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CIVIL RIGHTS ACTIONS BY STATE PRISONERS

Rodriguez v. McGinnis

That a prisoner retains certain basic constitutional rights is now considered a well-settled proposition.⁵⁰ No such clarity, however, is obtained in analyzing the remedies available to enforce such rights. The multiplicity⁵¹ of opinions expressed by the court en banc⁵² in *Rodriguez v. McGinnis*⁵³ is demonstrative of the conflicting viewpoints and policies involved in this question. In reversing two prior judgments,⁵⁴ the Second Circuit, under the authority⁵⁵ of *Wilwording v.*

⁵⁰ As early as 1894, the Supreme Court agreed that prisoners may sue to enforce certain basic rights. *In re Bonner*, 151 U.S. 242 (1894). A prisoner, it has been said, "retains all the rights of an ordinary citizen except those expressly, or by necessary implication, taken from him by law." *Coffin v. Reichard*, 143 F.2d 443, 445 (6th Cir. 1944), *cert. denied*, 325 U.S. 887 (1945). For Second Circuit commentary on this doctrine, see *Sostre v. McGinnis*, 442 F.2d 178 (2d Cir. 1970); *Wright v. McMann*, 387 F.2d 519, 522 (2d Cir. 1967). Chief Judge Foley, in *Rodriguez v. McGinnis*, 307 F. Supp. 627 (N.D.N.Y. 1969), (the initial opinion for the case discussed herein) considered this in some detail. *Id.* at 628. He concluded that the "hands-off" doctrine with respect to the rights of prisoners and internal prison administration retained little if any vitality. "It is settled . . . that the due process and equal protection processes of the fourteenth amendment follow prisoners into prison." *Id.* Rights of personal bodily security, access to the courts, and the first amendment freedoms are those rights most often considered in this context. Note, 42 U.S.C. 1983—*An Emerging Vehicle of Post-Conviction Relief for State Prisoners*, 22 U. FLA. L. REV. 596 (1970).

⁵¹ A total of eight different opinions were written with seven concurring in the result and one dissenting. *Rodriguez v. McGinnis*, 456 F.2d 79 (2d Cir. 1972).

⁵² The court en banc consisted of "the judges who should be in active service on the date of decisions along with members of the respective panels who had since taken senior status . . ." *Id.* at 80. As a result, the case was heard by twelve judges: Chief Judge Friendly and Circuit Judges Lumbard, Waterman, Moore, Smith, Kaufman, Hays, Feinberg, Mansfield, Mulligan, Oakes and Timbers.

⁵³ 456 F.2d 79 (2d Cir. 1972).

⁵⁴ The case was a consolidation of three individual cases all raising the same legal issue. In the first case, the United States District Court for the Northern District of New York directed the release of a state prisoner because of an unconstitutional deprivation of good behavior time. *Rodriguez v. McGinnis*, 307 F. Supp. 627 (N.D.N.Y. 1969). This decision was reversed by the court of appeals. 451 F.2d 730 (2d Cir. 1971). In the second case, the United States District Court for the Northern District granted the same relief by an order dated August 18, 1970. Again the court of appeals reversed, *United States ex rel. Katzoff v. McGinnis*, 441 F.2d 558 (2d Cir. 1971). Finally, the United States District Court for the Northern District, by an order dated June 12, 1970, granted the same relief to a third prisoner, John Kritsky. The court of appeals, by an order dated July 19, 1971, consolidated the three cases for this en banc proceeding. 456 F.2d at 79.

⁵⁵ It is at least uncertain whether, without the authority of *Wilwording* (see note 56 *infra*), the Second Circuit would have so decided *Rodriguez*. The opinions of Judges Friendly, Mulligan and Mansfield expressly stated that *Wilwording* constrained their holding. It can safely be assumed that, absent *Wilwording*, they would have joined the three dissenting judges. Judges Feinberg and Kaufman relied on *Wilwording* but, as Judge Kaufman indicated, did "not construe *Wilwording* as a ground breaking decision." 456 F.2d at 82. This apparently approximates the viewpoint of Judge Timbers, who concurred with Judges Smith, Feinberg and Kaufman. Judges Waterman and Smith who had dissented in the previous cases (451 F.2d 730, 733; 441 F.2d 558, 560) and Judge Oakes, who stated that he agreed with their reasoning, did not actually rely on *Wilwording*.

Swenson,⁵⁶ held that, even though the relief granted under section 1983 of the Civil Rights Act⁵⁷ would result in the prisoners' release, the court would not consider the petition as one of habeas corpus⁵⁸ "with its attendant requirement of exhaustion of state remedies when these are available. . . ."⁵⁹ Accordingly, the court refused to deny relief for failure to comply with exhaustion requirements.

In all three cases⁶⁰ before the court, the lower court declared that the petitioners had been unconstitutionally deprived⁶¹ of good be-

⁵⁶ 404 U.S. 249 (1971). In *Wilwording*, the petitioners challenged the living conditions and disciplinary measures of the maximum security section of the Missouri State Penitentiary. The relief sought was federal habeas corpus. This relief was denied by the district court, 331 F. Supp. 1188, 1194 (W.D. Mo. 1969) and by the Court of Appeals for the Eighth Circuit, 439 F.2d 1331, 1336 (8th Cir. 1971). The *ratio decidendi* for those denials was that, although the petitioners had exhausted state habeas corpus remedies, they had not invoked a number of possible alternative remedies and had thus not satisfied the exhaustion requirements of 28 U.S.C. § 2254 (1971). The Supreme Court held that such alternative remedies need not be resorted to, particularly in view of the fact that there is no evidence that "Missouri courts have [ever] granted a hearing to state prisoners on the conditions of their confinement." 404 U.S. at 250. More importantly, foreshadowing the issue in *Rodriguez*, the Supreme Court reasoned that "although cognizable in federal habeas corpus . . . petitioners' pleading may also be read to plead causes of action under the [federal] Civil Rights Acts . . . for deprivation of constitutional rights by prison officials." *Id.* at 251. The Court went on to hold that the state prisoners could have their actions treated as claims under the federal Civil Rights Acts and, if so treated, they would not be subject to exhaustion requirements. *Id.* at 251.

⁵⁷ 42 U.S.C. § 1983 (1970).

Civil action for deprivation of rights.

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 of law, suit in equity, or other proper proceeding for redress.

See also 28 U.S.C. § 1343(3) (1962). This act was passed by a reconstruction Congress in 1871 to enforce the fourteenth amendment at the expense of state power and independence. Note, § 1983: *A Civil Remedy for the Protection of Federal Rights*, 39 N.Y.U.L. Rev. 839 (1964). The purpose of the statute is extensively considered in *Monroe v. Pape*, 365 U.S. 167 (1961) and *McNeese v. Board of Educ.*, 373 U.S. 668 (1963). It is ". . . severalfold—to override certain kinds of state laws, to provide a remedy where state law was inadequate, 'to provide a federal remedy where the state remedy, though adequate in theory was not available in practice' . . . and to provide a remedy in the federal courts supplementary to any remedy any State might have." *Id.* at 671-72. Interestingly, despite its present attractiveness, § 1983 was invoked no more than 21 times in the first 50 years of its existence. Note, *Federal-State Relations and Section 1983*, 24 S.C.L. Rev. 101 (1972).

⁵⁸ 28 U.S.C. § 2241 (1971).

⁵⁹ 456 F.2d at 81. The exhaustion requirement and the philosophy of federal judicial restraint that it embodies dates back to *Ex parte Royall*, 117 U.S. 241 (1886). The exhaustion of state remedies prior to federal habeas corpus relief is directly mandated by statute—28 U.S.C. § 2254 (1971).

⁶⁰ See note 54 *supra*.

⁶¹ In the case of *Rodriguez*, who was found in possession of contraband photos, the district court found that the cancellation of his 120 days of good behavior time was the result of his failure to reveal the method of smuggling and the identities of those who had assisted him. Upon making this determination, the court found a deprivation of his right to due process since there was no institutional rule punishing refusal to inform, and ap-

havior time.⁶² The petitioners had brought federal civil rights actions based on the alleged unconstitutionality and, in each case, the district court restored the good behavior time at issue.⁶³ Since the restored time was in excess of the balance of their sentences, petitioners were entitled to immediate release.⁶⁴ The court of appeals initially reversed⁶⁵ but subsequently, sitting en banc, affirmed the district court judgments.⁶⁶

Perhaps even more than the variety of opinions,⁶⁷ the fact that three judges could consider *Wilwording* sufficiently in point to concur solely on the basis of that decision⁶⁸ while three others⁶⁹ could dissent in the face of it, offers evidence of the turmoil and conflict that this

propriate procedural safeguards had not been satisfied. 307 F. Supp. at 632. The court of appeals reversed, holding that petitioners had failed to exhaust state remedies, and declined to answer the constitutional question involved. 451 F.2d at 731. In the third case, the petitioner, John Kritsky, complained of an "unconstitutional deprivation of good time because of his participation in an inmate strike . . ." 456 F.2d at 85. Katzoff, the petitioner in the second case, lost good behavior time because of offensive remarks concerning a deputy commissioner and two nurses. Katzoff's remarks were recorded in his diary, kept with the knowledge and consent of prison officials. 441 F.2d at 559. The court of appeals did not reach the constitutional claims, but reversed strictly on a failure to exhaust state remedies. As a result, it seems that the issues before the court en banc are most precisely framed in *Katzoff*.

⁶² Prisoners serving indeterminate sentences can earn good behavior time at the rate of up to ten days per month. Theoretically, a prisoner could be released after serving but two-thirds of his maximum sentence. Earned good behavior time may properly be revoked for disciplinary reasons. N.Y. CORRECTION LAW § 803 (McKinney 1969); N.Y. PENAL LAW §§ 70.30 4(a), 70.40 1(a)(b) (McKinney 1967). See 441 F.2d at 559; 451 F.2d at 731.

⁶³ Restoring good behavior time reduced the petitioners' period of incarceration by the number of days involved. In these cases, because of the short time remaining on each petitioner's sentence, restoration in each case required release. Release from custody is generally the remedy sought in habeas corpus proceedings. See, e.g., *Johnson v. Avery*, 393 U.S. 483 (1969); *Fay v. Noia*, 372 U.S. 391 (1963). However, custody is a broad concept and it has been held that one who is on parole is under sufficient restraint to entitle him to bring habeas corpus. *Jones v. Cunningham*, 371 U.S. 236 (1963). Although habeas corpus does "enable those unlawfully incarcerated to obtain their freedom" (393 U.S. at 485), its basic purpose is "to test the legality of a prisoner's current detention." *Walker v. Wainright*, 390 U.S. 335, 336 (1968). It is, therefore, appropriate even if granting relief would not entitle petitioner to immediate release as in a challenge to the validity of one of several consecutive sentences. See *Peyton v. Rowe*, 391 U.S. 54 (1968); *Walker v. Wainright*, *supra*.

⁶⁴ The district court in *Rodriguez* added that, if release was not granted within a reasonable time, *Rodriguez's* attorney was to submit a writ of habeas corpus to achieve such release. 307 F. Supp. at 632. See note 63 *supra*.

⁶⁵ 451 F.2d at 731; 441 F.2d at 559.

⁶⁶ See note 54 *supra*.

⁶⁷ See note 51 *supra*.

⁶⁸ Chief Judge Friendly, joined by Judges Mulligan and Mansfield, registered his disagreement with the reasoning of *Wilwording* that permits a prisoner to escape the requirements of exhaustion "by styling his [habeas corpus] petition as one under the Civil Rights Act." 456 F.2d at 81. Judge Mansfield wrote a separate opinion and also reasoned that petitioners were actually bringing habeas corpus actions. However, it had been his view before *Wilwording* that, in civil rights actions under these circumstances, petitioners would be held to exhaustion requirements. *Id.* at 83.

⁶⁹ Judge Lumbard, joined by Judges Hayes and Moore.

case raised.⁷⁰ Judge Lumbard's dissent, after distinguishing *Wilwording* on the ground that no state remedies were available there,⁷¹ utilized statistics to establish that, in light of the recent increase of the number of section 1983 actions,⁷² state courts are better equipped to hear such complaints than are the overburdened federal courts.⁷³ This argument is attacked by the concurring opinions of Judge Feinberg⁷⁴ and Judge Oakes⁷⁵ for attempting to judicially resolve questions reserved for the legislative branch.⁷⁶ While Judge Lumbard argued for

⁷⁰ The conflicts here go deeper than a mere question of procedure. The exhaustion requirement has its roots in federal judicial restraint and the very nature of our federal system. See *Ex parte Royall*, 117 U.S. 241 (1886). Cogent arguments can be advanced for both sides on technical as well as broad policy grounds. It has generally been held that § 1983 is not appropriate where a specific federal remedy is available for the right involved. See Note, § 1983: *A Civil Remedy for the Protection of Federal Rights*, 39 N.Y.U.L. Rev. 839, 843 (1964). This general rule has been applied to § 1983 prison actions vis-à-vis habeas corpus. *Peinado v. Adult Authority*, 405 F.2d 1185, (9th Cir. 1969), cert. denied, 395 U.S. 968 (1969); *Johnson v. Walker*, 317 F.2d 418 (5th Cir. 1963). However, as Judge Smith indicates in his dissent in *Katzoff*, both *Peinado* and *Johnson* relate to an attack on the validity of the sentence and could be so distinguished. 441 F.2d at 560. Absent this distinguishing factor, the general rule prior to *Wilwording* would appear to bar the petitioners since habeas corpus would have been a proper specific remedy. *Wilwording* removed that bar but did not resolve the total issue. There are strong policy arguments for utilizing habeas corpus and retaining the exhaustion requirement. Federal courts are loathe to disturb the federal-state balance by intruding into internal state affairs. This reluctance is even greater when the intrusion is into the internal administration of prisons, traditionally a function of the executive branch. Therefore, separation of powers questions are also raised. Note, 42 U.S.C. 1983: *An Emerging Vehicle of Post-Conviction Relief for State Prisoners*, 22 U. Fla. L. Rev. 596 (1970).

⁷¹ Judge Lumbard reasoned that since New York did provide an adequate remedy (NEW YORK CIVIL RIGHTS LAW § 79 (c) (McKinney 1968)), "there was still room to hold that a district court in New York should refrain from hearing such a case until the state court has acted. . . ." 456 F.2d at 85. In his view, *Wilwording* would be inapplicable to the instant case since the Missouri courts did not provide such relief. See 404 U.S. at 250. This same theory was used to distinguish *Houghton v. Shafer*, 392 U.S. 639 (1968) (per curiam), i.e., no evidence was there presented that Pennsylvania provided an adequate remedy.

⁷² 456 F.2d at 86. Judge Mansfield also commented on the increase (170 per cent) in the number of civil rights actions brought by prisoners. *Id.* at 84.

⁷³ Judge Lumbard noted that, since the New York Supreme Court now holds court "within the confines of the prisons," the elimination of the exhaustion requirement "is a clear invitation to state prisoners to frame complaints of alleged mistreatment so that they will, at the least, be afforded some vacation from the tedium of prison life." 456 F.2d at 86. Judge Lumbard reasoned that, in light of the availability of the state courts, it would be an unwarranted security risk and drain on prison resources to require the transportation of complaining prisoners to distant federal courts.

This view finds support in Judge Mansfield's concurring opinion. *Id.* at 84.

⁷⁴ *Id.* at 83.

⁷⁵ *Id.* at 84.

⁷⁶ But this is almost a matter of perspective. Assuming *arguendo* that Judge Lumbard is correct and *Wilwording* is distinguishable, then perhaps the majority is using "judicial legislation" to eliminate the exhaustion requirement of habeas corpus by permitting the § 1983 action. However, it must be noted that the majority does not resort to statistics and the policy balancing that they imply.

a requirement of exhaustion of state remedies as a condition precedent to a cause of action in the federal courts under the Civil Rights Act by a state prisoner seeking equitable relief from allegedly unconstitutional prison conditions or sanctions⁷⁷

Judges Friendly, Mulligan and Mansfield reasoned that petitioners were merely disguising habeas corpus petitions within a section 1983 framework to escape such exhaustion requirements.⁷⁸

However, the majority⁷⁹ of the court en banc considered the exhaustion requirement inapplicable to section 1983 petitions and reasoned that petitioners' actions were properly framed under that statute. As indicated by Judge Kaufman's opinion,⁸⁰ the constitutional claim raised here is unrelated to any prior proceeding or final state adjudication, making habeas corpus inappropriate.⁸¹ Judge J. Joseph

⁷⁷ 456 F.2d at 85. The requirement for exhaustion of administrative state remedies in civil rights actions dies hard, despite the impressive list of Supreme Court precedents holding that such exhaustion is not required. See note 91 *infra*. Judge Lumbard considered most of these Supreme Court precedents and noted that only *Houghton* and *Wilwording* dealt with state prisons and that in *Wilwording* no state remedy was provided. He also noted that it did "not appear from the record what, if any, remedies were available to Houghton . . ." in the state of Pennsylvania. 456 F.2d at 85.

The court in *Eisen v. Eastman*, 421 F.2d 560 (2d Cir. 1969), *cert. denied*, 400 U.S. 841 (1970), in discussing the exhaustion requirements for civil rights actions prior to *Rodriguez*, cited *McNeese*, *Damico*, *Houghton*, and *Smith*, (see note 91 *infra*) and dismissed them as "simply condemning a wooden application of the exhaustion doctrine" in this area "[d]espite the breadth of some of the language" in these Supreme Court opinions. 421 F.2d at 569. Although this does not represent the entire holding in *Eisen*, such a narrow construction of the relevant Supreme Court precedents, even as dicta, is indicative of the judicial attitude toward exhaustion under § 1983.

More recent evidence of the tenacity of the exhaustion requirement in civil rights actions is *Metcalf v. Swank*, 444 F.2d 1353 (7th Cir. 1971), *cert. granted*, 406 U.S. 914 (1972). Here again, the court of appeals distinguished all of the relevant Supreme Court cases and held exhaustion was still required under certain circumstances. The Supreme Court subsequently vacated the judgment and "remanded the case for further consideration in light of *Carter v. Stanton* (405 U.S. 669 (1972))." 406 U.S. at 914. In *Carter*, the Court overturned a district court order dismissing the complaint of claimants who were contesting an Indiana welfare regulation. The district court had dismissed the complaint on the ground of failure to exhaust administrative remedies. The Court concluded that it is established "that exhaustion is not required in circumstances such as those presented here." 405 U.S. at 671.

The reluctance of the federal courts to circumvent the requirements of exhaustion here can be attributed, at least in part, to the same policies that make exhaustion a requisite for habeas corpus relief.

⁷⁸ See note 68 *supra*.

⁷⁹ The term majority is used loosely herein to indicate the six judges who readily concurred under *Wilwording*. It is actually more a plurality than a majority and not even that in view of the five opinions written by the six judges. See notes 51, 52, & 55 *supra*.

⁸⁰ Judge Kaufman's opinion is probably the closest to a majority or plurality opinion as four judges formally concurred with it and Judge Feinberg indicated agreement with the views expressed in it. 456 F.2d at 83.

⁸¹ Judge Kaufman analyzed the interaction of § 1983 and habeas corpus, noted their different purposes, and concluded that "*Wilwording* will not lead to the subversion or circumvention of the habeas corpus exhaustion requirement . . ." *Id.*

Smith, referring to his dissent⁸² in *Katzoff*,⁸³ agreed that neither abstention⁸⁴ nor exhaustion requirements "may bar a prisoner from his choice of a federal forum in a civil rights action."⁸⁵ Judge Smith also questioned attempts to "lighten [the courts'] burden by stifling or delaying . . ."⁸⁶ such constitutional complaints by prisoners. Although such "poorly prepared"⁸⁷ complaints impose an "onerous burden",⁸⁸ all too often they allege true injustice and

[i]t would be far better to provide more assistance in the districts which contain Attica and other large institutions giving rise to these issues than to deny redress within the federal court system for deprivation of civil rights.⁸⁹

As Judge Smith quite properly indicated, there is a pressing need for reform in this area and judicial intervention seems required.⁹⁰ In addition, the line of authority supporting the court's result is impressive.⁹¹ When evaluated in the light of these considerations, the result here is patently correct.⁹²

⁸² Judge Waterman also concurred on the strength of his earlier dissent. See note 55 *supra*.

⁸³ *Katzoff v. McGinnis*, 441 F.2d 558 (2d Cir. 1971). See note 61 *supra* for a summary of the facts in *Katzoff*, one of the prior decisions being reevaluated in the instant case. Judge Smith's dissent in *Katzoff* also noted that *Sostre v. McGinnis*, 442 F.2d 178 (2d Cir. 1971), has held that federal courts can restore good behavior time that is unconstitutionally cancelled. He concluded therefore that "[t]o 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." 441 F.2d at 560.

⁸⁴ Abstention basically allows federal courts, before deciding the constitutional implications of a state statute, to remand to the state courts for an authoritative construction. Thus, exhaustion sends the petitioner back to a state agency or court to resolve whether he was deprived of a federal right while abstention sends the petitioner back to a state court to interpret the meaning of the state statute. Note, § 1983: *A Civil Remedy for the Protection of Federal Rights*, 39 N.Y.U.L. REV. 839, 856 (1964).

⁸⁵ 456 F.2d at 81.

⁸⁶ *Id.* at 81-82.

⁸⁷ *Id.* at 82.

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ See E. Spaeth, Jr., *The Court's Responsibility for Prison Reform*, 16 VILL. L. REV. 1031 (1971). For general commentary on prisoners rights, see *Prisoner Rights and the Correctional Scheme: The Legal Controversy and Problems of Implementation — A Symposium*, 16 VILL. L. REV. 1029 (1971).

⁹¹ The exhaustive opinion in *Monroe v. Pape*, 365 U.S. 167 (1963), coupled with *McNeese v. Bd. of Educ.*, 373 U.S. 668 (1963), defined the basic purpose of § 1983. See note 57 *supra*. The theory enunciated in these cases was followed in *Damico v. California*, 389 U.S. 416 (1967) (per curiam) where the exhaustion of state administrative remedies was held not required. The Court, in *King v. Smith*, 392 U.S. 309 (1968), also considered the exhaustion of state administrative remedies as unnecessary. The doctrine was extended to prisoner situations in *Houghton v. Shafer*, 392 U.S. 639 (1968) (per curiam), holding that a state prisoner in Pennsylvania need not resort to state administrative remedies. The doctrine was again applied to prison situations in *Wilwording*. Since *Wilwording*, the high court has again affirmed the doctrine in *Carter v. Stanton*, 405 U.S. 669 (1972) (per curiam).

⁹² Some doubt is thrown on the validity of the Second Circuit's holding by the fact

The court's decision represents a major step in the area of prisoner's rights beyond the fact that it provides an alternative federal remedy to prisoners in certain special circumstances.⁹³ The import of this case stems more from the fact that it hopefully portends⁹⁴ a greater judicial receptivity to the rapidly increasing use of section 1983 by prisoners⁹⁵ and thus helps guarantee their access to a federal tribunal to protect their constitutional rights.

HABEAS CORPUS — EXHAUSTION OF REMEDIES

United States ex rel. Nelson v. Zelker

A deluge of habeas corpus petitions filed by state prisoners has caused serious concern among members of the federal judiciary. Some argue that the writ which, historically, has been held in high esteem as the primary safeguard against unconstitutional deprivations of liberty,⁹⁶

that, on June 19, 1972, the Supreme Court granted certiorari. *Oswald v. Rodriguez*, 407 U.S. 919 (1972). This is somewhat surprising considering the unanimous opinion in *Wilwording*. Perhaps the Supreme Court, realizing the difficulties encountered by the Second Circuit herein and the tenacity of the exhaustion requirement in this area (*see* note 77 *supra*), will attempt to finally settle the question by affirming the Second Circuit's decision. This is, of course, speculation but the fact remains that the granting of certiorari does muddy the waters somewhat at a time when they were finally clearing. Evidence that the Second Circuit is delaying application of the *Rodriguez* doctrine is found in *Ray v. Fritz*, No. 72-1455, (2d Cir. October 19, 1972), where the court stated:

We would thus remand without further ado were it not for the grant of certiorari by the Supreme Court in *Oswald v. Rodriguez*, 407 U.S. 919 (1972), decided by this court en banc sub nom. *Rodriguez v. Mc Ginnis*, 456 F.2d 79 (1972).

⁹³ The specific holding here provides alternative modes of relief only to those prisoners whose § 1983 actions are so timed that restoration of their good behavior time would result in their release. This group then has the alternative remedies of habeas corpus and § 1983.

⁹⁴ A significant limitation on the availability of § 1983 actions stems from the fact that the section is not applicable where a specific federal remedy is available for the right involved. *See* note 70 *supra*. After *Wilwording* and *Rodriguez*, the continued viability of this restriction must be questioned. The exhaustion requirement for § 1983 also appears to be fading in light of the multitude of Supreme Court precedents holding that exhaustion is not required. *See* note 91 *supra*. Elimination of these restrictions now appears likely and would obviously permit freer use of § 1983 by prisoners. However, the present situation within the Second Circuit remains in a state of flux pending Supreme Court review of *Rodriguez*. *Ray v. Fritz*, No. 72-1455 (2d Cir. October 19, 1972).

⁹⁵ In 1966, 21 state prisoner civil rights suits were commenced within the Second Circuit. By 1971, this number had increased to 535. 456 F.2d at 86.

⁹⁶ The writ of habeas corpus is one of our greatest safeguards of liberty. As R. Sokol says in *A HANDBOOK OF FEDERAL HABEAS CORPUS* (1965), "the function of the Great Writ can be simply expressed. It is to test in a court of law the legality of restraints on a person's liberty." *Id.* at 2. The power to grant a writ of federal habeas corpus is given to the Supreme Court, the courts of appeals and the district courts by 28 U.S.C. § 2241 (1970). Thus, a state prisoner, even after conviction and an unsuccessful appeal through the state court system, may raise issues of law and fact that can culminate in his discharge from custody.

The section of the habeas corpus statute (28 U.S.C. § 2241 *et seq.*) that applies to state prisoners is 28 U.S.C. § 2254 which provides that the writ may be granted "only