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Prisoners' Redress for Deprivation of a Constitutional Right: Federal Habeas Corpus and the Civil Rights Act.

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COMMENTS

PRISONERS' REDRESS FOR DEPRIVATION OF A CONSTITUTIONAL RIGHT: FEDERAL HABEAS CORPUS AND THE CIVIL RIGHTS ACT

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The propensity of federal courts to hear and determine prisoners' claims concerning conditions of confinement has been increasing over the past decade and all indications are that it will continue to do so. The increase can be attributed to a changing ideology regarding prisons and their function in society. If one regards a prison as strictly punitive in nature, then deprivations of basic human liberties may seem less abhorrent. It was recognized several years ago, however, that it is in the best interest of society and moral conscience that prisons serve as centers of rehabilitation.

> Many penologists hold today that the primary purpose of prisons is rehabilitation of convicts and their restoration to society as useful citizens; those penologists hold that other aims of penal confinement, while perhaps legitimate, are of secondary importance. That has not always been the prevailing view of what penitentiaries are for, if, indeed, it is today. In years past many people have felt, and many still feel, that a criminal is sent to the penitentiary to be punished for his crimes and to protect the public from his further depredations.[1]

If rehabilitation is the primary objective of prisons, then a whole new perspective has been created. While solitary confinement in an unheated, unsanitary cell may be a perfectly reasonable means of inflicting punishment, it is decidedly inconsistent with the rehabilitative function. Thus, if federal courts review prisoners' complaints with an eye toward the purpose of prisons, justification for their intervention is more easily provided.

While recognition of the primary function of prisons would allow the courts to determine whether prison conditions align with this function, there still remains the need for order within the prisons. Main-

[1] Holt v. Sarver, 309 F. Supp. 362, 379 (E.D. Ark. 1970), *aff'd*, 442 F.2d 304 (8th Cir. 1971). The court added that while often a sociological theory may ripen into constitutional law, such has not been the case with the theory of rehabilitation. The court, therefore, refused to hold that confinement in a prison that does not have rehabilitative programs is unconstitutional. *See* Williams v. New York, 337 U.S. 241, 248, 69 S. Ct. 1079, 1084, 93 L. Ed. 1337, 1343 (1940): "Retribution is no longer the dominant objective of the criminal law. Reformation and rehabilitation of offenders have become important goals of criminal jurisprudence."

tenance of order will necessitate the withdrawal of certain liberties. Even in society at large, certain liberties are given up for the benefits of participating in society. The problem is striking a balance between an ordered compatible society and allowance of maximum individual freedom. The problem is more accentuated in a prison. Prisons require a high degree of order which results in a proportionate loss of individual liberty. Furthermore, prisoners, by definition, are those convicted of taking a liberty which society has declared impermissible. The difficulty in striking the proper balance in prisons is the chief reason for federal courts' unwillingness to intervene.

Prison administration has traditionally been the domain of prison officials. The courts have felt that prison officials have the necessary penological expertise, coupled with close contact with the particular exigencies of prison administration, and have allowed wide latitude in their determinations.[2] A recognition is developing, however, that there are aspects of prison administration that only the courts are particularly suited to review.

> The federal courts do not sit to superintend the administration of the . . . jail system; but what they do sit to do, and what they must do, is insure that those who administer that system comply with the requirements of the Constitution: The duty to confront and resolve constitutional questions, regardless of their difficulty or magnitude, is the very essence of judicial responsibility. While federal courts must be sensitive to the problems created by unwarranted judicial interference with administration of state penal institutions, when questions of constitutional dimensions arise, the courts cannot simply abdicate their function out of misplaced deference to some sort of "hands-off" doctrine.[3]

The above quotation reflects a new judicial philosophy, one that is less content with vague abstractions and more concerned with protection of constitutional rights. Since a hearing in a federal forum is closely tied with the assertion that a constitutional right has unjustifiably been denied, concentration centers on the tests which have developed to determine whether a prisoner is entitled to relief. Consonant with the ready recognition that prisoners are entitled to their constitutional rights, has been the expansion of the remedies available to

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2 Spaeth, *The Courts' Responsibility for Prison Reform*, 16 VILL. L. REV. 1031 (1971). Judge Spaeth advances a very cogent argument that penological expertise is hardly a necessary prerequisite to reviewing prison conditions.

> No doubt it will be argued that judges are not penologists and should not meddle in prison administration. However, neither are judges economists, transportation experts, or electrical engineers; and yet they regularly review decisions of the Federal Trade Commission, Interstate Commerce Commission, and Federal Power Commission.

Id. at 1042.

3 Brenneman v. Madigan, 343 F. Supp. 128, 130 (N.D. Cal. 1972).

assert these rights. The removal of the barriers which formerly prevented prisoners from seeking relief under federal habeas corpus is examined, as are the reasons for the increasing popularity of the Civil Rights Act of 1871.[4] Clarification of the problem as to what types of complaints are cognizable under habeas corpus and the Civil Rights Act is attempted, with analysis of the courts' reluctance to allow prisoners to circumvent the habeas exhaustion rule by filing suits under the Civil Rights Act.

THE CONSTITUTIONAL TESTS

The effectiveness of post-conviction relief remedies has been largely dependent on whether the federal courts will apply the "hands-off" doctrine.[5] The essence of this doctrine is that the responsibility for prison administration is vested in the Attorney General and it is without the realm of the courts to review the internal management of prison systems.[6] Application of the "hands-off" doctrine today is determined by whether the petitioners' claims show deprivation of a constitutional right.[7]

Recognition that prisoners have constitutional rights is a departure from early judicial thinking. A prisoner was once regarded as a "slave of the state."[8] While prisoners have always had the right to be free from cruel and unusual punishment,[9] the affirmative rights of freedom of religion,[10] of association,[11] and of free access to the courts[12] have received only relatively recent confirmation by the courts.

Cruel and Unusual Punishment—The Eighth Amendment

The showing by a prisoner that his treatment by prison officials amounts to cruel and unusual punishment has always been a circum-

4 42 U.S.C. § 1983 (1970).

5 For cases applying the "hands-off" doctrine, *see* Adams v. Ellis, 197 F.2d 483 (5th Cir. 1952); Garcia v. Steele, 193 F.2d 276, 278 (8th Cir. 1951); *In re* Taylor, 187 F.2d 852, 853 (9th Cir.), *cert. denied*, 341 U.S. 955 (1951); Sturn v. McGrath, 177 F.2d 472, 473 (10th Cir. 1949).

6 This is the result of construction of 18 U.S.C. § 4001 (1970), which gives the attorney general the responsibility for federal prison administration.

7 *Cf.* Sostre v. McGinnis, 334 F.2d 906, 911 (2d Cir.), *cert. denied*, 379 U.S. 892 (1964).

8 Ruffin v. Virginia, 62 Va. (21 Gratt.) 790, 796 (1871).

9 *See, e.g., In re* Birdsong, 39 F. 599, 600 (S.D. Ga. 1889).

10 Long v. Parker, 390 F.2d 816 (3d Cir. 1968).

11 *Cf.* Jones v. Wittenberg, 323 F. Supp. 93 (N.D. Ohio 1971). It should be pointed out that freedom of association in prisons is usually tied to freedom of religion or allegations of cruel and unusual punishment. In denying a religious sect the opportunity to gather for services, for example, prison officials are open to attack on the constitutional issues of denial of freedom of religion or freedom of association. The former method is most often used since it is more difficult for prison officials to show compelling reasons why inmates should not be allowed to congregate. *See* Smoake v. Fritz, 320 F. Supp. 609 (S.D.N.Y. 1970). The question of the propriety of punitive isolation is also one of freedom of association, but generally it is attacked on the grounds of cruel and unusual punishment. *See* Jordan v. Fitzharris, 257 F. Supp. 674 (N.D. Cal. 1966).

12 Johnson v. Avery, 393 U.S. 483, 89 S. Ct. 747, 21 L. Ed. 2d 718 (1969).

stance justifying refusal to adhere to the "hands-off" doctrine.[13] Erosion of the "hands-off" doctrine in this context is dependent upon judicial definition of cruel and unusual punishment. The Supreme Court adopted a narrow view in early decisions. In the case of *In re Kemmler*,[14] decided in 1890, the Supreme Court declared that cruel and unusual punishment as used in the Constitution implies "something inhuman and barbarous, something more than the mere extinguishment of life."[15] The problem of defining exactly what constitutes cruel and unusual punishment has not been solved with the passing of years. In 1957, the Supreme Court decided *Trop v. Dulles*[16] and cast additional light on the question.

> The exact scope of the constitutional phrase "cruel and unusual" has not been detailed by this Court. But the basic policy reflected in these words is firmly established in the Anglo-American tradition of criminal justice. . . . The basic concept underlying the Eighth Amendment is nothing less than the dignity of man. While the State has the power to punish, the Amendment stands to assure that this power be exercised within the limits of civilized standards. Fines, imprisonment and even execution may be imposed depending on the enormity of the crime, but any technique outside the bounds of these traditional penalties is constitutionally suspect. . . . [T]he words of the Amendment are not precise, and . . . their scope is not static. *The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.*[17]

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[13] As early as 1889 a federal district court held that charges of inflicting cruel and unusual punishment will require judicial review. In the case of *In re* Birdsong, 39 F. 599 (S.D. Ga. 1889), the prisoner was chained by the neck to the grating of a cell and left standing in that position for several hours. As to the propriety of this type of discipline, Judge Speer remarked:

> The arbitrary power in a prison-keeper to iron a prisoner, or indeed, to select at his pleasure a penalty which he thinks adequate as a disciplinary measure for real or fancied misconduct, is intolerable among a free and enlightened people. It has no place among English-speaking nations.

Id. at 600.

[14] 136 U.S. 436, 10 S. Ct. 930, 34 L. Ed. 519 (1890).

[15] *Id.* at 447, 10 S. Ct. at 933, 34 L. Ed. at 524.

[16] 356 U.S. 86, 78 S. Ct. 590, 2 L. Ed. 2d 630 (1958).

[17] *Id.* at 99-101, 78 S. Ct. at 597-98, 2 L. Ed. 2d at 642 (emphasis added); *see* Weems v. United States, 217 U.S. 349, 378, 30 S. Ct. 544, 553, 54 L. Ed. 793, 803 (1910), where the Court said that a definition of cruel and unusual punishment "is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice." In one case, the fact that cruel and unusual punishment is a relative term which changes with the times worked to the detriment of the prisoners. In *Ex parte* Pickens, 101 F. Supp. 285 (D. Alas. 1951) the petitioner was one of 40 inmates in a jail which housed all of the inmates in a room of about 27 square feet. Most of the space was occupied by bunks, tables, and benches. There were no recreational facilities. Sixteen-year-old prisoners were housed with hardened criminals. There was no separate facility for mentally ill prisoners. The jail physician testified to the unsanitary conditions of the jail due to lack of ventilation and inadequate toilet facilities. There was an ever present danger of fire, as the room was heated by an ancient coal stove. Furthermore, there was only one exit and it was locked to prevent the escape of the prisoners. The court recognized that the jail was unfit

Since the finding of cruel and unusual punishment in particular circumstances is one avenue available to the prisoner to obtain a hearing in a federal court, definition of what constitutes cruel and unusual punishment is extremely important. The avenue has not always been available to state prisoners. It has only been since the 1962 Supreme Court decision of *Robinson v. California*,[18] where the Court decided that the eighth amendment was to be applied to the states, that a showing of cruel and unusual punishment by a state prisoner entitled him to a hearing in a federal court.

Determination of whether particular disciplinary actions amount to cruel and unusual punishment cannot be effected in a vacuum. The punishment must be weighed against the offense. If there is a large disparity between the punishment and the severity of the offense, there may be a finding of cruel and unusual punishment, though the punishment considered alone does not shock the conscience.[19] In *Wright v. McMann*,[20] the petitioner had been placed in segregation for failure to sign a "safety sheet." After spending 5 months in segregation, the petitioner was released, again refused to sign, and was sent back to segregation for an indeterminate period. The regulation which required prisoners to sign the "safety sheet" was meant to be a method to insure that prisoners read the safety rules before working in the prison shops. The petitioner sincerely believed that the sheet was a waiver of his right to sue the state of New York for injuries caused by negligence. The court found that his punishment was so disproportionate to his offense as to amount to a deprivation of his eighth and fourteenth amendment rights.[21]

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for human habitation, but failed to find cruel and unusual punishment. The court made reference to the relative nature of cruel and unusual punishment and continued:

> After all, the "cruel and inhuman punishment" suffered by the petitioner and others in the Anchorage jail, although rightly to be deplored and condemned by all people with humane instincts, is scarcely deserving of the name when compared with the danger and misery and "cruel and inhuman" circumstances under which our own soldiers and other troops of the United Nations now in action in Korea live—and die —where they are now not only compelled to lie or move about in the mud and slush and snow and frost for hours or even days on end . . . but exposed to the hazards of being shot and bombed, killed or maimed . . . . The question may well be asked why men in Anchorage, Alaska, accused of serious crime, even when imprisoned under the the conditions described, should be now discharged from imprisonment . . . when others of our citizens . . . engaged in the defense of all of the people of our nation—including those now confined in the Anchorage jail—are . . . undergoing hazards a thousand times as great and suffering "cruel and inhuman punishment" far more terrible than that to which the petitioner and his fellow prisoners in the Anchorage jail are exposed.

Id. at 289-90. The reasoning of this court does not appear to have been applied in subsequent cases.

18 370 U.S. 660, 82 S. Ct. 1417, 8 L. Ed. 2d 758 (1962).

19 Whether or not a particular act or circumstance shocks the conscience is another method of determining whether treatment is unconstitutional. *See* Rochin v. California, 342 U.S. 165, 172, 72 S. Ct. 205, 209, 96 L. Ed. 183, 190 (1952).

20 321 F. Supp. 127 (N.D.N.Y. 1970).

21 *Id.* at 145; *accord*, Landman v. Royster, 333 F. Supp. 621 (E.D. Va. 1971).

Cruel and unusual punishment continues to be an evasive term, but inroads have been made.[22] A flexible standard has been attached which allows for a continuously expanding definition. The fact that punishment will be considered in light of the offense indicates that all circumstances will be considered.[23] In this connection, federal courts should bear in mind that what may seem like a small privilege to society at large, amounts to a vital concern to the prisoner.

The "Preferred" Freedoms—The First Amendment

While the burden of showing disproportionate punishment in light of the offense is on the petitioner in alleging denial of his eighth amendment rights,[24] a different situation exists where a "preferred" constitutional right is involved. If a first amendment right is at issue, the burden of proof shifts from the individual petitioner to the prison officials. The courts presume that a prisoner has a right to freedom of religion,[25] access to the courts,[26] and freedom to petition for redress of grievances.[27] Where a prisoner asserts that one of these rights has been denied him, prison officials must meet a two-pronged test in order to justify denial of the right. First, it is incumbent upon officials to show that the right was denied to effect a "compelling state interest."

> In both the areas of racial classification and discrimination and First Amendment freedoms, we have pointed out that the stringent standards are to be applied to governmental restrictions in these areas, and rigid scrutiny must be brought to bear on the justifications for encroachments on such rights. The State must *strongly show* some substantial and controlling interest which requires the subordination or limitation of these important constitutional rights, and which justifies their infringement, and in absence of such compelling justification the state restrictions are impermissible infringements of these fundamental and preferred rights.[28]

22 For instances where cruel and unusual punishment has been found, see Jones v. Wittenberg, 330 F. Supp. 707 (N.D. Ohio 1971); Holt v. Sarver, 309 F. Supp. 362 (E.D. Ark. 1970), *aff'd*, 442 F. 2d 304 (8th Cir. 1971); Knuckles v. Prasse, 302 F. Supp. 1036 (E.D. Pa. 1969), *aff'd*, 435 F.2d 1255 (3d Cir.), *cert. denied*, 403 U.S. 936 (1971); Hancock v. Avery, 301 F. Supp. 786 (M.D. Tenn. 1969); Jordan v. Fitzharris, 257 F. Supp. 674 (N.D. Cal. 1966).

23 *See* Wright v. McMann, 460 F.2d 126 (2d Cir. 1972). In that case, while finding that the petitioner had met the burden of showing a disproportionate punishment, the court expressed that the burden is a heavy one.

> Ordinarily we would be most reluctant to find unconstitutionally disproportionate the use of segregated confinement as punishment. Prison officials, not federal judges, are in day to day proximity or contact with the inmates and are consequently better able to determine what punishment might or might not be appropriate to a particular offense committed by a particular inmate. . . . In short, the inmate alleging disproportionate punishment will ordinarily have a heavy burden.

Id. at 132.

24 *Id.* at 132.

25 *See* Walker v. Blackwell, 411 F.2d 23 (5th Cir. 1969).

26 Johnson v. Avery, 393 U.S. 483, 89 S. Ct. 747, 21 L. Ed. 2d 718 (1969).

27 Nolan v. Fitzpatrick, 451 F.2d 545 (1st Cir. 1971).

28 Brenneman v. Madigan, 343 F. Supp. 128, 130 (N.D. Cal. 1972) (citations omitted) (emphasis added).

The second requirement is that, after showing that there is a compelling state interest to observe, prison officials must then show that the only way to effect this interest is necessarily by denial of the constitutional right.[29] Thus, if another method is available which leaves the constitutional right intact, then that method must be employed. For example, prison officials would easily be able to show that keeping contraband out of the prisons is a compelling state interest. This, however, would not justify a prison regulation which prohibits the prisoners from receiving any incoming mail.[30] A more limited method, one which least restricts the prisoners' rights while also paying due homage to the substantial state interest, is to examine incoming mail before distributing it to the prisoners. By this procedure, the individual's rights are subjected to minimum infringement.[31] This "minimum restrictions" rule has not received universal recognition by the federal courts considering prisoner complaints. The rule has been applied to other groups whose rights were considered necessarily subservient to the overall state interest. Thus, the rule is being asserted by prisoners analogizing their positions to those of students,[32] mental hospital patients,[33] and government employees,[34] all of whom have recently challenged the restrictions on their constitutional rights.[35] In *Shelton v. Tucker*,[36] the issue was the constitutionality of a statute requiring teachers to annually file an affidavit listing organizations to which they have belonged or contributed to within the last five years. The Court invoked the "minimum restrictions" rule in holding the statute unconstitutional and recognized that the test was to be applied in any one of several situations involving infringement of constitutional rights.

> In a series of decisions this Court has held that, even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.[37]

The rule has now been expressly applied to prisoners. In *Barnett v.*

29 Palmigiano v. Travisono, 317 F. Supp. 776 (D.R.I. 1970).

30 Regulations concerning prisoners' mail have themselves been the subject of several constitutional claims. *See* Corby v. Conboy, 457 F.2d 251 (2d Cir. 1972); Nolan v. Fitzpatrick, 451 F.2d 545 (1st Cir. 1971). Many of the problems with mail censorship are inextricably related to denial of petitioner's free access to the courts. *See* Evans v. Moseley, 455 F.2d 1084 (10th Cir. 1972); LeVier v. Woodson, 443 F.2d 360 (10th Cir. 1971); Burns v. Swenson, 430 F.2d 771 (8th Cir. 1970), *cert. denied*, 404 U.S. 1062 (1971).

31 Jackson v. Godwin, 400 F.2d 529, 541 (5th Cir. 1968).

32 Tinker v. Des Moines Ind. Community School Dist., 393 U.S. 503, 89 St. Ct. 733, 21 L. Ed. 2d 731 (1969).

33 Rouse v. Cameron, 373 F.2d 451 (D.C. Cir. 1966).

34 Keyishian v. Board of Regents, 385 U.S. 589, 87 S. Ct. 675, 17 L. Ed. 2d 629 (1967).

35 *See* South Carolina Dep't. of Corrections, *The Emerging Rights of the Confined* 28 (1972).

36 364 U.S. 479, 81 S. Ct. 247, 5 L. Ed. 2d 231 (1960).

37 *Id.* at 488, 81 S. Ct. at 252, 5 L. Ed. 2d at 237.

Rogers,[38] the Court of Appeals for the District of Columbia Circuit suggested that, as a practical matter, in dealing with prison regulations the government would probably have a better chance in justifying a curtailment even of the "preferred" freedoms. The court expressly pointed out, however, that this does not relieve prison officials of the responsibility to convincingly show that they have reduced the impact of the denial "to the fullest extent consistent with the justified objective."[39]

It can be seen that even when dealing with fundamental "preferred" freedoms, the guidelines available to the courts are couched in vagueness and uncertainty. As was pointed out in relation to eighth amendment rights, the problem becomes one of defining the terms upon which the tests are based. The probability that a prisoner will be granted relief in a particular set of circumstances, then, is largely dependent on the court's definition of "compelling state interest" and "minimum restrictions."[40]

The attempt to assign a meaningful definition to these terms has resulted in application of the "clear and present danger test."[41] This test requires prison officials to show that denial of the "preferred" freedom was essential in view of the "clear and present danger" which would result in absence of the denial. The test seems to have been first enunciated by Justice Holmes in 1919 in the decision of *Schenck v. United States*.[42] The "clear and present danger" criterion has only

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38 410 F.2d 995 (D.C. Cir. 1969).

39 *Id.* at 1000.

40 This limitation can be attributed to the fact that the law in this area is barely beyond conception. As more decisions regarding prisoners' rights are handed down, the opportunity for drawing on the reasoning of other courts will be better presented. Perhaps the end result will be the emergence of a definite pattern which will provide guidance in deciding future claims. The courts are examining decisions rendered under like facts and circumstances that are presently available. The experiences of prisons in granting a right which has been denied prisoners in other prisons "should have *substantial probative value* on the question of the state interests in forbidding access." Brown v. Peyton, 437 F.2d 1228, 1232 (4th Cir. 1971) (emphasis added).

41 Knuckles v. Prasse, 302 F. Supp. 1036, 1056 (E.D. Pa. 1969), *aff'd*, 435 F.2d 1255 (3d Cir. 1970), *cert. denied*, 403 U.S. 936 (1971). This case contains a good review of the "clear and present danger" test.

42 249 U.S. 47, 39 S. Ct. 247, 63 L. Ed. 470 (1919). Involved here was the question of whether the Espionage Act of June 15, 1917, ch. 30, § 3, 40 Stat. 217, 219, infringed upon the rights of freedom of speech and press. The case has particular application to prisoners' rights since the court recognized the fact that the country was at war causes different standards to be applied in determining whether freedom of speech had been abridged.

> When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right.

Id. at 52, 39 S. Ct. at 249, 63 L. Ed. at 474. Petitioner had been convicted of conspiracy to cause insubordination in the military forces and obstruction of enlistment and recruiting. The Court, then, seemed to have recognized the superiority of a compelling state interest over individual constitutional rights. Still, the Court said:

> The question in *every case* is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent.

recently been applied by federal courts when considering the constitutional claims of prisoners,[43] and it has not received universal acceptance.[44] The Court of Appeals for the Third Circuit was a leader in applying the test to prisoners' claims,[45] but some confusion as to its application remains.[46] It is clear that the test will be applied in cases involving denial of religious freedom[47] and it seems certain that it will be extended to other "preferred" freedoms.

The significance of the "clear and present danger" test is that it offers guidance in determining what is meant by a "compelling state interest." Thus, it is not enough to show the existence of a compelling state interest; there must be a showing of a clear and present danger that jeopardizes that interest. While institutional security is definitely a compelling state interest,[48] a showing that the security is jeopardized cannot be based on speculation and absent a showing of clear and present danger, constitutional restrictions cannot be justified. Thus, the "clear and present danger" test must be utilized to determine if a compelling state interest is even at stake. The test seems to indicate that while showing the existence of a compelling state interest may be relatively easy, the additional burden of showing that the interest is jeopardized will be a heavy one.

REMEDIES

When a prisoner challenges the constitutionality of some aspect of his incarceration, the method by which he invokes the jurisdiction of

Id. at 52, 39 S. Ct. at 249, 63 L. Ed. at 473 (emphasis added). Thus, the test seems to have arisen out of a circumstance closely analogous to prisoners' claims.

43 Banks v. Havener, 234 F. Supp. 27 (E.D. Va. 1964) seems to have been the first time the test was applied to prisoners' claims by a federal court. The court there held that mere speculation that a riot will ensue from allowing muslim inmates to congregate does not meet the "clear and present danger" test.

> The probability of muslim-inspired future riots is speculative at best. . . . The antipathy of the other inmates and the staff, occasioned by the muslim belief in black supremacy, standing alone is not sufficient to justify the suppression of religious freedom in the Youth Center; neither is the alleged disruptive effect on the rehabilitation program . . . . To justify the prohibition of the practice of an established religion at the Youth Center the prison officials must prove by satisfactory evidence that the teachings and practice of the sect create a clear and present danger to the orderly functioning of the institution.

Id. at 30.

44 *See* Knuckles v. Prasse, 302 F. Supp. 1036 (E.D. Pa. 1969), *aff'd*, 435 F.2d 1255 (2d Cir. 1970), *cert. denied*, 403 U.S. 936 (1971). In that case, the "clear and present danger" test was applied to the prisoners' claim of denial of religious freedom. District Judge Higginbotham indicated, however, that he applied the test only because he was bound by the precedent set by the Court of Appeals for the Third Circuit in Long v. Parker, 390 F.2d 816 (3d Cir. 1968). Judge Higginbotham took particular issue with the requirement of "present" danger. His thinking is that this is too great a burden for prison officials to have to bear. He advocates a test of clear and *probable* danger. *Id.* at 1056-57.

45 Long v. Parker, 390 F.2d 816 (3d Cir. 1968).

46 *See, e.g.*, Cooper v. Pate, 382 F.2d 518 (7th Cir. 1967). The court there was unsure as to whether the "clear and present danger" test was applicable but the language of the decision indicates an implicit acceptance.

47 *Id.*

48 Jones v. Willingham, 248 F. Supp. 791 (D. Kan. 1965).

the federal court can have important bearing on whether relief is obtained. There are several remedies available which allow prisoners to challenge the conditions of their confinement, but the two most frequently resorted to are federal habeas corpus[49] and the Civil Rights Act of 1871.[50] Both require that the petitioner's claim be of constitutional dimensions,[51] but there are procedural difficulties involved with habeas corpus which are not encountered by petitioning for relief under the Civil Rights Act.

Habeas Corpus—The Custody and Exhaustion Obstacles

Federal habeas corpus has undergone substantial change since its earliest applications,[52] most of which has occurred in recent years. In general, the trend has been to expand the type of relief cognizable under habeas corpus. This expansion has been effectuated by a gradual relaxing of the formerly strict requirements of custody and exhaustion of available state remedies.

The requirement that a petitioner for a writ of habeas corpus be in custody has undergone the most drastic change.[53] In its earliest applications, custody required that the petitioner be actually physically restrained.[54] In line with this definition of custody it was held that a prisoner released on parole may not seek the writ.[55] Similar reasoning

[49] 28 U.S.C. §§ 2241-55 (1970).

[50] 42 U.S.C. § 1983 (1970).

[51] This is not entirely accurate. The Civil Rights Act provides relief for denial of federal statutory rights as well as constitutional rights, but, as a practical matter, there are very few statutory rights which a prisoner can assert.

[52] Habeas corpus came into existence in the United States with the passage of the Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 73, 81-82. The writ had only very limited application when first considered by the Supreme Court. Relief was authorized only if the court that ordered the confinement had no jurisdiction. *Ex parte* Kearney, 20 U.S. (7 Wheat.) 38, 5 L. Ed. 391 (1822). Jurisdiction in habeas cases began to assume new outer boundaries in 1867 when federal courts were given the power to hear habeas petitions of state prisoners. 28 U.S.C. § 2241(c)(3) (1970) (originally enacted Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385). The value of this extension was reduced by the fact that the same restrictive test in determining whether relief should be granted was still applied. If a state prisoner had been confined by a court of competent jurisdiction, habeas did not lie to grant relief. *In re* Converse, 137 U.S. 624, 11 S. Ct. 191, 34 L. Ed. 796 (1891).

[53] The statutory provision that a prisoner be in custody to seek relief under habeas corpus is 28 U.S.C. § 2241(c) (1970).

[54] Wales v. Whitney, 114 U.S. 564, 5 S. Ct. 1050, 29 L. Ed. 277 (1885). Here the petitioner had been Surgeon General of the Navy. He was being accused of dereliction of duty and the Secretary of the Navy sent him a letter placing him under arrest and ordering his confinement within the limits of the city of Washington, D. C. The Court's decision in denying the writ is based on the lack of physical restraint. *Id.* at 569, 5 S. Ct. at 1053, 29 L. Ed. at 278. The case contains a complete discussion of the custody requirement and points out problems, present even today, in determining when a person is in custody. *Id.* at 571-72, 5 S. Ct. at 1053-54, 29 L. Ed. at 279. It is interesting to note that English law applied a much less restrictive definition of custody. For example, in 1722 it was held that habeas was an appropriate remedy for a woman who was kept from seeing her husband when she wished; the test there applied was only whether she was free to go where she pleased. Rex v. Clarkson, 93 Eng. Rep. 625 (K.B. 1722).

[55] Weber v. Squier, 124 F.2d 618 (9th Cir. 1941), *cert. denied*, 315 U.S. 810 (1942) (writ of certiorari denied as moot since petitioner had been placed on probation).

has been applied to petitioners seeking relief while on probation.[56] The justification was that since the petitioner had been released, he was not in custody and his petition was moot.[57] The strictness of the custody requirement was diluted in *Jones v. Cunningham*.[58] The Supreme Court decided that a prisoner on parole may have lost his cause of action against the superintendent of the penitentiary, but may have a cause of action against the parole board. The prisoner's act of naming the parole board as party respondent "squarely raises the question, not presented in our earlier cases, of whether the Parole Board now holds the petitioner in its 'custody' within the meaning of 28 U.S.C. § 2241 so that he can by habeas corpus require the Parole Board to point to and defend the law by which it justifies any restraint on his liberty."[59] Justice Black then reviewed the usual conditions and restrictions imposed on a parolee and found that they amounted to significant restraints within the purview of habeas corpus.[60] The early strict interpretation of the custody requirement was further relaxed in 1967 with the Supreme Court decision of *Carafas v. LaVallee*.[61] There the petitioner had served his sentence and been released from custody before his application for a writ of habeas corpus had been fully adjudicated. The respondent advanced the usual argument that the unconditional release of a prisoner rendered moot a petition for habeas corpus since the requirement of custody was not fulfilled. The Court overruled a 1960 decision[62] and held that because of the *collateral consequences* of a criminal record, the petitioner has "a substantial stake in the judgment of conviction which survives the satisfaction of the sentence imposed on him."[63] Thus, judicial construction of "custody" advanced from the requirement of actual physical restraint to the broad application enunciated in *Carafas*.

Consonant with the early requirement that a prisoner be physically restrained to be in custody was the idea that habeas corpus was available only when the relief sought was a total release from this restraint. This was the position taken by the Supreme Court in 1934 with the decision

56 Viles v. United States, 193 F.2d 776 (10th Cir.), *cert. denied*, 343 U.S. 915 (1952).

57 Weber v. Squier, 124 F.2d 618 (9th Cir. 1941), *cert. denied*, 315 U.S. 810 (1942).

58 371 U.S. 236, 83 S. Ct. 373, 9 L. Ed. 2d 285 (1963).

59 *Id.* at 241, 83 S. Ct. at 376, 9 L. Ed. 2d at 290.

60 It is still generally held, however, that a petitioner who is out on bail is not in "custody" so as to enable him to seek relief under habeas corpus. *See, e.g.*, Matysek v. United States, 339 F.2d 389 (9th Cir. 1964), *cert. denied*, 381 U.S. 917 (1965).

61 391 U.S. 234, 88 S. Ct. 1556, 20 L. Ed. 2d 554 (1968).

62 Parker v. Ellis, 362 U.S. 574, 80 S. Ct. 909, 4 L. Ed. 2d 963 (1960). This case expressly held that a prisoner who had been released could not claim relief on a petition for habeas corpus since release rendered his cause moot.

63 Carafas v. LaVallee, 391 U.S. 234, 237, 88 S. Ct. 1556, 1559, 20 L. Ed. 2d 554, 558 (1968), *quoting* Fiswick v. United States, 329 U.S. 211, 222, 67 S. Ct. 224, 230, 91 L. Ed. 196, 203 (1946).

of *McNally v. Hill*.[64] There the petitioner had been convicted of three separate counts on an indictment. The sentences for the first two counts were to run concurrently, with the sentence on the third count to run consecutively with the second. The petitioner applied for a writ of habeas corpus asserting the invalidity of the conviction on the third count, but his application was filed while he was serving his sentence on the second count and before the sentence on the third count had begun to run. The Court decided that the writ would not issue since even if the petitioner's claim was favorably recognized it could not result in his immediate release. Since the sentence he was serving when he filed for the writ was admittedly valid, he could not be released until his third sentence began and if release could not be immediate, habeas was not the proper remedy.[65]

The decision in *McNally* militated against claims which sought only to challenge some condition of confinement where the remedy asked was merely improvement in the conditions.[66] The Court based their decision on application of the common law.[67] In approving the common law use of the writ, the Court used language which was unequivocal in effect.

> The purpose of the proceeding defined by the statute was to inquire into the legality of detention, discharge of the prisoner or his admission to bail, and that only if his detention were found unlawful.[68]

The inflexibility of the rule was mitigated somewhat with express judicial recognition of 28 U.S.C. § 2241 which provides that a court may "dispose of the matter as law and justice require."[69] This provision was used by the Supreme Court in *Dowd v. United States ex rel. Cook*[70] to avoid "the dilemma envisaged by the State of having to choose between ordering an absolute discharge of the prisoner and denying him all relief."[71] The confusion continued until 1967 when

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64 293 U.S. 131, 55 S. Ct. 24, 79 L. Ed. 238 (1934).

65 *Id.* at 135, 55 S. Ct. at 26, 79 L. Ed. at 241.

66 Williams v. Steele, 194 F.2d 32 (8th Cir.), *cert. denied*, 344 U.S. 822 (1952).

67 McNally v. Hill, 293 U.S. 131, 55 S. Ct. 24, 79 L. Ed. 238 (1934):

> The statute [now 28 U.S.C. § 2241] does not define the term *habeas corpus*. To ascertain its meaning and the appropriate use of the writ in the federal courts, recourse must be had to the common law, from which the term was drawn, and the decisions of this Court interpreting and applying the common law principles which define its use when authorized by the statute.

Id. at 136, 55 S. Ct. at 26, 79 L. Ed. at 241.

68 *Id.* at 136, 55 S. Ct. at 26, 79 L. Ed. at 242. *See also* Eagles v. United States *ex rel.* Samuels, 329 U.S. 304, 315, 67 S. Ct. 313, 319, 91 L. Ed. 308, 314 (1946).

> The function of *habeas corpus* is not to correct a practice but only to ascertain whether the procedure complained of has resulted in an unlawful detention.

69 28 U.S.C. § 2243 (1970).

70 340 U.S. 206, 71 S. Ct. 262, 95 L. Ed. 215 (1951).

71 *Id.* at 209, 71 S. Ct. at 264, 95 L. Ed. at 219.

the Supreme Court decided *Peyton v. Rowe*[72] and expressly overruled *McNally*. The Court found that the narrow limitations placed on habeas corpus in *McNally* were inconsistent with the purposes of federal habeas corpus and approved the finding of the Court of Appeals for the Fourth Circuit[73] that *McNally* represented a "doctrinaire approach" which had been based on jurisdictional concepts that had long since been rejected.[74] The rejection of *McNally* ended a long period of confusion as to when habeas would issue and when it would not.[75]

The *Peyton* decision, however, was not the last step in abrogating the "total release" rule. Two years after *Peyton*, the Supreme Court decided *Johnson v. Avery*.[76] The petitioner there was not seeking a release from custody, but was contesting a prison regulation which prohibited prisoners from offering legal aid to one another. The petitioner had been placed in a maximum security unit for violating this regulation. The Court allowed the use of the writ to challenge this one aspect of confinement and found the regulation unconstitutional.[77] Since *Johnson*, it has generally been held that habeas corpus is not restricted to those who ask to be released from custody, but is presently available to challenge conditions of confinement alleged to be illegal.[78] *Johnson*, even more than *Peyton*, represents a radical departure from early judicial applications of habeas corpus. The use of the writ was more traditional in *Peyton* since the challenge was to the judicial sentence. *Johnson*, however, allowed use of the writ to supervise prison administration.[79]

The custody requirement, then, is still very much in existence[80] but the former strict interpretation of custody has been ameliorated to the extent that it no longer presents an almost insuperable barrier to those who challenge merely the conditions of confinement. A second

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72 391 U.S. 54, 88 S. Ct. 1549, 20 L. Ed. 2d 426 (1968).

73 Peyton v. Rowe, 383 F.2d 709 (4th Cir. 1968).

74 Peyton v. Rowe, 391 U.S. 54, 57, 88 S. Ct. 1549, 1551, 20 L. Ed. 2d 426, 429 (1968).

75 As early as 1894 the Supreme Court decision of *In re* Bonner, 151 U.S. 242, 14 S. Ct. 323, 38 L. Ed. 149 (1894), had held that a prisoner unlawfully detained in one place could use the writ to challenge his detention, although he would not be granted an immediate release. He would still be subject to the right of the government to lawfully detain him in the proper place. The seeming inconsistency between *McNally* and *Bonner* has caused the courts some confusion; generally the *McNally* decision has been followed.

76 393 U.S. 483, 89 S. Ct. 747, 21 L. Ed. 2d 718 (1969).

77 *Johnson* does not, by any means, represent the first time that habeas was successfully used. As early as 1944, the Court of Appeals for the Sixth Circuit allowed a prisoner to use habeas to challenge one aspect of his lawful custody. Coffin v. Reichard, 143 F.2d 443 (6th Cir. 1944), *cert. denied*, 325 U.S. 887 (1945). "A prisoner is entitled to the writ of habeas corpus when, though lawfully in custody, he is deprived of some right to which he is lawfully entitled even in his confinement." *Id.* at 445. *But see* Snow v. Roche, 143 F.2d 718 (9th Cir.), *cert. denied*, 323 U.S. 788 (1944).

78 Mead v. Parker, — F.2d —, — (9th Cir. 1972).

79 For a complete historical development of the custody requirement see *Developments in the Law—Federal Habeas Corpus*, 83 HARV. L. REV. 1038, 1072-93 (1970).

80 *See, e.g.*, Glazier v. Hackel, 440 F.2d 592 (9th Cir. 1971).

major obstacle to relief through habeas has also undergone recent change. This is the requirement that a petitioner for federal habeas corpus must fully exhaust available state remedies before seeking relief in federal courts.[81]

The requirement seems to have been born of an early recognition of potential conflict between state and federal courts. The possibility for conflict in habeas jurisdiction arose in 1867 when habeas corpus was made available to state prisoners by act of Congress.[82] It was to resolve this possible conflict that the exhaustion requirement was instituted. The requirement is founded on the principle of comity between courts, "a doctrine which teaches us that one court should defer action on causes properly within its jurisdiction until the courts of another sovereignty with concurrent powers, and already cognizant of the litigation, have had an opportunity to pass upon the matter."[83] The rule, then, is predicated only on the precepts of comity since it is not a matter of jurisdictional power.[84] "The rule is not one defining power but one which relates to the appropriate exercise of power."[85]

In 1953, the Supreme Court decided *Brown v. Allen*[86] and the stringency of the exhaustion requirement was partially relaxed. There the Court squarely held that when a prisoner has once asserted his constitutional claim in state courts, he has effectively exhausted the available state remedies. He was not required to go back to the state courts and pursue a *collateral* remedy based on the same evidence and raising the same issues. The decision also provided that it was within the discretion of the federal district judge whether to hear evidence and argument on federal constitutional issues presented or to rely strictly on the state court findings.[87] In excluding *collateral remedies*, *Brown* served to restrict the meaning of the term "remedies available in the courts of the State."[88]

The next major step taken concerning exhaustion of state remedies

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81 28 U.S.C. § 2254(b)-(c) (1970).

82 Judiciary Act of 1867, ch. 28, § 1, 14 Stat. 385. *See* Comment, *The Relationship of State and Lower Federal Courts in Criminal Constitutional Litigation*, 3 ST. MARY'S L.J. 249, 259-63 (1971).

83 Darr v. Burford, 339 U.S. 200, 204, 70 S. Ct. 587, 590, 94 L. Ed. 761, 767 (1950).

84 Fay v. Noia, 372 U.S. 391, 420, 83 S. Ct. 822, 839, 9 L. Ed. 2d 837, 858 (1963); Baldwin v. Lewis, 442 F.2d 29, 32 (7th Cir. 1971). That the exhaustion requirement is grounded on federal policy rather than federal power can also be inferred from that fact that if a petitioner presents an obviously meritless claim to a federal court under habeas without first having exhausted his state remedies, the court will disregard the exhaustion requirement and simply deny relief. This is done on the basis that 28 U.S.C. § 2241 (1970) confers jurisdiction on federal courts to hear habeas cases, while the limitation requiring exhaustion in 28 U.S.C. § 2254 (1970) is merely a matter of national policy. *In re* Ernst's Petition, 294 F.2d 556, 561 (3d Cir. 1961).

85 Bowen v. Johnston, 306 U.S. 19, 27, 59 S. Ct. 442, 446, 83 L. Ed. 455, 459 (1939).

86 344 U.S. 443, 73 S. Ct. 397, 97 L. Ed. 469 (1953).

87 *Id.* at 463-64, 73 S. Ct. at 410-11, 97 L. Ed. at 492.

88 28 U.S.C. § 2254(b)-(c) (1970).

was in 1963 with the decision of *Townsend v. Sain.*[89] The Court held there that the federal courts "*must* hold an evidentiary hearing if the habeas applicant did not receive a full and fair evidentiary hearing in a state court."[90] Thus, to the extent that *Brown* allowed for discretion to the trial court in this matter, that decision was overruled.[91] The *Townsend* decision is important in that it insures that the petitioner may have his cause relitigated if there has not been a full, reliable finding of fact in the state court.[92] While the decision does not actually diminish the need to exhaust available remedies, it does insure that summary disposition will not be made of the case by a federal court on the basis that all the facts were determined at the state level.

Fay v. Noia,[93] decided the same day as *Townsend,* was the most important decision on the exhaustion requirement. The petitioner and two co-defendants had been convicted in a New York state court of murder. The two co-defendants appealed alleging that their convictions were based on coerced confessions. The trial court judgment was affirmed but their convictions were set aside in a post-conviction proceeding. Noia had not appealed his conviction. After 14 years he applied for relief in the state courts but was barred for failing to appeal his conviction. He then sought a writ of habeas corpus in federal district court. The court expressed concern over the apparent denial of his fourteenth amendment rights, but felt bound by the exhaustion rule to deny the writ. The Supreme Court determined that the writ should have been granted. The Court held that the exhaustion requirement meant that a petitioner must exhaust state remedies available at the time he applies for the writ. A contrary holding would bar access to the federal courts to a petitioner who had a valid federal constitutional claim simply because he committed a procedural default. "In what sense is Noia's custody not in violation of federal law simply because New York will not allow him to challenge it on *coram nobis* or on delayed appeal?"[94] The Court recognized the conceptual possibility that petitioners would deliberately bypass state procedures to get into federal court on habeas corpus. The Court decided that the district judge

89 372 U.S. 293, 83 S. Ct. 745, 9 L. Ed. 2d 770 (1963).
90 *Id.* at 312, 83 S. Ct. at 757, 9 L. Ed. 2d at 785 (emphasis added).
91 *Id.* at 312, 83 S. Ct. at 757, 9 L. Ed. 2d at 785.
92 We hold that a federal court must grant an evidentiary hearing to a habeas applicant under the following circumstances: If (1) the merits of the factual dispute were not resolved in the state hearing; (2) the state factual determination is not fairly supported by the record as a whole; (3) the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing; (4) there is a substantial allegation of newly discovered evidence; (5) the material facts were not adequately developed at the state-court hearing; or (6) for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair fact hearing.
Id. at 313, 83 S. Ct. at 757, 9 L. Ed. 2d at 786.
93 372 U.S. 391, 83 S. Ct. 822, 9 L. Ed. 2d 837 (1963).
94 *Id.* at 428, 83 S. Ct. at 843, 9 L. Ed. 2d at 862.

should exercise discretion and deny relief to those he determined had deliberately bypassed state court remedies.[95]

The exhaustion requirement is still an essential prerequisite to a state prisoner attempting to gain access to federal court. The decisions of *Brown, Townsend,* and *Noia,* however, have mitigated the former stringency of the rule to the extent that a state prisoner no longer faces what often was a substantial barrier to the federal courts. Furthermore, if a federal court does deny the petitioner a hearing, it is because of a finding that the state court disposition was clearly correct.

The Civil Rights Act of 1871—Section 1983

In order to state a cause of action under section 1983 of the Civil Rights Act of 1871 the petitioner must allege that the defendants acted under color of state law and that they deprived the petitioner of a constitutionally protected right, privilege, or immunity.[96] Since every aspect of a prisoner's life is controlled by state officials, a prisoner will have little difficulty satisfying the "under color of state law" test[97] and can concentrate on showing deprivation of a constitutional right. Since an action brought under section 1983 does not require exhaustion of state remedies, it has become the most popular method of seeking relief from alleged unconstitutional prison conditions and regulations.[98]

In its earliest applications, however, the courts held that an action brought under the Civil Rights Act did require exhaustion of available state administrative and judicial remedies.[99] The first major breakthrough came in 1961 in *Pierce v. LaVallee*[100] where the Court of Appeals for the Second Circuit allowed a prisoner who alleged denial of

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[95] *Id.* at 438, 83 S. Ct. at 848, 9 L. Ed. 2d at 869.

[96] 42 U.S.C. § 1983 (1970) 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.

[97] "Under color of state law" has been defined as "[m]isuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law . . . ." United States v. Classic, 313 U.S. 299, 326, 61 S. Ct. 1031, 1043, 85 L. Ed. 1368, 1383 (1941). *See also* Screws v. United States, 325 U.S. 91, 108-13, 65 S. Ct. 1031, 1038-41, 89 L. Ed. 1495, 1506-09 (1945).

[98] The 1971 Annual Report of the Director of the Administrative Office of the United States' Courts reflect that civil rights suits from 1968 to 1971 have increased 170 per cent while, in the same period, habeas corpus petitions have increased only 30 per cent. *See* Rodriguez v. McGinnis, 456 F.2d 79, 84 (2d Cir. 1971) (concurring opinion). Section 1983 has been used for several purposes. Jackson v. Bishop, 404 F.2d 571 (8th Cir. 1968) (cruel and unusual punishment); Hirons v. Director, 351 F.2d 613 (4th Cir. 1965); Pierce v. LaVallee, 293 F.2d 233 (2d Cir. 1961) (denial of religious freedom); Hancock v. Avery, 301 F. Supp. 786 (M.D. Tenn. 1969) (release from solitary confinement).

[99] *See, e.g.,* United States *ex rel.* Atterbury v. Ragen, 237 F.2d 953, 956 (7th Cir. 1956), *cert. denied,* 348 U.S. 846 (1957).

[100] 293 F.2d 233 (2d Cir. 1961).

religious freedom to bring his action in federal court without making initial application to the state processes. The court concentrated on the fact that a "preferred" constitutional freedom was at stake and, as such, the case was "quite distinguishable" from those where the prisoner was alleging physical abuse.[101] Thus, the court implied that this was not a matter of prison discipline which concededly was the province of prison authorities.

The Supreme Court also considered the question in 1961 with the case of *Monroe v. Pape*.[102] After a detailed review of the legislative history of the Civil Rights Act, the Court found that the very reason for its enactment was because of the inability or outright refusal of state courts to provide relief in many cases involving constitutional rights even though relief was warranted. In holding that the exhaustion rule was never meant to have any application to actions brought under the Civil Rights Act, the Court made the now famous statement:

> The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked.[103]

Since *Monroe* did not deal specifically with prisoner complaints there was some confusion among federal courts as to whether prisoners were still required to exhaust state and administrative remedies.[104] In 1963, the Supreme Court ended the dispute with the decision of *Houghton v. Shafer*,[105] where it was specifically held that the decision in *Monroe* was to be applied to state prisoner suits brought under the Civil Rights Act. Thus, it would seem that any problem federal courts had with application of the exhaustion rule had been indisputably solved. As will be seen, however, such was not the case.

HABEAS CORPUS OR THE CIVIL RIGHTS ACT?— "THE RECURRENT RIDDLE"

The decisions expanding the availability of federal habeas corpus to state prisoners have created a unique situation: the remedies of federal

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101 *Id.* at 235.

102 365 U.S. 167, 81 S. Ct. 473, 5 L. Ed. 2d 492 (1961). There Chicago police officers had broken into the petitioner's home without a warrant for arrest or search and forced the petitioner and his family to stand naked in the living room while they ransacked the house. They then took the petitioner to the police station and subjected him to 10 hours of questioning about a 2-day-old murder before finally releasing him without being charged.

103 *Id.* at 183, 81 S. Ct. at 482, 5 L. Ed. 2d at 503.

104 *Compare* Gaito v. Prasse, 312 F.2d 169, 172 (3d Cir.), *cert. denied*, 374 U.S. 816 (1963) [*and*] United States *ex rel.* Oakes v. Taylor, 269 F. Supp. 1022 (E.D. Pa. 1967) (exhaustion is required) *with* Rivers v. Royster, 360 F.2d 592, 594 (4th Cir. 1966) [*and*] Talley v. Stephens, 247 F. Supp. 683, 686 (E.D. Ark. 1965) (exhaustion not required).

105 392 U.S. 639, 88 S. Ct. 2119, 20 L. Ed. 2d 1319 (1968).

habeas corpus and the Civil Rights Act are becoming somewhat interchangeable. The basis of the similarity is the fact that both remedies require that the prisoner assert deprivation of a constitutional right.[106] Since *Johnson v. Avery*[107] habeas corpus has been a proper remedy for a prisoner who alleges that the conditions of his confinement are unconstitutional. Habeas corpus, as has been shown, requires that the state prisoner initially resort to state judicial processes before he can be granted a hearing in a federal tribunal.[108] Section 1983, on the other hand, does not require exhaustion of state remedies,[109] but is also available to challenge conditions of confinement. Thus, there exists a large, overlapping area where prisoners' claims are cognizable under both remedies. The essential difference of the exhaustion requirement has caused confusion among federal judges which is only now being resolved. Judge Doyle aptly labelled the ensuing problem as the "recurrent riddle."[110]

In spite of the similar characteristics shared by habeas corpus and section 1983, basic differences do remain. There are certain prisoner complaints which call for clear application of one remedy to the exclusion of the other. Habeas corpus is clearly the proper remedy for a prisoner who alleges that his conviction and sentence were in violation of his constitutional rights. Thus, it has been held that allegations that the petitioner was denied counsel at his parole revocation hearing,[111] or subjected to a warrantless search,[112] or denied due process in summary court-martial proceedings[113] are cognizable under habeas, and relief cannot be granted under section 1983. Disposition of these claims in favor of the petitioner would result in his release, and since release from prison is not provided for under section 1983, the peculiar applicability of habeas is clear.[114] On the other hand, if the prisoner is seeking an award of damages, filing under section 1983 is the proper procedure,[115] although a few courts have applied habeas to prisoners' damage suits and dismissed their claims for failure to exhaust state remedies.[116]

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106 28 U.S.C. § 2241(c)(3) (1970); 42 U.S.C. § 1983 (1970).
107 393 U.S. 483, 89 S. Ct. 747, 21 L. Ed. 2d 718 (1969).
108 28 U.S.C. § 2254(b)-(c) (1970).
109 Wilwording v. Swenson, 404 U.S. 249, 92 S. Ct. 407, 30 L. Ed. 2d 418 (1972); Houghton v. Shafer, 392 U.S. 639, 88 S. Ct. 2119, 20 L. Ed. 2d 1319 (1968); Damico v. California, 389 U.S. 416, 88 S. Ct. 526, 19 L. Ed. 2d 647 (1967); McNeese v. Board of Educ., 373 U.S. 668, 83 S. Ct. 1433, 10 L. Ed. 2d 622 (1963); Monroe v. Pape, 365 U.S. 167, 81 S. Ct. 473, 5 L. Ed. 2d 492 (1961).
110 Edwards v. Schmidt, 321 F. Supp. 68, 69 (W.D. Wis. 1971).
111 Smartt v. Avery, 411 F.2d 408 (6th Cir. 1969).
112 Martin v. Roach, 280 F. Supp. 480 (S.D.N.Y. 1968). *See also* Johnson v. Walker, 317 F.2d 418 (5th Cir. 1963).
113 Miller v. Rockefeller, 327 F. Supp. 542 (S.D.N.Y. 1971).
114 *E.g.*, King v. Rouse, 316 F. Supp. 1039 (W.D. Va. 1970).
115 Kalec v. Adamowski, 406 F.2d 536 (7th Cir. 1969).
116 *E.g.*, Smith v. Logan, 311 F. Supp. 898 (W.D. Va. 1970).

The areas where application of one remedy or the other is clear have caused federal courts few problems. It is the claims cognizable under both remedies, those challenging the conditions of confinement, that have bred confusion. The problem centers on the fact that section 1983 does not require exhaustion of available state remedies. Thus, a prisoner who wants an initial hearing in a federal forum could seemingly elect the procedurally advantageous remedy of section 1983 and not have to worry about exhaustion. Since this would be the obvious course of action, some federal judges have been concerned that the final result will be to effectively repeal the exhaustion requirement of habeas corpus.[117] The attempt to insure the continuing vitality of the exhaustion requirement has resulted in what has been denominated the "circumvention rule:"[118] Section 1983 may not be used by the state prisoner to circumvent the established rules of comity and the requirement that state remedies be first exhausted before resort can be had to a federal forum.[119] In short, section 1983 may not be used in cases which call for application of habeas corpus only. The "circumvention rule" is clearly applicable to section 1983 petitions which, in essence, actually contest the legality of conviction and sentence,[120] but it appears to have been applied too broadly.[121]

Since *Monroe* and *Houghton,* it has been clear that the exhaustion rule has no application to the Civil Rights Act. Many federal judges, however, feel that this is an infringement upon the basic precepts of comity which denies the state court the right to litigate federal constitutional claims and provide state relief where warranted. Furthermore, it has the effect of overburdening federal courts. One method which has been employed to avoid this has been to simply designate a prisoner's section 1983 claim as one cognizable under federal habeas corpus and require the prisoner to seek his relief through state judicial processes.

> Therefore, despite the broad substantive language of the civil rights statutes, they should be interpreted with an eye to their history and with an awareness that they are not the only available means by which persons alleged to have suffered deprivation of their rights may seek redress.
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> . . . The civil rights provisions should be construed so as to respect the proper balance between the federal and state law en-

117 *See, e.g.,* Gomez v. Miller, 341 F. Supp. 323, 334 (S.D.N.Y. 1972) (dissenting opinion).

118 Edwards v. Schmidt, 321 F. Supp. 68, 70 (W.D. Wis. 1971).

119 Smart v. Avery, 411 F.2d 408 (6th Cir. 1969); Greene v. New York, 281 F. Supp. 579 (S.D.N.Y. 1967); Lombardi v. Peace, 259 F. Supp. 222 (S.D.N.Y. 1966).

120 *E.g.,* Smartt v. Avery, 411 F.2d 408 (6th Cir. 1969); Johnson v. Walker, 317 F.2d 418 (5th Cir. 1963); Martin v. Roach, 280 F. Supp. 480 (S.D.N.Y. 1968).

121 *See, e.g.,* Rodriguez v. McGinnis, 451 F.2d 730 (2d Cir. 1971), *rev'd on rehearing,* 456 F.2d 79 (2d Cir.), *cert. granted sub nom.,* Oswald v. Rodriguez, 407 U.S. 919 (1972) (No. 71-1369); United States *ex rel.* Katzoff v. McGinnis, 441 F.2d 558 (2d Cir. 1971), *rev'd on rehearing sub nom.,* Rodriguez v. McGinnis, 456 F.2d 79 (2d Cir.), *cert. granted sub nom.,* Oswald v. Rodriguez, 407 U.S. 919 (1972) (No. 71-1369).

> forcement systems and should not be used in a manner calculated to centralize adjudicative power in the federal courts.[122]

United States ex rel. Katzoff v. McGinnis[123] is an example of the reluctance of some federal courts to allow prisoners to have their initial hearing in a federal tribunal. There the petitioner brought a section 1983 action in federal district court alleging unconstitutional deprivation of 50 days good time credit. A diary had been found in the possession of the petitioner in which he had made crude remarks about the Deputy Commissioner. The federal district court held that there was no prison regulation against keeping a private diary and that the prisoner had been denied due process, equal protection of the law, and freedom of thought. The court ordered full restoration of good time credit which resulted in the prisoner's release. The Court of Appeals for the Second Circuit reversed holding that the appellee was seeking release from custody and therefore his section 1983 petition was in reality a habeas corpus petition. The court then dismissed the cause for failure to exhaust state remedies. In fact, the petitioner was not seeking release from prison, but only restoration of good time credit of which he had been unconstitutionally deprived. That restoration of the time happened to complete his sentence and result in his release was only an incident to his claim. The dissent stated the better view:

> To make the availability of this remedy turn on the fortuitousness of the prisoner's timing in filing his section 1983 claim makes no sense in terms of either logic or judicial efficiency.
>
> A civil rights plaintiff is entitled to choose a federal forum. If relief such as restoration of good time earned has the incidental effect of entitling him to immediate release, it should not deprive him of that choice.[124]

The "circumvention rule," then, seems to have been applied too broadly. The idea that a petition cannot be brought under section 1983 if habeas is appropriate is undoubtedly proper. The rule, however, should apply only to those circumstances where habeas is peculiarly applicable in its traditional use, and not where section 1983 is also proper. To construe the rule otherwise results in the untenable position that the Civil Rights Act does indeed require exhaustion of available state remedies. It seems to be an indirect method of requiring what the Supreme Court has directly held is not required.

The "recurrent riddle" was very much in existence when Daniel

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122 Greene v. New York, 281 F. Supp. 579, 581 (S.D.N.Y. 1967).

123 441 F.2d 558 (2d Cir. 1971), *rev'd on rehearing sub nom.*, Rodriguez v. McGinnis, 456 F.2d 79 (2d Cir.), *cert. granted sub nom.*, Oswald v. Rodriguez, 407 U.S. 919 (1972) (No. 71-1369).

124 *Id.* at 560 (dissenting opinion).

Wilwording and four other prisoners filed applications for writs of habeas corpus in federal district court. They had resorted initially to the state courts but their applications were dismissed for failure to state grounds upon which relief could be granted. They alleged physical mistreatment by prison employees and that the facilities in the maximum security unit in which they were confined were inadequate and more restrictive than necessary for the maintenance of prison discipline. The federal district court dismissed their petitions.[125] On appeal, the Court of Appeals for the Eighth Circuit reviewed the recent tendency to construe prisoners' petitions flexibly, but held the prisoners to the strict letter of the exhaustion rule under habeas and affirmed the trial court's decision. The court held that to the extent that the prisoners sought equitable relief cognizable in habeas corpus, they must return to the state courts to exhaust the remedies of mandamus, prohibition, injunction, or any other possible method of relief.[126] The Supreme Court reversed.[127] The Court held that the petitioners had sufficiently exhausted state remedies. The mere possibility that the prisoner may get relief in additional state proceedings does not bar federal relief. The real significance of the decision, however, is the Court's holding that although the relief sought was cognizable under habeas corpus, the remedy of the Civil Rights Act was also available.

> Petitioners were therefore *entitled* to have their actions treated as claims for relief under the Civil Rights Acts, not subject, on the basis of their allegations, to exhaustion requirements.[128]

The effect of *Wilwording*, then, was to point out that where either remedy is applicable, it is not within the discretionary power[129] of the federal courts to style the petition as one under habeas corpus.

> Indeed, the *sua sponte* construction by the Supreme Court of *Wilwording's* petition as a complaint under section 1983 *clearly articulates that state prisoners alleging deprivation of constitutional rights by prison officials are not forced to mold their claim for relief in the form of a petition for a writ of habeas corpus.*[130]

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125 Wilwording v. Swenson, 331 F. Supp. 1188 (W.D. Mo. 1969).

126 Wilwording v. Swenson, 439 F.2d 1331 (8th Cir. 1971).

127 Wilwording v. Swenson, 404 U.S. 249, 92 S. Ct. 407, 30 L. Ed. 2d 418 (1971).

128 *Id.* at —, 92 St. Ct. at 409, 30 L. Ed. 2d at 421 (emphasis added).

129 Rodriguez v. McGinnis, 456 F.2d 79 (2d Cir. 1972) (concurring opinion) (emphasis added), *cert. granted sub nom.*, Oswald v. Rodriguez, 407 U.S. 919 (1972) (No. 71-1369).

> I would add that prior to Wilwording v. Swenson, my view was that even though there might be cases where a state prisoner's complaint, purportedly brought pursuant to § 1983, could not be treated as a petition for *habeas corpus*, a federal court, upon its finding that a prisoner was seeking equitable relief and was afforded an adequate state court remedy (as here), had the *discretionary power* as a court of equity to defer action pending the prisoner's application to the state court for relief.

Id. at 83 (emphasis added).

130 *Id.* at 83 (concurring opinion) (emphasis added). Consider also the remarks of Chief Judge Friendly:

The decision in *Wilwording* would seem to have solved the "recurrent riddle." The opinion has already been advanced, however, that *Wilwording* can be distinguished from other section 1983 petitions where relief is also cognizable in habeas corpus.[131] Any lingering doubt may soon be dissipated. The Supreme Court has granted certiorari to determine the issue again, and this time the question is presented in a manner which should leave little room for interpretation: Should state prisoners have the option of challenging conditions of confinement by means of the Civil Rights Act despite the purported existence of an appropriate remedy by means of habeas corpus?[132]

This question seems to be little more than a restatement of an issue which the Court has decided five times before.[133] In essence, it asks whether state prisoners should be allowed to seek initial relief in federal court, without regard to state remedies, when that relief is sought through the Civil Rights Act. The "circumvention rule" prohibits state prisoners from circumventing the requirements of habeas corpus by use of section 1983 when the relief sought is traditionally and peculiarly cognizable under habeas corpus. The issue to come before the Court seems to be an inverse application of this rule: May federal courts be allowed to circumvent the advantages of the Civil Rights Act by requiring a petitioner to seek his relief, though cognizable under section 1983, through federal habeas corpus? No sound explanation has ever been offered as to why the availability of federal habeas corpus precludes the availability of section 1983. There does not seem to be anything inherent in either remedy which would support the concept that one is superior.

Quoting from *Wilwording*, "[s]tate prisoners are not held to any stricter standard of exhaustion than other civil rights plaintiffs."[134] This is sound law. The tests for determining whether a prisoner has been denied a constitutional right, discussed earlier, take into consideration the unique factors of the prisoner's situation such as the need for maintenance of prison order. Once the tests have been applied with these unique factors considered and a finding has been made that in

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[I] do not understand how a state prisoner who is entitled to relief by *habeas corpus* under 28 U.S.C. § 2254 can opt out of that section, with its attendant requirement of exhaustion of state remedies when these are available, simply by styling his petition as one under the Civil Rights Act. But *Wilwording* seems to indicate that he can. *Id.* at 81.

131 *Id.* at 85 (dissenting opinion).

132 *Id.*

133 Wilwording v. Swenson, 404 U.S. 249, 92 S. Ct. 407, 30 L. Ed. 2d 418 (1972); Houghton v. Shafer, 392 U.S. 639, 88 S. Ct. 2119, 20 L. Ed. 2d 1319 (1968); Damico v. California, 389 U.S. 416, 88 S. Ct. 526, 19 L. Ed. 2d 647 (1967); McNeese v. Board of Educ., 373 U.S. 668, 83 S. Ct. 1433, 10 L. Ed. 2d 622 (1963); Monroe v. Pape, 365 U.S. 167, 81 S. Ct. 473, 5 L. Ed. 2d 492 (1961).

134 Wilwording v. Swenson, 404 U.S. 249, —, 92 S. Ct. 407, 409, 30 L. Ed. 2d 418, 422 (1972).

view of all of this, the prisoner is entitled to relief, then the prisoner should be considered on an equal basis with other civil rights plaintiffs. In short, the prisoner may have a heavier burden in proving that he is entitled to relief, but upon so proving he stands before the court as a person who has been denied a constitutional right. Requiring the prisoner to utilize the remedy of habeas corpus when section 1983 is equally available would result in holding state prisoners to a stricter standard of exhaustion than other civil rights plaintiffs. Thus, while an ordinary citizen subjected to police brutality could seek initial redress in federal court, the state prisoner who has been beaten by guards would be required to style his petition as one seeking a writ of habeas corpus and be forced to go first to the state courts. As one judge has said:

> But I cannot believe that federal jurisdiction in cases involving prisoner rights is any more offensive to the state than federal jurisdictions in areas of police procedures for search, arrest, and detention, . . . education, . . . welfare . . . or public housing. I can think of no reason why the question of prison administration should be classified as one of greater or more peculiar state concern than the instances to which I have just referred.[135]

The argument has been advanced that to allow a prisoner to style his petition as a section 1983 claim will ultimately result in effective repeal of section 2254 which requires exhaustion for habeas claims.[136] This argument seems to make the erroneous assumption that section 1983 can completely displace habeas corpus. Any claim that the prisoner's conviction or sentence is illegal, however, is cognizable under habeas corpus and not under section 1983. Thus, the traditional function of habeas is completely preserved. Even if habeas corpus was never again used by prisoners to challenge the conditions of their confinement, the end result would be to restore habeas to its pre-*Johnson v. Avery*[137] status. The reason for extending the availability of habeas corpus in *Johnson* was to grant the petitioner relief where it was clear that he was entitled to it. Thus, *Johnson*, in the interest of protecting constitutional rights, stretched habeas corpus to outer boundaries it had never before reached. Since then, however, it has been recognized that a statutory remedy exists to provide for the circumstances presented in *Johnson*: Section 1983. In short, far from repealing the exhaustion requirement of habeas corpus, the end result can be no more than to restore it to its traditional function. One federal judge has recognized

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135 Rodriguez v. McGinnis, 456 F.2d 79, 82 (2d Cir. 1972) (concurring opinion).

136 *E.g.*, Johnson v. Walker, 317 F.2d 418, 419-20 (5th Cir. 1963).

137 393 U.S. 483, 89 S. Ct. 733, 21 L. Ed. 2d 731 (1969).

that the Supreme Court in *Wilwording* implicitly rejected the "repeal argument."

> I find it difficult to believe that the Court, *specifically confronted with the alternative modes of pleading*, overlooked or did not consider fully the interaction of 28 U.S.C. § 2254(b) and 42 U.S.C. § 1983.[138]

There seems to be no legal basis for requiring a petitioner to label his petition as one seeking a writ of habeas corpus when his claim is cognizable under section 1983. The basis, rather, is one of policy; the policy that state courts should have the initial opportunity to adjudicate the prisoner's claim. The Supreme Court has held five times that this policy has no application to claims under the Civil Rights Act.[139] The question was narrowed each time it was presented for consideration by the Court. *Monroe, McNeese,* and *Damico* held that exhaustion was not required of civil rights plaintiffs generally while *Houghton* specifically applied these holdings to state prisoners. *Wilwording* narrowed it still further by actually converting a habeas petition into a section 1983 claim and holding that no exhaustion was required. The question which has now been presented to the Court is narrowed even further, but the fact remains that it is essentially the same question. The fact that federal courts, since *Monroe,* have attempted to find a basis for requiring a prisoner filing a section 1983 claim to exhaust state remedies reflects a strong belief in the basic precepts of comity. It also reflects, however, the fact that the "hands-off" doctrine is not yet history. While many federal courts have granted relief to prisoners under section 1983 without regard to exhaustion, some judges have been slow to accept the clear holdings of the *Monroe* line of cases, and have attempted to bypass their effect by various means. As the "hands-off" doctrine slips out of the focus of modern ideology, federal courts should not resort to fictions in an attempt to salvage it.

CONCLUSION

Prisoners undoubtedly occupy a special status in society. "Lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by considerations underlying our penal system."[140] This principle, advanced by the

138 Rodriguez v. McGinnis, 456 F.2d 79, 83 (2d Cir. 1972) (concurring opinion) (emphasis added).

139 Wilwording v. Swenson, 404 U.S. 249, 92 S. Ct. 407, 30 L. Ed. 2d 418 (1972); Houghton v. Shafer, 392 U.S. 639, 88 S. Ct. 2119, 20 L. Ed. 2d 1319 (1968); Damico v. California, 389 U.S. 416, 88 S. Ct. 526, 19 L. Ed. 2d 647 (1967); McNeese v. Board of Educ., 373 U.S. 668, 83 S. Ct. 1433, 10 L. Ed. 2d 622 (1963); Monroe v. Pape, 365 U.S. 167, 81 S. Ct. 473, 5 L. Ed. 2d 492 (1961).

140 Price v. Johnston, 334 U.S. 266, 285, 68 S. Ct. 1049, 1060, 92 L. Ed. 1356, 1369 (1948).

Supreme Court in 1944, has continuing application today. In years past it has afforded courts a rationale for summary dismissal of many prisoner complaints. A recognition in recent years, however, has developed and matured that a prisoner "retains all the rights of an ordinary citizen except those expressly, or by necessary implication, taken from him by law."[141]

There remains a reluctance, however, in some federal courts, to assume primary responsibility for litigating prisoner complaints. These courts are concerned about the flood of complaints which overburden the federal courts. This is a problem which the courts can solve, not by limiting prisoners' access to federal courts, but by directing attention to the very root of the prisoners' complaints. Some federal courts are beginning the practice of maintaining jurisdiction over a complaint long after relief has been granted to an individual petitioner. Having once become acquainted with the unconstitutional practices of a particular prison, it would seem logical to enter a court order requiring the defendant prison officials to correct the practices and file periodic reports informing the court of the progress that has been made. Perhaps this would eventually curtail the large number of prisoner complaints. It would certainly curtail the number of meritorious complaints. This practice has the further advantage of being preventive in nature. While the flood of complaints is bound to continue for a time, eventually court ordered improvements could serve to limit the number.

Even today advocacy of court supervision of prison administrators may be an unpopular position. In those circumstances, however, where the prisoner has proved the existence of unconstitutional practices, court intervention to effect a complete remedy is warranted. A certain amount of supervision may be required until the problem is rectified. Prison administration could still rest with the prison officials with the courts offering guidelines as to what is required to fully observe constitutional rights in the context of a prison. Once prison officials have discarded unconstitutional regulations and practices under federal court direction, the number of prisoner complaints may begin to diminish. It must be remembered that correction and alleviation of a long-existing problem is always more burdensome than maintenance of the ultimate solution.

141 Coffin v. Reichard, 143 F.2d 443, 445 (6th Cir. 1944), *cert. denied*, 325 U.S. 887 (1945).