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RECENT DEVELOPMENTS IN PRISON LITIGATION: PROCEDURAL ISSUES AND REMEDIES

Bruce Zagaris*

INTRODUCTION

To seek redress for a denial of rights, prisoners may employ a number of legal remedies including: tort suits for damages against corrections officials or against the state or federal government; suits for damages or injunctions against state officials under the Federal Civil Rights Act of 1871 (hereinafter Civil Rights Act or section 1983); mandamus against prison officials; writs of habeas corpus; and class actions for damages or injunctive relief.

A novel remedy, pursued by the inmates of the Attica Correctional Facility, was a class action in which they sought to compel state and federal prosecution of prison authorities who allegedly violated the constitutional rights of prisoners during the Attica riots of 1971. The Court of Appeals for the Second Circuit, without resolving the question of standing, affirmed the district court's refusal to interfere with prosecutorial discretion to bring indictments on the federal or state level. The circuit court's unwillingness to formulate judicial standards for review of prosecutorial discretion may deprive prisoners of the protection of the criminal law.

This article will trace recent important legal developments delineating remedies available to prisoners whose civil rights have been violated. The two principal means of seeking federal judicial review of internal state prison practices have been habeas

4. 477 F.2d at 382-83. But see Comment, Prosecutorial Discretion—A Reevaluation of the Prosecutor's Unbridled Discretion and its Potential for Abuse, 21 DePaul L. Rev. 485, 498 (1972).
corpus petitions and civil rights suits under section 1983. Although in most cases these two statutory remedies are equally available, the United States Supreme Court's recent decision in Preiser v. Rodriguez has placed significant limitations upon prisoners' use of the Civil Rights Act. This article will discuss the implications of the Preiser decision and its impact on the subsequent strategy of prison litigation. In addition, the increasing use of the class action suit, encouraged by the possibility of awards of attorneys' fees under the emerging "private attorney general" doctrine, will be considered.

**TORT SUITS**

Prisoners traditionally have relied on tort suits to recover for injuries caused by the negligence of prison officials. The courts ordinarily have used the tort standard of due care to determine whether prison officials have jeopardized the safety of prisoners, who must rely on their wardens for adequate food, shelter, clothing, medical attention and protection from physical attack. When the duty of care owed to inmates is defined by statute, suits can be brought against prison officials for noncompliance with the statutory directives.

Tort actions for negligence have generally proved ineffective. The suspension by many states of prisoners' civil rights during imprisonment has been interpreted by a number of courts to preclude the right of an inmate to commence a legal action, except to challenge an original conviction. The practical problems of

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stale evidence, imperfect memories, unavailable witnesses, and the suspect credibility of convicts' testimony make the inmates' burden of proof difficult to meet.13

If an inmate with a cause of action against a prison guard is to recover a significant monetary judgment, he must establish the government's liability under the doctrine of respondeat superior, since most guards are judgment proof.14 However, the doctrine of sovereign immunity—the notion that a governmental body may not be sued without its consent—must still be considered. Sovereign immunity can shield governmental bodies from liability.15

In 1963, the United States Supreme Court held, in United States v. Muniz,16 that under the Federal Tort Claims Act prisoners may recover damages from the federal government for personal injuries caused by the negligence of federal prison employees. The Court of Appeals for the District of Columbia extended Muniz, holding that a federal prisoner could sue the United States under the Federal Tort Claims Act for injuries sustained while in the custody of local authorities in a local jail.18 The Muniz decision, however, was limited by the Supreme Court in United States v. Demko. In Demko the federal statute,20 providing prisoners compensation from a federal fund for injuries incurred during prison employment, was deemed the exclusive remedy for such injuries.21 Thus, suits under the Tort Claims Act were barred for prisoners' work-related injuries.

Prisoners bringing tort claims against a governmental entity must grapple with additional obstacles. Intentional torts, such as battery, are excluded from the tort claims which may be brought against governmental bodies under the Tort Claims Act.22 Fur-

\[\text{generally Note, California Entity Immunity from Tort Claims by Prisoners, 19 Hastings L.J. 573, 573-74 (1968).}

12. Convicts are often released or transferred from the plaintiff's prison facility.


14. Id.

15. Approximately one third of the states recently have abrogated sovereign immunity through statute or judicial decision. See Van Alstyne, Governmental Tort Liability: A Decade of Change, 1966 Ill. L.F. 919; Morris, The Disappearing Doctrine of Governmental Immunity from Tort Liability, 26 G.B.J. 435 (1964); Comment, Judicial Abrogation of Governmental and Sovereign Immunity, 78 Dick. L. Rev. 365, 366-70 (1973).


thermore, statutes authorizing these suits often exclude causes of action arising out of official conduct that is prescribed by statute or administrative regulation, or that lies within the discretion of the governmental officials. Often prison officials contend successfully that the acts in question were discretionary, and that to hold them responsible for such acts would unfairly circumscribe their ability to govern, thereby endangering the security of the institution. Despite the numerous obstacles, inmates recently have successfully employed civil damage suits to obtain compensation and deter prison officials from flagrant violation of prisoners' rights.

MANDAMUS

By obtaining a writ of mandamus a prisoner may compel the prison authorities to take specific action to vindicate his civil rights. Mandamus may be used to control ministerial (non-discretionary) acts and to require officials to exercise their discretion. However, the manner in which this discretion is exercised is not subject to review by mandamus. The difficulty in applying mandamus to specific instances and in overcoming other technical requirements has limited the utility of this remedy.

Difficulties are also encountered when mandamus is brought to force wardens to follow standards imposed by statute. These statutes tend to be so general that non-compliance is as hard to

liability: "Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.

23. See, e.g., Federal Tort Claims Act, id. § 2680, which provides:

The provisions of this chapter . . . shall not apply to—

(a) Any claim based upon an act or omission of an employee of the Government exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

24. SINGER, supra note 13 at 440.


27. Id.


29. Id. See, e.g., CAL. PEN. CODE § 2652 (West 1970), which reads in part:

It shall be unlawful to use in the prisons, any cruel or unusual punishment or to inflict any treatment or allow any lack of care whatever which would injure or impair the health of the prisoner.
prove, as compliance is to order. In addition, the exhaustion of administrative remedies must precede any mandamus action.\(^{30}\)

Various federal writs in the nature of mandamus are available to the prisoner in federal prison.\(^{31}\) In 1962, Congress conferred original jurisdiction on all federal district courts over any action in the nature of mandamus to compel an officer, employee or any agency of the United States to perform a duty owed to a petitioner.\(^{32}\) The Supreme Court, however, in *Panama Canal Co. v. Grace Line*,\(^ {33}\) has limited mandamus to those situations which clearly involve no exercise of discretion by a government official. Furthermore, a federal court has no jurisdiction to order mandamus against a state official.\(^ {34}\)

**SUITS UNDER THE CIVIL RIGHTS ACT**

Recently the Federal Civil Rights Act (section 1983)\(^ {35}\) has been the most effective device for redressing prisoners' grievances when state officers are involved. Section 1983 states:

> 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 or laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

In 1961, in *Monroe v. Pape*,\(^ {36}\) the Supreme Court rejuvenated this long dormant statute. The Court of Appeals for the Seventh Circuit dismissed, for failure to state a cause of action, a section 1983 suit against Chicago police officers for the warrantless search of a family residence and detention of the father.\(^ {37}\) The majority Supreme Court opinion held that the purpose of section 1983 was to provide a federal remedy for violations of constitutional rights by officials acting under color of state law.\(^ {38}\) A federal court thus has jurisdiction over any claim alleging violation of due process or equal protection rights.\(^ {39}\)

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34. *In re Wolenski*, 324 F.2d 309 (3rd Cir. 1963) (per curiam).
39. *Id.* at 171.
Since section 1983 is meant "to provide a federal remedy where the state remedy, though adequate in theory, [is] not available in practice," federal courts have concurrent jurisdiction under section 1983 over claims that could also be brought under state law. To avail himself of a federal forum, an inmate must allege deprivation, under color of state law, of a federal statutory right or a constitutional right guaranteed by the fourteenth amendment.

Official action conducted under color of state law has been interpreted by the United States Supreme Court to include the actions of a private person who "is a willful participant in joint activity with the State or its agents." Therefore, trustee prisoners and private persons acting in concert with state correctional officers would come within the purview of the Act.

Federal prisoners, however, have been unable to utilize section 1983, since this section applies only to activities carried out under color of state law. Therefore, it cannot be used to obtain judicial relief against federal officials.

**Damages**

Under the Civil Rights Act an aggrieved petitioner may seek both legal and equitable remedies. Federal courts recently have awarded compensatory damages to prisoners in cases brought under the Act; for example, inmates have been awarded damages for physical and mental injuries suffered while they were kept in solitary confinement. Despite the awards of damages obtained in these cases, sovereign immunity may be a defense to a section 1983 action, if the state law recognizes the immunity, and the factual situation involves ministerial activity.

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40. Id. at 174.
41. Id. at 183.
42. Outzs v. Maryland National Insurance Co., 470 F.2d 790, 792 (9th Cir. 1972).
43. U.S. v. Price, 383 U.S. 787, 794 (1966) (federal prosecution of a Mississippi sheriff, patrolman and several private individuals for conspiring to deprive three civil-rights workers of their civil rights under color of state law).
47. See text accompanying note 15 supra.
Injunctions

Even where damage suits against government entities can be brought, such after-the-fact adjudications do not satisfy the convict who needs to resolve his grievances quickly and in advance of any further violation of his civil rights. The injunction, by which a court orders either affirmative action or the cessation of oppressive practices, is the most effective tool to accomplish the convict's objectives. Despite the effectiveness of this form of relief, injunctions on behalf of prisoners seldom issue from state courts.\(^{49}\)

Injunctive relief is available in federal district courts under section 1983 to prevent future violations of prisoners' constitutional and federal statutory rights, despite state statutory provisions suspending a prisoners' capacity to bring such a civil action. Where unconstitutional prison practices are systematically employed, the courts may, in class actions, require prison officials to develop and propose for approval by the court a new plan of prison operation, or file regular reports with the court regarding progress made in eliminating violations of prisoners' civil rights.\(^{50}\)

Exhaustion of State Remedies

It is now undisputed that exhaustion of state judicial or administrative remedies is not a prerequisite to a suit under the Civil Rights Act.\(^{51}\) For many years prisoners have been successful in bypassing state remedies because the remedies have been unavailable either in theory or in practice.\(^{52}\) Confusion has arisen, however, over whether litigants bringing suits under the Civil Rights Act are excused from exhausting state remedies in every case, or only in those cases where application for relief through state processes clearly would be futile.\(^{53}\)

The recent case of *McCray v. Burrell*,\(^{54}\) a federal district court decision requiring inmates to pursue state administrative remedies before bringing a federal civil rights suit, has the poten-

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49. See SINGER, supra note 13 at 450, in which the authors note that they were able to find no reported decisions in which a state court had issued an injunction on behalf of prisoners against prison officials.


52. See Houghton v. Shafer, 392 U.S. 639, 640 (1968) (per curiam) (§ 1983 suit was available since the remedies afforded by the state, requiring inmates to take their problems to the "Classification and Treatment Clinic," the superintendent of the institutions, the Deputy Commissioner of the Corrections, the Commissioner of Corrections and, as a final appeal, the state attorney general, were determined to be futile).


tial to cut drastically the number of cases challenging prison conditions handled initially by the federal courts. In *McCray*, the court announced that the State of Maryland had established a truly workable system for administrative processing of prisoner grievances that would result in prompt and meaningful relief. The court expressed concern over the staggering increase in federal court caseloads due to prisoners' rights complaints. For instance, the plaintiff himself had filed 36 suits with the court. To determine the adequacy of an available state administrative remedy, a threefold test was set forth. First, the state remedy must be scrutinized on its face to determine whether it contains forbidden indicia of pre-judgment, rendering it violative of due process. Second, the remedy must be adequate in practice, that is, it must be administered in an even-handed manner. Third, the extent of the state's interest in the subject matter of federal litigation must be considered in order to minimize federal-state friction.

The Maryland statute scrutinized in *McCray* set up an Inmate Grievance Commission to receive complaints from state prisoners, hold hearings where complaints were found meritorious, and order changes. If changes were ordered, the order would be sent to the Secretary of Public Safety and Correctional Services, who could affirm, reverse or modify it. The complaining inmate could seek review of a final adverse ruling in a state court. The statute provided that "[n]o court shall be required to entertain an inmate's grievance or complaint within the jurisdiction of the Inmate Grievance Commission unless and until the complainant has exhausted the remedies as provided in this section." The *McCray* court found that despite the Commission's lack of authority to award monetary damages, the state administrative

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55. Id. at 1200.
56. Id. at 1193.
57. Id. at 1201.
59. Id. § 204F(e).
60. Id. § 204F(e), (f).
61. Id. § 204F(l).
procedure must still be exhausted, as “there is no sense of imme-
diacy attendant upon the awarding of money damages to redress
particular deprivations of constitutional rights."

The import of the McCray decision, coming at a time when
many state and federal officials wish to curtail prisoner suits under
the Civil Rights Act, is to sanction the State’s establishment of its
own machinery to process inmate grievances. Exhaustion of pre-
sumptively prompt and fair administrative procedures would then
become, as in McCray, a necessary condition to a section 1983
suit by a prisoner.

Two portions of the McCray decision are particularly disturb-
ing. The first concerns one of the tests used by the court to deter-
mine whether a state administrative remedy is “adequate”—the
extent of a state’s interest in the subject matter of litigation. Al-
though the test serves as one criterion to determine whether a fed-
eral court should exercise jurisdiction, it has not been, nor should
it be, determinative of jurisdiction in the usual suit challenging
prison conditions. Indeed, it is the very interest of the state or
state official in depriving a citizen of his rights that provides the
rationale for federal intervention. For example, it must be sup-
posed that the state’s interest in “efficient” prison administration
will frequently collide with the prisoners’ due process rights. The
misuse of the state interest standard would be serious indeed; fed-
eral courts should not curtail the availability of section 1983 suits
by placing their imprimatur on inadequate state procedures in the
name of so-called “state interest.”

The other objectionable portion of the McCray decision is the
holding that an inmate seeking monetary damages must first ex-
haust state remedies which do not provide for monetary relief.
Such a prerequisite makes it unlikely that a Maryland inmate can
obtain prompt financial redress under the Civil Rights Act for an
injury suffered at the hands of a prison official. Under the McCray
decision, the potential dilution of an inmate’s federal
remedies becomes apparent.

Declaratory Judgments

A declaratory judgment, often requested simultaneously with
a prayer for injunctive relief, defines the rights and obligations of
the parties to a case. The federal court will issue a declaratory
judgment under the Declaratory Judgment Act only if there is
an actual, immediate dispute between the prisoner and his named

63. 367 F. Supp. at 1209.
64. See text accompanying note 57 supra.
defendant or defendants. There must be, in short, a definite threat of interference with defined rights of the prisoner. Once such a declaratory judgment is rendered declaring a prison condition unconstitutional, prison officials decide what particular action is required to alleviate the situation. The court may also retain jurisdiction where additional relief may be necessary in the future.

Abstention

The doctrine of abstention—by which a federal court may, in its discretion, stay or dismiss its proceedings until an issue of state law is authoritively determined by a state court—should not be applied by itself to deprive the federal courts of jurisdiction in prisoner rights actions. Cases decided by the United States Supreme Court and lower federal courts have held that both state equitable and legal remedies need not be exhausted before federal relief is sought. Indeed, in prison cases where federal constitutional issues, rather than unresolved questions of state law, necessarily govern any decision, abstention is particularly inappropriate.

Habeas Corpus

Traditionally, habeas corpus has been the principal means by which prisoners have attacked the legal basis for their incarceration. This writ, carried over from the English common law, was first used by state courts. The writ is provided for in the Constitution, and, in 1867, Congress authorized the use of habeas corpus by federal courts. The applicability of the writ of habeas corpus has gradually expanded. For many years habeas corpus could be employed by a prisoner only to challenge the legality of his original conviction;
but in 1944 Coffin v. Reichard\textsuperscript{74} a federal court of appeals authorized habeas corpus to remedy unconstitutional conditions of confinement. Since Coffin, courts have made the writ available to any prisoner who raises a proper legal challenge to his prison confinement or treatment.\textsuperscript{76} Thus, in Johnson v. Avery,\textsuperscript{76} the United States Supreme Court approved a prisoner's use of habeas corpus to challenge his solitary confinement, which was imposed for the violation of a prison regulation. It was not necessary for the inmate to seek total release from the prison. Subsequently, federal and state courts have used habeas corpus to remedy any gross mistreatment of prisoners.\textsuperscript{77}

Even though courts have expanded the scope of habeas corpus, the practical application of the remedy in federal courts is difficult and time consuming.\textsuperscript{78} The writ can be used only after alternative remedies have been exhausted.\textsuperscript{79} Hence, a state prisoner may not bring a federal habeas corpus action until:

the applicant has exhausted the remedies available in the courts of the State, or [until] there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.\textsuperscript{80}

The federal courts have found this requirement of exhausting state remedies applicable to suits challenging conditions within a prison.\textsuperscript{81}
Inmates with grievances regarding conditions of confinement may sometimes circumvent this exhaustion requirement. If state law does not provide for any redress for violation of a right guaranteed by federal law, the state judicial system may be bypassed. Furthermore, if state remedies are illusory because of the virtually insuperable procedural difficulties involved, direct resort to the federal system is permissible. At present, few departments of correction have procedures for resolving prisoners' grievances. If effective administrative complaint procedures similar to the Maryland statute scrutinized in McCray v. Burrell are developed in the future, prisoners will be required to use these administrative channels before taking their grievances to court.  

**Preiser v. Rodriguez**

*The Preiser Decision*

To avoid the complications and delays inherent in exhausting administrative remedies prior to seeking a writ of habeas corpus, and to gain the advantages of liberal discovery proceedings, expansive class action rules and the broad equitable powers of federal courts under the Civil Rights Act, prisoners' attorneys have brought an ever increasing number of prisoners' rights suits under section 1983. Although *Preiser v. Rodriguez* represents a watershed in the judicial attempt to define the relationship between the federal habeas corpus statute and section 1983, the Supreme Court's majority opinion failed to clear the already muddied waters surrounding this issue.
Preiser involved consolidated appeals of three New York State prisoners who originally had filed complaints in federal court under Section 1983. Their complaints challenged the administrative procedures leading to their placement in solitary confinement and deprivation of previously earned "good conduct" reductions from their indeterminate sentences. While each prisoner's complaint under the Civil Rights Act was combined with a petition for habeas corpus, the district court in each case had treated the habeas petitions as only "incidental" to insuring full relief if the prisoners triumphed on their civil rights claim. The district court held that in each instance the prison's procedures were an unconstitutional violation of the prisoners' due process rights, and ordered the restoration of good conduct time which had been lost by the plaintiffs. As a result of this restoration, most of the prisoners became eligible for immediate parole.

The state appealed to the United States Court of Appeals for the Second Circuit, contending that the object of the plaintiffs' suit had been release, not redress for administrative abuse, and that therefore they should properly have petitioned for writs of habeas corpus. Under section 2254(b) of the federal habeas corpus statute, prisoners first must exhaust available state remedies before filing writs in federal court; the plaintiffs had failed to do this. The state argued that the district court lacked jurisdiction under the Civil Rights Act since the federal habeas corpus statute preempted a section 1983 action. Furthermore, no jurisdiction would lie under habeas corpus because state remedies had not been exhausted as required. The circuit court accepted the state's argument and reversed the holding of the district court. Later, after two other prisoners appealed, the Second Circuit ordered that the case be reheard en banc, and affirmed the district court decision. A majority of the court of appeals believed that the Supreme Court's decision in Wilwording v. Swenson authorized prisoners to elect whether to bring their claims in habeas corpus or under section 1983. In Wilwording the Supreme Court, in essence, held that prisoner complaints about conditions and arbitrary procedures could be brought under section 1983 of the Civil Rights Act.

89. Id. at 628.
90. Id. at 632.
91. Id.
94. 451 F.2d at 731.
96. 404 U.S. 249 (1971) (per curiam).
The Supreme Court's majority opinion in *Preiser*, authored by Justice Stewart, reversed the appellate court and held that under the circumstances of the consolidated cases, habeas corpus was the sole remedy available to the prisoners; their failure to exhaust state remedies precluded jurisdiction by the federal district court. The Court characterized the issue as whether, under the *Wilwording* rationale, a state prisoner may bring a civil rights suit under section 1983 to challenge an allegedly unconstitutional deprivation of good conduct credits where restoration of those credits would result either in his immediate release from prison or in shortening his period of confinement. The court answered this question in the negative, ruling broadly that it was the intent of Congress that habeas corpus be the sole remedy for prisoners seeking either release or shortening of their term of confinement.

Suits for immediate or accelerated release were characterized as being within the "core" of habeas corpus, necessitating fulfillment of the specific requirements of a federal habeas corpus statute, including exhaustion of state remedies. The limits of the Court's concept of the "core" or "essence" of habeas corpus are still not clear. Moreover, it should be noted that even after *Preiser*, suits seeking only damages for illegal actions by state officials must be brought under section 1983 and may not be brought as habeas corpus actions. Consequently, suits challenging the conditions of confinement rather than the fact or length of custody can be brought under section 1983, although the Court left open the possibility that habeas corpus might provide a supplemental remedy.

The *Preiser* decision represents at least a partial setback for the prison reform movement. Federal judges with a predisposition against prison suits will use *Preiser* to channel most prison litigation within the ambit of the habeas corpus statute with its burdensome exhaustion requirement, at least where reduction of terms or outright release could arguably result. Certain Civil Rights Act suits seem clearly barred by *Preiser*: suits challenging disciplinary procedures resulting in loss of good time, since a successful challenge would result in earlier release for a prisoner;

100. *Id.* at 482.
101. *Id.* at 488-90.
102. *Id.* at 484.
103. *Id.* at 494. The Court specifically reaffirmed four state prisoner cases in which section 1983 jurisdiction was upheld, on the "understanding" that "a section 1983 action is a proper remedy for a state prisoner who is making a constitutional challenge to the conditions of the prison life, but not to the fact or length of custody." *Id.* at 499.
104. *Id.*
challenges to parole revocation, since a favorable decision would reinstate parole; and suits seeking release for pretrial detainees. Hopefully, *Preiser* will be limited to those specific situations where the challenge is the fact or duration of confinement and the relief requested is an immediate release from imprisonment.

The well-reasoned dissenting opinion in *Preiser*,\(^\text{106}\) authored by Justice Brennan, observed that the majority had misapplied the facts of that case to the newly announced standard—restricting prisoners to the remedy of habeas corpus when shortening of the confinement period or "release" was sought. As one commentator has noted,\(^\text{106}\) all three prisoners in *Preiser* challenged not the actual deprivation of credits, but rather the summary, *ex parte* manner in which these credits were revoked. Release in this case was no more than a fortuitous or incidental consequence of the procedural challenge.\(^\text{107}\) In addition, total release was not involved since the inmates would still be on parole. In other words, the plaintiffs were not escaping their sentences: "[t]he form of their custody was simply altered."\(^\text{108}\)

The potential release of prisoners made possible by section 1983 suits may persuade some judges to refuse to hear such suits on the ground of preemption by the federal habeas corpus remedy.\(^\text{109}\) But the facts of *Preiser* must be recalled; the remote and collateral nature of the release in that case certainly should not be used to rationalize the conclusion that any suit, based upon unlawful prison conditions, which potentially could result in release, must be brought solely under a writ of habeas corpus.

Cogent arguments can be made to limit *Preiser*. Only when a prisoner seeks direct and outright release from unlawful custody, and not when he seeks improved treatment, should he be required to pursue habeas corpus. The most effective support for this proposition lies in the four state prisoner cases discussed in the majority opinion in *Preiser*,\(^\text{110}\) in which section 1983 jurisdiction was specifically reaffirmed. Additional support for this proposition can be found in a recent federal district court decision, *Gomez v. Miller*\(^\text{111}\).

The four state prisoner cases approved in *Preiser*—cases which did not require the federal habeas corpus remedy—follow

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105. *Id.* at 500 (Brennan, J., dissenting).
107. *Id.* at 525.
108. *Id.*
109. *Id.*
110. 411 U.S. at 498.
a discernible pattern. In Cooper v. Pate, a prisoner was held to have stated a cause of action under section 1983 where he alleged that he had been denied permission to purchase specific religious publications and denied other privileges enjoyed by his fellow inmates. In Houghton v. Shafer a complaint was held to state a cause of action under section 1983 where a prisoner alleged that legal materials which he was using to pursue an appeal were confiscated by prison authorities. Wilwording v. Swenson involved a challenge by prisoners to the living conditions and disciplinary measures imposed upon them while in the maximum security section of the prison. The Supreme Court found that the complaint stated a claim under both section 1983 and the federal habeas corpus statute. In Haines v. Kerner, section 1983 jurisdiction was upheld in a claim for damages arising out of an allegedly unconstitutional solitary confinement. The Preiser Court distinguished each of these recent Supreme Court decisions by characterizing them as involving prisoners’ claims relating solely to the states’ alleged unconstitutional treatment of inmates while in confinement.

In Gomez v. Miller plaintiffs challenged the New York commitment procedures for the mentally ill in a section 1983 suit before a three-judge federal district court. Plaintiffs, persons indicted for various felonies but untried, challenged their confinement in a hospital for the "criminally insane" run by the Department of Corrections, since their commitment was based only upon a finding of incompetence to stand trial. They contended that the equal protection and due process clauses of the fourteenth amendment required the state to prove in a jury trial that they were "dangerous" before they could be committed to a "prison" hospital, which was inferior to civilian hospitals. The state statutes in question provided for a jury trial on the question of dangerousness in all cases except those of indicted felons found incompetent to stand trial. The plaintiffs, however, did not challenge the state's right to commit them to a civilian hospital merely on a finding of incompetence.

The district court rejected the state’s contention that the habeas corpus statute was controlling. The court noted that grant-
ing the relief sought would result at best in a transfer to a civilian hospital and not an outright release.\textsuperscript{121} The Supreme Court affirmed without opinion,\textsuperscript{122} subsequent to its decision in Preiser.

The Gomez decision supports the use of section 1983 jurisdiction in cases in which the relief sought will not result in an immediate or accelerated release. For example, Gomez arguably supports section 1983 jurisdiction in the following types of cases: (1) those in which prisoners object to their unlawful transfer between prison facilities; (2) those in which prisoners claim that they have been sentenced to the wrong institution (for example, juveniles contesting incarceration in adult facilities; objections to special facilities for drug offenders or mentally ill persons); and (3) possibly those cases in which prisoners allege deprivation of due process in parole-release hearings.

\textit{Applications of Preiser to Parole Hearings}

In regard to violations of due process in parole-release hearings, a ruling that a prisoner has been denied due process in parole proceedings will not result in automatic release in all cases. Instead, a prisoner cannot be released unless there is an additional finding by the parole board that the prisoner actually meets the specific requirements necessary for parole. In contrast, a successful due process challenge to a parole revocation hearing requires an immediate release of the petitioner and reinstatement of parole.\textsuperscript{123} Since parole revocation challenges dispute the legality of incarceration, they fall within the "core" of habeas corpus under the Preiser ruling; therefore, a section 1983 action will not lie.

\textit{Res Judicata}

A novel issue presented by Preiser is whether res judicata will apply in prison suits brought partly under a writ of habeas corpus, and partly under a section 1983 action. For example, if the state court in considering the habeas corpus petition reaches a factual determination adverse to the petitioners, which includes the same matter litigated in part under section 1983, an issue will arise as to whether the state habeas corpus determination is res judicata in a pending section 1983 action. This question has not yet been decided. In Preiser, the Court merely noted that a number of lower courts have held principles of res judicata applicable to section 1983 actions.\textsuperscript{124} The Court refrained, how-

\begin{itemize}
\item \textsuperscript{121} Id. at 328.
\item \textsuperscript{122} Miller v. Gomez, 412 U.S. 914 (1973).
\item \textsuperscript{123} See Morrisey v. Brewer, 404 U.S. 471 (1972).
\item \textsuperscript{124} 411 U.S. at 497.
\end{itemize}
ever, from specifically approving these holdings.\textsuperscript{125}

Although a majority of the courts of appeals decisions which have considered the issue have held res judicata applicable to section 1983,\textsuperscript{126} none of these decisions has addressed the specific issue which arises from Preiser: whether relitigation under section 1983 is precluded by an adverse state finding of facts determined in a state habeas corpus proceeding, which plaintiffs were forced to file as a condition precedent to federal habeas corpus relief. Several reasons militate against applying res judicata principles to this situation. First, res judicata is based partly on the rationale that where litigants voluntarily choose to adjudicate a case in a certain forum, they should be bound by that choice.\textsuperscript{127} This rationale does not apply where a suit, such as a state habeas corpus proceeding, is a statutory prerequisite to the plaintiff's pursuit of further relief. Second, in \textit{England v. Louisiana State Board of Medical Examiners},\textsuperscript{128} where res judicata issues arose from a federal court's invocation of the abstention doctrine so as to allow state courts to rule on issues of state law, the Court distinguished between voluntary and involuntary submission of federal claims to state courts.\textsuperscript{129} In so doing, the Court upheld the litigant's right to preserve federal claims for a federal forum.\textsuperscript{130} Finally, when claims are filed simultaneously in federal and state courts, to bar litigation under section 1983 because the state court reached a decision first would severely restrict the usefulness of that section. This result would be anomalous, since section 1983 was enacted in part to insure the effective protection of individual federal rights in a federal court.\textsuperscript{131}

\textbf{Federal Cases}

Since the \textit{Preiser} decision, a handful of federal court cases have dealt with challenges to "conditions" of confinement and efforts to obtain prisoner "release." While some decision have followed \textit{Preiser} without question, four recent decisions\textsuperscript{132} are indica-

\textsuperscript{125} Id. at 497, 509 n.14.
\textsuperscript{126} See, e.g., Chism v. Price, 457 F.2d 1037 (9th Cir. 1972).
\textsuperscript{127} See Johnson v. Dept. of Water and Power of City of Los Angeles, 450 F.2d 294, 295 (9th Cir. 1971), \textit{cert. denied}, 405 U.S. 1072 (1972) (appellant chose to pursue his remedies through the state administrative and judicial systems); C.J. Enterprises, Inc. v. Cataldo, 457 F.2d 1012, 1015 (1st Cir. 1972) (appellants elected to litigate the constitutional validity of the ordinance in state court).
\textsuperscript{128} 375 U.S. 411 (1964).
\textsuperscript{129} Id. at 418.
\textsuperscript{130} Id. at 421-2.
\textsuperscript{132} Hartmann v. Scott, 488 F.2d 1215 (8th Cir. 1973); Wingard v. North Carolina, 366 F. Supp. 982 (W.D.N.C. 1973); Mercado v. Rockefeller, 363 F.
Two of these cases involved challenges by inmates to transfers between prisons. In *Hartmann v. Scott*, the Eighth Circuit Court of Appeals overturned the district court's dismissal of a prisoner's class action, which sought to declare invalid and enjoin the enforcement of a Minnesota statute adopting the Interstate Compact on Mental Health. The plaintiff-inmate in this case was found to be mentally ill and dangerous, and was civilly committed in Minnesota in 1951. In 1970, after being transferred to an institution in Arizona, he escaped. In 1971, he was arrested in Colorado for a misdemeanor and was then transported against his will and without a hearing to Minnesota, where he was reincarcerated in the Minnesota Security Hospital. In dismissing the inmate's section 1983 suit, the federal district court, in an unpublished decision anticipating *Preiser*, found that the relief requested was totally integrated with the claim that plaintiff's detention was illegal and that such claim, by its very nature, raised the same questions that must be determined in a habeas corpus action.

The court of appeals, however, disagreed with the lower court's view that the inmate's request for declaratory and injunctive relief, based on the unconstitutionality of the Minnesota statutes and regulations, could not be separated from his request for a discharge. The *Hartmann* court, in a post-*Preiser* decision, held that since neither the declaratory nor the injunctive relief sought by Hartmann would result in release from confinement, he was free to challenge the statutes in a section 1983 action without first having exhausted his state remedies.

In *Sherman v. Lowe*, an inmate of a state prison brought a civil rights action seeking both an order returning him to the city jail pending appeal from his conviction, and monetary damages for injuries allegedly suffered as a result of his transfer from jail to prison. The essence of the inmate's complaint was: (1) that his transfer from jail to state prison was contrary to the sentencing decree of the court and therefore deprived him of due process; (2) that his transfer was contrary to state law and therefore denied him equal protection of the law; and (3) that his transfer interfered with the medical and hospital treatment he had received in the state mental hospital.

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133. 488 F.2d 1215 (8th Cir. 1973).
134. Inmate Hartman brought the suit on behalf of himself and all prisoners confined in the Minnesota state mental hospital.
136. 488 F.2d at 1222-3.
been receiving, thereby causing him injuries and inflicting on him cruel and unusual punishment. The district court dismissed the suit, holding that the inmate's claims should have been raised in a petition for habeas corpus. The court's ruling was based in part on unresolved questions of state law and the resulting propriety of federal court abstention.

In Wingard v. North Carolina, a section 1983 suit was brought in which an inmate alleged that his two consecutive ten year sentences had been improperly treated by state prison officials as the equivalent of one continuous sentence of twenty years duration. He therefore claimed that he was being unlawfully denied participation in rehabilitation and other prison programs which inmates serving sentences of ten years or less may enjoy. Such treatment, the inmate claimed, constituted cruel and unusual punishment and denial of due process. He sought by way of relief an injunction and damages. The state contended that the relief requested would result in the truncation of the inmate's sentence, thereby necessitating treatment of the suit as a petition for federal habeas corpus, which must be dismissed for failure to exhaust state remedies. The district court ruled in favor of the inmate. The court stated that the relief, if granted, would make the inmate eligible for parole, but would not constitute an actual grant of parole. The court distinguished Preiser by noting that although the practical and desired result of the inmate's petition was an earlier release from prison, such release was not its sole aim. The petition, therefore, did not fall within the parameters of habeas corpus as outlined by the Supreme Court. The Wingard court read Preiser as restricting a prisoner to a habeas corpus proceeding when the only relief sought is immediate or more speedy release from imprisonment. Inmate Wingard, in contrast, sought the benefits of work release and participation in rehabilitation programs as well as an accelerated release.

In Mercado v. Rockefeller, a Civil Rights Act and federal habeas corpus class action was brought by parolees from a state training school seeking a determination that the New York statute providing that a "person in need of supervision" means a juvenile

138. Id. at 1387.
139. Id.
140. Id. at 1387.
142. Id. at 983.
143. Id.
144. The mixture of objectives of the inmate's suit was depicted in the court's analysis: "Furthermore, although plaintiff is obviously interested in seeing daylight as soon as possible, he is also asking for some other relief which is not confined nor addressed to speedy relief from prison. . . ." Id.
“who is incorrigible, ungovernable or habitually disobedient and beyond the control of parent or other lawful authority” was unconstitutional. Since the Preiser decision had intervened between the commencement of the action and its resolution, the plaintiffs were forced to concede that their section 1983 cause of action was preempted by the habeas corpus remedy. Treating the suit as essentially a petition for federal habeas corpus, the district court dismissed the complaint for failure to exhaust state remedies.

All four of the federal cases discussed involved not only challenges against prison conditions and/or procedures, but also attempts to obtain immediate release or to reduce the period of confinement. In viewing the four decisions in light of Preiser, conceptual inconsistencies emerge, which perhaps ultimately can be explained only in terms of public policy considerations. For example, in Sherman, had the court heard the inmate's suit, other prisoners might have been able to bring successful suits to gain residence in a local jail which was already overcrowded and unmanageable. Similarly, in Mercado, if the plaintiffs had prevailed, the result would have been the immediate release of thousands of juveniles in New York. On the other hand, in the two cases won by the inmates, the courts appeared to have been swayed by concern for humane treatment. In Wingard, the multiple rehabilitative opportunities for the plaintiff-inmate became the crucial issue. In Hartmann, the plaintiff previously had been declared mentally ill; he already had exhausted attempts to gain release and had proved himself capable of existing in the outside world following his escape. The conceptual problems already raised by these four decisions bear out predictions made by Justice Brennan in the Preiser dissent. The distinction between suits in which prisoners seek immediate release—the so-called “core” of a habeas corpus action—and suits challenging the oppressive conditions of incarceration, creates an unmanageable and impractical legal standard with which to judge the propriety of a particular form of prison litigation. Indeed, in Preiser and in the four federal cases, the courts could have stressed either release or conditions of imprisonment as the major issue.

Post-Preiser Strategy

Prisoners' lawyers can take two approaches to avoid the ad-
verse impact of Preiser. The first avenue is to seek some appropriate form of relief other than release whenever possible. For example, an attack on disciplinary procedures can include a request for a declaratory judgment and injunctive relief (both restraining the enforcement of present procedural rules and commanding the adoption of new ones). This circumspect approach should avoid the application of the Preiser rationale. The second approach is to append, as a matter of course, damage claims in section 1983 complaints. Courts sympathetic to hearing prison reform cases could justify retention of the entire case on theories of pendent jurisdiction. Other less receptive courts could exercise jurisdiction over the damage claim and send the remainder of the suit to state court, resulting in potential state-federal friction, as well as inefficiency and duplication. In any event, it appears that Preiser has not clarified, but rather confused, procedure in prison reform cases.

Class Actions

Class actions have proved to be an especially advantageous litigation tool for prisoner plaintiffs. Plaintiffs and defendants, however, must be chosen with care in prison litigation to insure that procedural and substantive advantages are utilized to the fullest. Moreover, the increasing tendency of the courts to award attorneys' fees to the "private attorney general" provides an additional incentive for the filing of class actions. The Preiser case should not serve to deter such suits.

Class actions often provide the most practical means for prisoners to attack widespread unconstitutional prison practices. Albeit expensive and cumbersome, the benefits of class actions are numerous. With a class of plaintiffs, a whole suit cannot be rendered moot by the release of an inmate. Further, the involvement of numerous plaintiffs permits extensive discovery, with the result that more evidence will be admissible at trial. The relief available to a class also tends to be broader in scope than the personal redress permitted an individual. In addition,

154. See, e.g., Holt v. Sarver, 309 F. Supp. 362 (E.D. Ark. 1970) (prisoners' individual claims did not present basis for individual relief, but since conditions at the prison as a whole constituted cruel and unusual punishment, prison officials ordered to present plans for correction of all unconstitutional conditions).
155. Hirschkop, supra, at 45.
156. Id.
157. See text accompanying notes 166-67 infra.
158. Hirschkop, supra, at 45.
decrees in class actions may apply retroactively to persons within the class when the complaint was filed.\textsuperscript{160} Finally, Rule 23 of the Federal Rules of Civil Procedure is technically beneficial to class action plaintiffs in that it ensures a more efficient and effective redress of prisoner grievances than is possible in an individual suit.\textsuperscript{161}

In selecting the best plaintiffs to represent the class, prisoner's attorney must consider the following factors. First, since considerations of security are used by prison officials to justify prison conditions, inmates with good disciplinary records should be chosen to lead the class.\textsuperscript{162} Second, since many jurors will not believe a convict's testimony, the most credible prisoners should be used as witnesses.\textsuperscript{163}

Normally it is wise to select carefully a large number of defendants as the class to be sued because of the attendant procedural benefits.\textsuperscript{164} For instance, a large defendant class often facilitates choice of venue, thereby enabling the attorney to proceed in a favorable forum.\textsuperscript{165} Naming many defendants also facilitates the discovery process. When a prison official is named as a defendant he can be compelled to produce documents, submit to depositions without subpoena,\textsuperscript{166} and answer interrogatories.\textsuperscript{167} Ordinarily, witnesses are not amenable to such direct and inexpensive discovery devices.

Care must be taken to select defendants that are actually representative of their class.\textsuperscript{168} The defendants also should be named with a view towards facilitating the widest possible discovery. When damages are sought, it is important that at least some defendants are solvent and not protected by existing immuni-

\textsuperscript{160} See Long v. Robinson, 436 F.2d 1116 (4th Cir. 1971).
\textsuperscript{161} Hirschkop lists the following aspects of a 23(a) action which render it advantageous in prison litigation:

Because of the nature of prisons, the class will be easily definable and so numerous as to render joinder of all parties impracticable. \textit{Fed. R. Civ. P. 23(a).} A class action will promulgate a more effective and uniform relief, since all members of the class, hopefully all prisoners, will benefit from a positive decision. \textit{See Fed. R. Civ. P. 23(c)(3).} There can be no dismissal or compromise without the approval of the court. \textit{Fed. R. Civ. P. 23(e). . . .} Notice also provides an effective means to discover prisoners' complaints as well as to secure evidence suitable for trial.

\textsuperscript{162} Hirschkop, \textit{supra}, at 45-46 n.35.
\textsuperscript{163} Id.
\textsuperscript{164} Id.\textsuperscript{165} Id. at 46-47.
\textsuperscript{166} \textit{Fed. R. Civ. P. 30, 31, 34.}
\textsuperscript{167} \textit{Id. 33.} The rule providing for interrogatories applies only to \textit{parties} to an action.
\textsuperscript{168} \textit{Id. 23(a).}
ties. The attorney must also determine which individuals might be more valuable to the plaintiffs not joined as defendants.

Rule 23 of the Federal Rules of Civil Procedure, adopted in 1966, has simplified the requirements for bringing a class action. There are now four basic requirements for the maintenance of a class action in federal court: (1) the class must be so numerous that it is impractical to bring the individual members before the court; (2) there must be questions of law or fact common to the class; (3) the claims or defenses of the representative parties must be typical of the claims or defenses of the class; and (4) the representative parties must be able to protect the interests of the class fairly and adequately.

Several additional requirements for class actions are indicated in the Rules. First, it must appear that the maintenance of separate actions would create a risk of inconsistent adjudications or impede the ability of other members of the class to safeguard their own interests. Second, the party opposing the class must have acted or refused to act on grounds generally applicable to the class. Third, the questions of law or fact common to the members of the class should predominate over any questions affecting only individual members.

Class actions asserting prisoner rights under the Civil Rights Act should not be precluded by Preiser. Instead, where it can be demonstrated that a class action is the only effective way to obtain relief in a particular case, courts should uphold section 1983 jurisdiction. For instance, where inmates within a prison institution systematically are denied due process in parole-release hearings, a class action suit would be proper. In this situation the plaintiffs should argue that the policies behind the class action suit would best vindicate the constitutional rights of the class; section 1983 jurisdiction would follow derivatively.

AWARDING ATTORNEY'S FEES

There has been an emerging trend among federal judges to use their equitable powers to award "private attorney general" fees in certain prison cases. This trend infuses the class action

169. See text accompanying note 15 supra.
170. For instance, certain prison officials should not be named as defendants so that they may remain available for negotiation regarding amelioration of challenged conditions without the presence of defendants' attorneys.
172. Id. 23(b)(1)(A), (B).
173. Id. 23(b)(2).
174. Id. 23(b)(3).
prison suit with a fee-generating potential which will promote its utility and effectiveness. A consideration of the importance of awarding attorney's fees in prison litigation merits discussion of recent, pertinent case law.

An award of attorney's fees in prison litigation strengthens the inmate's right of access to the courts, a right concomitant with the guarantee of due process of the fifth amendment of the United States Constitution. Awards of attorney's fees in prison litigation also promote the public's interest in the fair and humane operation of those institutions which we have misnamed "correctional facilities." It is necessary to encourage awards of fees in these cases because the work of groups like the American Civil Liberties Union, legal aid, and prison societies, although constructive, has been inadequate to effect the breadth and depth of prison reform needed in our nation today. The increased involvement of individual attorneys in prison litigation would also eliminate the forced dependence of the prison reform movement on limited government financing and private foundations.176

The power of the federal courts to award attorney's fees in prison cases is derived primarily from the common fund and improper conduct theories. Under the common fund theory, attorney's fees are awarded to an individual who has brought a suit that has preserved or created a common fund which then becomes available to a class of beneficiaries.177 The actual award is taken out of the fund, so that the other beneficiaries will not have received a "free ride" at the expense of the plaintiff. In the so-called improper conduct cases attorney's fees have been awarded where the defendant has engaged in fraudulent, groundless, oppressive or vexatious conduct.178

Two relatively recent decision by the United States Supreme Court have promoted the trend toward awarding attorney's fees in public interest litigation. In *Newman v. Piggie Park*,179 the Supreme Court upheld the award of reasonable attorney's fees under Title II of the Civil Rights Act of 1964,180 which allows a federal court discretionary authority to award such fees to the prevailing party.181 The Court in *Piggie Park* also suggested that this discre-

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177. Id. at 314.
178. Id. at 317.
179. 390 U.S. 400 (1968) (per curiam).
181. 42 U.S.C. § 2000a-3(b) (1970) provides in relevant part:

In any action commenced pursuant to this subchapter, the court, in its discretion, may allow the prevailing party, other than the United States,
tion should be exercised as the rule rather than the exception in civil rights cases. The Piggie Park decision thereby signaled a readiness by the Supreme Court to award attorney's fees in public interest litigation. The Court's rationale for making the award was not simply to punish the defendant, but to encourage "private attorneys general" to bring lawsuits for the constructive purpose of advancing the public interest.

Mills v. Electric Auto-Lite Co. dealt with a successful shareholders' derivative suit challenging a materially misleading proxy statement, which violated section 14(a) of the Securities and Exchange Act of 1934. Although other sections of the Act provided for the award of attorney's fees to the prevailing party, section 14(a) did not. Nevertheless, the United States Supreme Court held that an attorney's fee award was proper under the circumstances. The specific authorization, in certain sections of the Act, to grant such awards was found not to foreclose similar awards in analogous situations. The Mills decision reinforced the theme advanced in Piggie Park that socially desirable litigation should be encouraged. Mills goes further than Piggie Park in that it awarded attorney's fees without specific statutory authority.

Encouraged by the Supreme Court's increasing receptiveness to the principle that attorney's fees should be awarded to successful private plaintiffs who help to further important public policies, lower federal courts have broadened the scope of cases in which awards are authorized. They have done this using several techniques: (1) liberally interpreting statutory provisions authorizing the award of attorney's fees; (2) applying more broadly the ex-

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182. 390 U.S. at 402.
183. Id.
186. Sections 9(e) and 18(a) of the Act permit the award . . . of attorney's fees to a party. 15 U.S.C. §§ 78i(e), 78r(a) (1970).
187. 396 U.S. at 390.
188. See Lea v. Cone Mills Corp., 438 F.2d 86 (4th Cir. 1971) (Equal Employment Opportunities Act construed as providing attorney's fees in test cases as well as in cases where plaintiffs actually needed work); Parham v. Southwestern Bell Telephone Co., 433 F.2d 421 (8th Cir. 1970) (even when employee did not establish right to damages, he was awarded attorney's fees where his lawsuit prompted his employer to comply with the Civil Rights Act); Clark v. American Marine Corp., 320 F. Supp. 709 (E.D. La. 1970) (plaintiffs awarded attorney's fees under Title VII of the Civil Rights Act of 1964 as agents of enforcement of national policy rather than as prevailing parties in damage suit).
ceptions to the general rule against granting fees; and awarding fees in contexts where even the traditional exceptions noted above are not applicable.

Indeed, federal courts recently have awarded attorney's fees specifically in prisoners' rights cases. In *Gates v. Collier* the Fifth Circuit Court of Appeals affirmed a district court's award of nearly $42,000 in attorney's fees and $11,000 in costs and expenses in a class action brought by inmates of the Mississippi State Prison against the superintendent of the penitentiary, the members of the state penitentiary board, and the governor of the state. The district court's award was based on the improper conduct theory—that the defendants were guilty of maintaining a defense in bad faith, vexatiously, wantonly or for improper reasons.

At least two other federal court decisions have awarded attorney's fees in prison litigation cases. In *Taylor v. Perini*, a civil rights action was commenced which sought numerous reforms in the operation and policies of the Marion Correctional Institute in Ohio. After several years of litigation and negotiation, a consent order was entered. The defendant was ordered to pay $21,055.07 to plaintiff's counsel as reimbursement for out-of-pocket expenses and reasonable attorney's fees based upon services rendered in the handling of this action. Again, in *Newman v. Alabama* a federal district court awarded $14,483 to attorneys for successfully prosecuting a class action civil rights suit to recover damages for inadequate medical treatment of state prisoners.

Even where there is no statute authorizing the award of attorney's fees, and traditional equitable doctrines allowing such an award are not applicable, the *Piggie Park-Mills* doctrine suggests that unless there is a specific statute prohibiting the award, the courts should nevertheless award attorney's fees as a matter of course to the successful plaintiff who has acted as a private attorney general to vindicate the public interest. As this practice be-

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189. *See, e.g.*, Ojeda v. Hackney, 452 F.2d 947 (5th Cir. 1972) (district court had discretion to award fees to attorney for successful plaintiffs in suit for recovery for welfare payments, despite lack of provision for such award under state law).

190. *See, e.g.*, Callahan v. Wallace, 466 F.2d 59 (5th Cir. 1972) (attorneys' fees awarded for successful injunction against justice courts hearing certain traffic cases in which the justices had a pecuniary interest in convicting defendants); Brewer v. School Board, 456 F.2d 943 (4th Cir.), cert. denied, 409 U.S. 892 (1972) (attorneys' fees awarded in suit providing school children free busing, although the pecuniary benefit extended could not be traced to a fund).

191. 489 F.2d 298 (5th Cir. 1973).

192. Id. at 300-01.


194. Id. at 1187.

comes more common, the award of fees in such cases will serve both as an incentive to members of the private bar to engage in litigation involving important public issues, such as prison reform, and as a deterrent to future wrong-doing by prison officials and their state government superiors.

**CONCLUSION**

In some areas the course of recent developments in prisoners' rights litigation has been far-reaching and progressive, while in other areas the law has remained regressive and tradition-bound. Nevertheless, this author believes that prisoners' rights litigation is gradually eroding the deeply ingrained injustices of our prison system, although most of the work lies ahead.

*Preiser v. Rodriguez*196 could seriously impede federal judicial review of state prison practices by imposing on complaining inmates the burdensome, expensive and time-consuming exhaustion-of-state-remedies requirement inherent in the habeas corpus procedure. Given the elusive nature of the *Preiser* distinction between complaints challenging "conditions of confinement" or treatment and those seeking "release" from confinement, the author strongly urges lower courts to adhere strictly to the *limited* holding of *Preiser* and require prisoners to proceed under the habeas corpus statute rather than section 1983 of the Civil Rights Act only when immediate release from state custody is the relief sought. In particular, a section 1983 action should lie when a convicted person alleges a denial of due process in a parole-release hearing, since immediate release would not result from a determination in plaintiff's favor.

In the wake of *Preiser*, prudent attorneys representing prisoners may be able to preserve section 1983 actions by carefully limiting the terms of the relief sought and avoiding a request for the prisoners outright release. *Wingard v. North Carolina*197 may furnish the correct pleading formula to circumvent *Preiser*. A claim for damages could also persuade a federal court to retain a section 1983 claim which might otherwise be relegated to the habeas corpus procedure.

The ever increasing use of class actions to assert prisoners' claims for damages and injunctive relief is a positive trend. Class action suits are particularly well adapted to prison litigation and constitute an efficient and effective means of enforcing the legal rights of convicts. A major advantage of the class action under the

198. See note 141 and accompanying text supra.
Federal Rules of Civil Procedure, at least where the defendants are carefully chosen, is the liberal discovery procedures provided in the Rules.¹⁹⁹

Finally, the increasing number of awards of attorney’s fees in prison cases by federal courts, particularly in class actions, is a welcome trend which will further encourage the urgently needed reform in our prison systems. Our society and legal system must respond now to correct the human abuse and procedural inequities which prevail in those institutions we have misleadingly labeled “correctional facilities.”

¹⁹⁹. See note 157 and accompanying text supra.