FEDERAL COURTS—COLLATERAL ESTOPPEL—EXCEPTION TO PRECLUSION PRINCIPALS IN SECTION 1983 ACTIONS BROUGHT TO VINDICATE FOURTH AMENDMENT VIOLATIONS—*McCurry v. Allen*, 606 F.2d 795 (8th Cir. 1979), *cert. granted*, 100 S. Ct. 1012 (1980).

In the wake of the Supreme Court's decision in *Stone v. Powell*,[1] individuals convicted of criminal offenses in state courts have had to seek relief other than habeas corpus when trying to vindicate alleged violations of the fourth amendment prohibition against illegal searches and seizures. One possible remedy is a civil rights action under 42 U.S.C. § 1983 for damages against the individual policemen accused of the wrong-doing.[2] The issue faced by the Court of Appeals for the Eighth Circuit in *McCurry v. Allen*[3] was whether collateral estoppel barred the relitigation of the legality of a search and seizure in a section 1983 damage action brought by a state prisoner denied access to federal habeas corpus by the *Stone* decision.

On April 9, 1977 the St. Louis Police Department received a tip that Willie McCurry was currently involved in selling heroin.[4] Six or seven undercover police officers were dispatched to McCurry's house, two of whom went to the door to attempt to make a purchase, while the others hid in nearby bushes.[5] The officers knocked at the door and when McCurry appeared they asked if they could buy some "caps".[6] McCurry asked the officers to wait, re-entered the house and returned shooting, seriously injuring the two officers at the door.[7] A gun battle ensued between the suspect and the remaining officers who were quickly reinforced by thirty additional officers.[8]

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[1] 428 U.S. 465 (1976). The Court held that where the state has provided a defendant with a full and fair opportunity to present his search and seizure claim, the Constitution does not require that he be allowed to raise it again at a habeas corpus hearing. *Id.* at 496.

[2] Section 1983 provides that:

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

42 U.S.C. § 1983 (1976).

Monroe v. Pape, 365 U.S. 167 (1961) found that section 1983 gave a civil cause of action against municipal police for their unconstitutional acts.

[3] 606 F.2d 795 (8th Cir. 1979), *cert. granted*, 100 S. Ct. 1012 (1980).

[4] *Id.* at 796.

[5] *Id.*

[6] *Id.* "Caps" is a slang term for heroin capsules. *Id.*

[7] *Id.*

[8] *Id.*

After being told by the police that if he came out of the house " 'no action would be taken,' "[9] McCurry surrendered.[10] Suspecting that others might still be inside, the police entered and searched the house, finding heroin.[11]

Prior to trial, McCurry moved to have the evidence found in the house suppressed.[12] The motion was partially granted, allowing only the introduction of the evidence found in plain sight.[13] At the trial, McCurry was found guilty of illegal possession of heroin as well as two counts of assault with intent to kill with malice aforethought.[14]

Following his conviction, McCurry, in July, 1978, filed a $1,000,000 damage suit against individual officers of the St. Louis Police Department.[15] The complaint alleged that the officers conspired to conduct an illegal search of McCurry's home, that the officers did in fact conduct an illegal search of his home, and, finally, that they assaulted him during his arrest.[16] In a memorandum decision,[17] the Federal District Court for the Eastern District of Missouri granted the defendants' motion for summary judgment.[18] The court stated that the sole issue in the section 1983 suit, the constitutionality of the search and seizure, had been fully litigated on the merits and adversely determined to plaintiff's position—thereby collaterally estopping the relitigation of that issue in a subsequent civil action.[19]

On appeal, the Court of Appeals for the Eighth Circuit reversed and remanded holding that "it is our duty to consider fully unencumbered by the doctrine of collateral estoppel, appellant's § 1983 claims."[20] In a brief analysis, the court of appeals stressed the importance of providing a federal forum to hear the claims of state prisoners denied the availability of habeas corpus under *Stone*.[21] Judge McMillan, writing for a unanimous panel, acknowledged that other federal circuits and numerous district courts had applied collateral es-

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[9] *Id.* The police communicated with McCurry by using a bullhorn. *Id.*

[10] *Id.*

[11] *Id.*

[12] *Id.*

[13] *Id.* The heroin which the police found hidden among tires was excluded. *Id.*

[14] *Id.* at 797.

[15] *Id.*

[16] *Id.*

[17] *Id.*

[18] *Id.* at 796.

[19] *Id.* at 797.

[20] *Id.* at 799. The court also held that the appellant was required to exhaust his state remedies before proceeding with the rehearing. *Id.* This issue is discussed at notes 99-104 *infra* and accompanying text.

[21] *Id.*

toppel to section 1983 actions when the issues raised in those actions were adversely determined to the federal plaintiff in prior state criminal trials.[22] Specifically, the court noted, collateral estoppel had barred post-conviction section 1983 actions claiming search and seizure violations in two federal appellate decisions prior to *Stone*.[23]

The *McCurry* opinion observed, however, that a number of the courts that had applied collateral estoppel to section 1983 suits "expressly based their holding on the fact that federal habeas corpus relief, and thus a federal forum, was then available" to defendants seeking review of their state court conviction.[24] Relying on *Mitchum v. Foster*,[25] a case in which the Supreme Court interpreted section 1983 as granting broad power to federal courts,[26] the court claimed that it was duty bound to compensate for appellant's loss of habeas corpus review by permitting his section 1983 action despite *Stone's* endorsement of the competency of state judges to pass on constitutional claims.[27] The court buttressed its analysis with an expansive interpretation of Chief Justice Burger's concurrence in *Stone* from which the eighth circuit concluded that the denial of habeas corpus review in search and seizure cases was premised, in part, on the availability of other remedies.[28] *McCurry* found section 1983 to be such a remedy.

In order to fully understand the impact of this case, it is necessary to examine the Civil Rights Act of 1871 and the subsequent case law up to the *McCurry* decision. The Act of 1871,[29] which included what is now codified at 42 U.S.C. § 1983, was enacted to overcome the influence of the Ku Klux Klan on the administration of justice in the Reconstruction South.[30] Congress feared that Southern courts had "one form of justice for Unionists and blacks and another form of justice for the Ku Klux Klan and its sympathizers."[31] The clear pur-

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[22] *Id.* at 797-98.

[23] *Id.* at 798.

[24] *Id. See* notes 51-58 *infra* and accompanying text.

[25] 407 U.S. 225 (1972).

[26] *Id.* at 242.

[27] McCurry, 606 F.2d at 799.

[28] *Id.* at 7.

[29] 42 U.S.C. § 1981 (1976).

[30] Theis, *Res Judicata in Civil Rights Act Cases: An Introduction to the Problem*, 70 NW. L. REV. 859, 866 (1976) [hereinafter cited as Theis]. The legislative history of the post Civil War civil rights acts is recounted in Amsterdam, *Criminal Prosecutions Affecting Federally Guaranteed Civil Rights: Federal Removal and Habeas Corpus Jurisdiction to Abort State Court Trial*, 113 U. PA. L. REV. 793 (1965) and Aims, *The Ku Klux Klan Act of 1871: Some Reflected Light on State Action and the Fourteenth Amendment*, 11 ST. LOUIS U. L. J. 331 (1967).

[31] Theis, *supra* note 30, at 866-67 (footnote omitted).

pose of the Act was to provide a federal forum for the enforcement of federal constitutional rights.[32] Although the specific conditions in the Reconstruction Era which precipitated passage of the Act have significantly changed,[33] section 1983 still provides a means for redressing violations of federal rights committed under color of state law.[34] Despite the fact that the legislative history of the Act is without reference to res judicata or collateral estoppel,[35] one commentator has contended that an expansive application of preclusion principles would not comport with the congressional intent of section 1983.[36] Federal courts have nonetheless applied collateral estoppel to civil rights cases with "substantial unanimity,"[37] even when the prior judgment is a state criminal conviction.[38] The argument in favor of applying preclusion principles to post-conviction section 1983 actions

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[32] Monroe v. Pape, 365 U.S. 167 (1961). That case involved a section 1983 damage action against thirteen Chicago police officers alleging an illegal search and seizure. The Supreme Court held that the federal remedy was supplementary to any state remedy which need not be invoked prior to seeking relief under section 1983. *See also* Moran v. Mitchell, 354 F. Supp. 86 (E.D. Va. 1973).

[33] Theis, *supra* note 30, at 869.

[34] Monroe v. Pape, 365 U.S. 156 (1961).

[35] Theis, *supra* note 30, at 866. Nor is it likely that the drafters of the Act could have foreseen the recent liberalization in the application of collateral estoppel. *Developments in the Law: § 1983 and Federalism*, 90 HARV. L. REV. 1133, 1139 n.39 (1976) [hereinafter cited as *Developments*].

[36] Theis, *supra* note 30, at 866.

Briefly, collateral estoppel or issue preclusion bars a party from relitigating a fact or issue that has been actually litigated and determined in a prior action. Application of the doctrine gives finality to judgments and thus conserves scarce judicial resources. Finally, and most importantly with respect to the issue discussed herein, collateral estoppel promotes the interest of comity between federal and state courts. F. JAMES, CIVIL PROCEDURE §§ 11.18-11.22 (1965).

The officers, sued in their individual capacity for alleged violations of constitutional rights, are not barred by requirements of mutuality from defensively pleading collateral estoppel in a section 1983 suit. The officers are considered part of the prosecution in the preceding state trial. Moran v. Mitchell, 354 F. Supp. 86, 89 (E.D. Va. 1973). *See also*, Comment, *Collateral Estoppel Effects of State Criminal Convictions in Section 1983 Actions*, 1975 U. ILL. L. F. 95, 96 [hereinafter cited as ILL. Comment].

Federal courts are required to give preclusive effect to state court judgments by statute. 28 U.S.C. § 1738 (1977). Frequently, courts ignore the statute and refer "to a general federal law of res judicata." *Developments*, *supra* note 35, at 1334. Whenever collateral estoppel is discussed in the text or footnotes of this note it is meant to include reference to section 1738 also.

[37] Rimmer v. Fayetteville Police Department, 567 F.2d 277, 280 (5th Cir. 1978). *See, e.g.*, Mastracchio v. Ricci, 498 F.2d 1257, 1260 (1st Cir. 1974), *cert. denied*, 420 U.S. 909 (1975); Moran v. Mitchell, 354 F. Supp. 86, 88-89 (E.D. Va. 1973) and cases cited therein.

[38] Mastracchio v. Ricci, 498 F.2d 1257, 1260-61 (1st Cir. 1974), *cert. denied*, 420 U.S. 989 (1975). The test used to determine the applicability of collateral estoppel in subsequent civil trials is whether the question " 'was distinctly put in issue and directly determined' in the criminal conviction . . . issues which were essential to the verdict must be regarded as having been determined by the judgment." Emich Motors Corp. v. General Motors Corp., 340 U.S. 558, 569 (1951).

was presented in the leading case of *Palma v. Powers*.[39] The district court stated that unless mandated by public policy "there is no reason why a litigant . . . given a full and fair opportunity to present his case . . . should be allowed to relitigate [it] . . . in another court."[40] A second action in federal court was perceived as a waste of judicial resources, a potential cause of friction between federal and state courts, and as undermining society's interest in the finality of judgments.[41] Federal courts have also relied on the "plain language"[42] of the Supreme Court in *Preiser v. Rodriquez*[43] that "res judicata has been held to be fully applicable to a[n] . . . action brought under section 1983."[44]

With the Supreme Court's decision in *Stone v. Powell*,[45] the general applicability of preclusion principles to all civil rights cases must be questioned. *Stone* held that "where the state has provided an opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner may not be granted federal habeas corpus relief on the ground that the evidence obtained in an unconstitutional search or seizure was introduced at his trial."[46] The Court found that the marginal contribution to deterring police violations gained by applying the exclusionary rule in habeas corpus actions was significantly outweighed by the societal costs incurred in the rule's use which "persist with special force" in collateral actions.[47] The Court listed these costs as deflecting the courts from the truth-finding process, freeing the guilty, and fostering disrespect for the judicial system.[48] Fourth amendment claims are not concerned with the convict's guilt

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[39] 295 F. Supp. 924 (N.D. Ill. 1969) (collateral estoppel bars relitigation of legality of search and seizure in section 1983 action even though the issue was not argued at the criminal trial resulting in conviction). *See also* Meadows v. Evans, 529 F.2d 385 (5th Cir. 1976), *aff'd en banc*, 550 F.2d 345 (5th Cir.), *cert. denied*, 434 U.S. 969 (1977) (Tjoflat, J., concurring). *But see* Ney v. California, 439 F.2d 1285 (9th Cir. 1971) (res judicata would render section 1983 a "dead letter").

[40] Palma v. Powers, 295 F. Supp. 924, 932 (N.D. Ill. 1969).

[41] *Id.* at 937-38.

[42] Meadows v. Evans, 529 F.2d 385 (5th Cir. 1976), *aff'd en banc*, 550 F.2d 345 (5th Cir.), *cert. denied*, 434 U.S. 969 (1977) (Tjoflat, J., concurring). The "plainness" of the Court's language has been criticized for being indefinite, thus leading to inconsistent results in the lower courts. Theis, *supra* note 30, at 865.

[43] 411 U.S. 475 (1973) (Supreme Court rejected state prisoner's section 1983 suit to recover "good time" credit stating that proper action was habeas corpus; in dicta Court stated that normal rules of preclusion would apply to section 1983).

[44] *Id.* at 497.

[45] 428 U.S. 465 (1976).

[46] *Id.* at 494.

[47] *Id.* at 495.

[48] *Id.* at 490-91.

or innocence and therefore do not justify the burdens placed upon the judicial system in habeas corpus cases.[49] Furthermore, the *Stone* Court embraced the idea of parity between federal and state courts in determining questions of constitutional law.[50]

As noted in the *McCurry* opinion,[51] the problem created for a state prisoner by a lack of habeas corpus review on the one hand, and the application of collateral estoppel to section 1983 suits on the other, has been recognized in dicta by a number of federal courts before and after *Stone*.[52] Providing a conceptual nexus for this dilemma is *Rimmer v. Fayetteville Police Department*,[53] a post-*Stone* decision in which a state prisoner was collaterally estopped from litigating a section 1983 damage suit alleging a violation of his sixth amendment right of confrontation.[54] While acknowledging that collateral estoppel was generally applicable to a post-conviction section 1983 action when, as there, the state prisoner had a federal forum available to determine his constitutional claim, the Court of Appeals for the Fourth Circuit stated that *Stone* had generally removed the possibility of habeas corpus relief in cases involving alleged search and seizure violations.[55] The court went on to suggest that the application of issue preclusion to a section 1983 action "by reason of a state court conviction in those cases . . . may deny a state court prisoner access to a federal forum entirely."[56] Such a result was seen by that circuit to be at odds with the intent of Congress in passing the Civil Rights Act of 1871.[57] *Rimmer*, however, did not have to ad-

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[49] *Id.* at 491-92 n.31.

[50] *Id.* at 493-94 n.35.

[51] McCurry, 606 F.2d at 798.

[52] *See, e.g.*, Rimmer v. Fayetteville Police Dep't, 567 F.2d 273, 276 (4th Cir. 1977) (section 1983 suit for damages based on alleged unconstitutional confrontation barred by collateral estoppel after conviction); Thistlewaite v. City of New York, 497 F.2d 339, 343 (2d Cir.), *cert. denied*, 419 U.S. 1093 (1974) (section 1983 damage suit alleged violation of first amendment rights barred after conviction for distributing anti-war literature in city parks without permit); Moran v. Mitchell, 354 F. Supp. 86 (E.D. Va. 1973) (section 1983 suit for damages alleging illegal arrest barred by collateral estoppel after conviction). *See also* Meadows v. Evans, 529 F.2d 385 (5th Cir. 1976), *aff'd en banc*, 550 F.2d 345 (5th Cir.), *cert. denied*, 434 U.S. 969 (1977) (Goldberg, J., concurring). *But see* Palma v. Powers, 295 F. Supp. 924, 937-38 (N.D. Ill. 1969).

[53] 567 F.2d 273 (4th Cir. 1977).

[54] *Id.* at 274-75.

[55] *Id.* at 276.

[56] *Id.*

[57] *Id.* The Civil Rights Act of 1871 was generally intended to provide access to a federal forum in civil rights cases. The court's contention was that whenever a state convict has been denied access to habeas corpus and would be collaterally estopped in a section 1983 action seeking redress of constitutional rights, the Act may justify an exception to the operation of preclusion principles. *See* notes 29-34 *supra* and accompanying text.

dress that issue. Such cases have done little more than note the problem and suggest that an exception may have to be made to the general application of collateral estoppel for section 1983 suits filed as a result of *Stone*.[58]

In *McCurry*, the court of appeals recognized that the Supreme Court was determined in *Stone* to limit the reach of the exclusionary rule and the social costs occasioned by its use.[59] Consequently, *McCurry* placed substantial weight on Chief Justice Burger's concurrence in that case, where he renewed his campaign to find alternatives to the exclusionary rule.[60] Burger argued that the flaws in the rule and the costs of applying it have been amply demonstrated over the course of its existence.[61] In its present "absolutist" application, the exclusionary rule has been a disincentive to the legislative development of rational alternatives.[62] "The time has come," he declared in *Stone*, to modify the reach of the exclusionary rule.[63]

Based on the Burger concurrence, the *McCurry* Court concluded that the result reached in *Stone* was partially justified on the basis that alternative remedies to habeas corpus for search and seizure violations, including section 1983 damage suits, were still available to state prisoners.[64] The circuit's interpretation is not, however, fully in accord with the Chief Justice's intent. In *Stone* he was concerned with exhorting Congress and state legislatures to take action in fashioning alternatives to the exclusionary rule[65] rather than inviting a judicial response to the problem. Burger concurred in *Stone* because he viewed the result as an appropriate impetus to the desired legislative action.[66] Without being four square with the Chief Justice, the *McCurry* decision is certainly within the spirit of the concurrence. By

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[58] The cursory language used in *Rimmer* and the cases cited in note 52 *supra* undercut the contention of the Court of Appeals for the Eighth Circuit that these courts "expressly" applied collateral estoppel because of the availability of habeas corpus to the plaintiff.

[59] McCurry, 606 F.2d at 798.

[60] *See* Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388 (1971) (Burger, C.J., dissenting).

Burger contended that the application of the exclusionary rule failed to adequately deter police violations of the fourth amendment while allowing countless criminals to go free. This "monolithic" approach failed to distinguish *de minimus*, good faith encroachments of fourth amendment rights resulting from the burdens of police work as opposed to flagrant and intentional violations. He asserted that society has the right to expect rational and graded responses from the judiciary to fourth amendment violations. *Id.* at 416-19.

[61] Stone, 428 U.S. at 500-01 (Burger, C.J., concurring).

[62] *Id.*

[63] *Id.* at 496.

[64] McCurry, 606 F.2d at 798.

[65] Stone, 428 U.S. at 500-01 (Burger, C.J., concurring).

[66] *Id.*

applying section 1983 the *McCurry* court has employed existing legislation to furnish a remedy for search and seizure violations.[67] It is a remedy which, if not barred by collateral estoppel, is immediately available for use as an alternative to the "Draconian [and] discredited"[68] exclusionary rule.

Still, the primary basis for the holding of the court of appeals was its reliance on *Mitchum v. Foster*.[69] Interpreting section 1983 in a different context,[70] the Supreme Court in *Mitchum* described the Civil Rights Act of 1871 as "an altering of the relationship between the States and the nation with respect to the protection of federally created rights."[71] The result of that alteration was "the interposition of the federal courts between the States and the people as guardians of the People's federal rights—to protect the people from unconstitutional action under color of state law."[72] Under this broad claim of federal power the panel in *McCurry* believed it was compelled to provide the appellant with a federal forum for his section 1983 claim as a result of *Stone*.[73]

In light of recent Supreme Court decisions, *Mitchum's* value as precedent for such broad federal power has been undercut[74] by the expansion of the holding of *Younger v. Harris*[75]—"that principles of federalism, comity and [economy] generally preclude federal equitable [intervention] into pending state" cases.[76] As a result of these policy considerations, an exception to the application of collateral estoppel for section 1983 actions filed as a result of *Stone* must rest on a narrower justification which fits the special circumstances of such cases.

Despite the tenuous nature of the circuit court's analysis, should collateral estoppel bar post-conviction section 1983 damage actions seeking redress of alleged search and seizure violations, McCurry and

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[67] *See, e.g.*, California v. Ney, 439 F.2d 1285 (9th Cir. 1971).

[68] Stone, 428 U.S. at 500 (Burger, C.J., concurring).

[69] 407 U.S. 225 (1972).

[70] The issue faced by the Court was whether section 1983 was an exception to the anti-injunction statute, 28 U.S.C. § 2283 (1976). *Id.*

[71] 407 U.S. at 242.

[72] *Id.*

[73] McCurry, 606 F.2d at 799.

[74] *Developments*, *supra* note 35, at 1335. Also, federal equitable intervention is less offensive to state judicial autonomy than intrusions into interests protected by preclusion principles. *Id.*

[75] 401 U.S. 37 (1971). *Younger* requires that a party exhaust all state remedies available to him before turning to the federal courts. Other cases in the *Younger* line are Juidice v. Vail, 430 U.S. 327 (1977) and Huffman v. Pursue, Ltd., 420 U.S. 592 (1975).

[76] *Developments*, *supra* note 35, at 1335-36.

others like him may very well be left without a federal forum to hear their fourth amendment claims. Before commencing an analysis of whether an exception is possible, it is necessary to identify the competing interests in a post-conviction action of the type sought by the appellant. On one side are the interests fostered by collateral estoppel—economy, efficiency and comity, as well as the *Stone* Court's desire to limit the use of the exclusionary rule in collateral actions.[77] Juxtaposed to those interests are the promises of a federal forum embodied in section 1983 for the protection of federal rights and the corollary federal interest in the consistent application of constitutional law.[78]

While a full scale exception to the rules of preclusion for all section 1983 damage actions would greatly tax scarce judicial resources and cause unnecessary friction between federal and state courts,[79] a number of commentators have argued for exceptions in limited circumstances.[80] Based on those contentions, a strong argument can be made for exempting post-conviction section 1983 damage actions for redress of search and seizure violations from collateral estoppel when habeas corpus is unavailable.

Two distinct approaches have been suggested. The first approach, which rejects the analogy between habeas corpus and section 1983, contends that allowing single issues of law and fact to be relitigated in a section 1983 action in federal court after a state court determination, is not as offensive to the values protected by the general rules of preclusion as a de novo trial.[81] The federal interest in providing a choice of forum through section 1983 and in protecting civil rights, however, remains constant whether the doctrines of res judicata or collateral estoppel are involved.[82] The state court convic-

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[77] *See* note 36 *supra* and accompanying text.

[78] *Developments*, *supra* note 35, at 1339.

Throughout this discussion it must be remembered that the only other alternative to section 1983 for these convicts is direct appeal on writ of certiorari to the United States Supreme Court. With the ever growing caseload, however, only a small percentage will have their search and seizure claim heard in that Court. On the topic of the Court's caseload, *see generally* Administrative Office of U.S. Courts Federal Judicial Center Report of the Study Group on the Caseload of the Supreme Court (1972).

[79] *Developments*, *supra* note 35, at 1336. *See also* Vestal, *State Court Judgment as Preclusive in Section 1983 Litigation in a Federal Court*, 27 OKLA. L. REV. 185 (1974).

[80] *See, e.g.*, Averitt, 44 U. COLO. L. REV. 191 (1972) [hereinafter cited as Averitt]; McCormack, *Federalism and Section 1983; Limitations on Judicial Enforcement of Constitutional Claims, Part II*, 60 VA. L. REV. 250 (1974) [hereinafter cited as McCormack]; Theis, *supra* note 30; *Developments*, *supra* note 35; ILL. Comment *supra* note 36.

[81] *Developments*, *supra* note 35, at 1338-39.

[82] *Id.* at 1339.

tion will remain undisturbed because only the legality of the search and seizure will be relitigated resulting in a monetary award to a successful plaintiff and not in his release from prison.[83] When only a single issue is to be relitigated there is less of a strain on judicial resources than when an entire case is retried.[84] Similarly, the exception will be limited to a single class of cases.[85] Finally, this exception respects the federal interest in maintaining consistent fourth amendment adjudication.[86] As the interests of comity, efficiency and respect for state systems of criminal justice are maintained "it becomes increasingly unjustifiable to override section 1983's provision of a meaningful choice of forum for challenges to the constitutionality of state action."[87]

In cases like *McCurry* the state prisoner seeking relief under section 1983 for an alleged search and seizure violation did not have a choice of forum in the preceeding state criminal action and is further denied access to habeas corpus review by *Stone*. Following conviction, the prisoner must seek civil relief in either federal court or in the state system which has just validated the contested search and seizure. Congress anticipated in enacting section 1983 that situations might arise where there would be no state remedy for civil rights violations and provided potential plaintiffs with the option of suing in federal court.[88] Choice of forum is the essential element of section 1983.[89] Thus, where the section 1983 plaintiff has freely chosen a state forum to litigate an issue later presented to federal court, collat-

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[83] *Id.* Such an approach would satisfy the *Stone* Court's concern that an otherwise guilty party may be released from prison as a result of a search and seizure violation unrelated to the prisoner's guilt.

[84] *Id.*

[85] Judicial interests in economy and efficiency are further respected by the fact that an exception will only be made for section 1983 cases filed because habeas corpus is denied to prisoners with search and seizure claims.

[86] *Developments*, *supra* note 35, at 1339.

An exception similar to the one outlined above is also compatible with the *Younger* Doctrine. The state's interest in carrying out its public policies is given due deference and the finality of the judgment respects the court's determination of guilt. Yet, the analysis recognizes that *Younger* is "not a mandate to prefer state court resolution of issues related to state action and policies at all costs." *Id.* at 1342. The continued validity of that argument, however, is questioned in Gibbons, *Our Federalism*, 12 SUFF. L. REV. 1087, 1106 (1978) [hereinafter cited as Gibbons].

[87] *Developments*, *supra* note 35, at 1342. *See* Note, *Younger Grows Older: Equitable Abstention in Civil Proceedings*, 50 N.Y.U. L. Rev. 871, 918 (1975).

[88] Monroe v. Pape, 365 U.S. 361 (1961); Rimmer v. Fayetteville Police Dep't, 567 F.2d 273, 276 (4th Cir. 1977); Moran v. Mitchell, 354 F. Supp. 86, 89 (E.D. Va. 1973).

[89] *Developments*, *supra* note 35, at 1342.

eral estoppel should bar the second trial.[90] In the unique situation created by *Stone*, however, the argument in favor of an exception becomes stronger. A state prisoner like McCurry may have no alternative but a section 1983 damage suit to redress alleged state violation of his fourth amendment rights.[91]

Under the second approach, post-conviction section 1983 suits are analogized to habeas corpus relief based on the premise that each shares the important primary function of protecting constitutional principles.[92] Habeas corpus is an area in which the interests of preclusion and comity are subordinated to the "overriding interest in federal enforcement of constitutional mandates."[93] Similarly, section 1983 actions should also be given this kind of preferential treatment at least in the situations where habeas corpus is unavailable to a state prisoner.[94]

Because a section 1983 damage suit seeking to vindicate a state convict's fourth amendment rights is unconcerned with questions of guilt or innocence, an exception to the rule of preclusion based on the above analogy merits consideration in light of the concern expressed by the *Stone* Court that a guilty party might "go free because the constable stumbled."[95] Due to this fear the Supreme Court has ruled that convicts claiming search and seizure violations are barred from habeas corpus relief.[96] A section 1983 damage suit, on the other hand, does not result in the plaintiff's release from prison. The

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[90] McKeithen v. Parker, 488 F.2d 553 (5th Cir.), *cert. denied*, 419 U.S. 838 (1974). *See also* Theis, *supra* note 30, at 868; *Developments*, *supra* note 35, at 1342 n.54; McCormack, *supra* note 80, at 276-77.

[91] *See, e.g.*, *Developments*, *supra* note 35, at 1350-51.

[92] *See* Averitt, *supra* note 80, at 214; McCormack, *supra* note 80, at 259-60; ILL. Comment, *supra* note 36, at 100-02; Comment, *Section 1983: A Civil Remedy for the Protection of Federal Rights*, 38 N.Y.U. L. REV. 839 (1964). The cases cited at note 52 *supra*, suggesting an exception for section 1983 cases when habeas corpus is unavailable, could be read as implicitly accepting this rationale. *See, e.g.*, ILL. Comment, *supra* note 36, at 100 (discussing Moran v. Mitchell, 354 F. Supp. 86 (E.D. Va. 1973)).

The analogy between habeas corpus and section 1983 is not universally accepted. *See* Palma v. Powers, 295 F. Supp. 924, 937-38 (N.D. Ill. 1969) (opportunity for federal habeas corpus rests on the larger interest of the right to personal freedom); *Developments*, *supra* note 35, at 1337.

As Averitt states, personal liberty justifies the exception of habeas corpus from the application of res judicata and "it is not clear that the rights secured by section 1983 are of such less dignity that they cannot command similar protection," Averitt, *supra* note 80, at 214, at least in the unique situation where habeas corpus is unavailable to a prisoner seeking redress for an alleged unconstitutional search and seizure.

[93] McCormack, *supra* note 80, at 260.

[94] ILL. Comment, *supra* note 37, at 100-02.

[95] People v. DeFore, 242 N.Y. 13, 24, 150 N.E. 505, 588 (1926).

[96] Stone, 428 U.S. at 494-95.

sole concern in a case of this type is the "vindication of principle"[97] for alleged violations of fourth amendment rights. The federal interest in assuring correct determination of fourth amendment search and seizure rights is as strong in a post-conviction section 1983 action as it is in a normal habeas corpus proceeding. Therefore, collateral estoppel should not be applied to section 1983 suits filed as a result of *Stone* in order to protect the federal interest in correct and consistent enforcement of fourth amendment rights.[98]

Although McCurry's section 1983 claim was not collaterally estopped, the court believed it necessary to delay the district court's rehearing until the appellant had exhausted all state remedies although this issue has been expressly left open by the Supreme Court.[99] To keep the analogy between section 1983 and habeas corpus as perfect as possible,[100] exhaustion should be required in such cases.[101] Habeas corpus petitioners are required by statute[102] to exhaust all state remedies before applying to the federal courts for relief. This affords the states an opportunity to review and correct any errors committed at trial.[103] Similarly, respect for state judicial systems, an important concern of the *Stone* Court,[104] mandates the same result for section 1983 suits brought because habeas corpus is unavailable to the state prisoner.

Under the profferred section 1983 analyses, the "societal costs"[105] occasioned by habeas corpus challenges to a state court's determination of a search and seizure's constitutionality are minimized if not completely removed.[106] The convict will not be released in a successful case, rather, he is compensated by a damage award for police

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[97] McCormack, *supra* note 80, at 259.

[98] *Id.* at 260. This rationale comports with the interest analysis under an exception based on the limited intrusions on finality and comity principles by collateral estoppel. *See* note 99 *infra*. and accompanying text.

[99] McCurry, 606 F.2d at 799; Judice v. Vail, 430 U.S. 327, 339 n.16 (1979).

[100] *See* ILL. Comment, *supra* note 37, at 103-04 discussing the flaws in the analogy.

[101] *See contra*, McCormack, *supra* note 80, at 266.

[102] 28 U.S.C. § 2254 (1976). The exhaustion requirement of the *Younger* Doctrine has been given as the reason for a more general exception from res judicata for section 1983 actions than described in this note. *See* Theis, *supra* note 30, at 873.

[103] The respect for notions of comity in habeas corpus actions are described as deference to the state courts rather than a lack of federal power. Fay v. Noia, 372 U.S. 391, 402-12 (1963).

[104] Stone, 428 U.S. at 492-94 nn. 31 & 35 (1976).

A section 1983 damage suit further respects state determinations of guilt by only providing prospective relief. *See* Wooley v. Maynard, 406 F. Supp. 1381 (D.N.H. 1976), *aff'd*, 430 U.S. 705 (1977).

[105] Stone, 428 U.S. at 495 (1976).

[106] *See* notes 82-86 & 95-98 *supra* and accompanying text.

violations of his constitutional rights.[107] The state court determination of guilt remains undisturbed while federal interests are protected.[108] Without an exception from the rules of preclusion for cases similar to *McCurry*, the *Stone* decision would represent a substantial abandonment of the federal interest in the correct application of fourth amendment rights.[109]

While the Supreme Court has indicated a preference for applying preclusion principles to section 1983 actions, the full import of the court's preference remains unclear.[110] For example, a number of courts have suggested that preclusion principles should not apply to section 1983 actions when habeas corpus is unavailable.[111] Certainly, the important interests fostered by collateral estoppel are outweighed by section 1983's promise of a choice of forum and the federal interest in uniform constitutional adjudication at least in the unique situation created by *Stone*.[112]

If *Stone* was intended to limit the reach of the exclusionary rule, an exception from preclusion for such section 1983 cases may be acceptable to the Supreme Court. Beneath the concern expressed about the effects of the exclusionary rule, however, are other policy considerations of the Burger Court which may foreclose any exception. Justice Brennan has stated that the *Stone* decision was more concerned with limiting access to federal forums and with "notions of comity and federalism than with the exclusionary rule."[113] Some commentators have even come to the conclusion that *Stone* precludes any contest in federal court of state determinations of fourth amendment rights.[114]

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[107] McCormack, *supra* note 80, at 290.

[108] *See* note 106 *supra*.

[109] *But see* Gibbons, *supra* note 86, at 1112-13.

[110] The statement in Preiser v. Rodriquez, 411 U.S. 475 (1973), that res judicata would apply to civil rights cases has been described as based on "a premise [that is] less than persuasive [and] . . . is far less than a holding." Theis, *supra* note 30, at 863. The Court's failure to directly address this issue has been responsible for the diverse results reached by the lower courts. *Id.* at 865.

[111] *See* note 52 *supra* and accompanying text. Implicit in these dicta statements is the recognition that comity, finality and efficiency are judicial creations and must be accommodated at times with more pressing policies. McCormack, *supra* note 80, at 290; Theis, *supra* note 30, at 878-79.

[112] *See* notes 82-86 & 95-98 *supra* and accompanying text.

The results obtained by using section 1983 in this manner may provide experience from which to judge whether or not the exclusionary rule is the only effective mode of protecting fourth amendment rights. Clearly, the costs of applying the exclusionary rule in collateral actions are contained while the state prisoner is allowed an opportunity to vindicate his constitutional rights in federal court. *But see* Mapp v. Ohio, 367 U.S. 643 (1961) (exclusionary rule is only means of protecting fourth amendment).

[113] Stone, 428 U.S. at 515-16 (Brennan, J., dissenting).

[114] *See* Gibbons, *supra* note 86, at 1112-13.

The *Stone* majority stressed the fact that habeas corpus actions reviewing search and seizure claims result "in serious intrusions on values important to our system of government"[115] because the prisoner's guilt or innocence is not involved.[116] According to *Stone*, such intrusions are unjustifiable where the state conviction may be overturned.[117] As demonstrated earlier, however, the conviction remains undisturbed and the prisoner remains incarcerated when section 1983 is the mode of redress for search and seizure claims.[118] The other values identified by the court, however, are the same as those protected by collateral estoppel and are the same "intrusions" which, without the prisoner's release, would result in a post-conviction section 1983 action.[119] The Court has not addressed this issue yet and any prediction would be premature.[120] Arguably, the major fear expressed by the Court in *Stone* is quelled by recourse to section 1983.[121]

In a similar vein the *Stone* majority expressed its unreserved confidence in the ability of state courts to decide questions of federal rights.[122] Noting that state courts have the same obligation to uphold the federal constitution as do federal courts, the majority went on to state that "[d]espite differences . . . we are unwilling to assume that there now exists a general lack of appropriate sensitivity to constitutional rights in the . . . courts of the several states."[123]

As generally agreed, the conditions in southern courts which prompted the passage of the Act of 1871 no longer exist.[124] Still, concern about the adequacy of state courts in safeguarding federal rights are frequently voiced. These concerns have been the subject of much scholarly debate.[125] At one extreme are the proponents of the idea that state-federal court parity is a "dangerous myth."[126] Essen-

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[115] Stone, 428 U.S. at 491-92 n.31.

[116] *Id.*

[117] *Id.* at 491.

[118] *See* notes 82-86 & 95-98 *supra* and accompanying text.

[119] Stone, 428 U.S. at 491 n.31.

[120] *See* note 110 *supra*. The Court's concern with comity and finality is really another way of expressing its concern over the fact that a guilty party may be released from prison on an issue totally unrelated to that guilt.

[121] *See* McCormick, *supra* note 80, at 290.

[122] Stone, 428 U.S. at 493-94 n.35.

[123] *Id.*

[124] *See* Theis, *supra* note 30, at 866-67.

[125] *See, e.g.*, Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105 (1976) [hereinafter cited as Neuborne]; Aldisert, *Judicial Expansion of Federal Jurisdiction: A Federal Judge's Thoughts on Section 1983*, Comity and the Federal Caseload, 1973 Law and Soc. Order 557 [hereinafter cited as Aldisert].

[126] *See* Neuborne, *supra* note 125, at 1105.

tially, this side contends that institutional differences result in state court systems which are less capable of constitutional adjudication than their federal counterparts.[127]

At the other end of the spectrum are the defenders of state court parity.[128] For example, a federal circuit judge has argued that the media and academia are responsible for the unreasonable disdain of state courts[129] resulting in an ever growing federal docket.[130] The preference for federal adjudication is incompatible with the Constitution's system of federalism creating a national court system.[131] Disagreeing with the claims that state courts are institutionally less capable of dealing with federal rights, supporters of state parity point to the number of cases in which state courts are required to address the question of federal rights and to the resulting experience gained in handling those cases.[132]

The problem, at least for purposes of the issue discussed in this note, can be resolved without praising federal courts or condemning state systems. The key concern is balancing the interests of federal-state comity with the federal interest in constitutional adjudication. As stated earlier, where the interests in comity are respected, as they are under the suggested exceptions, the federal interest in constitutional adjudication and the policy considerations underlying section 1983 are both promoted.

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[127] *Id.* at 1115-30.
[128] *See* Aldisert, *supra* note 125.
[129] *Id.* at 559.
[130] *Id.*
[131] *Id.* at 578.
[132] *Id.* at 572.