

private wealth through an estate tax system,<sup>31</sup> and at the same time prevent individuals from voluntarily transferring private funds for Government use. Outright elimination by the states of legislative restrictions upon the power to take by will provides the most sensible solution.<sup>32</sup>

## PRISONERS' REMEDIES FOR MISTREATMENT\*

VENGEANCE is no longer considered an underlying objective of modern penal sanctions.<sup>1</sup> Nevertheless, mistreatment of prisoners in state and county prisons, in jails and on highway gangs is undoubtedly widespread.<sup>2</sup>

31. Federal estate taxation has been praised both as a source of revenue and as promoting a more equitable distribution of wealth. See Roosevelt, *Message to the Congress of the United States*, 79 CONG. REC. 9657, 9658 (1935); Cahn, *Federal Regulation of Inheritance*, 88 U. OF PA. L. REV. 297 (1940).

32. Two states expressly provide that a testator may bequeath or devise his property to any person or corporation capable of holding real estate. ALA. CODE tit. 61, § 4 (1940); GA. CODE ANN. § 113-116 (1937); cf. UTAH CODE ANN. § 101-1-4 (1943). The vast majority of states, however, have no specific provision defining permissible legatees. Similarly, the Model Execution of Wills Act makes no mention of the power to devise or bequeath. A specific definition of permissible legatees appears unnecessary, since all classes of legatees prohibited from taking must be defined. 1 SCHOULER, WILLS, EXECUTORS AND ADMINISTRATORS § 31 (6th ed. 1923). The principal drafter of the California Probate Code has recommended that its present restrictive provision be deleted. Evans, *Comments on the Probate Code of California*, 19 CALIF. L. REV. 602, 609 (1931).

\* Johnson v. Dye, 175 F.2d 250 (3d Cir. 1949), *rev'd per curiam*, 70 Sup. Ct. 146, *re-hearing denied*, 70 Sup. Ct. 238 (1949).

1. Modern penology seeks to eliminate the vengeance motive in punishment and replace it with rehabilitation of the offender, in order that he may be returned to society as a law-abiding citizen. BARNES & TEETERS, *NEW HORIZONS IN CRIMINOLOGY* 10-13 (1943). Decisions have been based in part upon this shift in emphasis. *E.g.*, Orme v. Rogers, 32 Ariz. 502, 260 Pac. 199 (1927).

2. For national surveys of penal conditions, see 5 ATT'Y GEN. SURVEY OF RELEASE PROCEDURES 122-3 (1940); BARNES & TEETERS, *NEW HORIZONS IN CRIMINOLOGY* 582-644 (1943). NATIONAL COMMISSION ON LAW OBSERVANCE AND ENFORCEMENT, REPORT ON PENAL INSTITUTIONS 27-31 (1931); PRESIDENT'S COMMITTEE ON CIVIL RIGHTS, TO SECURE THESE RIGHTS 25-9 (1947). For conditions in particular institutions, see the series of publications by the Osborne Association: HANDBOOKS OF AMERICAN PRISONS AND REFORMATORIES and HANDBOOKS OF AMERICAN INSTITUTIONS FOR DELINQUENT JUVENILES.

Southern road gangs have been particularly criticized. While the wearing of chains has been generally abolished, many of the accompanying abuses have evidently continued. BARNES & TEETERS, *supra*, at 624-32; MOOS, STATE PENAL ADMINISTRATION IN ALABAMA 135-6 (1942); Life, Nov. 1, 1943, pp. 93-9; Time, Sept. 13, 1943, p. 23, col. 3.

Particular examples of brutality have been described in cases. *E.g.*, Screws v. United States, 325 U.S. 91, 92-3 (1945); Crews v. United States, 160 F.2d 746, 747-8 (5th Cir. 1947); Culp v. United States, 131 F.2d 93, 96-7 (8th Cir. 1942). See also the following reports from the N.Y. Times: Oct. 28, 1947, p. 27, col. 1. (Birmingham News barred from state prisons in Alabama for "very unfair" stories of flogging and other mistreatment); May 29, 1948, p. 30, col. 3 (warden and six guards in New Jersey

The law has not yet provided an adequate remedy for prisoners who suffer abuses committed in the name of prison discipline. A tort action against responsible state officials is the principal form of legal redress.<sup>3</sup> But this action affords only restricted relief: frequently statutes prevent convicts from suing; <sup>4</sup> potential defendants are protected by the doctrines of sovereign immunity and administrative discretion; <sup>5</sup> and recovery on the merits is difficult even when suit is possible.<sup>6</sup>

prison indicted for beating prisoners and committing other offenses); Aug. 6, 1948, p. 36, col. 1 (Governor of New Jersey refuses to extradite a Negro fugitive to South Carolina on account of his previous mistreatment there); April 9, 1949, p. 8, col. 5 (six police officers indicted by a federal grand jury for mistreating a recaptured prisoner in Tennessee jail); July 12, 1947, p. 26, col. 1, and July 19, 1947, p. 6, col. 4 (warden and guards kill five prisoners in a road camp near Brunswick, Georgia). On the Brunswick episode, see also *New Republic*, July 28, 1947, p. 11; *Life*, July 21, 1947, p. 29.

3. *E.g.*, *Holloway v. Moser*, 193 N.C. 185, 136 S.E. 375 (1927); *Hunt v. Rowton*, 143 Okla. 181, 288 Pac. 342 (1930); *Clark v. Kelly*, 101 W.Va. 650, 133 S.E. 365 (1926). Recovery in some states is based on statute. *E.g.*, N.Y. COURT OF CLAIMS ACT §§ 8, 9(2). *Dailey v. State*, 190 Misc. 542, 75 N.Y.S.2d 40 (N.Y. Ct. Cl. 1947).

Legal procedures other than tort suits have occasionally been invoked in the state courts. See Comment, *Legal Consequences of the Third Degree*, 9 OHIO ST. L.J. 514, 519-24 (1948). For example, a jailer who abuses a prisoner may be held in contempt on the theory that he has violated the court's commitment order. *Howard v. State*, 28 Ariz. 433, 237 Pac. 203 (1925); *cf. In re Birdsong*, 39 Fed. 599 (S.D. Ga. 1889). *Contra*: *People ex rel. Grenfell v. District Court*, 89 Colo. 78, 299 Pac. 1 (1931). Contempt has an important advantage from the prisoner's point of view in that statutes which disqualify a prisoner from suing do not apply. See note 4 *infra*. The disadvantage lies in persuading a court to imply a direction not to abuse the prisoner from the jailer's instruction to "receive and safely keep" him.

The offending officer may also be subject to criminal prosecution. *E.g.*, *State v. Mincher*, 172 N.C. 895, 90 S.E. 429 (1916). *Cf. State ex rel. Boynton v. Jackson*, 139 Kan. 744, 33 P.2d 118 (1934) (quo warranto used to dismiss a sheriff who abused his prisoners). But prosecutions are seldom undertaken, possibly because prosecutors are unwilling to discredit the administration of which they are a part.

Many states, in addition to judicial remedies, provide for administrative inspection of prisons to uncover acts of brutality. *E.g.*, CONN. GEN. STATS. § 2862 (1949). To implement these remedies, prisoners have the right to send uncensored mail to the inspecting authority. *E.g.*, CONN. GEN. STATS. § 2863 (1949). *Cf. MOOS, STATE PENAL ADMINISTRATION IN ALABAMA* 135-6 (1942).

4. *E.g.*, N.Y. PENAL LAW §§ 510, 511; *Green v. State*, 251 App. Div. 108, 295 N.Y. Supp. 672 (4th Dep't 1937). Sixteen other states had similar statutes in 1939. Notes, 48 YALE L.J. 912, 913 (1939); 26 GEO. L.J. 1051 (1938); 34 VA. L. REV. 463; *id.* at 959 (1948). While these statutes deprive convicts of their right to sue only during their imprisonment, the delay can be vital. Evidence and testimony grow cold, and the deterrent effect of such suits is largely lost.

5. *E.g.*, *Gentry v. Hot Springs*, 227 N.C. 665, 44 S.E.2d 85 (1947) (sovereign immunity); *Gurley v. Brown*, 193 P.2d 693 (Nev. 1948) (administrative discretion). See PROSSER, TORTS 1063-79 (1941); Jennings, *Tort Liability of Administrative Officers*, 21 MINN. L. REV. 263, 297, 301 (1937); Note, 102 A.L.R. 174, 182 (1936). The guard who commits the offense may not be protected by the doctrines of sovereign immunity and administrative discretion. But he is also likely to be a financially unsatisfactory defendant. *But cf. Holloway v. Moser*, 193 N.C. 185, 136 S.E. 375 (1927).

6. See page 808 *infra*.

As a result of these restrictions, prisoners have looked to the federal courts for an effective alternate remedy based on the due process clause of the Fourteenth Amendment. But the recent case of *Johnson v. Dye*<sup>7</sup> indicates that mistreated prisoners have a rough road to travel when seeking relief in the federal courts. Johnson had escaped from a Georgia chain gang and fled to Pennsylvania, where the Governor, after proper requisition by the Governor of Georgia, ordered his extradition. Alleging that his mistreatment in Georgia constituted a denial of due process, Johnson sought a writ of habeas corpus in the state court. Denial of the writ there was upheld in the intermediate appellate court.<sup>8</sup> Without going on to the Pennsylvania Supreme Court, Johnson shifted his forum to the federal district court. His petition for habeas corpus was again denied.<sup>9</sup> But the Court of Appeals for the Third Circuit, sitting en banc, reversed, allowing the writ to issue.

The initial obstacle to entertaining the writ in the federal courts was procedural: since petitioner had not appealed to the Pennsylvania Supreme Court, he had not "exhausted his state remedies." While the exhaustion rule applies to ordinary habeas corpus applications,<sup>10</sup> the third circuit held that it does not apply when habeas corpus is used to attack extradition warrants.<sup>11</sup>

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7. 175 F.2d 250 (3d Cir. 1949), *rev'd*, 70 Sup. Ct. 146 (1949).

The third circuit's decision in *Johnson v. Dye* has already been invoked in four similar cases: *Ex parte Marshall*, 85 F. Supp. 771 (D.N.J. 1949); *Harper v. Wall*, 85 F. Supp. 783 (D.N.J. 1949); *Williams v. Glasco*, Civil No. 685-49, D.N.J., Dec. 16, 1949; *People ex rel. Jackson v. Ruthazer*, 90 N.Y.S.2d 205 (Sup. Ct. 1949), *aff'd*, 93 N.Y.S.2d 729 (1st Dep't 1949). Only in *Harper v. Wall* was the petitioner's contention sustained.

8. *Commonwealth ex rel. Johnson v. Dye*, 159 Pa. Super. 542, 49 A.2d 195 (1946); *affirming* No. 3679, Allegheny County Common Pleas, April Term 1946.

9. *Johnson v. Dye*, 71 F. Supp. 262 (W.D. Pa. 1947).

10. Section 2254 of the new Judicial Code provides, "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 unless it appears that the applicant has exhausted the remedies available in the courts of the State. . . ." 28 U.S.C. § 2254 (1948). This section codifies *Ex parte Hawk*, 321 U.S. 114 (1944).

11. 175 F.2d 250, 256 (3d Cir. 1949). The third circuit had ample precedent. Though extradition procedure is in the hands of state officials, the power to extradite derives from federal authority. U.S. CONST. Art. IV, § 2; 18 U.S.C. § 3182 (1948); *Kentucky v. Dennison*, 24 How. 66 (U.S. 1860). As a consequence, a petitioner attacking an extradition warrant by writ of habeas corpus has been allowed to do so initially in the federal courts. *E.g.*, *Drew v. Thaw*, 235 U.S. 432 (1914); *Roberts v. Reilly*, 116 U.S. 80, 94 (1885). See 2 MOORE, EXTRADITION 1017 (1891). Recent cases on this point in the lower federal courts are conflicting. Two circuits have required state prisoners attacking extradition warrants by writs of habeas corpus to exhaust their state remedies. *Lyon v. Harkness*, 151 F.2d 731 (1st Cir. 1945), *cert. denied*, 327 U.S. 782 (1946); *Kaufman v. Mount*, 131 F.2d 112 (5th Cir. 1942). The third circuit had some difficulty in making up its mind. *United States ex rel. Darcy v. Sup't County Prisons*, 111 F.2d 409, *cert. denied*, 311 U.S. 662 (3d Cir. 1940) (exhaustion not applied) was overruled *sub silentio* by *Powell v. Meyer*, 147 F.2d 606 (3d Cir. 1945), which was in turn overruled in *Johnson v. Dye*, 175 F.2d 250, 257 (3d Cir. 1949).

One petition has even been transferred from the state court, where it was initially

But this ruling was short-lived. The Supreme Court granted certiorari and simultaneously reversed. Its thirty-three word order consisted solely of a citation to the leading case expounding the exhaustion rule.<sup>12</sup> This action is ambiguous in light of earlier Supreme Court decisions<sup>13</sup> which had held that extradition warrants may be attacked initially in either federal or state courts. On the one hand, the Supreme Court may mean to preserve this option, insisting only that the attack be carried all the way through the state court system once the petitioner elects to begin there. On the other hand, the Supreme Court may have reversed its earlier decisions *sub silentio*, and may now insist that petitioners attacking extradition warrants always begin in state courts.

By reversing on a point of procedure, the Supreme Court avoided considering the substantive Constitutional issue which the third circuit resolved in Johnson's favor. Arguing that freedom from cruel and unusual punishment is "basic" and "fundamental," the third circuit squarely held that a state which inflicts such punishment deprives a prisoner of the due process of law guaranteed by the Fourteenth Amendment.<sup>14</sup> With this finding there should be little disagreement.

heard, to a federal court. *United States ex rel. McCline v. Meyering*, 75 F.2d 716, 718 (7th Cir. 1934). This is the precise procedural situation in the *Johnson* case.

Section 2254, *supra* note 10, can be interpreted as exempting extradition proceedings from the exhaustion requirement: state procedure must be exhausted where the prisoner is in "custody pursuant to the judgment of a State court." 28 U.S.C. § 2254 (1948) (emphasis added). Extradition warrants are executive warrants issued by the governor of the asylum state. Therefore, a person held in custody under an extradition warrant is not in "custody pursuant to the judgment of a state court." The House draft of § 2254 included executive warrants, but these were dropped at the conference stage. SEN. REP. No. 1559, 80th Cong. 2d Sess. 9 (1949). See MOORE'S JUDICIAL CODE COMMENTARY 445 (1949). But see note 34 *infra*.

A more vulnerable step than exhaustion in the *Johnson* case was the fact that the due process issue was allowed to be raised at all. Ordinarily a collateral attack upon an extradition requisition is limited to an examination of whether the accused is charged with a crime, a check for identity between the person held and the person demanded, and an inquiry into the prisoner's fugitive status. *Drew v. Thaw*, 235 U.S. 432 (1914); 2 MOORE, EXTRADITION 1021-34 (1891); Note, 21 COL. L. REV. 709 (1921). But see UNIFORM CRIMINAL EXTRADITION ACT § 6 (fugitive status not required for extradition). This limited scope had been expanded to include due process in only one decision prior to the *Johnson* case. *Commonwealth ex rel. Mattox v. Sup't of County Prisons*, 152 Pa. Super. 167, 31 A.2d 576 (1943), 53 YALE L.J. 359 (1944); 47 COL. L. REV. 470 (1947); 17 TEMP. L.Q. 469 (1943). See also Alexander, *The Thomas Mattox Extradition Case*, 2 NAT. B.J. 1 (1944).

12. *Ex parte Hawk*, 321 U.S. 114 (1944), cited in *Dye v. Johnson*, 70 Sup. Ct. 146 (1949). See note 10 *supra*.

13. See note 11 *supra*.

14. *Johnson v. Dye*, 175 F.2d 250, 255 (3d Cir. 1949).

The Supreme Court has found several sections of the Bill of Rights to be "basic" and "fundamental" in order to incorporate them into the due process clause of the Fourteenth Amendment. *E.g.*, freedom of speech, *Herndon v. Lowry*, 301 U.S. 242 (1937); right to counsel, *Uveges v. Pennsylvania*, 335 U.S. 437 (1948). See Comment, *The*

But the provocative part of the third circuit decision lies in the factual finding that Georgia chain gang discipline is severe enough to be labeled "cruel and unusual."<sup>15</sup> Unlike earlier Eighth Amendment cases,<sup>16</sup> *Johnson v. Dye* strikes down practices which have close counterparts in many state

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*Adamson Case: A Study in Constitutional Technique*, 58 YALE L.J. 268, 279-86 (1949). The Supreme Court probably agrees with the third circuit that the cruel and unusual punishment clause of the Eighth Amendment should be similarly incorporated. In *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 462 (1947), the Court so assumed, without specifically deciding the issue. And in a case in which a Georgia sheriff killed a prisoner, the Court upheld an indictment charging the sheriff with depriving the prisoner of his constitutional rights. The sheriff's conviction was reversed, however, because of the judge's charge. *Screws v. United States*, 325 U.S. 91 (1945).

In a partial dissent in the *Johnson* case, Judge O'Connell would require a mistreated prisoner alleging denial of due process to prove both that he had been punished cruelly in the past and that he will be similarly punished in the future. He would not consider past acts of mistreatment violations of the Fourteenth Amendment so long as the state was genuinely attempting to prevent the recurrence of similar acts. *Johnson v. Dye*, 175 F.2d 250, 259 (3d Cir. 1949). See 23 SO. CALIF. L. REV. 86 (1949); 23 TEMP. L.Q. 234 (1950).

15. Cruel and unusual punishment was originally identified with the inhuman tortures of seventeenth century England. These tortures were the immediate motivation for the initial prohibition. Bill of Rights, 1 WILL. & MARY, Sess. 2, c. 2 (1688). Similar prohibitions appear in the United States Constitution and the constitutions of 47 states. N.Y. STATE CONSTITUTIONAL CONVENTION COMMITTEE, CONSTITUTIONS OF THE STATES AND THE UNITED STATES 1763 (1938). Some states have given these clauses a restricted interpretation, limiting them to situations similar to the historic tortures from which the prohibition originally sprang. *E.g.*, *Hart v. Commonwealth*, 131 Va. 726, 741, 109 S.E. 582, 586-7 (1921). *Cf.* *Weems v. United States*, 217 U.S. 349, 409 (1910) (dissenting opinion). Other states and the national government have rejected an historic interpretation and use a modern standard. *E.g.*, *Weems v. United States*, 217 U.S. 349 (1910); *State v. Kimbrough*, 212 S.C. 348, 46 S.E.2d 273 (1948). See 1 BISHOP, CRIMINAL LAW 696-700 (9th ed. 1923); Schofield, *Cruel and Unusual Punishment*, 5 ILL. L. REV. 321 (1911); Note, 48 W. VA. L.Q. 63 (1941).

In *Johnson v. Dye*, the third circuit refused to specify which of the punishments inflicted by Georgia prison officials were considered cruel and unusual: "We shall not set out in this opinion the revolting barbarities. . . . To perpetrate these atrocities in an opinion is to be unfair to the American scene as a whole and to reflect little credit on this generation for posterity. . . ." 175 F.2d 250, 256 n.12 (3d Cir. 1949). But the forms of discipline usually used on southern road gangs are described in the works cited *supra* note 2.

Since *Johnson's* conviction, Georgia has abolished chain gangs by statute. Whipping, shackles, and stripes are explicitly forbidden. 77 GA. CODE ANN. § 370 (1946). *Cf.* GEORGIA CONST. § 2-109: "nor shall any person be abused . . . in prison." See also 77 GA. CODE ANN. § 365 (1946), which provides that the State Board of Corrections shall institute a program of humane prison administration having rehabilitation as its purpose. There is some doubt, however, whether Georgia's prison practices have achieved the level indicated by these statutes. See, for example, the reports cited *supra* note 2 on the Brunswick road camp incident in 1947.

16. *E.g.*, *Weems v. United States*, 217 U.S. 349 (1910) (Philippine "cadena"—a punishment consisting of imprisonment in chains, complete isolation from the outside world, and the imposition of heavy and permanent civil disabilities); *Davis v. Berry*, 216 Fed. 413 (S.D. Iowa 1914), *rev'd as moot*, 242 U.S. 468 (1917) (Iowa statute requiring

and county penal institutions.<sup>17</sup> These practices are in part checked by an occasional federal prosecution under the civil rights acts.<sup>18</sup> The *Johnson* case establishes a broader base on which the convict himself may seek relief, either by a federal habeas corpus action or by a private action under the civil rights acts.

The federal habeas corpus statute, which applies generally to "custody in violation of the Constitution,"<sup>19</sup> is broad enough to include mistreatment<sup>20</sup> as well as the traditional ground of lack of due process in trial.<sup>21</sup> But there are difficulties which diminish the effectiveness of the writ in mistreatment cases. In dealing with prisoners whose guilt is beyond doubt, courts may hesitate to grant full release—the relief usually associated with habeas corpus.<sup>22</sup> This difficulty can be avoided. Habeas corpus has been used in many ways,<sup>23</sup> and the writ can be altered to extend relief short of full release by granting the writ and then remanding the prisoner to the keeper's custody with directions to respect his civil rights.<sup>24</sup> This creates a new problem,

sterilization of recidivists declared unconstitutional in three-judge district court). See Note, 48 W. VA. L.Q. 63 (1941). See note 15 *supra*.

17. See note 2 *supra*.

18. 18 U.S.C. § 242 (1948), originally part of the first Civil Rights Act, 14 STAT. 27 (1866). *Screws v. United States*, 325 U.S. 91 (1945); *Crews v. United States*, 160 F.2d 746 (5th Cir. 1947).

19. 28 U.S.C. § 2241 (1948).

20. Since mistreatment of a convict by his keeper has no reference to the validity of the proceedings in the trial court, it is impossible to say that the trial court has lost jurisdiction by denying the prisoner due process of law. But the jurisdictional concept is not required by the statute. 28 U.S.C. § 2241 (1948). If a prisoner is mistreated so as to amount to a denial of due process, his confinement becomes "in violation of the Constitution" and the statute would appear to sustain an issue of the writ. This reasoning direct from the statute, without discussing "jurisdiction", has been adopted in several recent cases. See, *e.g.*, *Hawk v. Olson*, 326 U.S. 271, 274 (1945). See Note, *The Freedom Writ—The Expanding Use of Federal Habeas Corpus*, 61 HARV. L. REV. 657, 661 (1948).

21. Traditionally, habeas corpus will lie only when the committing court had no jurisdiction over the prisoner or lost it before commitment. *E.g.*, *Dorsey v. Gill*, 148 F.2d 857, 871 (D.C. Cir. 1945), *cert. denied*, 325 U.S. 890 (1945). Denial of due process became equivalent to loss of jurisdiction in *Johnson v. Zerbst*, 304 U.S. 458, 468 (1938). See Note, *The Freedom Writ—The Expanding Use of Federal Habeas Corpus*, 61 HARV. L. REV. 657, 660 (1948).

22. The reason for this judicial hesitation may be surmised from the comment of R. E. Warren, Director, Georgia Department of Corrections, when informed of the *Johnson* case: "If the State of Pennsylvania or any other state is interested in adopting convicted criminals as citizens, we'll be glad to furnish them with 6,000 others. . . ." N.Y. Times, May 19, 1949, p. 24, col. 3.

23. One historian believes habeas corpus was originally designed to put people in jail, not to get them out. Jenks, *The Story of Habeas Corpus*, 18 L.Q. REV. 64, 65 (1902); Longsdorf, *Habeas Corpus—A Protean Writ and Remedy*, 10 OHIO STATE L.J. 301 (1949). Bracton described habeas corpus as a writ to compel a defendant to appear and attend an action in personam. See 2 POLLOCK AND MAITLAND, HISTORY OF ENGLISH LAW 593 n.4 (2d ed. 1899).

24. This procedure was specifically approved in *Coffin v. Reichard*, 143 F.2d 443 (6th

however. A keeper can be held in contempt for violating the court's order to protect the prisoner's civil rights. Courts may fear that a mistreated convict will use alleged violations of the order as a club over the head of the prison administration.<sup>25</sup>

But the chief obstacle to the use of federal habeas corpus by a state prisoner is the rule requiring him to exhaust his state remedies.<sup>26</sup> This rule does more than merely delay resort to the lower federal courts. It may bar access altogether. Federal courts may refuse to consider a petition for habeas corpus until the prisoner, after losing in the highest state court, has petitioned the United States Supreme Court for a writ of certiorari.<sup>27</sup> And a

Cir. 1944), in which a federal prisoner complained of abuse by a guard. The court relied upon its statutory authority to dispose of a habeas corpus petition "as law and justice require." 28 U.S.C. § 2243 (1948). The flexibility of habeas corpus is also illustrated by cases in which the writ issued to transfer a prisoner from one institution to another. *E.g.*, *In re Bonner*, 151 U.S. 242 (1893); *People ex rel. Saia v. Martin*, 289 N.Y. 471, 46 N.E.2d 890 (1943). *But cf.*, *e.g.*, *McNally v. Hill*, 293 U.S. 131, 136 (1934) ("the only judicial relief authorized was the discharge of the prisoner or his admission to bail. . ."); *Snow v. Roche*, 143 F.2d 718 (9th Cir. 1944); *Application of Dunn*, 150 Neb. 669, 35 N.W.2d 673 (1949).

25. *Cf. Thorp v. Clark*, 67 F. Supp. 703, 704 (D.N.H. 1946): "the conduct of the state prison or its discipline is not the proper object of investigation on habeas corpus proceedings. It is not the function of this court to superintend the treatment of prisoners in the state prison. . . ."

Denial of an injunction might be rationalized on the basis of general equitable rules governing its issuance. Particularly relevant is the mandate that an injunction will not issue to prevent a threatened physical wrong. *McCLINTOCK, EQUITY* 428 (1936). However, such an injunction did issue in *Davis v. Berry*, 216 Fed. 413 (S.D. Iowa 1914). *Cf. Hague v. CIO*, 307 U.S. 496 (1939). See note 16 *supra*.

26. See note 10 *supra*.

27. The original statement of the exhaustion rule included seeking certiorari to the Supreme Court as part of the "state remedies." *Ex parte Hawk*, 321 U.S. 114, 116 (1944).

The *Hawk* decision has since been limited by *Wade v. Mayo*, 334 U.S. 672 (1948), in which the Supreme Court declared that the certiorari step was beyond state remedies. While failure to seek certiorari would no longer prevent the district court from entertaining a habeas corpus petition, the Supreme Court in the *Wade* case indicated that a failure to seek certiorari may still be a relevant factor in the district court's decision to hear a petition. 334 U.S. 672, 680, 681.

*Wade v. Mayo* was decided before § 2254 was adopted (see note 10 *supra*), and the new statute may overrule it. See the opposing arguments in *Parker, Limiting the Abuse of Habeas Corpus*, 8 F.R.D. 171, 177 (1949) (pro), and *MOORE, JUDICIAL CODE COMMENTARY* 449 (1949) (con). The Supreme Court may decide the issue in a pending case, *Darr v. Burford*, 172 F.2d 668 (10th Cir. 1949), *cert. granted*, 337 U.S. 923 (1949).

Section 2254, which embodies the exhaustion rule, provides for two exceptional situations in which a federal court may hear a habeas corpus petition from a state prisoner who has not exhausted his state remedies. These are: (1) when there is an absence of state corrective process, and (2) there are circumstances rendering such process ineffective to protect the rights of the prisoner. *Cf. United States ex rel. Montgomery v. Ragen*, 86 F. Supp. 382 (N.D. Ill. 1949).

denial of certiorari in habeas corpus proceedings is usually considered a ruling on the merits, binding on lower federal courts.<sup>28</sup>

The difficulties of habeas corpus may be avoided by choosing an action for damages or an injunction under the federal civil rights acts.<sup>29</sup> One section of these acts enables a prisoner<sup>30</sup> to bring an action<sup>31</sup> against any person who, under color of state law, deprives him of rights guaranteed by the Constitution of the United States. There is no doubt that state prison officials, enforcing prison discipline, act under color of state law.<sup>32</sup> And the Supreme Court has assumed that freedom from cruel and unusual punishment is a right protected by the Constitution against state infringement.<sup>33</sup>

The civil rights action eliminates some of the procedural handicaps that plague habeas corpus. Release of the prisoner is not part of the relief in a civil proceeding, and the exhaustion of state remedies rule does not apply.<sup>34</sup>

28. *E.g.*, *Haughey v. Smyth*, 170 F.2d 68 (4th Cir. 1948). *But cf.* *House v. Mayo*, 324 U.S. 42, 48 (1945). See Fraenkel, *Some Current Civil Liberties Problems*, 15 BROOKLYN L. REV. 12, 24 (1948): "when the Supreme Court refuses certiorari, it would be a hardy district judge who would then grant habeas corpus. . . ." See note 22 *supra*.

29. REV. STAT. § 1979 (1875), 8 U.S.C. § 43 (1946). The section was originally part of the Ku Klux Klan Act of 1871, 17 STAT. 13 (1871). It subjects to legal or equitable penalties any person who, under color of law or custom, deprives any other person of any rights, privileges, or immunities secured by the Constitution or federal laws. In common with the federal civil rights laws generally, early efforts to implement this provision were unavailing. *E.g.*, *Brawner v. Irwin*, 169 Fed. 964 (N.D. Ga. 1909). See KORNITZ, *THE CONSTITUTION AND CIVIL RIGHTS* 8-47 (1947) (describing the judicial emasculation of civil rights legislation passed during the Reconstruction period). However, actions brought under 8 U.S.C. § 43 have been increasingly successful since 1939. See, *e.g.*, *Mills v. Board of Education*, 30 F. Supp. 245 (D. Md. 1939). Complaints in two prison mistreatment cases brought under § 43 withstood motions to dismiss, although the final outcomes are unreported. *Picking v. Pennsylvania R.R.*, 151 F.2d 240 (3d Cir. 1945); *Gordon v. Garrison*, 77 F. Supp. 477 (E.D. Ill. 1948). *Cf.* *McShane v. Moldovan*, 172 F.2d 1016 (6th Cir. 1949).

8 U.S.C. § 43 is the civil counterpart of 18 U.S.C. § 242, cited *supra* note 18.

30. An action under § 43 may be brought by "any person." See note 29 *supra*.

31. The capacity of an individual to sue in the federal courts is determined by the law of his domicile. FED. R. CIV. P. 17(b). Many states do not allow convicts to maintain civil suits. See note 4 *supra*. In these states convicts might be barred from bringing a federal action as well. *Panko v. Endicott Johnson Corp.*, 24 F. Supp. 678 (N.D.N.Y. 1938). But the Rules of Civil Procedure are designed to regulate procedure only, not to affect substantive rights. 28 U.S.C. § 2072 (1948). The civil sections of the civil rights acts probably grant such substantive rights, though the question has not yet arisen in connection with Rule 17(b). *Cf.* *McShane v. Moldovan*, 172 F.2d 1016, 1022 (6th Cir. 1949).

32. *Gordon v. Garrison*, 77 F. Supp. 477, 479 (E.D. Ill. 1948). *Cf.* *Screws v. United States*, 325 U.S. 91, 107 (1945).

33. *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 462 (1947). See note 14 *supra*.

34. Section 2254 applies only to habeas corpus petitions. See note 10 *supra*. The exhaustion principle has been applied in other statutes. Federal courts may not entertain attacks upon state taxes and state rate orders unless the state review procedure does not supply a "plain, speedy, and efficient" remedy. 28 U.S.C. §§ 1341, 1342. Even in the absence of such statutes, the Supreme Court has declared that it will exercise discretion and

Courts will probably hesitate to grant injunctive relief for the same reason they are presently reluctant to use court orders in habeas corpus petitions—the possibility that the threat of contempt proceedings will hamper prison administration.<sup>35</sup> But the alternative relief of money damages does not raise this problem.

Choosing the proper procedural path is admittedly only the beginning of the mistreated convict's search for relief. The difficult factor of proof must still be faced. As a practical matter, the prisoner must prove, generally, that the allegedly cruel prison conditions do exist, and, particularly, that he personally was subjected to them.<sup>36</sup> His witnesses to general mistreatment will usually have to be other prisoners, whose credibility is open to attack, and who may be reluctant to testify for fear of subsequent retribution by prison officials. And he may have no witnesses at all to his particular mistreatment.

Courts in general have been reluctant to vindicate the right of prisoners to be free from extreme punishment. In *Johnson v. Dye*, the third circuit, through the writ of habeas corpus, attempted to implement the principle that prisoners, too, are entitled to due process of law. The Supreme Court's reversal, based upon a procedural rule which will hinder all federal habeas corpus petitions, points up the need for a different procedural vehicle. The federal civil rights acts may supply a satisfactory alternative, except that difficult problems of proof will remain. Probably any real improvement in prison treatment must depend on federal prosecution or on legislative reform by the states.

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deny federal relief to plaintiffs who challenge state action in the federal courts without having first sought relief in state courts. *Stainback v. Mo Hock Ke Lok Po*, 336 U.S. 368 (1949). See Comment, *Discretion to Deny Federal Relief Against State Action*, 28 TEXAS L. REV. 410 (1950). But in federal civil rights cases the federal district courts have specifically been granted jurisdiction. 28 U.S.C. § 1343 (1948). It is unlikely that an exhaustion principle could apply here.

35. See note 25 *supra*.

36. *Johnson v. Dye*, 175 F.2d 250, 253, 258 (3d Cir. 1949), *rev'd*, 70 Sup. Ct. 146 (1949). *Johnson's* evidence on general conditions consisted of articles in national magazines about Georgia prison practices and oral testimony from other escaped chain gang prisoners who happened to be in the Pennsylvania jail with him. He presented only his own testimony for evidence as to how he personally had been mistreated. The State of Georgia made no effort to rebut. 175 F.2d 250, 253, 258. Cf. *People ex rel. Jackson v. Ruthazer*, 90 N.Y.S.2d 205, 211 (Sup. Ct. 1949), *aff'd*, 93 N.Y.S.2d 729 (1st Dep't 1949) (when Georgia actively opposed the petition and presented extensive rebuttal evidence, petition was denied).