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Kenneth G. Mason

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PRISONERS' RIGHTS—LIMITING REMEDIES
FOR RESTORATION OF STATE PRISONERS' GOOD-TIME CREDITS

It is a uniform feature of state prisons to allow a prisoner to earn good
time behavior credits whereby the prisoner can shorten the duration of
his prison sentence through compliance with prison rules.¹ These credits
are revocable at any time by prison officials for a violation of any prison
rule. Years of accumulated credits can be wiped out in an instant, re-
storing a sentence to its original release date.

Because of the value of good behavior credits to prisoners, a revoca-
tion in a manner the prisoner believes to be unlawful, may well prompt
an action for restoration. The purpose of this note is fourfold: to show
the existing remedies available to a state prisoner who has had his credits
revoked; to explore the meaning and impact of Preiser v. Rodriguez² on
those remedies; to discern what viable courses of action remain as a result
of that decision; and finally, to explore the procedural avenues a pris-
oner must follow to obtain restoration of his good behavior credits.

A state prisoner wishing to restore his good-time credits is faced with
a choice between two important federal laws. The first and more tradi-
tional of these is the writ of habeas

1. For example, in New York an inmate may earn 10 days “good time” for
each month served, thus a potential reduction in his sentence by one-third. N.Y.
CORRECTION LAW § 803(1) (McKinney 1968); N.Y. PENAL LAW §§ 70.30(4)(2),
70.40(1)(a), (b) (McKinney 1967). See, e.g., TEX. REV. CIV. STATS. ANN. tit. 108,
Section 2241(c) provides that “[t]he writ of habeas corpus shall not extend to a
prisoner unless . . . (3) [h]e is in custody in violation of the Constitution or laws
or treaties of the United States. . . .” Section 2254 provides in pertinent part:
(a) The Supreme Court, a Justice thereof, a circuit judge, or a district
court shall entertain an application for a writ of habeas corpus in behalf
of a person in custody pursuant to the judgment of a State court only on
the ground that he is in custody in violation of the Constitution or laws
or treaties of the United States.
(b) An application for a writ of habeas corpus in behalf of a person in
custody pursuant to the judgment of a State court shall not be granted un-
less it appears that the application has exhausted the remedies available in
the courts of the State, or that there is either an absence of available
State corrective process or the existence of circumstances rendering such
process ineffective to protect the rights of the prisoner.
and the common law history of the writ show that the focus of an habeas corpus attack by a person in custody is upon the legality of the custody, and that the traditional function of the writ is to secure release from illegal custody. Under the applicable habeas corpus statute, there is a requirement that a litigant fully exhaust the available state remedies before a federal court will entertain his petition for habeas corpus. The reasoning for this exhaustion of remedies policy will be discussed later.

The second and more recently enacted remedy for the restoration of good time credits is the Civil Rights Act, 42 U.S.C. § 1983. This broadly phrased statute gives a cause of action for deprivation of constitutionally secured rights when these rights are denied by any person acting under color of state authority. There is an important procedural difference between an action brought under section 1983 and an action brought under a writ of habeas corpus which plays a key part in the problem. Section 1983 requires no exhaustion of state remedies as illustrated in the landmark case Monroe v. Pape. The relief provided by the Civil Rights Act is supplementary to the state remedy and there is no requirement of exhaustion of state remedies before invoking federal remedy in section 1983. The practical effect of this difference is that a plaintiff may go to federal district court at the outset and file a suit to redress his grievances.

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


   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 . . . or other person . . . to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

8. 365 U.S. 167, 183 (1961). The Supreme Court stated that [i]t is no answer that the state has a law which if enforced would give relief. The federal remedy is supplementary to the state remedy, and the latter need not be sought first and refused before the federal one is invoked.

Id. at 183.

Until Preiser v. Rodriguez, the two above mentioned federal laws coexisted as avenues of relief for state prisoners to rectify prison situations they felt to be unlawful. In Rodriguez the Supreme Court ruled that in cases where a state prisoner seeks restoration of good-time credits, and by way of relief seeks a determination that he is entitled to immediate or speedier relief, his sole federal remedy is a writ of habeas corpus. This is the first time the Court viewed these remedies in conflict.

In its resolution of this conflict, the Court arrived at a formula whereby it allowed some prisoners' rights suits to be brought under section 1983 and required some others to be brought under habeas corpus. Prisoners' suits seeking restoration of good-time credits fall under the latter category. The Court's formula depends upon a narrow factual distinction between the types of relief sought. When a state prisoner is making a constitutional challenge to the conditions of his prison life, but not to the fact or length of his custody, section 1983 is the proper remedy. However, when that same prisoner is challenging the duration of his physical imprisonment, and the relief he seeks is a determination that he is entitled to an immediate or more speedy release from imprisonment, his sole federal remedy is a writ of habeas corpus. This formula erects barriers to suits by state prisoners seeking restoration of their good-time credits which did not previously exist. In his dissenting opinion, Justice Brennan stated that "the Court devises today an ungainly and irrational scheme that permits some prisoners to sue under § 1983, while others may proceed only by way of petition for habeas corpus." Not only has Rodriguez limited the prisoner's choice of remedies, but the decision has created severe problems of manageability because the standard is anomalous; further, it will result in a significant waste of judicial energy in implementation. This note will attempt to identify the problems created by this decision and to review those remedies still available to state prisoners seeking restoration of good-time credits.

Rodriguez consolidated three separate actions brought by state prisoners against the New York Department of Correctional Services. Prisoner Rodriguez was charged with possession of contraband material. Prisoner Katzoff was charged with making derogatory comments about prison officials in his diary. Prisoner Kritsky was charged with being a leader in a demonstration and advocating insurrection. All three prisoners had their good-time credits revoked and they claimed that this was done without due process of law, thereby violating their constitutional rights. Each filed a civil rights complaint under section 1983, combined with a petition for habeas corpus, in federal district court.

As to Rodriguez's claim, the district court held that his section 1983 suit was properly brought and that habeas corpus was a "mere adjunct to insure full relief if [Rodriguez] prevails in the dominant civil rights claim." The court held for Rodriguez on the merits. The court of appeals reversed, holding that Rodriguez's action was really a petition for habeas corpus, and as such should not have been entertained by the district court. The court grounded this determination on its belief that Rodriguez had not fully exhausted his state remedies pursuant to section 2254(b), and therefore that the requirements of federal habeas corpus had not been met.

As to prisoner Katzoff's claim, the district court, in an unreported opinion, held that his failure to exhaust state remedies was no bar to his suit since it was a civil rights action and habeas corpus was only incidental to assure enforcement of the judgment. The court held for Katzoff on the merits. The court of appeals reversed without reaching the merits. It held that Katzoff's action was essentially an application for habeas corpus, since it could result in his immediate release, and therefore that it should have been dismissed because Katzoff sought no relief from the state courts.

As for prisoner Krtisky, the district court found the civil rights action to be proper, and held that he had been denied due process of law and the good-time credits were restored. Before the court of appeals reached a decision as to Kritsky's claim it ordered the case to be reheard en banc, together with the Rodriguez and Katzoff cases. After a rehearing en banc, the court of appeals affirmed the judgments of the district court in all of the cases "upon the consideration of the merits and upon the authority of Wilwording v. Swenson."

The Civil Rights Act was not always an available remedy to state prisoners. For many years, the general "hands off" doctrine, aggravated by the federal courts' reluctance to inject themselves into state administrative problems, prevented the Civil Rights Act from becoming

16. See, e.g., Siegel v. Ragen, 180 F.2d 785, 788 (7th Cir. 1950):
   The Government of the United States is not concerned with, nor has it the power to control or regulate the internal discipline of the penal institutions of its constituent states.
an effective remedy for prisoners.\textsuperscript{17} It was not until a line of cases instituted under section 1983, which either expressly or impliedly rejected the "hands off" doctrine, that the potential use of this section became apparent.\textsuperscript{18} These cases held that the constitutional rights retained by the prisoner are of sufficient importance to afford him protection in a federal court, not withstanding the effect on orderly prison administration.\textsuperscript{19}

With the Supreme Court's acceptance of section 1983 as a valid basis on which state prisoners could challenge unconstitutional prison situations, the number of these suits naturally spiralled upward. The number of non-habeas corpus claims filed by state prisoners in federal courts in 1970 reflected a 43 per cent increase over 1963.\textsuperscript{20}

A number of these cases were delivered by the Supreme Court. Cooper v. Pate\textsuperscript{21} allowed the use of section 1983 for a challenge to denial of certain religious publications. In Houghton v. Shafer,\textsuperscript{22} prison officials were held to have violated the Constitution by confiscation of legal materials; the Court found no need to resort to state remedies. Likewise in Cruz v. Hauck,\textsuperscript{23} the denial of access to legal materials was the source of a successful section 1983 suit. In Haines v. Kerner,\textsuperscript{24} a prisoner was allowed to recover damages suffered in wrongful disciplinary confinement. In Wilwording v. Swenson,\textsuperscript{25} the right of state prisoners to bring such non-habeas corpus suits was challenged anew. The Court reiterated that the remedy provided by the Civil Rights Act "is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked."\textsuperscript{26} The Court reconsidered the requirements attendant to habeas corpus actions:

\bibitem{17} Goldfarb & Singer, Redressing Prisoners Grievances, 39 GEO. WASH. L. REV. 175, 253 (1970).
\bibitem{20} Wilwording v. Swenson, 439 F.2d 1331, 1333 n.3 (8th Cir. 1971).
\bibitem{21} 378 U.S. 546 (1964) (per curiam).
\bibitem{22} 392 U.S. 639 (1968).
\bibitem{23} 404 U.S. 59 (1971).
\bibitem{24} 404 U.S. 519 (1972) (per curiam).
\bibitem{25} 404 U.S. 249 (1971) (per curiam). Prisoners alleged that facilities were inadequate in the areas of hygiene, recreation, educational and religious practices, thus depriving them of the basic amenities guaranteed by the 5th, 8th, and 14th amendments.
\bibitem{26} Id. at 251 (citations omitted).
The exhaustion-of-state-remedies rule should not be stretched to the absurdity of requiring the exhaustion of . . . separate remedies, when at the outset, a petitioner cannot intelligently select the proper way, and in conclusion he may find only that none of the [alternatives] is appropriate or effective.\footnote{27}

Cases with factual patterns parallel to Rodriguez have been decided on the appellate level. In \textit{Wright v. McMann},\footnote{28} prison officials revoked a prisoner's good-time credits for failure to sign a "safety sheet." The court restored the credits, without requiring any exhaustion of state remedies.

In light of this evolving line of cases, it seemed as if the Court were establishing a viable remedy for all state prisoners to use in challenges to alleged unconstitutional aspects of prison existence. This trend was abruptly halted in Rodriguez, which marks a strict limitation on the Civil Rights Act as a remedy for state prisoners. Only a prisoner who merely seeks to challenge a condition of his confinement may have direct access to federal courts. The Court has erected a barrier to state prisoners who challenge in any way the very fact or duration of confinement; they must pursue, as their \textit{sole} federal remedy, a writ of habeas corpus.

For what reasons then, did the Court disallow the Civil Rights Act as a prisoner's remedy in favor of habeas corpus? Despite the holdings in the previous cases mentioned above which allowed section 1983 relief, the Court felt that strong policy considerations were jeopardized by allowing section 1983 and the federal habeas corpus statute to exist as concurrent remedies for the restoration of good-time credits. The exhaustion of state remedies doctrine (now codified in the federal habeas corpus statute, 28 U.S.C. § 2254) reflects a policy of federal-state comity.\footnote{29} This principle of comity was defined by Justice Black as "a proper respect for state functions."\footnote{30} Comity requires exhaustion of state remedies to avoid the unnecessary friction between the federal and state court systems that would result if a lower federal court were to upset a state court conviction without first giving the state court system an opportunity to correct its own constitutional errors.\footnote{31}

Early federal intervention in state criminal proceedings would tend to remove federal questions from the state courts, isolate those courts from constitutional issues, and thereby remove their understanding of and hospitality to federally protected interests. Second, exhaustion preserves orderly administration of state judicial business, preventing the interruption

\footnotesize{\begin{itemize}
\item 27. \textit{Id.} at 250 (citation omitted).
\item 28. 460 F.2d 126 (2d Cir. 1972).
\end{itemize}}
of state adjudication by federal habeas proceedings. It is important that petitioners reach state appellate courts, which can develop and correct errors of state and federal law and most effectively supervise and impose uniformity on trial courts.  

These are the basic policy values underlying the exhaustion of state remedies requirement prior to invoking habeas corpus relief. The Court in Rodriguez had to decide whether these policy considerations were present and how to cope with them.

At an earlier time in its history the Court would not have had to deal with this question, for federal involvement in matters of state prisons is a new phenomenon. In recent years the traditional reluctance of federal courts to intervene in this area has diminished. Federal courts have reviewed virtually every aspect of prison administration, including broad-based examination of institution-wide conditions.  

There are two ways to view this trend. One view supposes that increased federal intervention, by increasing use of the Civil Rights Act, will have a detrimental effect on the scope of habeas corpus. As the petitioners for the state argued in Rodriguez,

if federal courts may freely redesignate the nature of the action and state prisoners have the option of pressing their grievances under the Civil Rights Act, the practical consequence may be that habeas corpus relief will largely be confined to cases involving the validity of the original conviction.

Respondents argued the opposite view, that the need to require habeas corpus was not absolutely compelling: "The exhaustion requirement is merely an accommodation of our federal system designed to give the State an initial 'opportunity to pass upon and correct' alleged violations of its federal prisoners' rights."

The prisoners argued further that regarding comity considerations, habeas corpus has been construed to require exhaustion to avoid upsetting state court convictions, and that this case, because it is concerned with post-conviction administrative problems, does not involve those considerations. They also argued that the history and policies of the habeas corpus statute indicate that exhaustion is required in order to avoid friction between federal and state courts, not between federal courts and

32. Developments, supra note 4, at 1094.
36. See Developments, supra note 4, at 1093.
state administrative agencies (here the New York correctional system). State administrative actions are the only state actions at issue in prison condition cases.37

The Court held that the comity considerations are not limited to challenges to the validity of convictions. It recognized the strong interest which a state has in the administration of its prisons and that the same strong considerations of comity that require giving a state court system the first opportunity to correct its own errors after convicting a defendant, also required giving a state the first opportunity to correct errors made in the internal administration of its prisons.

In addition to the above mentioned advantages, a further strong reason for the prisoners' preference toward section 1983 as a remedy was the time factor. Where good-time credits are concerned, the time spent by the prisoner in exhausting state remedies completely may consume time which the prisoner could have been enjoying in freedom had his release date not been set back by the revocation of the good-time credits. As a result, the prisoner desires a speedy adjudication of his rights. The prisoners urged upon the Court the view that:

By requiring prior resort to state courts, [the exhaustion rule] does postpone the federal hearing of applicant's federal claims and may prolong an invalid detention. This delay is inherent in the requirement, yet it is an unnecessary price to exact from a person, in the name of comity or judicial economy, where state procedures offer no practical hope of swift vindication of his federal claim.38

In addition to the time-consuming aspect of habeas corpus, the prisoners contended that these steps were futile and, therefore, that they need not be complied with.39

As reflected in its decision, the Court was not receptive to either of these arguments. The Court noted that the New York Civil Rights Act explicitly provides for injunctive relief to a state prisoner "for improper treatment where such treatment constitutes a violation of his constitutional rights." The fact that New York has such a provision will be significant in the future applications of the Rodriguez rationale. This point will be explored later.

37. See generally Parker, Limiting the Abuses of Habeas Corpus, 8 F.R.D. 171 (1948).
38. Developments, supra note 4, at 1097.
The core of the problem faced by the Court was a statutory overlap. It had to make a decision that would necessarily limit the scope of one remedy over the other. Justice Brennan, speaking for the dissent, cited an apprehension of the majority of the Court that the no-exhaustion rule of section 1983 might, in the absence of some limitation, devour the exhaustion rule of the habeas corpus statute. The Court constructed such a limitation, distinguishing between prisoner challenges to conditions (section 1983 applies) and durations (habeas corpus applies) of confinement. But how effective is that limitation i.e., distinguishing between condition and duration of confinement, in achieving the Court's purposes? Is the distinction one that can be readily determined by the lower courts? In the context of the facts of this case, there are several possible situations in which Rodriguez would be controlling law. The following hypotheticals illustrate the difficulty of applying the Court's new standards:

*Situation 1*

Prisoner seeks restoration of good-time credits only. This is the situation presented in the facts of Rodriguez and is easily handled by the decision. Prisoner must pursue habeas corpus as his sole federal remedy.

*Situation 2*

Prisoner seeks damages only. Rodriguez permits state prisoners to bring these actions under the Civil Rights Act in federal court without any requirement of exhaustion.

*Situation 3*

Prisoner seeks restoration and damages. Under Rodriguez (situation 1) habeas corpus is the sole federal remedy for restoration. Damages are inapposite for a habeas corpus action. They are to be brought under section 1983 where restoration is forbidden. The result? Simultaneous litigations.

*Situation 4*

Prisoner seeks restoration of credits and relief from conditions of confinement. Rodriguez would require simultaneous litigation of these claims in separate forums.

*Situation 5*

Prisoner seeks restoration of credits, damages and relief from

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42. Id. at 494; cf. Ray v. Fritz, 468 F.2d 586 (2d Cir. 1972).
44. Id.
conditions of confinement. *Rodriguez* does not specifically address itself to this complex, but highly feasible situation.

The Court gives no indication how lower courts are supposed to treat cases where claims sounding in habeas corpus are mixed with claims cognizable in a section 1983 suit. It is quite possible that cases will arise where claims for money damages, restoration of good-time credits and alleviation of unlawful conditions could all arise out of the same set of facts.

According to *Rodriguez*, some specific actions are to be granted immediate federal jurisdiction under section 1983, while others come under federal jurisdiction only after the exhaustion-requirements of habeas corpus are met. Yet, when these actions all arise out of the same set of facts, how can they be adjudged separately in accordance with sound judicial management? Nevertheless, this hydra-headed situation results from the Court's approach. As Justice Brennan, for the minority noted:

In many instances the prisoner's claim will be under simultaneous consideration in two distinct forums. . . . [I]f the federal court is the first to reach a decision, and if that court concludes that the procedures are, in fact, unlawful, then the entire state proceeding must be immediately aborted, even though the state court may have devoted substantial time and effort to its consideration of the case. By the same token, if traditional principles of res judicata are applicable to suits under § 1983, . . . the prior conclusion of the State court suit would effectively set at naught the entire federal court proceeding. This is plainly a curious prescription for improving relations between state and federal courts. 45

The problems this decision creates for prisoners seeking restoration of good-time credits are perplexing. 46 It is apparent that pleadings will form a more crucial role in securing an adequate remedy for such a prisoner. The decision as to which form of action to pursue and in which court to initiate the action, will be a difficult choice for some counsel.

45. *Id.* at 511 (citations omitted). For the minority, Justice Brennan further noted in regard to the collateral issue of res judicata in § 1983 suits:

That assumes, of course, that a damage claim cannot be raised on habeas corpus, . . . and that the special res judicata rules of habeas corpus would not apply. In any case, we have never held that the doctrine of res judicata applies, in whole or in part, to bar the relitigation under § 1983 of questions that might have been raised, but were not, or that were raised and considered in state court proceedings. The Court correctly notes that a number of lower courts have assumed that the doctrine of res judicata is fully applicable to cases brought under § 1983. But in view of the purposes underlying enactment of the Act—in particular . . . the inclination of state courts to enforce federally protected rights, . . . that conclusion may well be in error.

46. *Id.* at 509 n.14 (citations omitted).
What is more disquieting is that the availability of the assistance of counsel to the prisoner at the time such actions arise is often minimal.47 Those prisoners who, because their case involves the duration of their confinement and not the conditions of that confinement, cannot sue for equitable relief in federal court under section 1983, will likely seek other means of obtaining a federal remedy.48 One major way to gain direct access to federal courts is through the section 1983 damage suit. A damage action may be brought by a state prisoner under the Civil Rights Act in federal court without any requirement of prior exhaustion of state remedies.49 It has been held that where only damages are sought and state administrative remedies for prisoners have no provisions for damage claims,50 it is improper to require exhaustion of state remedies.51

However, this course of action is not without pitfalls. Some judges have not disguised their displeasure with, and ridicule of, exorbitant damage claims by prisoners.52 The prisoner should therefore refrain from claiming astronomical amounts53 and he should be careful to allege highly specific facts in support of his claim.54

This warning is not meant to minimize the potential of a section 1983 damage suit. In revocation of good-time credit cases where a clear constitutional right has been violated, a damage claim is appropriate. Although it does not achieve restoration of lost credits, damage suits will have a marked value because they should act as a deterrent to improper actions by state officials.55

47. Federal courts receive many petitions from state prisoners requesting judicial relief to redress some alleged deprivation of constitutional rights. Typically, prisoners do not have the assistance of counsel and petitions are vaguely worded and inarticulate. Edwards v. Schmidt, 321 F. Supp. 68, 69 (W.D. Wisc. 1971).
48. Federal courts are "more likely to apply federal law sympathetically and understandingly than are state courts." ALI STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS 166 (1969).
49. Sostre v. McGinnis, 442 F.2d 178 (2d Cir. 1971); Ray v. Fritz, 468 F.2d 586 (2d Cir. 1972).
50. In New York, the state where the Rodriguez case arose, see, e.g., N.Y. SESS. LAWS ch. 283, § 15 (McKinney 1972). The new law forecloses private damage suits against prison employees acting "within the scope of their employment and in the discharge of their duties," but, like its predecessors, permits the injured party to sue the state in the Court of Claims.
51. 468 F.2d 586 (2d Cir. 1972).
55. Liability under section 1983 is entirely personal in nature intended to be satisfied out of the individual's own pocket. 442 F.2d 178, 205 (2d Cir. 1971).
The authorization by the courts to use section 1983 damage suits as a remedy for state prisoners is of recent origin. *Rodriguez*, as has been shown, has significantly altered the remedies available to prisoners. The use of section 1983 damage suits was not abrogated in the least by the Court. If prisoners are forbidden from seeking equitable relief under section 1983 but section 1983 actions for damages are still condoned, it is very possible that an increasing number of damage actions will be brought. A significant increase in the number of such suits could exert an effect on the states themselves. If damage suits for these particular prisoners proliferate, will this not oblige the states to move toward the establishment of administrative or judicial remedies for review of prisoners' claims that are genuinely effective? With the dispensation of equitable relief for such prisoners, damages may very well be the key federal remedy available after *Rodriguez*.

There is one final question raised by dicta in *Rodriguez*. The Court said:

> If the prisoner could make out a showing that, because of the time factor, his otherwise adequate state remedy would be inadequate, a federal court might entertain his application immediately, under [28 U.S.C.] § 2254(b)'s language relating to 'the existence of circumstances rendering such [state] process ineffective to protect the rights of the prisoner.'

A key circumstance rendering exhaustion ineffective is a lack of any provision under which a state court, in the course of exhaustion, will grant hearings to state prisoners to review revocation of good-time credits. In the instant case, the parties conceded an adequate remedy was present. Query, in the absence of such an adequate provision in state law, does *Rodriguez* require exhaustion?

In *Wilwording v. Swenson*, the Court took judicial notice that the Missouri court system simply did not grant hearings to state prisoners to review the conditions of their confinement. Accordingly, the Court did not require exhaustion. Is the Court suggesting, through its dicta in *Rodriguez* that, where no adequate state remedy exists to review revocation of good-time credits, that exhaustion is not required? In future actions this may well prove to be a key contention in determining the scope of *Rodriguez*'s directive to exhaust state remedies before entrance to federal court.

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57. Id. at 497.
Preiser v. Rodriguez significantly restricts federal remedies available to state prisoners. Under the banner of “comity,” the Court directs state prisoners to undertake the onerous duty of exhaustion of state remedies in order to restore revoked good-time credits. In its wake, Rodriguez leaves limited federal remedies. First, section 1983 may be used to pursue monetary damages directly in federal court. Secondly, a prisoner may attempt to pursue the Court’s untested, inarticulated notion that a lack of any procedures within the state to hear challenges to revocation may result in a federal court immediately entertaining a habeas corpus application. Beyond these rather meager federal remedies, the prisoner will have to turn his focus to the state.

Kenneth G. Mason