The Exhaustion Doctrine: State Prisoners Caught between Civil Rights Actions and Writs of Habeas Corpus

Linda Marie Bell
Comment

The Exhaustion Doctrine: State Prisoners Caught Between Civil Rights Actions and Writs of Habeas Corpus

On one hand, the exhaustion doctrine requires state prisoners to exhaust their state remedies before filing a petition for a writ of habeas corpus in federal court when they contest their confinement. On the other hand, prisoners challenging their civil rights may file in federal court without exhausting all state remedies. This Comment addresses how federal courts should determine which rule to apply when a prisoner brings an action contesting confinement, but seeks only declaratory relief or damages.

I. INTRODUCTION

State prisoners have two avenues of redress to challenge a violation of their rights. First, they may petition for a writ of habeas corpus when challenging their confinement under 28 U.S.C. § 2254.1 Second, they may bring a civil rights action when challenging the conditions of their imprisonment under 42 U.S.C. § 1983.2 A habeas

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1. The first section of the code provides:

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


2. The Civil Rights Act states:
Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes
corpus action requires exhaustion of all state remedies prior to bringing a suit in the federal courts,\(^3\) while a civil action does not.\(^4\) A conflict may arise when a prisoner brings a civil rights action that challenges confinement. Normally when prisoners challenging their confinement seek actual reduction or rescission of their sentences their actions fall within section 2254.\(^5\) By contrast, when prisoners challenge their confinement seeking only damages or declaratory relief the federal courts apply widely varying standards.\(^6\)

This Comment addresses the conflict that occurs as the result of

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3. Statutory exhaustion requires that "[a]n 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." 28 U.S.C. § 2254(c) (1988).

4. Monroe v. Pape, 365 U.S. 167, 183 (1961). In the *Monroe* case, the Monroes sued Chicago police officers and the City of Chicago for violation of their civil rights because Chicago police officers entered and searched the Monroes' home and arrested Mr. Monroe, all without search or arrest warrants. The Supreme Court upheld the action against the police officers, regardless of the exhaustion of state remedies, stating, "It is no answer that the State has a law which if enforced would give relief. The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before a federal one is invoked." *Id.* An additional important difference between the two actions is that damages are not an available remedy under a writ of habeas corpus. Preiser v. Rodriguez, 411 U.S. 475, 493 (1973).

5. "Release from penal custody is not an available remedy under the Civil Rights Act." *Preiser*, 411 U.S. at 479 (quoting Peinado v. Adult Authority of Dept. of Corrections, 405 F.2d 1185, 1186 (9th Cir. 1969)).

6. See Guerrero v. Mulhearn, 498 F.2d 1249 (1st Cir. 1974) (civil rights action by a prisoner claiming that his phone had been illegally wiretapped was dismissed for failure to exhaust state remedies); Mack v. Varelas, 835 F.2d 995 (2d Cir. 1987) (state prisoner bringing civil rights action against sheriff for failure to produce witness at criminal trial fell within § 1983 and did not require exhaustion of remedies); Brown v. Fauver, 819 F.2d 395 (3rd Cir. 1987) (inmate's civil rights claim challenging prison disciplinary procedures and loss of good time credits, was dismissed for lack of exhaustion of state remedies); Todd v. Baskerville, 712 F.2d 70 (4th Cir. 1983) (prisoner's civil rights action for monetary damages from improper crediting of good time credits was dismissed); Spina v. Aaron, 821 F.2d 1126 (5th Cir. 1987) (prisoner claiming violation of due process when implicated in prison escape required to exhaust all state remedies because, although the complaint did not request reinstatement of good time credits, a determination could affect the fact or duration of his confinement); Hadley v. Werner, 753 F.2d 514 (6th Cir. 1985) (prisoner brought civil rights action claiming ineffective assistance of counsel; court of appeals dismissed the case for failure to exhaust state remedies); Viens v. Daniels, 871 F.2d 1328 (7th Cir. 1989) (prisoners implicated in attempted escape filed action claiming denial of due process and were not required to exhaust state remedies as action fell under § 1983); Offet v. Solem, 823 F.2d 1256 (8th Cir. 1987) (inmate brought an action for deprivation of good time credits and the court stayed the claim pending exhaustion of state remedies); Young v. Kenny, 907 F.2d 874 (9th Cir. 1990) (prisoner sued for deprivation of good time credits and court stayed claim until the exhaustion of all state remedies); Gwin v. Snow, 870 F.2d 616 (11th Cir. 1989) (prisoner's claim of racial prejudice in denial of parole and compassionate leave fell within § 1983 and did not require exhaustion of state remedies).
the overlap between section 22547 and section 19838 when prisoners
challenging their confinement seek damages or declaratory relief.
Part Two provides a historical overview of the writ of habeas corpus,
the exhaustion doctrine, and civil rights actions under section 1983.
Part Three discusses the Supreme Court's answer to the conflict as
set forth in the cases of Preiser v. Rodriguez9 and Wolff v. McDon-
nell.10 Part Four analyzes the circuit courts' implementations of the
Supreme Court guidelines, as well as the division among the circuit
courts. Finally, Part Five proposes a resolution of the division by the
use of a two-pronged test that first focuses on what the prisoner is
challenging, then, in some cases, upon the remedy the prisoner is
seeking. As a result, prisoners' civil rights actions not challenging
their underlying conviction would be analyzed according to the Su-
preme Court guidelines, that is, according to the remedy sought. Alter-
atively, prisoners' civil rights actions challenging their
underlying convictions would be subject to the habeas corpus re-
quirements and the prisoners would be required to exhaust their
state remedies.

II. BACKGROUND

A. Habeas Corpus and the Exhaustion Doctrine

The writ of habeas corpus ad subjiciendum originated in 16th
century England.11 By the late 1600s the writ was the usual manner
that a person would use to regain their liberty when wrongfully im-
prisoned.12 The Colonists used habeas corpus when faced with any
situation of illegal physical confinement.13 Subsequently, the United
States Constitution recognized the writ.14 Originally, the question of
the court's jurisdiction to hear the case was the limit of habeas

7. 28 U.S.C. § 2254 (1988). See supra notes 1, 3 and accompanying text; infra
note 20.
11. Preiser, 411 U.S. at 484.
12. Id. A Chief Justice of the Court of Common Pleas stated, "The writ of habeas
corpus is now the most usual remedy by which a man is restored again to his liberty, if
he have been against law deprived of it." Bushnell's Case, Vaughan 135, 136, 124 Eng.
Rep. 1006, 1007 (1670).
14. The Suspension Clause states: "The Privilege of the Writ of Habeas Corpus
shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety
may require it." U.S. Const. art. I, § 9, cl. 2.
Over time, the writ expanded to cover any confinement violating the Constitution or fundamental law, regardless of whether the court had jurisdiction. The Supreme Court first recognized the exhaustion doctrine in the case of Ex parte Royall. The exhaustion doctrine requires that prisoners seeking relief through a writ of habeas corpus exhaust all state remedies before seeking relief in the federal courts. The basis

15. Preiser, 411 U.S. at 485 (citing Ex parte Watkins, 29 U.S. 193 (1830)).
16. Id. (citing Ex parte Siebold, 100 U.S. 371 (1880); Johnson v. Zerbst, 304 U.S. 458 (1938)). The Preiser Court cited the following cases as representative of the variety of claims that may be brought by writ of habeas corpus: Ex parte Siebold, 100 U.S. 371 (1880) (challenges to custody claiming the statute under which the person was convicted is unconstitutional); Ex parte Royall, 117 U.S. 241 (1886) (challenges to custody prior to trial when indictment is defective); In re Bonner, 151 U.S. 242 (1894) (challenges to confinement in the wrong institution); Johnson v. Zerbst, 304 U.S. 458 (1938) (challenges to denial of constitutional rights at trial); Von Moltke v. Gilles, 332 U.S. 708 (1948) (challenges to invalid guilty pleas); Parisi v. Davidson, 405 U.S. 34 (1972) (challenges to unlawful detention by the Executive or military); Morrisey v. Brewer, 408 U.S. 471 (1972) (challenges to unlawful revocation of parole). Habeas relief also applies to prisoners on parole and a person who has been released on bail or on their own recognizance. Preiser, 411 U.S. at 486 n.7.

The most frequently raised grounds for relief in habeas corpus proceedings include:
(a) Conviction obtained by a plea of guilty which was unlawfully induced or not made voluntarily with understanding of the nature of the charge and consequences of the plea.
(b) Conviction obtained by use of coerced confession.
(c) Conviction obtained by use of evidence gained pursuant to an unconstitutional search and seizure, [where the state has not provided a full and fair hearing on the merits of the Fourth Amendment claim].
(d) Conviction obtained by use of evidence gained pursuant to an unlawful arrest [where the state has not provided a full and fair hearing on the merits of the Fourth Amendment claim].
(e) Conviction obtained by a violation of the privilege against self-incrimination.
(f) Conviction obtained by the unconstitutional failure of the prosecution to disclose defendant evidence favorable to the defendant.
(g) Conviction obtained by a violation of the protection against double jeopardy.
(h) Conviction obtained by action of a grand or petit jury which was constitutionally selected and impaneled.
(i) Denial of effective assistance of counsel.
(j) Denial of right to appeal.

JUDICIAL CONFERENCE OF THE UNITED STATES, RULES GOVERNING SECTION 2254 CASES IN THE UNITED STATES DISTRICT COURTS 5 (Comm. Print 1976).
17. 117 U.S. 241 (1886).
18. This is considered one of the great disadvantages of habeas corpus relief. Section 1983 claims are thought to be favorable because no exhaustion is required. Other ways in which civil rights claims appear preferable to habeas corpus claims include:
(1) The Federal Rules of Civil Procedures apply fully to an action under § 1983, but only partially to habeas corpus cases, making areas such as discovery of prison records more difficult.
(2) A § 1983 claim may be brought as a class action lawsuit. A habeas corpus class action suit might not be allowed because habeas corpus is intended to be an individual remedy.
(3) Monetary damages may be recovered only in a § 1983 claim.

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The advantages to bringing a suit in federal court include the fact that federal judges may be more isolated from political pressure and public opinion than state court judges. See Burt Neuborne, The Myth of Parity, 90 Harv. L. Rev. 1105, 1125-28 (1977). “Most states do not have adequate judicial remedies and workable procedures for handling prisoners’ claims relating to prison conditions. . . . [E]ven in states which do have adequate remedies, prisoners, . . . historically, found a much friendlier reception in federal courts.” Sheldon Krantz, The Law of Corrections and Prisoners’ Rights in a Nutsheil 254-55 (3d ed. 1988).

The reasoning behind the policy is the far-reaching grasp 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.” Frank v. Morgan, 237 U.S. 309, 346 (1915) (Holmes, J., dissenting).

The exhaustion doctrine lies in federal and state comity, with the underlying concept that the state should have an opportunity to correct errors within its system before being scrutinized by the federal courts.20

The exhaustion doctrine was codified by Congress in 28 U.S.C. § 225420 in 1948. Since codification, the Supreme Court has further defined the exhaustion doctrine, requiring total exhaustion of claims in habeas petitions containing exhausted and unexhausted, or “mixed,” claims.21 Additionally, if the state fails to raise the issue of nonexhaustion, the court may consider the issue waived, unless comity and judicial efficiency dictate otherwise.22

Exhaustion is not required for civil rights claims brought pursuant to 42 U.S.C. § 1983.23 Yet, a dilemma arises when a prisoner brings a suit claiming a civil rights violation if the remedy affects the length of confinement, even in those cases in which the prisoner is seeking only damages or declaratory relief.
B. Section 1983 and Prisoners' Civil Rights

The Civil Rights Act, codified in 42 U.S.C. § 1983,\textsuperscript{24} originated as Section 1 of the Ku Klux Klan Act of April 20, 1871.\textsuperscript{28} The intention of the Act was to bolster the Fourteenth Amendment, as evidenced by its title, “An Act to enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for Other Purposes.”\textsuperscript{26} The primary aims of the Act were to override offending state laws,\textsuperscript{27} to provide a federal remedy when state laws were inadequate,\textsuperscript{28} and to provide a federal remedy when a state remedy theoretically existed, but in reality was not available.\textsuperscript{29}

Nonetheless, for years the federal courts adopted a “hands-off” approach toward the corrections system. That is, the federal courts declined to make decisions about the methods used in the corrections system.\textsuperscript{30} Following the hands-off approach, the courts later reached the opposite extreme with an “open door” approach. In other words, the federal courts addressed issues that ranged from the complex to the mundane without requiring exhaustion of either administrative

\begin{itemize}
\item \textsuperscript{24} See supra note 2. According to the Supreme Court in \textit{Wolff}, the Constitutional rights of prisoners include: religious freedom, access to the courts, freedom from racial discrimination, and due process of law before being deprived of life, liberty, and property. \textit{Wolff v. McDonnell}, 418 U.S. 539, 556 (1974).
\item \textsuperscript{25} \textit{Monroe}, 365 U.S. at 171.
\item \textsuperscript{26} Id. At the Congressional debates, Senator Edmunds, Chairman of the Senate Committee on the Judiciary stated:
\begin{quote}
The first section is one that I believe nobody objects to, as defining the rights secured by the Constitution of the United States when they are assailed by any state law or under color of any State law, and it is merely carrying out the principles of the civil rights bill, which has since become a part of the Constitution.
\end{quote}
\textit{Id.} (quoting CONG. GLOBE, 42nd Cong., 1st Sess., App. 68, 80, 83-85).
\item \textsuperscript{27} Id. at 173. The Court explained that “[t]here are threads of many thoughts running through the debates . . . . First, it might, of course, override certain kinds of state laws.” \textit{Id.}
\item \textsuperscript{28} Id. at 173-74. Senator Sherman of Ohio explained this “thread” with an example:
\begin{quote}
[I]t is said that the reason is that any offense may be committed upon a negro by a white man, and a negro cannot testify in any case against a white man, so that the only way by which any conviction can be had in Kentucky in those cases is in the United States courts, because the United States courts enforce the United States laws by which negroes may testify.
\end{quote}
\textit{Id.} (quoting CONG. GLOBE, 42nd Cong., 1st Sess. 345.)
\item \textsuperscript{29} Id. at 174. Some examples of § 1983 actions by prisoners that were upheld by the Supreme Court include: Cooper v. Pate, 378 U.S. 546 (1964) (prisoner claimed he was denied privileges solely because of his religious beliefs); Wilwording v. Swenson, 404 U.S. 249 (1971) (prisoners claimed poor living conditions and unreasonable disciplinary measures); Haines v. Kerner, 404 U.S. 519 (1972) (prisoner claimed physical injuries occurred while he was unlawfully placed in solitary confinement).
\item \textsuperscript{30} THE FEDERAL JUDICIAL CENTER, RECOMMENDED PROCEDURES FOR HANDLING PRISONER CIVIL RIGHTS CASES IN FEDERAL COURT 29-30 (1980).
\end{itemize}
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The courts today are in what the Federal Judicial Center calls "a period of re-evaluation," in which the courts are trying to achieve a balance between the "hands-off" and the "open-door" approaches to prisoners' civil rights litigation. The issue of exhaustion of state remedies is a large part of that balancing act.

III. THE SUPREME COURT'S POSITION

The seminal Supreme Court cases concerning the line between habeas corpus and civil rights actions are Preiser v. Rodriguez and Wolff v. McDonnell. In Preiser, the Supreme Court set forth a rule that a prisoner need not exhaust his state remedies when seeking relief other than the fact or duration of confinement. Wolff confirms the Preiser rule.

A. Preiser v. Rodriguez: Fact or Duration of Confinement

In Preiser, three New York prisoners lost good conduct time credits through disciplinary actions. The prisoners claimed they had been unconstitutionally deprived of their good time credits. They each

31. Id. at 30-31.
33. Id. at 167.
35. THE FEDERAL JUDICIAL CENTER, supra note 30, at 31-32.
40. Preiser, 411 U.S. at 478, 480-81. Rodriguez lost 120 days of accumulated good time credits after contraband was discovered in his cell. He asserted that he was actually being punished because he refused to disclose where the materials originated from. Because he had no hearing on that issue, he claimed that his due process rights had been violated. Id. at 478. The second prisoner, Katzoff, lost 50 days of good time credits for writing derogatory comments about prison officials in his personal diary. He claimed that the prison officials had violated his constitutional rights by punishing him for statements in a personal diary. Id. at 480. The third prisoner, Kritsky, lost 600 days of good time for leading a prison-wide demonstration. Kritsky claimed that his due process rights were
sought injunctive relief to reinstate the credits, which in each case would have resulted in immediate release from prison. The court of appeals consolidated the actions and upheld the district courts' restoration of good time credits in each of the cases.

The Supreme Court overturned the court of appeals decision and refused the request to restore lost good time credits. The Court interpreted these actions to fall "within the core of habeas corpus in attacking the very duration of their physical confinement itself." In addition, the Supreme Court reasoned that Congressional intent, state and federal comity, and efficiency called for the use of habeas corpus in this type of action. The Court held that habeas

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41. Id. at 479-81. The district court restored Rodriguez' good time credits under the Civil Rights Act. The court reasoned that the habeas corpus claim was "merely a proper adjunct to insure full relief . . . in the dominant civil rights claim." Rodriguez v. McGinnis, 307 F. Supp. 627, 628-29 (N.D.N.Y. 1969). A divided court of appeals (prior to the joinder of the three cases) reversed the decision, stating, "Use of the Civil Rights Statutes to secure the release of persons imprisoned by State Courts would thus have the effect of repealing 28 U.S.C. § 2254; of course, such was not the intent of Congress." Rodriguez v. McGinnis, 451 F.2d 730, 731 (2d Cir. 1971) (quoting Johnson v. Walker, 317 F.2d 418, 419-20 (5th Cir. 1963)). Katzoff was also granted his good time credits by the district court, only to be reversed by a divided court of appeals. Preiser, 411 U.S. at 480 (citing United States ex rel. Katzoff v. McGinnis, 441 F.2d 558 (2d Cir. 1971)). Katzoff was granted his good time by the district court and before the court of appeals decided the case on appeal, the three cases were consolidated and brought before the court of appeals en banc. Id. at 482.

42. Id. The Court held that "complaints of state prisoners relating to the conditions of their confinement were cognizable either in federal habeas corpus or under the Civil Rights Act, and that as civil rights actions they were not subject to any requirement of exhaustion of state remedies." Id.

43. Id. at 500.

44. Id. at 487-88. "In any event, the nature of the respondents' suits was an attack on the legality of their physical confinement itself; and to deal with such attacks on physical custody, however imposed and whether not related to conviction by a court, is the long-established function of habeas corpus." Id. at 488 n.8.

45. Id. at 489-90. "In amending the habeas corpus laws in 1948, Congress clearly required exhaustion of adequate state remedies as a condition precedent to the invocation of federal judicial relief . . . and that specific determination must override the general terms of § 1983." Id. See also supra note 20.

46. Preiser, 411 U.S. at 490. The Court explained the reasoning behind the habeas corpus statute:

[T]he reason why only habeas corpus can be used to challenge a state prisoner's underlying conviction is the strong policy requiring exhaustion of state remedies in that situation—to avoid the unnecessary friction between the federal and state court systems that would result if a lower federal court upset a state court conviction without first giving the state court system an opportunity to correct its own constitutional errors.

Id.

47. Id. at 492. The Court explains that because most potential litigation involving state prisoners arises on a day-to-day basis, it is most efficient and properly handled by the state administrative bodies and state courts, which are . . . familiar with the grievances of state prisoners and in a better physical and practical position to deal with these grievances.
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corpus should extend to civil rights actions when prisoners seek judgments that go directly to the fact or duration of their confinement.\textsuperscript{48} The Supreme Court distinguished a habeas petition from a section 1983 claim on the basis of the relief requested, not upon the alleged facts.\textsuperscript{49} The Court reasoned that an action for damages did not fulfill the traditional purpose underlying habeas corpus.\textsuperscript{50} Thus, an action for damages would fall under section 1983.\textsuperscript{51} The Court explicitly stated that in such a case it would be unnecessary for the prisoner to exhaust all of his state remedies.\textsuperscript{52}

B. Wolff v. McDonnell: Remedy Short of Restoration of Good Time Credits

In the Wolff case,\textsuperscript{53} the Supreme Court reaffirmed its position in Preiser.\textsuperscript{54} In Wolff, a Nebraska prisoner brought a class action suit complaining, among other things, that the prison's procedures for depriving prisoners of good time credits violated their due process rights.\textsuperscript{55} The prisoners requested that the good time credits be restored, that prison officials submit a plan for a hearing procedure that complied with due process, and that the prisoners be awarded damages for the deprivation of their civil rights.\textsuperscript{56}

The Supreme Court determined that the claim for damages could

\textsuperscript{48} Id. at 500. The Court specifically held that "when a state prisoner is challenging the very fact or duration of his physical imprisonment, and the relief he seeks is a determination that he is entitled to immediate release or a speedier release from that imprisonment, his sole federal remedy is a writ of habeas corpus." Id.

\textsuperscript{49} Id. at 494.

\textsuperscript{50} Id. at 493. "In the case of damages, habeas corpus is not an appropriate or available federal remedy." Id. at 494 (emphasis in original). Recall that money damages are not available under habeas corpus. \textit{See supra} note 4.

\textsuperscript{51} \textit{Preiser}, 411 U.S. at 494. "[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." Id.

\textsuperscript{52} Id. The Court explained: "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." Id.


\textsuperscript{54} \textit{See supra} notes 40-52 and accompanying text.

\textsuperscript{55} Wolff, 418 U.S. at 543. In addition, the prisoners alleged that the inspection of mail between inmate and attorney was unconstitutional and that the inmate assistance program was constitutionally inadequate. The district court granted partial relief. The court restored the good time credits, but rejected the due process claim. The court of appeals reversed and denied the requested restoration of the good time credits, but ordered that the prison officials expunge any records made in violation of a prisoner's due process rights. Id. at 543-44.

\textsuperscript{56} Id. at 553.
The Court interpreted *Preiser* to preclude only the injunctive relief of restoring the good time credits. The Court then held that under 42 U.S.C. § 1983, a federal court may "determine the validity of the procedures for revoking good time credits and to fashion appropriate remedies for any constitutional violations ascertained, short of ordering the actual restoration of good time already canceled." Thus, the Supreme Court granted the federal courts broad discretion to review section 1983 claims.

IV. THE CIRCUIT COURTS' DIVISION

In the aftermath of *Preiser* and *Wolff*, the circuit courts have interpreted the rule for exhaustion of remedies differently. Most circuits have held, contrary to the apparent rule of the Supreme Court, that state remedies must be exhausted in a section 1983 action requiring a determination of the validity of the sentence, regardless of the requested relief. These courts have proceeded using either a test examining the validity of the sentence or a collateral estoppel test. In contrast, a few circuits in recent decisions have used a test looking at the relief requested, in recognition of the apparent Supreme Court test set forth in *Preiser* and *Wolff*. This section examines representative circuit cases for each treatment of the issue.

A. Validity of the Sentence

A majority of the circuits apply a test focusing on whether the prisoners are challenging the validity of their underlying sentences.

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57. *Id.* at 554. "*Preiser* expressly contemplated that claims properly brought under § 1983 could go forward while actual restoration of good-time credits is sought in state proceedings." *Id.*

58. *Id.* at 555. The court stated:

Such a declaratory judgment as a predicate to a damages award would not be barred by *Preiser* and because under that case only an injunction restoring good time improperly taken is foreclosed, neither would it preclude a litigant with standing from obtaining by way of ancillary relief an otherwise proper injunction enjoining the prospective enforcement of invalid prison regulations.

*Id.*

59. *Id.*

60. See supra note 6.

61. See infra notes 64-96 and accompanying text.

62. See infra notes 97-105 and accompanying text.

63. See infra notes 106-29 and accompanying text.

64. Even among the circuits applying a "validity of the sentence" test, the results differ. Some circuit courts dismiss without prejudice any § 1983 civil rights action requiring a federal court to declare the validity of a state court's criminal conviction before exhaustion of all state remedies. The First, Third, Fourth, and Sixth Circuits appear to follow this method. See Guerro v. Mulhearn, 498 F.2d 1249 (1st Cir. 1974) (civil rights action by a prisoner claiming that his phone had been illegally wiretapped was dismissed for failure to exhaust state remedies); Brown v. Fauver, 819 F.2d 395 (3rd Cir. 1987) (inmate's civil rights claim challenging prison disciplinary procedures, including removal of good time credits, was dismissed for lack of exhaustion of state remedies); Todd v.
The First, Second, and Sixth Circuits provide examples of the test used to require exhaustion when a prisoner challenges an underlying conviction. The Ninth Circuit provides an example of the test extended to require exhaustion when prisoners challenge prison procedures affecting the length of their sentences.

1. The First Circuit: Guerro v. Mulhearn

Shortly after the decision in Preiser, the First Circuit decided Guerro v. Mulhearn. In Guerro, a prisoner claimed that perjury was committed in order to obtain a search warrant to search his apartment. Additionally, he asserted that his telephone was illegally wiretapped and the prosecution concealed the existence of the wiretap during trial. The prisoner sued for declaratory judgment and compensatory and punitive damages. The court of appeals found that Guerro did not fall within the "core of habeas corpus" test of Preiser. Additionally, the court recognized that the Supreme Court had "expressly distinguished the situation where the relief sought is damages, rather than release from incarceration." The Court of Appeals for the First Circuit, however, determined that Preiser was not controlling because in Preiser the Supreme Court had not been faced with a case that required a ruling on the validity of a state criminal conviction. In support of its decision,

Baskerville, 712 F.2d 70 (4th Cir. 1983) (prisoner's civil rights action for monetary damages from improper crediting of good time credits was dismissed); Hadley v. Werner, 753 F.2d 514 (6th Cir. 1985) (A prisoner brought civil rights action claiming ineffective assistance of counsel. The court of appeals dismissed the case for failure to exhaust state remedies.). Other circuits stay § 1983 actions until the prisoner has exhausted all state remedies. See Mack v. Varelas, 835 F.2d 995 (2d Cir. 1987) (state prisoner bringing civil rights action against sheriff for failure to produce witness at criminal trial fell within § 1983 and did not require exhaustion of remedies); Offet v. Solem, 823 F.2d 1256 (8th Cir. 1987) (inmate brought an action for deprivation of good time credits and the court stayed the claim pending exhaustion of all state remedies); Young v. Kenny, 907 F.2d 874 (9th Cir. 1990) (prisoner sued for deprivation of good time credits and court stayed claim until the exhaustion of all state remedies).

65. See infra notes 67-86 and accompanying text.
66. See infra notes 87-96 and accompanying text.
67. 498 F.2d 1249 (1st Cir. 1974).
68. Id. at 1251.
69. Id.
70. Id. See supra note 44 and accompanying text.
71. Guerro, 498 F.2d at 1251.
72. Id. at 1252. The court of appeals distinguished the Preiser decision:

Although the Court expressly distinguished the situation where the relief sought is money damages, rather than release from incarceration, it did so in the context of a case in which determination of a damage claim would not
the First Circuit used a policy argument outlined in *Preiser* that section 1983 actions should not be a vehicle for circumvention of habeas corpus. In the same vein, the court cited Supreme Court decisions holding that federal suits for equitable relief must be dismissed if they concern the same matter as, and would interfere with, an ongoing state prosecution. Thus, the First Circuit resolved the conflict by dismissing the civil rights action pending exhaustion of state remedies when the court would have to make a judgment on the original conviction.

2. **The Second Circuit: Mack v. Varelas**

In *Mack v. Varelas*, a prisoner sought damages from the sheriff's department and the deputy sheriff for failing to comply with a court order to produce a witness, thus depriving Mack of his Sixth Amendment right to present a defense. The Court of Appeals for the Second Circuit found that Mack's claim for damages should not have been treated as a petition for habeas corpus. Because the prisoner was seeking something other than immediate or speedy release and he was not attacking the length of his confinement, a judgment did not depend on the validity of his confinement. The circuit court

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73. Id. (footnotes omitted).
74. Id. at 1253. The court stated: *Preiser*, nevertheless, is highly relevant to the issue under discussion. The Court's holding demonstrates the importance of preserving the integrity of the writ of habeas corpus, in its traditional context, from circumvention of the limitations placed upon the writ. The writ of habeas corpus is, after all, the more narrow and specific remedy.

75. 835 F.2d 995 (2d Cir. 1987).
76. Id. at 997. Mack and his accomplice Jefferson were charged with robbery. Jefferson pled guilty. Mack requested that the incarcerated Jefferson be produced as a witness at Mack's trial before February 7th. The sheriff's department failed to produce Jefferson by February 11th and Mack's motion for continuance was denied by the trial court. Jefferson did not testify and the jury found Mack guilty.

77. Id. The district court reasoned that the claim properly fell within the realm of habeas corpus because "any damage he suffered by the alleged inaction of defendant is dependent on a determination of the invalidity of the conviction." The claim was dismissed for failure to exhaust state remedies.

78. Id. at 998. "[A] civil rights action for damages, insofar as it does not also seek
overturned the lower court’s dismissal for failure to exhaust all state remedies. The circuit court then stayed the prisoner’s claim on the “prudential consideration that those [state criminal] proceedings may suffice to establish that Mack’s incarceration does not constitute injury.” Hence, the Second Circuit appears to follow a rule requiring a stay of section 1983 action pending exhaustion of remedies based on whether the prisoner is challenging the validity of the underlying sentence.

3. The Sixth Circuit: Hadley v. Werner

In Hadley v. Werner, a prisoner sought damages on the theory that an inadequate fee schedule for appointed counsel denied him effective assistance of counsel. Hadley maintained that as a result of ineffective assistance of counsel he had involuntarily pled guilty. The Sixth Circuit affirmed the district court’s decision to dismiss the action seeking damages and maintained that the proper recourse for Hadley was a petition for habeas corpus. Relying on the First Circuit’s reasoning in Guerro v. Mulhearn, the Court of Appeals for the Sixth Circuit concluded that the decision in Preiser did not control section 1983 actions for money damages. Therefore, the Sixth

to void or shorten the term of imprisonment, is not a challenge that should be made by means of a habeas petition . . . .” Id.

79. Id. at 998-99. The court explained: “Mack’s complaint is a civil rights complaint and is not properly characterized as a habeas petition . . . [T]he complaint assumes that Mack will remain confined for the entire length of the sentence, and it demands damages for each day of his ordered confinement.” Id. at 998.

80. Id. at 999.

81. 753 F.2d 514 (6th Cir. 1985).

82. Id. at 515. Hadley claimed that the fee schedule was so low that only inexperienced and incompetent attorneys were attracted. Even then he maintained that those attorneys did not devote their full efforts to the cases because of the minimal amount of compensation. Hadley pursued $85 million in damages and an injunction to prevent the defendants from violating his constitutional rights in the future. Id.

83. Id. at 516.

84. Id. The court did, however, vacate the district court’s judgment that the prisoner had failed to state a claim upon which relief could be granted. Id.


86. Hadley, 753 F.2d at 516. The court explained that Preiser did not control Hadley’s appeal, quoting language from Preiser that “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.” Id. (quoting Preiser, 411 U.S. at 494). The court also cited Supreme Court dicta: “More recently the Court acknowledged that it has not determined ‘if a Federal District Court should abstain from deciding a section 1983 suit for damages stemming from an unlawful conviction pending collateral exhaustion of state court attacks on the conviction itself.’” Id. (quoting Tower v. Glover, 467 U.S. 914 (1984)).
Circuit also dismissed a civil rights action for failure to exhaust state remedies in a case involving the underlying conviction.

4. The Ninth Circuit: Young v. Kenny

In Young v. Kenny, a prisoner sued for damages for the state officials' failure to apply jail-time credits to his prison sentence. The Court of Appeals for the Ninth Circuit modified the district court's dismissal to stay the claim pending the exhaustion of state remedies. The court held that "habeas must be the exclusive federal remedy not just when a state prisoner requests the invalidation or reduction of his sentence, but whenever the requested relief requires as its predicate a determination that a sentence currently being served is invalid or unconstitutionally long."

The Ninth Circuit court recognized a potential conflict with the Preiser and Wolff decisions. Nonetheless, the court asserted that habeas corpus must be the exclusive federal remedy whenever the requested relief requires a determination on the sentence being served. The court claimed that this position agreed with all other circuits who had decided the issue. Additionally, the circuit court cited the Eighth Circuit decision in Offet, which proposed that interpreting Wolff to allow a state prisoner to circumvent the exhaustion requirement through artful pleading would put Wolff in direct conflict with the rationale of Preiser. Furthermore, the Ninth Circuit court cited the following decisions in support of its position:

87. 907 F.2d 874 (9th Cir. 1990).
88. Id. at 875.
89. Id. at 878. The court reasoned that "[b]ecause Young is still in prison and has failed to exhaust his state remedies, a federal court judgment that his jail-time credits have been improperly withheld would undermine the exhaustion requirement in federal habeas corpus actions and frustrate important values of federal state comity." Id. (footnote omitted).
90. Id. at 876 (emphasis in original).
91. Id. at 877. The court, after quoting language from Wolff, stated: "We are acutely aware that this language appears to conflict with the rule we have just adopted; this passage from Wolff may suggest that the exclusivity of habeas turns on the type of relief requested by the plaintiff." Id.
92. Id. at 876-77. In support of their statement the court cited Guerro v. Mulhearn, 498 F.2d 1249, 1251-55 (1st Cir. 1974); Mack v. Varelas, 835 F.2d 995, 998 (2d Cir. 1987); Brown v. Fauver, 819 F.2d 395, 397-99 (3d Cir. 1987); Todd v. Baskerville, 712 F.2d 70, 72-73 (4th Cir. 1983); Richardson v. Fleming, 651 F.2d 366, 373 (5th Cir. 1981); Hadley v. Werner, 753 F.2d 514, 516 (6th Cir. 1985); Hanson v. Heckle, 791 F.2d 93, 94-97 (7th Cir. 1986); Offet v. Solem, 823 F.2d 1256, 1258-61 (8th Cir. 1987); Gwin v. Snow, 870 F.2d 616, 626-27 (11th Cir. 1989). The court later discussed the disparity between the circuit court position and the apparent meaning of the Supreme Court in Wolff: "Although we join our sister circuits, we share a concern expressed by many of them... Many of the decisions cited above discuss Wolff at length and attempt to distinguish it, none very persuasively." Young, 907 F.2d at 877.
93. Id. The court explained:

While we, too, are unable to come up with a principled way of distinguishing Wolff, we agree with Judge Bowman writing for the Eighth Circuit, that to read Wolff as allowing a state prisoner to avoid exhaustion requirement by
court supported its decision through dicta in the Supreme Court case of *Tower v. Glover*.94 although *Tower* did not involve the issue being decided in *Young*.95 The Supreme Court, however, stated in *Tower*, "We . . . have no occasion to decide if a Federal District Court should abstain from deciding a § 1983 suit for damages stemming from an unlawful conviction pending the collateral exhaustion of state-court attacks on the conviction itself."96 Thus, the Ninth Circuit requires the staying of a civil rights claim pending exhaustion of state remedies when a determination on the underlying sentence is required.

B. Collateral Estoppel Test

Another method the courts have used to determine whether the exhaustion doctrine applies is the collateral estoppel test.97 This test was articulated in *Spina v. Aaron*.98 In *Spina*, a prisoner brought an action after being found guilty of attempted escape, alleging insufficient evidence.99 *Spina* asked for a more favorable security status, for expunging all records of an attempted escape, and for damages

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95. *Young*, 907 F.2d at 877-78. The court stated, "Even though the issue we consider today was not presented in *Tower* . . . we presume that the *Tower* majority deliberately included it in its opinion to signal that the Court deems itself not to have ruled on our issue." *Id.* at 878.
96. *Tower*, 467 U.S. at 923. See also *Young*, 907 F.2d at 878; see supra note 86.
97. These courts have generally allowed the trial court the option to stay or dismiss a § 1983 claim requiring determination of the validity of a state court criminal prosecution. See *Spina v. Aaron*, 821 F.2d 1126 (5th Cir. 1987) (prisoner claiming violation of due process when implicated in prison escape required to exhaust all state remedies because although the complaint did not request reinstatement of good-time credits a determination could affect the fact or duration of his confinement); *Hernandez v. Spencer*, 780 F.2d 504 (5th Cir. 1986); *Richardson v. Fleming*, 651 F.2d 366 (5th Cir. 1981); *Gwin v. Snow*, 870 F.2d 616 (11th Cir. 1989) (prisoner's claim of racial prejudice in denial of parole and compassionate leave fell within § 1983 and did not require exhaustion of state remedies).
98. 821 F.2d 1126 (5th Cir. 1987).
99. *Id.* at 1128. *Spina* involved a federal prisoner, however, the court used a parallel analysis as if he had been a state prisoner, stating, although the policies underlying the system of federal habeas corpus relief granted state prisoners are not identical to those underlying the framework of relief granted federal prisoners, the fact remains that, for both state and federal prisoners, Congress has chosen habeas corpus as the appropriate avenue to challenge fact or duration of a prisoner's confinement.

*Id.*
for violation of his constitutional rights. The Court of Appeal for the Fifth Circuit found that Spina's actions should have been pursued under habeas corpus because he challenged a hearing that had affected the date of his release.

The court reasoned that Congress had determined that habeas corpus was the appropriate remedy for a prisoner to challenge the fact or duration of their confinement. Thus, the federal courts must be cautious not to defeat the will of Congress by allowing civil rights suits by prisoners that circumvent habeas corpus proceedings. The test set forth by the court in Spina is whether a prisoner's action "constitutes, through the effects of res judicata and collateral estoppel, an indirect challenge to the fact or duration of his confinement which must be pursued initially through habeas corpus." Thus, the district court should review relevant state law and determine whether dismissal without prejudice will preserve the prisoner's claim until he exhausts all state remedies and can petition for habeas corpus. If the court determines that the action will not be preserved, it should stay the action or otherwise preserve the prisoner's rights.

C. Remedy Sought

Recently a few circuits have attempted to follow the Supreme Court's apparent intent in Preiser and Wolff, which allows actions for damages or declaratory relief to be brought in federal court without exhaustion of state remedies. Cases from the Seventh Circuit

100. Id. at 1127.
101. Id. at 1128. The court reiterated the Fifth Circuit rule:
[P]risoners who challenge either (1) the constitutionality of the state court conviction or sentence underlying their confinement, or (2) a single allegedly defective hearing affecting their eligibility for, or entitlement to, accelerated release, must pursue their claims through habeas corpus. . . . [E]ven broad-based challenges to rules or procedures . . . must be pursued in habeas corpus if resolution of the factual and legal obligations necessary to resolve the civil rights claims would automatically entitle one or more plaintiffs to accelerated release.

Id.

102. Id. "Federal courts, therefore, must be wary of defeating the will of Congress by allowing the prisoners to bring civil rights suits against either state or federal officials that directly or indirectly circumvent habeas corpus proceedings or reduce them to an "exercise in futility." Id.

103. Id. The court, however, noted that "our holding in no way 'defeats' Spina's right to redress his . . . claims. We merely hold that he may not pursue those claims until he exhausts remedies available to him through habeas corpus." Id.

104. Id. at 1129.

105. Id. "[i]f such dismissal will defeat Spina's opportunity to assert his . . . claims, the district court may stay those claims or take any other action that will preserve Spina's rights." Id.

106. See Viens v. Daniels, 871 F.2d 1328 (7th Cir. 1989) (prisoners implicated in an attempted escape filed action claiming denial of due process and were not required to
and the Eleventh Circuit provide examples of this treatment of the conflict.

I. The Seventh Circuit: Viens v. Daniels

The Seventh Circuit adhered to the idea of dismissing any nonexhausted claim until its recent decision in Viens v. Daniels.\(^\text{107}\) In Viens, two prisoners sued for declaratory relief and compensatory and punitive damages for punishment occurring after being implicated in an attempted prison escape.\(^\text{108}\) The district court held that exhaustion was required because a favorable judgment might be used as collateral estoppel in later habeas actions seeking actual restoration of good time credits.\(^\text{109}\) The Court of Appeals for the Seventh Circuit reversed the lower court’s dismissal and allowed the prisoners to bring their section 1983 claims without exhaustion of state remedies.\(^\text{110}\)

The court of appeals interpreted Wolff as a confirmation of the exhaust state remedies as action fell under § 1983); Gwin v. Snow, 870 F.2d 616 (11th Cir. 1989) (prisoner's claim of racial prejudice in denial of parole and compassionate leave fell within § 1983 and did not require exhaustion of state remedies).

\(^{107}\) Viens, 871 F.2d 1328 (7th Cir. 1989). See Hanson v. Heckel, 791 F.2d 93 (7th Cir. 1986) (prisoner challenged prison disciplinary hearing procedure that deprived him of good time credits and the court held that the prisoner's sole remedy was in habeas corpus). The Viens court declined to “determine the applicability of Preiser solely by reference to the relief sought rather than by reference to the nature of the claim.” Viens, 871 F.2d at 1332; Crump v. Lane, 807 F.2d 1394, 1395, 1401 (7th Cir. 1986) (prisoner challenged parole board denial of parole by habeas corpus and civil rights actions and the court dismissed the claims because of failure to exhaust). The Crump court, after identifying an apparent conflict with Wolff, stated, “The core of Crump’s claim concerns the fact or duration of his confinement, and any award of damages would be entirely dependent upon favorable resolution of that issue.” 807 F.2d at 1401.

\(^{108}\) Viens, 871 F.2d at 1330. Prison officials discovered two homemade ladders against the prison wall. No one had actually escaped. The morning the ladders were discovered, Perruquet, one of the prisoners, went to the prison infirmary with a broken foot and strained ligaments. He claimed he had fallen down a flight of stairs. Viens, another prisoner, claimed that he saw Perruquet fall. Another inmate testified that the two had planned to escape. At a hearing before the prison disciplinary committee, the committee denied requests of the prisoners to examine certain witnesses and to examine some of the evidence. The committee found both of the prisoners guilty and revoked 360 days of each prisoner's good time credits and ordered the prisoners be placed in disciplinary segregation for 360 days. Id. at 1329-30.

\(^{109}\) Id. at 1330. The court of appeals explained, “The district court believed that section 2254’s policy of giving state courts the first opportunity to rule on matters affecting the duration of a state prisoner’s confinement would be undermined if a prisoner were allowed to bring a section 1983 damages action without first applying to state court.” Id.

\(^{110}\) Id. at 1334. A major factor in the court's decision was that the court perceived the prisoners' claims as substantial. The court stated, “These punishments are substantial; plaintiffs do not challenge these sanctions merely as a pretext to attack the revocation of good time.” Id.
Preiser holding—the distinction to be drawn between habeas corpus petitions and section 1983 claims is the relief being sought. The court found additional support for its position in the Supreme Court case of Patsy v. Florida Board of Regents, which held that under section 1983 a plaintiff need only exhaust state remedies when specifically provided for by Congress. The court of appeals interpreted this to mean that the exhaustion requirement should be construed narrowly. Additionally, the court rejected the argument presented by the Eighth Circuit case Offet v. Solem that the judgment would act as collateral estoppel in later habeas corpus proceedings. The Viens court avoided a direct conflict with previous precedent by distinguishing the facts, using as support an Eleventh Circuit case similar to the Viens case. In essence, the court failed to follow Seventh Circuit precedent in favor of the Supreme Court remedy test.

2. The Eleventh Circuit: Gwin v. Snow

Although the Eleventh Circuit follows the Fifth Circuit in staying or dismissing section 1983 actions, the Court of Appeals for the Eleventh Circuit perceived a conflict with the Supreme Court in the

111. Id. at 1331. This reading of Preiser was confirmed in Wolff. In Wolff, as in Preiser, the prisoner alleged that the procedures used to deprive him of good time were unconstitutional. However, unlike Preiser, the prisoner in Wolff sought both restoration of good time and money damages. The Court held that Preiser did not foreclose the latter claim.

112. 457 U.S. 496 (1982) (an employee of a Florida university was not required to exhaust state remedies before bringing her section 1983 claim asserting sexual and racial discrimination).

113. Id. The court, in response to an argument that the issue of exhaustion in § 1983 claims had yet to be decided, stated, "[W]e have on numerous occasions rejected the argument that a section 1983 action should be dismissed where the plaintiff has not exhausted state administrative remedies." Id. at 500.

114. Viens, 871 F.2d at 1334. "The decision in Patsy suggests that Preiser's exhaustion requirement should not be too expansively construed." Id.

115. See Offet v. Solem, 823 F.2d 1256, 1262 (8th Cir. 1987).

116. Viens, 871 F.2d at 1333. "The analysis... adopted by the Eighth Circuit in Offet, ultimately proves too much. ... [U]nder the collateral estoppel standard the state could insulate every imposition of discipline from attack under section 1983 by simply revoking one hour, or one day, of good time as part of every punishment it imposed." Id.

117. See McKinnis v. Mosley, 693 F.2d 1054 (11th Cir. 1982), in which the court had rejected precedent similar to the Seventh Circuit case of Hanson v. Heckel, 791 F.2d 93 (1986). See supra note 107.

118. Viens, 871 F.2d at 1333.

119. Id. "[A]s the Supreme Court recognized in both Preiser and Wolff, a section 1983 action is proper where a prisoner challenges the conditions of his confinement rather than its duration." Id.
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case of *Gwin v. Snow*. Gwin brought actions that challenged parole board decisions that denied him parole and denied him compassionate leave. Gwin sought damages and injunctive relief in both actions. The district court granted summary judgment dismissing all claims. Notably, the court dismissed the equal protection claims because Gwin had failed to exhaust all of his state remedies. The Court of Appeals for the Eleventh Circuit affirmed the lower court's dismissals except for the section 1983 equal protection claims.

The court interpreted *Wolff* and *Preiser* as requiring federal courts to look only at the relief requested when determining whether the action properly falls under section 2254 or section 1983. Regardless, the court of appeals declined to follow the apparent Supreme Court test because the court constrained to follow the precedent of prior Fifth and Eleventh Circuit decisions. The standard the court of appeals used provided that "[h]abeas corpus is the

120. 870 F.2d 616 (11th Cir. 1989).
121. *Id.* at 617-18. Gwin was a black inmate serving a life sentence. Gwin claimed that the Georgia Department of Corrections Parole Board, which had only one black member, had continually denied Gwin parole in violation of his equal protection rights because the Board considered both Gwin's race and the race of his victim in making their decision. The Board also denied him compassionate leave when his mother died. *Id.* at 618.
122. *Id.* Gwin requested declaratory and injunctive relief as well as $70,000 in damages from each board member for denial of parole. He sought injunctive relief, damages, appointment of counsel, attorney's fees, and a jury trial for denial of compassionate leave. *Id.*
123. *Id.* In addition, the district court dismissed the due process claims because (1) Gwin had no liberty interest in parole, (2) Gwin's claim of discrimination was too speculative to give Gwin standing to challenge the Board's racial makeup, and (3) Gwin had no right of access to his parole file. *Id.* at 618-19.
124. *Id.* at 625. The court held, "Because Gwin challenges the Board's procedure of allegedly considering race as a factor in its parole decisions, he can properly bring his claim under section 1983 because a declaration of unconstitutionality of such procedures would not automatically lead to his release." *Id.*
125. *Id.* at 621. The court explained:

Integrating the *Wolff* and *Preiser* decisions, we see that the Court exclusively focused on the particular relief that the prisoners' [sic] requested to determine whether their complaints necessarily constituted habeas corpus claims.

... [I]ndividuals seeking damages claims or injunctive relief to prospectively enjoin unconstitutional procedures can use section 1983 and need not exhaust state court remedies. ... [P]risoners seeking both habeas corpus relief and proper section 1983 relief can proceed with their section 1983 claims without exhausting state remedies while simultaneously exhausting state remedies for their habeas corpus claims.

*Id.*
126. *Id.* The Eleventh Circuit, created in 1981, follows the precedent of the Fifth Circuit up to the time of the circuit split. *Id.*
exclusive initial cause of action where the basis of the claim goes to the constitutionality of the state court conviction." The court openly disagreed with the precedent. "To the extent that this court's decisions prohibit prisoners damages claims under section 1983, we believe such decisions extend beyond the permissible boundary for requiring exhaustion of state remedies." Without breaking away from precedent, however, the court found that Gwin had valid section 1983 claims because decisions on the claims would not affect the length of Gwin's sentence. Therefore, although the Eleventh Circuit precedent follows the stay or dismiss idea, the court of appeals supports the Supreme Court remedies test.

V. PROPOSED SOLUTION: A TEST INCORPORATING THE SUPREME COURT'S DAMAGES TEST AND STAYING OF CIVIL RIGHTS ACTION PENDING EXHAUSTION OF STATE REMEDIES

The conflict among the circuit courts results in giving prisoners in different circuits different rights. Fairness demands a consistent

127. Id. (citing Fulford v. Klein, 529 F.2d 377, 381 (5th Cir. 1976)). Fulford was an inmate who sought monetary damages under a claim that the district attorney had withheld exculpatory evidence. Fulford did not attack the validity of his conviction. Nonetheless, the Fifth Circuit Court of Appeals denied his § 1983 claim for failure to exhaust all state remedies. Fulford, 529 F.2d at 377. In addition, a panel of the Eleventh Circuit declared that the "proper rubric for a particular cause of action ought not be determined 'solely on the basis of relief sought, i.e., actions for money damages may go forward while actions for injunctive relief from incarceration may not.'" McKinnis v. Mosely, 693 F.2d 1054, 1057 (11th Cir. 1982) (quoting Fulford, 529 F.2d at 381).

128. Gwin, 870 F.2d at 622. The court in Gwin criticized the precedent: Although our predecessor court recognized that the nature of the required relief factored into the Court's analysis for distinguishing between proper and improper section 1983 actions, it repeatedly declined to interpret Preiser and Wolff as solely relying on the required relief for determining the propriety of a section 1983 action. Id. at 621. The court further stated, "[T]o the extent that this court's decisions do not allow claims under section 1983 for relief which would not reduce a prisoner's confinement, such decisions impermissibly conflict with the Supreme Court's decisions." Id. at 623.

129. Id. at 624. The court distinguished Gwin's claim: Even under this narrower test, however, Gwin can bring two of his claims under section 1983 without exhausting state remedies. First, Gwin's equal protection claim challenging the denial of compassionate leave, if successful, will not lessen the duration of his sentence by one day. Second, both our predecessor court and this court have distinguished between claims challenging a denial of parole and claims attacking the parole decision process. Id. (citation omitted).

130. The dissent in Preiser predicted this problem at the time the decision was made. "[I]t seems clear the scheme's unmanageability is sufficient reason to condemn it. For the unfortunate but inevitable legacy of today's opinion is a perplexing set of uncertainties and anomalies." Preiser, 411 U.S. at 506 (Brennan, Douglas, & Marshall, JJ., dissenting).
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Any unified solution, however, affects not only prisoners' rights, but the federal court system and federal-state comity.

This Comment proposes a test that first looks to whether an inmate's section 1983 action challenges the prisoner's underlying sentence or challenges some other violation of the prisoner's civil rights, such as prison conditions or prison disciplinary procedures. If the section 1983 action challenges the prisoner's underlying sentence, then the civil rights action should be stayed pending exhaustion of all state remedies. If the section 1983 action challenges some other violation of the prisoner's civil rights, then the court should look to the remedy sought by the prisoner. If the prisoner is requesting release from prison, then the claim should be stayed until all state claims are exhausted. If the prisoner is requesting damages or injunctive relief, then the claim should be allowed to go forward without exhaustion of state remedies. This section discusses the effects of the application of the proposed test in the area of prisoners' rights, the federal courts, and federal-state comity.

A. Effect of Conflict on Prisoners' Rights

In many instances a prisoner may seek redress for violation of the same constitutional rights under either habeas corpus or section 1983. Nonetheless, any reconciliation of the procedural conflict

131. The Federal Judicial Center says of the conflict, "[T]his is a matter that will have to be resolved either through a decision of the United States Supreme Court or by a congressional amendment to 28 U.S.C. § 2254." THE FEDERAL JUDICIAL CENTER, supra note 30, at 1 n.8.

132. This test is similar to the approach taken in Young v. Kenny. See supra notes 87-96 and accompanying text. Note, however, that this test would allow some cases to go forward without exhaustion that Young would not allow because this test screens out those making claims against their original convictions and uses the Supreme Court remedy test, rather than simply looking to see if a determination affecting a prisoner's sentence must be made. This preserves § 1983 claims to a greater extent.

133. Wolff v. McDonnell, 418 U.S. 539, 579 (1974). The Supreme Court emphasized the similarities between the two actions: "[W]hile it is true that only in habeas actions may relief be granted which will shorten the term of confinement ... it is more pertinent that both actions serve to protect basic constitutional rights." Id. The Court further stated that it found "no reasonable distinction between the two forms of action." Id. at 580.

The Advisory Committee on Rules of Civil Procedure and the Federal Judicial Center both oppose bringing state condition-of-confinement cases under a writ of habeas corpus. The Advisory Committee stated:

"It is, however, the view of the Advisory Committee that claims of improper conditions of custody or confinement ... can be better handled by other means such as 42 U.S.C. § 1983 ... [T]he Supreme Court treated a habeas corpus
should recognize that neither action should take precedent over the other and should assure that procedure is not exalted over substance. At the very core of the substantive problem is adequate protection of prisoners' civil rights. This section focuses on prisoners' rights in the areas of speedy determination and access to federal courts—two areas of prisoners' civil rights that are greatly affected by the imposition of an exhaustion requirement.

1. Speedy Determination, Res Judicata, and Collateral Estoppel

The Ninth Circuit Court of Appeals in Young v. Kenny reasoned against dismissal of the prisoner's section 1983 claim by noting that the result was too harsh. The court recognized that the exhaustion of state remedies may take years to complete. By the time the prisoner is able to refile a section 1983 action, the statute of limitations may have run. The Ninth Circuit stated, "[I]t would hardly promote the goals of the Civil Rights Act of 1871 to twice deny prisoners a federal forum for section 1983 complaints, once for being too early and again for being too late." One way to avoid this problem would be the use of a res judicata or collateral estoppel test. That is, a prisoner would be able to go forward with a section 1983 claim as long as a judgment on the claim would not estop a state court from making an independent decision on the validity of the prisoner's sentence in any future habeas corpus proceedings. The court in Viens argued against the petition by a state prisoner challenging the conditions of confinement as a claim for relief under 42 U.S.C. § 1983, the Civil Rights Act.”

The Federal Judicial Center, supra note 30, at 1 n.8 (quoting H.R. DOC. NO. 94-464, 94th Cong., 2d Sess. 113 (1976)).

134. Wolff, 418 U.S. at 579. In the course of discussing inmates right of access to the courts, the Supreme Court in Wolff stated: It is futile to contend that the Civil Rights Act of 1871 has less importance in our constitutional scheme than does the Great Writ. The recognition by this Court that prisoners have certain constitutional rights which can be protected by civil rights actions would be diluted if inmates . . . were unable to articulate their complaints to the courts.

Id.

135. See infra note 147 and accompanying text.

136. Young v. Kenny, 907 F.2d 874, 878 (9th Cir. 1990).

137. Id. The Young court expressed concerns about this issue: "Exhaustion of state remedies is a process that may take years to complete; it is not farfetched to contemplate that a prisoner may be unable to exhaust state remedies before the limitations period expires on his section 1983 claim." Id.

138. Id.

139. A collateral estoppel test was used by the Fifth Circuit in Spina. See supra notes 97-105 and accompanying text.

140. Res judicata principles apply fully to civil rights actions and partially to habeas corpus proceedings. Thus, a state prisoner may seek federal habeas corpus relief.
use of a collateral estoppel test because, “under the collateral estoppel standard the state could insulate every imposition of discipline from attack under section 1983 by simply revoking one hour, or one day, of good time as part of every punishment it imposed.”\textsuperscript{141} Hence, the collateral estoppel test could, in essence, defeat all section 1983 claims brought by prisoners.

Another solution is to stay the civil rights action pending exhaustion of state remedies.\textsuperscript{142} While a stay of the section 1983 claim on the claim for which the state has denied relief. 28 U.S.C. § 2254(d)(1988). The statute lists the exceptions to res judicata:

In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit—

(1) that the merits of the factual dispute were not resolved in the State court hearing;

(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately developed at the State court hearing;

(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to the determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record.

And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the state court was erroneous.


\textsuperscript{141} Viens v. Daniels, 871 F.2d 1328, 1333 (7th Cir. 1989).

\textsuperscript{142} The Ninth Circuit recommended this solution in\textit{ Young}. The court explained,
pending exhaustion would avoid statute of limitations problems, staying does not adequately address the need for immediate relief sometimes sought in section 1983 actions. This concern is certainly most pressing when a prisoner is challenging prison conditions, for example, a prisoner trying to get an injunction against unconstitutional prison disciplinary policies. Thus, the proposed test would allow those seeking injunctive relief or damages immediate access to the federal courts and would preserve the claims of those challenging their underlying convictions or seeking release from prison.

2. Access to Federal Courts

The right of prisoners to have access to the courts is compelling and should be preserved. Eighth Circuit Judge Arnold noted, "[T]he policy favoring exhaustion is not the only policy operating in this area. There is also a policy, stated by Congress in § 1983, making available a federal forum for actions complaining of deprivation of federal rights under color of state law." Furthermore, according to the Supreme Court's analysis in Patsy v. Florida Board of Regents, in enacting section 1983 Congress intended to allow a section 1983 plaintiff to choose between state and federal courts. The 1871 Congress also believed that the state authorities were "unable or unwilling to protect the constitutional rights of individuals."

The Supreme Court test focusing on the remedy carefully protects prisoners' access to the courts. However, prisoners challenging their underlying conviction have already had an opportunity to present their cases through the trial and appeals process. A prisoner challenging internal prison procedure has not had the opportunity of this

"[D]istrict courts in some circuits stay, rather than dismiss, section 1983 complaints in this posture. This is a wise policy." Young, 907 F.2d at 878 (citations omitted).

143. Professor Krantz states, "Exhaustion of administrative remedies should not be required when it will mean substantial delays in responding to prisoners' claims, when the constitutionality of a prison regulation is at issue, where the administrator alone cannot appropriately remedy the grievances, or where resort to administrative remedy is futile." Krantz, supra note 18, at 271.

144. The ABA standards state, "Prisoners should have free and meaningful access to the judicial process; governmental authorities should assure such access. Regulations or actions should not unduly delay or adversely affect the outcome of a prisoner's claim for relief or discourage prisoners from seeking judicial consideration for their grievances." ABA STANDARDS FOR CRIMINAL JUSTICE 23-2.1 at II(a) (2d ed. 1980 & Supp. 1986). See also Wilwording v. Swenson, 404 U.S. 249, 251 (1971) ("State prisoners are not held to any stricter standard of exhaustion than other civil rights plaintiffs.").

145. Offet v. Solem, 823 F.2d 1256, 1262 (8th Cir. 1987) (Arnold, J., dissenting). The court in Viens also stated, "We cannot accept such off-hand treatment of the importance to a state prisoner of prompt access to federal court under section 1983 where the prisoner alleges that the conditions of his confinement violate the constitution." 871 F.2d at 1334.


147. Patsy, 457 U.S. at 505, quoted in Viens, 871 F.2d at 1334.
access to the courts. Also, considerations of the limitations of the judicial system sometimes must override the absolute freedom of access to the courts.\textsuperscript{148} The proposed test attempts to protect access to the courts by granting immediate access where it is most needed, while at the same time minimizing the possible detrimental effects on the federal courts and federal-state comity.

\textbf{B. Effect of Conflict on Federal Courts}

According to the Supreme Court's analysis in \textit{Patsy v. Florida Board of Regents}, in enacting section 1983 "Congress assigned the federal courts a paramount role in protecting constitutional rights."\textsuperscript{149} Notwithstanding, some practical concerns face federal courts adjudicating civil rights actions of prisoners. On one hand, overloaded federal dockets are a large factor in the push for narrowing the scope of section 1983 actions by prisoners. Prisoners bring a large number of frivolous suits. The courts argue that requiring exhaustion in a greater number of circumstances will reduce the flood of litigation.\textsuperscript{150}

On the other hand, state courts, just as federal courts, are overworked and a broad interpretation of section 1983 jurisdiction may be more efficient and less burdensome to already crowded state courts. Furthermore, often the issues presented are likely to be resolved in the federal court system eventually. Nonetheless, staying the civil rights action in a majority of the cases would probably increase judicial economy. Not only could the civil rights action be brought at the same time as a possible habeas corpus action, but the

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{148} The \textit{Guerro} court explained: \[\text{Whatever cost to the litigant may be involved, there is an overriding cost that is avoided. Damage to the smooth operation of the administration of criminal justice, injury to the proper workings of a federal system, and undermining of congressional concern with the functioning of the writ of habeas corpus—all are harms which are prevented by the requirement that a civil rights damage action be deferred.}\]
\end{itemize}
\end{footnotesize}
two actions could possibly be consolidated. Additionally, if prisoners continue to file suits, regardless of the merits of their claims, it might increase judicial efficiency to have a clear test that avoids litigation over whether the suit falls within the ambit of habeas corpus or of the Civil Rights Act. Providing a bright-line rule may allow prisoners to be aware of their rights to bring suit in federal court, which in turn will save court time spent litigating the appropriateness of the claims. The proposed test promotes judicial economy because it gives easy-to-follow guidelines that encourage staying civil rights claims and exhaustion of state remedies.

An additional problem the federal courts face is the responsibility of preserving the will of Congress in enacting the habeas corpus statutes. As the court in Spina warns, “Federal courts, therefore, must be wary of defeating the will of Congress by allowing prisoners to bring civil rights suits against either state or federal officials that directly or indirectly circumvent habeas corpus proceedings or reduce them to ‘an exercise in futility.’” By requiring exhaustion when the prisoner challenges an underlying conviction or seeks release from prison, the proposed test preserves the intent behind habeas corpus.

C. Effect of Conflict on Federal-State Comity

Federal-state comity is one of the bases for the exhaustion doctrine and is often given as a reason for narrow interpretations of the actions allowed under section 1983. Many federal courts argue that state courts should have the first opportunity to correct their mistakes. In addition, the state interest in prisoners is greater than their interest in the general population because the state controls every aspect of a prisoner’s life. In the Guerro case, the First Circuit discussed the issue of federal-state comity in depth. The court concluded that:

Where the federal court in dealing with the question of damages caused

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151. Guerro, 498 F.2d at 1254 n.15. In addition, the court asserted that the determination of damages would be simplified and the possibility of attack because of failure to mitigate damages or speculativeness would be reduced. Id.

152. A committee set up by Justice Rehnquist examining death row inmates found a need to a simpler, unified approach: “The lack of coordination between the federal and state legal systems often results in inefficient and unnecessary steps in the course of litigation. Prisoners, for example, often spend significant time moving back and forth between the federal and state systems in the process of exhausting state remedies.” Panel Seeks New Limits on Death Row Appeals, MANHATTAN LAWYER, Oct. 3-9, 1989, at 15.

153. Spina v. Aaron, 821 F.2d 1126, 1128 (5th Cir. 1987) (quoting Fulford v. Klein, 529 F.2d 377, 381 (5th Cir. 1976)).

154. See, e.g., Young, 907 F.2d at 876. “It is well-established that the states have a substantial interest in the administration of their prisons, and in the correction of any problems that may arise therein.” Id.

155. See supra note 47.
by violation of civil rights, would have to making rulings by virtue of which the validity of a conviction in contemporary state proceedings would be called into question, the potential for federal-state friction is obvious. The federal ruling would embarrass, and could even intrude into the state proceedings. Questions concerning the effect to be given the federal ruling in the state courts might be difficult ones, and could lead to delay, or even derailment of the course of the state action.\textsuperscript{166}

The proposed test provides for the preservation of the states’ ability to correct its mistakes, particularly in the area of underlying convictions, which is arguably the most intrusive area for the federal courts to become involved in. The proposed test also goes a step further and protects the state from federal intervention prior to exhaustion of state remedies when the prisoner is not challenging an underlying conviction, but requests release from prison. An example would be the restoration of good time credits removed as punishment without a hearing. The possibility remains that the federal court award of damages or injunction in a parole or good-time credit case could have an effect of a later habeas corpus case, however, this narrow area certainly falls within the intent of the Supreme Court in \textit{Preiser} and \textit{Wolff}.

VI. CONCLUSION

State prisoners have two avenues of redress to challenge violation of their rights. First, they may petition for a writ of habeas corpus when challenging their confinement under 28 U.S.C. § 2254. Second, they may bring a civil rights action when challenging the conditions of their imprisonment under 42 U.S.C. § 1983. In the \textit{Preiser} and \textit{Wolff} decisions, the Supreme Court established a bright-line test to distinguish between the two types of actions. The circuit courts have consistently failed to follow this test, creating conflicts with the Supreme Court as well as among the circuit courts. The conflict needs to be resolved to provide a fair and consistent test to determine when prisoners may bring section 1983 claims without exhausting all of their state remedies. The Supreme Court’s test looking solely at the requested relief protects the prisoner’s constitutional rights, even when a determination may require decision on a collateral issue otherwise in the province of habeas corpus. Yet, in some cases this test promotes judicial inefficiency and could have detrimental side effects on state and federal relations.\textsuperscript{167}

The Supreme Court’s remedy rule is most effective when prisoners

\textsuperscript{166} Guerro, 498 F.2d 1253.
\textsuperscript{167} Justice White recognized the present confusion in Bressman v. Farrier, 111 S.
challenge prison conditions as in the *Preiser* and *Wolff* cases. Challenges to a prisoner's underlying sentence, however, should be guided by the rules of habeas corpus, requiring exhaustion of state remedies to preserve the purposes underlying habeas corpus actions as well as prisoners' civil rights.

LINDA MARIE BELL

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Ct. 1090 (1991)(White, J., dissenting). He stated, "Because of the confusion and divergence of opinion these issues have generated in the Court of Appeals, and the fact that this Court has not ruled definitively upon the issues presented, I would grant certiorari."

*Id.* at 1091 (White, J., dissenting).