancillary to their section 1983 action and did not require them to exhaust state remedies.<sup>70</sup> The court of appeals affirmed,<sup>71</sup> and the Supreme Court reversed, holding that a writ of habeas corpus was the only appropriate remedy for the prisoners' claims.<sup>72</sup>

In reaching its decision, the Court examined the extent to which section 1983 provides an alternative to the relief traditionally provided by habeas corpus. The Court found that a challenge to "the fact or duration of confinement" based upon allegedly unconstitutional administrative action is "close to the core of habeas corpus."<sup>73</sup> The Court concluded that the general language of section 1983 could not override the specific remedy of habeas corpus in these cases.<sup>74</sup>

655 F.2d 210 (10th Cir. 1981) (remanded to determine whether Attorney General certified that grievance procedures comply with § 1997e(b)); *Johnson v. Baskerville*, 568 F. Supp. 853 (E.D. Va. 1983) (effect of § 1997e not yet confirmed).

67 411 U.S. 475 (1973).

68 *Id.* at 476.

69 *Id.*

70 *Id.* at 478-81. The district court subsequently found for the prisoners on the merits and ordered their immediate release. *Id.*

71 *Id.* at 482.

72 *Id.* at 500.

73 *Id.* at 489. Both a challenge to the fact or duration of confinement based on administrative action and a challenge to the conviction attack the constitutionality of the confinement itself and seek either release or shortening of the duration. Therefore, both fall within the core of habeas corpus, and habeas corpus is the exclusive remedy if available. *Id.* at 490.

74 *Id.*

However, the Court indicated that damages actions fall within the scope of section 1983. The Court stated:

If a state prisoner is seeking damages, he is attacking something other than the fact or length of his confinement, and he is seeking something other than immediate or more speedy release—the traditional purpose of habeas corpus. In the case of a damages claim, habeas corpus is not an appropriate and available federal remedy. Accordingly . . . a damages action by a state prisoner could be brought under the Civil Rights Act in federal court without any requirement of prior exhaustion of state remedies.<sup>75</sup>

The Supreme Court thus established a dichotomy between section 1983 and habeas corpus: actions challenging the fact or length of confinement should proceed under habeas corpus, while pure damages actions should proceed under section 1983.

Since 1973, federal courts facing the problem of appropriate classification have attempted to implement the Supreme Court's *Preiser* guidelines. Certain fact patterns easily fall within one of the *Preiser* categories. However, the majority of prisoner pro se complaints are not so easily classified, and therefore problems remain in identifying an action as appropriate for section 1983 relief or for habeas corpus relief.

#### A. *Habeas Corpus Claims*

In *Preiser*, the Supreme Court concluded that Congress' specific intent in enacting the federal habeas corpus statute overrode section 1983's broad and general language. Therefore, habeas corpus is the exclusive remedy for any challenges to the fact or length of confinement based on administrative or judicial action.<sup>76</sup>

Claims of unconstitutional procedure during the criminal trial itself fall under habeas corpus, since such claims challenge the fact of confinement.<sup>77</sup> In these inquiries, while theoretically focusing only

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<sup>75</sup> *Id.* at 494.

<sup>76</sup> *Id.* at 489-90.

<sup>77</sup> Justice Holmes' dissenting opinion in *Frank v. Morgan*, 237 U.S. 309 (1915), provides the classic statement of the principles underlying the writ of habeas corpus:

*[H]abeas corpus* cuts through all forms and goes to the very tissue of the structure. It comes in from the outside, not in subordination to the proceedings, and although every form may have been preserved opens the inquiry whether they have been more than an empty shell.

. . . Whatever disagreement there may be as to the scope of the phrase "due process of law," there can be no doubt that it embraces the fundamental conception of a fair trial . . . . We are not speaking of mere disorder, or mere irregularities in procedure, but of a case where the processes of justice are actually subverted. In such a case, the Federal court has jurisdiction to issue the writ.

on the legality of the detention,<sup>78</sup> the federal habeas corpus proceeding actually examines the state trial itself. In fact, under the federal habeas corpus statute, a federal district court may even hold an evidentiary hearing if the state record is inadequate to determine the prisoner's constitutional claims.<sup>79</sup>

In addition to state convictions, which have traditionally fallen within the scope of habeas corpus, actions attacking the deprivation of good-time credits have also indirectly come under habeas corpus. In *Preiser*, the Supreme Court noted that such claims attack the duration of confinement by seeking restoration of credits which would shorten, or end, the prisoner's confinement.<sup>80</sup> The *Preiser* Court held that such actions fall under habeas corpus because they essentially allege illegal detention and seek early or immediate release from confinement.<sup>81</sup>

The *Preiser* Court's reasoning, however, can lead to confusing results in actions dealing with deprivation of good-time credits. For example, in *Todd v. Baskerville*,<sup>82</sup> a state prisoner alleged that prison officials had improperly cancelled his good-time credits. He therefore sought both release from confinement and damages for illegal detention.<sup>83</sup> The district court found that habeas corpus was the prisoner's appropriate remedy and consequently dismissed the action for failure to exhaust state remedies.<sup>84</sup> The Court of Appeals for the Fourth Circuit agreed, finding that since the prisoner attacked the length of his confinement by alleging improper cancellation of good-time credits, the claim clearly fit into the *Preiser* habeas corpus definition. The Fourth Circuit treated the prisoner's damages claim as "purely ancillary to and dependent on a favorable resolution of the length or duration of his sentence."<sup>85</sup>

The Fourth Circuit, however, concluded its opinion with a rather confusing result. Using the record, the court of appeals calcu-

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*Id.* at 346-47.

78 The Supreme Court has stated:

It is clear, not only from the language of §§ 2241(c)(3) and 2254(a), but also from the common-law history of the writ, that the essence of habeas corpus is an attack by a person in custody upon the legality of that custody, and that the traditional function of the writ is to secure release from illegal custody.

*Preiser*, 411 U.S. at 484.

79 28 U.S.C. § 2254(d) (1976).

80 411 U.S. at 487.

81 *Id.* at 489.

82 712 F.2d 70 (4th Cir. 1983).

83 *Id.* at 71.

84 *Id.*

85 *Id.* at 73.



lated that the prisoner should already have been released from prison. The court reasoned that if the prisoner had indeed already been released, then habeas corpus was no longer available to him. Therefore, section 1983 was his appropriate remedy.<sup>86</sup> Alternatively, the court stated that if the prisoner was still in custody, the action should be dismissed for failure to exhaust state remedies as required by the federal habeas corpus statute.<sup>87</sup>

*Todd* illustrates that despite the seeming clarity of the *Preiser* distinction between the remedies, its practical application to even the simplest case reveals that the two remedies are in fact closely related. Although the Fourth Circuit initially found that habeas corpus was the prisoner's exclusive remedy, the court held that the same claim could be remedied by section 1983 if habeas corpus was no longer available. In effect, the exclusivity of the habeas corpus remedy was conditional. From this perspective, the *Preiser* distinctions between section 1983 and habeas corpus seem to merely establish a hierarchy of remedies.

### B. Section 1983 Claims

In *Preiser*, the Supreme Court stated in dictum that section 1983 is the exclusive remedy for damages actions by state prisoners.<sup>88</sup> Subsequently, in *Wolff v. McDonnell*,<sup>89</sup> the Court held that due process claims stemming from prison procedures which would not affect the length or duration of the state prisoner's sentence also come under section 1983.<sup>90</sup> Together, these two cases establish the guidelines for determining which claims warrant section 1983 relief.

In *Preiser*, the Court noted in dictum that a state prisoner suit for damages falls under section 1983 because it attacks something other than the fact or length of confinement and seeks something other than immediate or speedy release.<sup>91</sup> This dictum in *Preiser* later became the holding in *Wolff*.<sup>92</sup> However, in addition to finding damages claims appropriate under section 1983, the *Wolff* Court also addressed the availability of declaratory and injunctive relief for vio-

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86 *Id.* The federal habeas corpus statute requires that a petitioner be "in custody." 28 U.S.C. § 2254(a) (1976).

87 *Todd v. Baskerville*, 712 F.2d at 73. Since the damage claim would disappear if the prisoner was successful in having the good-time credits restored, the court held that the prisoner's claim should properly come under habeas corpus.

88 *See* note 75 *supra* and accompanying text.

89 418 U.S. 539 (1974).

90 *Id.* at 555.

91 411 U.S. at 494.

92 418 U.S. at 554.

lations arising out of invalid prison disciplinary procedures.<sup>93</sup>

In *Wolff*, state prisoners challenged the prison disciplinary procedures seeking both money damages and an injunction restoring good-time credit and compelling submission of a plan for a prison hearing procedure.<sup>94</sup> The Supreme Court found the district court could properly examine the constitutionality of the state prison procedure and award damages and injunctive relief<sup>95</sup> under section 1983 for any injury incidental to the invalid proceeding.

Therefore, under the Supreme Court's guidelines in *Preiser* and *Wolff*, in order to maintain an action under section 1983, the state prisoner must seek damages or injunctive relief for prison procedures not resulting in his immediate release or in a shortening of his sentence. However, if the damages claim is purely ancillary to a claim for release, as in *Todd v. Baskerville*, the action then falls under habeas corpus.<sup>96</sup>

A Second Circuit case which involved a constitutional due process violation unrelated to the fact or length of confinement illustrates the proper application of the guidelines set forth in *Preiser* and *Wolff*. In *Haymes v. Regan*,<sup>97</sup> a state prisoner brought suit to force disclosure of the parole board's evaluation criteria after the board denied his parole application.<sup>98</sup> The court of appeals found that the prisoner's claim properly stated a section 1983 cause of action.<sup>99</sup> Citing *Preiser*, the court distinguished the prisoner's general attack upon the prison's entire disciplinary process from a challenge to a particular hearing: "[I]t is the manner of parole decision-making, not its outcome, that is challenged . . ." <sup>100</sup> The court found the former action arose under section 1983 and the latter would fall under habeas corpus.<sup>101</sup>

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93 418 U.S. at 542-43.

94 *Id.* at 553.

95 *Id.* at 554-55. While the district court on remand could not issue an injunction compelling the restoration of the credits, the Court ruled that the district court could issue "ancillary relief" by enjoining the future enforcement of invalid prison regulations. *Id.* at 555. For further discussion of the holding in *Wolff*, see notes 108-12 *infra* and accompanying text.

96 712 F.2d at 73.

97 525 F.2d 540 (2d Cir. 1975).

98 *Id.* at 542. Initially, the prisoner sought release, but he amended his complaint to request injunctive and declaratory relief. *Id.*

99 *Id.*

100 *Id.*

101 *Id.*

### C. *Overlap Between Section 1983 and Habeas Corpus*

In section 1983 and federal habeas corpus remedies, two areas of overlap remain after *Preiser*. First, while the *Preiser* Court stated that state prisoners may attack constitutional violations arising from conditions of confinement under section 1983, it intentionally did not decide whether habeas corpus might also apply to these actions.<sup>102</sup> Second, the Court's solution for "combination complaints"<sup>103</sup> can result in a factual situation producing separate proceedings for the section 1983 and the habeas corpus claims.

In *Preiser*, the Supreme Court clearly established that section 1983 covers prisoner claims concerning conditions of confinement. However, the Court suggested that habeas corpus might also apply to such claims: "When a prisoner is put under additional and unconstitutional restraints during his lawful custody, it is arguable that habeas corpus will lie to remove the restraints making the custody illegal."<sup>104</sup> In a footnote, the Court discussed the possible origins of this overlap,<sup>105</sup> but declined to examine the concept further. Therefore, section 1983 is not the exclusive remedy for challenging prison conditions because, under unspecified circumstances, habeas corpus may also provide a remedy.<sup>106</sup>

The second area of overlap between section 1983 and habeas corpus is a combination complaint, that is, one containing allegations properly arising under both habeas corpus and section 1983. The *Preiser* Court noted that such complaints must be split into two actions:

If a prisoner seeks to attack both the conditions of his confinement and the fact or length of that confinement, his latter claim, under our decision today, is cognizable only in federal habeas corpus with its attendant requirement of exhaustion of state remedies. But, consistent with our prior decisions, that holding in no way precludes him from simultaneously litigating in federal

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

103 Combination complaints are those that contain both a habeas corpus claim and a § 1983 claim.

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

105 *Id.* at 499 n.15. The Court noted that there are two possible explanations for the overlap. One theory is that the scope of the habeas corpus custody requirement was so uncertain that prisoners challenging conditions sought a remedy in a civil rights suit. A converse theory is that prisoners originally used habeas corpus to remedy prison condition abuses because § 1983 initially was not a viable remedy. *Id.*

106 In 1979, the Supreme Court had an opportunity, in *Bell v. Wolfish*, 441 U.S. 520 (1979), to address the issue, but it declined to do so: "Thus, we leave to another day the propriety of using a writ of habeas corpus to obtain review of the conditions of confinement, as distinct from the fact or length of the confinement itself." *Id.* at 526-27 n.6.

court, under section 1983, his claim relating to the conditions of confinement.<sup>107</sup>

Therefore, if a prisoner both alleges unlawful confinement and seeks damages for that confinement, both a section 1983 and a habeas corpus action may arise from the same factual situation. In *Wolff v. McDonnell*,<sup>108</sup> the Court applied the simultaneous litigation concept to a similar situation. The prisoners in *Wolff* challenged the prison's disciplinary procedures and sought money damages and injunctive relief.<sup>109</sup> The Court found that the *Preiser* guidelines foreclosed an injunction compelling actual restoration of good-time credits until the prisoner exhausted state remedies.<sup>110</sup> However, the Court allowed the section 1983 claim for damages and injunctive relief<sup>111</sup> to proceed in the federal court while the prisoner concurrently sought restoration of the good-time credits in state proceedings.<sup>112</sup>

### III. Current Problems and a Suggested Resolution

Although the *Preiser* distinction seems clear, federal courts nevertheless have experienced difficulty in dealing with the "ambiguous borderland"<sup>113</sup> between section 1983 and habeas corpus. District courts are faced with a variety of fact situations, often complicated by the descriptions written by prisoners acting without benefit of counsel.

The characterization problem federal courts face in dealing with state prisoner postconviction litigation has been previously addressed. But several other problems are also inherent in the current Supreme Court guidelines. One of these is the inappropriate emphasis the *Preiser* distinction places on the relief requested by the prisoner.<sup>114</sup> Federal courts traditionally have avoided classifying cases according to the relief sought, or the label attached to the complaint, because they fear state prisoners would routinely claim damages to

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107 *Preiser*, 411 U.S. at 499 n.14.

108 418 U.S. 539 (1974). For further discussion of *Wolff*, see notes 92-95 *supra* and accompanying text.

109 418 U.S. at 554.

110 *Id.*

111 The district court could not compel restoration of the credits, but could enjoin prospective enforcement of invalid prison regulations. See note 95 *supra*.

112 418 U.S. at 554. The prisoner was relegated to seeking restoration of the credits in state court even though the outcome in federal court might have determined through res judicata the claim in state court. *Id.* at 554 n.12.

113 *McKinnis v. Mosely*, 693 F.2d 1054, 1056 (11th Cir. 1982).

114 See notes 67-75 *supra* and accompanying text.

avoid the habeas corpus exhaustion requirement.<sup>115</sup> The *Preiser* Court, however, distinguished between the two remedies solely on the basis of the relief sought.

Another problem with the guidelines is that the confusion they have created in classifying cases could adversely impact upon federalism. The various federal courts predictably will apply the *Preiser* guidelines differently and therefore may erroneously review cases, which should have gone first to the state courts under habeas corpus, under section 1983. The state has a significant interest in running its prison system without interference from the federal government.<sup>116</sup> Since the state regulates every aspect of a prisoner's life, opportunities for friction between the state and federal courts already abound.<sup>117</sup> The *Preiser* decision exacerbates this tension between the state and the federal courts by allowing district courts to inquire into the conditions of state prisons without first allowing the state to assess

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115 See, e.g., *McKinnis*, 693 F.2d at 1057 (avoid "tyranny of labels"); *Johnson v. Hardy*, 601 F.2d 172, 174 (5th Cir. 1979) (courts are governed by classifications, regardless of relief sought or prisoner's label); *Fulford v. Klein*, 529 F.2d 377, 381 (5th Cir. 1976) (classify according to basis of claim, not relief sought).

116 In *Bell v. Wolfish*, 411 U.S. 520 (1979), the Court sounded a note of caution about federal court intervention in state prison administration:

The deplorable conditions and Draconian restrictions of some of our Nation's prisons are too well known to require recounting here, and the federal courts rightly have condemned these sordid aspects of our prison systems. But many of these same courts have, in the name of the Constitution, become increasingly enmeshed in the minutiae of prison operations . . . . But under the Constitution, the first question to be answered is not whose plan is best, but in what branch of the Government is lodged the authority to initially devise the plan. This does not mean that constitutional rights are not to be scrupulously observed. It does mean, however, that the inquiry of federal courts into prison management must be limited to the issue of whether a particular system violates any prohibition of the Constitution. . . . The wide range of "judgment calls" that meet constitutional . . . requirements are confided to officials outside of the Judicial Branch of Government.

*Id.* at 562.

117 The *Preiser* Court commented:

It is difficult to imagine an activity in which a State has a stronger interest, or one that is more intricately bound up with state laws, regulations, and procedures, than the administration of its prisons . . . . For state prisoners, eating, sleeping, dressing, washing, working, and playing are all done under the watchful eye of the State, and so the possibilities for litigation under the Fourteenth Amendment are boundless. What for a private citizen would be a dispute with his landlord, with his employer, with his tailor, with his neighbor, or with his banker becomes, for the prisoner, a dispute with the State. Since these internal problems of state prisons involve issues so peculiarly within state authority and expertise, the States have an important interest in not being bypassed in the correction of those problems.

411 U.S. at 491-92. See also *Wolff*, 418 U.S. at 562 ("Guards and inmates co-exist in direct and intimate contact. Tension between them is unremitting.")

its procedures and conditions.<sup>118</sup>

A final problem with the current Supreme Court guidelines is the *Preiser* solution to combination cases: simultaneous litigation. As the dissent in *Preiser* pointed out, simultaneously litigating the same claim in both state and federal courts wastes judicial resources.<sup>119</sup> However, under the *Preiser* decision, a state prisoner could subject the same allegedly unconstitutional disciplinary proceedings to litigation in both state and federal court: in state court seeking restoration of good-time credits, and in federal court seeking damages and injunctive relief. Besides being inefficient, such simultaneous litigation could also have a negative impact on federal-state relations. If the federal court reaches a decision first in the section 1983 case, then, under *res judicata*, this decision would foreclose a state court determination of the same issues. Conversely, since the principles of *res judicata* also apply to section 1983 cases,<sup>120</sup> an early state court decision would preempt the ongoing federal proceeding. Either result would create tension between federal and state court systems.

The problems in the prisoner postconviction area stem from the Supreme Court's attempt to carve out distinct parameters for section 1983 and federal habeas corpus actions. The Court's inability to adequately clarify the statutes indicates that the present statutory scheme needs improvement. The time has come for Congress to restructure these statutes to provide a remedy tailored for state prisoners' suits.<sup>121</sup>

As an alternative to the current statutes, Congress should elimi-

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118 Section 1997e of the Civil Rights for Institutionalized Persons Act, 42 U.S.C. § 1997e (Supp. V 1981), seems to solve this problem by requiring exhaustion in all § 1983 cases brought by prisoners. *See* note 66 *supra*. Section 1997e strikes a viable compromise between the federal and state interests involved. The statute contains specific requirements for the states to follow in formulating adequate prison grievance procedures. Furthermore, the statute gives the states the opportunity to initially fashion grievance procedures; but yet, the statute provides that the federal courts have the authority to step in if the state provides inadequate procedures. The states should take advantage of this opportunity and formulate standards for grievance procedures that address the state's needs while complying with the standards set forth in § 1997e.

119 411 U.S. at 511.

120 *Wolff*, 418 U.S. at 554 n.12.

121 The Senate has taken notice of some of the problems plaguing federal habeas corpus. *See* The Finality of Criminal Judgments Improvements Act, S.R. 2638, 97th Cong., 2d Sess., 128 CONG. REC. S11851-59 (daily ed. Sept. 21, 1982). Yet, as one commentator has stated, [T]he proper resolution of the continuing controversy about habeas corpus will come only when there is substantial consensus on what its proper function is in a federal system in the late twentieth century. . . . If there can be substantial agreement on the function of the writ, the substantive grounds on which it is to be available should fall readily in place. Finally a set of procedural rules are needed that

nate section 1983 as a remedy for state prisoners' claims and establish a broadened federal habeas corpus as the sole remedy for those claims. However, a restructured habeas corpus should absorb current section 1983 provisions concerning conditions of confinement and damages by including a remedy for these complaints. This suggested restructuring would still allow federal review of alleged constitutional violations; but, through the exhaustion requirement, the states would first have the opportunity to correct such violations. And, to ensure additional protection of prisoners' constitutional rights, Congress could incorporate into federal habeas corpus a provision which would allow the Attorney General to bring suit in federal court on behalf of a state prisoner in exceptional circumstances.<sup>122</sup> For example, if prison conditions were life-threatening and the state authorities would not respond, then the state prisoner could turn to the Attorney General for assistance.<sup>123</sup>

Several persuasive reasons support establishing federal habeas corpus as the exclusive remedy for state prisoners suits. First, shortly after Congress expanded federal habeas corpus to include state prisoners' claims, it enacted section 1983's broad civil rights protections.<sup>124</sup> This alone suggests that Congress intended the expanded

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will be clear, that will be understandable to prisoners, and that will give a fair opportunity to resolve constitutional contentions on their merits.

Such a solution is far more likely to be achieved by legislation than it is by episodic decisionmaking. The Department of Justice and the Senate have been working in this direction . . . . My hope is not that the present proposals will be adopted intact, but that they will stimulate a dialogue in which open-minded and responsible people will be able to agree on what habeas corpus should be in the future.

Wright, *Habeas Corpus: Its History and Its Future* (Book Review), 81 MICH. L. REV. 802, 810 (1983). Moreover, Wright's comments could apply equally well to the relationship between section 1983 and habeas corpus. Congress should determine the function of each and should resolve the confusion about the relationship between the two remedies.

122 Section 1997a of the Civil Rights of Institutionalized Persons Act, 42 U.S.C. § 1997a (Supp. V 1981), currently allows the Attorney General to sue state officials on behalf of a state prisoner:

Whenever the Attorney General has reasonable cause to believe that any State or . . . official, employee . . . or other person acting on behalf of a State . . . is subjecting persons residing in or confined to an institution . . . to egregious or flagrant conditions which deprive such persons of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States.

*Id.* Congress could include such a provision in the restructured federal remedy for state prisoners' claims.

123 For a discussion of the advantages of Attorney General involvement, see S. Rep. No. 416, 96th Cong., 2d Sess., reprinted in 1980 U.S. CODE CONG. & AD. NEWS 787, 803-05.

124 Congress expanded federal habeas corpus in 1867. See notes 31-33 *supra* and accompanying text. Then, in 1871, Congress enacted the Civil Rights Act of 1871. Section one of this

habeas corpus as a specific remedy for state prisoners' suits and section 1983 for other general civil rights actions.

Furthermore, the habeas corpus exhaustion requirement, which would apply to all prisoner litigation under this proposal, promotes federalism in two ways. First, the exhaustion requirement recognizes the state interest and expertise in the administration of its penal and criminal justice systems. Thus, exhaustion of state administrative remedies taps the expertise of correctional authorities who are the most familiar with their prison facilities and who have a substantial interest in correcting any internal problems. Exhaustion of state judicial remedies respects the state's interest in administering its criminal law and in conducting its criminal trials. Second, requiring state appellate review allows state courts to correct their own errors without federal intervention.<sup>125</sup> Mutual respect between the federal and state judicial systems is thereby promoted.

Requiring all state prisoner suits to be channeled through the state administrative and judicial systems may also significantly reduce the federal judiciary's state prisoner litigation burden.<sup>126</sup> Satisfaction of the prisoner's claim at the state level would eliminate the prisoner's need to petition for federal relief. Even in those cases where the need for federal proceedings is not eliminated, the state adjudication would have clarified the issues, thus speeding the federal proceeding.

Finally, establishing habeas corpus as state prisoners' exclusive remedy would eliminate the need for simultaneous litigation in cases where the prisoner seeks both damages and release from confinement. Designating one remedy specifically for all state prisoners' constitutional claims avoids the inefficiencies inherent in simultaneous litigation.<sup>127</sup> State prisoners could, in one action, challenge the fact, length, and conditions of confinement.

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Act contained the provisions currently codified at 42 U.S.C. § 1983. *See* note 9 *supra* and accompanying text.

125 *See, e.g.,* *Rose v. Lundy*, 455 U.S. 509, 518-19 (1982); *Felder v. Estelle*, 693 F.2d 549, 551 (5th Cir. 1982).

126 Enactment of § 1997e of the Civil Rights for Institutionalized Persons Act, *see* notes 66 and 118 *supra*, indicates congressional approval of an exhaustion requirement for state prisoner litigation. *See* *Patsy v. Board of Regents*, 457 U.S. 496, 507-12 (1982). Section 1997e authorizes a federal district court to require, in its discretion, exhaustion of state administrative remedies. 42 U.S.C. § 1997e(a)(1) (Supp. V 1981). However, this limited exhaustion requirement is not sufficient. Eliminating § 1983 as a federal remedy for state prisoners' actions would accomplish what Congress began in § 1997e by authorizing a limited exhaustion requirement.

127 For a discussion of simultaneous litigation, *see* notes 119-20 *supra* and accompanying text.



#### IV. Conclusion

The proper role of section 1983 and federal habeas corpus in state prisoner postconviction remedies is far from settled. The recent increase in state prisoner litigation in federal courts has illuminated the problems inherent in the current dual remedy scheme. Moreover, the Supreme Court's classification guidelines have not eliminated the confusion surrounding these two remedies. Statutory reform would provide a simple and efficient solution. Minimally, then, Congress should determine and explicitly define the scope of each remedy. Ideally, Congress should restructure the statutes to make habeas corpus the exclusive federal remedy for all state prisoner claims.

*Maureen A. Dowd*