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Case Comments


Undercover police officers went to the home of Willie McCurry after receiving a tip that he was selling heroin. Two of the officers knocked on the door and, when McCurry answered, asked if they could buy some heroin “caps.” McCurry left for a moment and then returned, firing a weapon at the officers. A gun battle ensued, and the officers arrested McCurry. After McCurry’s removal from the scene, police searched his residence and discovered heroin. A Missouri state court ruled the search constitutional and found McCurry guilty of both possession of heroin and assault with intent to kill.1 McCurry subsequently filed a civil rights action for damages under 42 U.S.C. § 1983,2 naming as defendants the police officers involved and the City of St. Louis Police Department. The complaint alleged, among other things,3 that the search of his home was unconstitutional.4 In response, the defendants argued that the doctrine of collateral estoppel5 precluded relitigation of the search and


2. Section 1983 provides:
Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

3. The complaint also alleged that the police officers had assaulted McCurry upon his arrest. McCurry v. Allen, 606 F.2d 795, 797 (8th Cir. 1979), cert. granted, 100 S. Ct. 1012 (1980).

4. Id.

5. Collateral estoppel makes prior determinations of fact or law binding on parties in subsequent suits if the determinations were fully litigated and necessary to the prior judgment, even if the prior suit was based on a different
seizure claim. On this basis, the federal district court granted a summary judgment for the defendants. On appeal, a three-judge panel of the Court of Appeals for the Eighth Circuit reversed, holding that a state court determination on the constitutionality of a search and seizure is not to be given collateral estoppel effect in a section 1983 action. McCurry v. Allen, 606 F.2d 795 (8th Cir. 1979), cert. granted, 100 S. Ct. 1012 (1980).

The United States Supreme Court has not yet decided whether state criminal determinations should be given collateral estoppel effect in section 1983 actions, nor, prior to McCurry, had the Eighth Circuit. Seven other circuits, however, cause of action. Collateral estoppel thus differs from the other components of the doctrine of res judicata, merger and bar, which prevent relitigation of the same cause of action regardless of the particular issues raised. See Restatement (Second) of Judgments §§ 47(a), 46, 68 (Tent. Draft No. 1, 1973). See generally Developments in the Law—Section 1983 and Federalism, 90 Harv. L. Rev. 1133, 1331-33 (1977) [hereinafter cited as Developments]. The res judicata rules followed by federal courts are supported by 28 U.S.C. § 1738 (1976). Section 1738 implements the full faith and credit clause, U.S. Const. art. IV, § 1. See note 29 infra.


7. The Eighth Circuit panel remanded the case to district court, but stayed proceedings until the Missouri state court decided McCurry's direct appeal of his criminal conviction. 606 F.2d at 799. The Eighth Circuit stated that it would be compelled to abstain completely until the matter had been settled in the Missouri courts if McCurry were seeking an injunction or a declaratory judgment. Id. (citing Judice v. Vail, 430 U.S. 327, 333-36 (1977); Huffman v. Pursue, Ltd., 420 U.S. 592, 604-07 (1975); Younger v. Harris, 401 U.S. 37, 44 (1971)). The court further noted that the Supreme Court has explicitly avoided ruling whether federal courts must abstain from deciding damage claims in such situations. 606 F.2d at 799 (citing Judice v. Vail, 430 U.S. at 339 n.16). Nonetheless, the Eighth Circuit stated that “[i]n deference to the state courts, . . . we believe it appropriate to abstain under the present circumstances.” 606 F.2d at 799. The court said that the plaintiff would probably go without relief for a number of years, indicating that this result is “the price exacted by our federal-state court system.” Id. The court also held that the district court judge erred in granting summary judgment without considering McCurry's assault claim. Id. at 797.


9. The court had previously ruled, however, that res judicata would apply in a federal section 1983 action brought after a state civil proceeding. See Robbins v. District Court, 592 F.2d 1015, 1018 (8th Cir. 1979); Goodrich v. Supreme Court, 511 F.2d 316, 318 (8th Cir. 1975). The court had also applied res judicata
have either held or stated in dictum that state criminal decisions should be given collateral estoppel effect in federal court actions under section 1983. A number of federal district courts have reached similar conclusions. Most of these circuit and district courts decided the issue before 1975, when the Supreme Court significantly limited access to federal forums for persons convicted of crimes in state courts. In Stone v. Powell, the Court 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 evidence obtained in an unconstitutional search or seizure was introduced at his trial." The principles to issues of misconduct in employment that were separable from the constitutional claims alleged by a plaintiff. See Jenson v. Olson, 353 F.2d 825, 829 (8th Cir. 1965).

10. See cases cited in McCurry, 606 F.2d at 797 nn.2-8. Only the Seventh and Ninth Circuits have yet to rule on the question. In Brubaker v. King, 505 F.2d 534, 537-38 (7th Cir. 1974), the Seventh Circuit stated that the issue of probable cause litigated at a state suppression hearing was different from the section 1983 issue of whether the law enforcement officer acted in good faith and with reasonable belief that there was probable cause, and that the state court ruling therefore could not have collateral estoppel effect. In Ney v. California, 439 F.2d 1285 (9th Cir. 1971), the Ninth Circuit held that requirements for collateral estoppel were not met because the state court had not decided the constitutional issue, and commented that adherence to normal collateral estoppel rules in federal section 1983 actions would make the Civil Rights Act "a dead letter." Id. at 1288.


Most commentators disagree with the courts and argue for a variety of exceptions to collateral estoppel for section 1983 actions. See, e.g., Averitt, Federal Section 1983 Actions After State Court Judgments, 44 U. COLO. L. REV. 191, 195-96 (1972); McCormack, Federalism and Section 1983: Limitations on Judicial Enforcement of Constitutional Claims, Part II, 60 VA. L. REV. 250, 286-91 (1974); Theis, supra note 8, at 872-81; Developments, supra note 5, at 1338-43; Comment, The Collateral Estoppel Effect of State Criminal Convictions in Section 1983 Actions, 1975 U. ILL. L.F. 95, 100-06. See also Note, The Preclusive Effect of State Judgments on Subsequent 1983 Actions, 78 COLUM. L. REV. 610, 616-17 (1978) (collateral estoppel should apply unless section 1983 plaintiff was not provided with a "full and fair hearing" in state court).


13. Id. at 494 (footnotes omitted). Under 28 U.S.C. § 2254 (1976), a person held in custody on a state criminal conviction may bring a federal habeas corpus action for his release if he has exhausted his state remedies and can demonstrate that his conviction was unconstitutional. See 3 W. LAFAVE, SEARCH AND SEIZURE § 11.7(f), at 750 (1978). For the history of this statute, see note 38 infra. Prior to 1976, the year Stone was decided, federal habeas corpus relief was available to a person whose state court convictions rested upon evidence obtained from illegal searches and seizures. See Kaufman v. United States, 394 U.S. 217, 225 (1969). The Stone decision has been sharply criticized. E.g., Robbins & Sanders, Judicial Integrity, the Appearance of Justice, and the Great Writ of Habeas Corpus: How to Kill Two Thirds (or More) with One
Court rejected the argument that a special federal interest is served by allowing federal collateral review in the context of habeas corpus.

Before Stone, the availability of federal habeas corpus based on fourth amendment violations was a factor that influenced some federal courts to apply collateral estoppel in section 1983 actions. In fact, several of the judges who ruled that collateral estoppel principles should apply in section 1983 actions premised their decisions upon the existence of the habeas corpus remedy. Given this background, it is not surprising that Stone resulted in a reassessment of the application of collateral estoppel in section 1983 actions. For example, in Clark v. Lutcher, a Pennsylvania federal district court acknowledged that plaintiffs are collaterally estopped from relitigating facts decided at a previous state criminal trial, but held that the federal courts are "free to apply federal law in a different manner to the same facts." Clark, like McCurry, involved a section 1983 action. The state court found that there was probable cause for Clark's arrest, and he subsequently brought a section 1983 claim based on the fourth amendment. The Clark court reasoned that, because Stone had cut off the plaintiff's right to federal collateral review by means of habeas corpus, application of collateral estoppel would effectively deny the plaintiff access to a federal forum to litigate his civil rights claim. The court therefore refused to give collateral estoppel effect to the state court determination that there was probable cause for the plaintiff's arrest.

In McCurry v. Allen, the Eighth Circuit panel adopted a
similar rationale, and expressly limited its holding to illegal search and seizure claims brought under section 1983 by persons denied federal habeas relief after Stone. The court noted that only two of the circuit court decisions that have held or stated the view that collateral estoppel applies in section 1983 actions involved illegal search and seizure claims, and that both of these were decided prior to Stone. The court in McCurry also observed that the decisions of the other circuits in which collateral estoppel was applied emphasized the existence of habeas corpus as an alternative means of access to federal forums. The panel concluded "that because of the special role of federal courts in protecting civil rights, . . . and because habeas corpus is now unavailable to appellant, . . . it is our duty to consider fully, unencumbered by the doctrine of collateral estoppel, appellant's § 1983 claims."

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20. The court did not cite the Clark case, although it was briefed by the plaintiff. Brief for Plaintiff-Appellant at 14-15, McCurry v. Allen, 606 F.2d 795 (8th Cir. 1979), cert. granted, 100 S. Ct. 1012 (1980).
21. 606 F.2d at 798. For a discussion of the scope of the court's ruling, see note 25 infra.
22. 606 F.2d at 798 (citing Metros v. United States Dist. Court, 441 F.2d 313 (10th Cir. 1971); Mulligan v. Schlachter, 369 F.2d 231 (6th Cir. 1966)).
23. 606 F.2d at 798 (citing Rimmer v. Fayetteville Police Dept', 557 F.2d 273 (4th Cir. 1977); Thistlethwaite v. City of New York, 497 F.2d 339 (2d Cir.), cert. denied, 419 U.S. 1093 (1974); Moran v. Mitchell, 354 F. Supp. 86 (E.D. Va. 1973). The court in McCurry incorrectly cited Alexander v. Emerson, 489 F.2d 285 (5th Cir. 1973) (per curiam), as a case in which the court's resort to collateral estoppel in a section 1983 action was premised on the availability of habeas relief. 606 F.2d at 798. Collateral estoppel was not at issue in Alexander. That case does, however, provide some support for McCurry because the Alexander court relied on the possibility that the plaintiff could gain habeas relief as a justification for dismissing his section 1983 action.
24. 606 F.2d at 799 (citing Mitchum v. Foster, 407 U.S. 225, 242 (1972), for the proposition that federal courts have a special role to play in protecting civil rights). As further support for its conclusion that Stone necessitated the preservation of access to the federal forum by means of section 1983 actions, the McCurry court noted that "Chief Justice Burger in his concurring opinion in Stone v. Powell partially justified rendering habeas corpus unavailable as a remedy for fourth amendment claims on the basis that alternative remedies were still available." 606 F.2d at 799. The Eighth Circuit reasoned that a section 1983 damage action "is clearly one of the more obvious of such alternative remedies." Id. It may be a mistake, however, to infer that Chief Justice Burger's comment in Stone supports McCurry. The thrust of his remarks in Stone was that there is a need to develop alternatives to the exclusionary rule and habeas corpus for the purpose of deterring police misconduct, not that termination of habeas corpus is justified simply because there are alternative means of access to federal courts. See 428 U.S. at 500-01 (Burger, C.J., concurring). Moreover, the Chief Justice does not seem to believe that existing section 1983 actions are an effective means of deterring fourth amendment violations. Cf. Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 421 (1971) (Burger, C.J., dissenting) ("The problems of both error and deliberate misconduct by law enforcement officials call for a workable remedy. Private damage
The *McCurry* exception\(^{25}\) to collateral estoppel—allowing federal collateral review of state rulings on fourth amendment issues—is justifiable because it ensures that plaintiffs with fourth amendment claims will have access to federal forums. Moreover, the Eighth Circuit's approach is consistent with the pre-*Stone* decisions in other circuits that justified application of collateral estoppel in section 1983 actions on the availability of federal habeas corpus relief. Finally, even though *McCurry* provides a new opportunity for federal collateral review of fourth amendment claims, it is compatible with the *Stone* decision. Section 1983 and federal habeas corpus actions differ substantially in terms of the congressional purposes behind their enactment, the remedies they impose, and the effects they have on the criminal justice system.

From a policy perspective, it is desirable to provide persons with civil rights claims access to federal forums because federal courts are likely to enforce certain federal constitutional rights more rigorously and uniformly than state courts. First, state judges might construe federal constitutional law in terms of local actions against individual police officers concededly have not adequately met this requirement, and it would be fallacious to assume today's work of the Court in creating a remedy will really accomplish its stated objective.

Courts might also avoid applying collateral estoppel in section 1983 actions by finding that the elements of collateral estoppel are not present. This position could be based on a lack of mutuality between the parties, on the absence of a jury at state suppression hearings, on differences in the burdens of proof that must be met at civil and criminal trials, or on distinctions between the ultimate issues. *See* Brief for Plaintiff-Appellant at 20-23, *McCurry* v. Allen, 606 F.2d 795 (8th Cir. 1979), *cert. granted*, 100 S. Ct. 1012 (1980). The *McCurry* court apparently rejected this approach. *See* 606 F.2d at 798 n.10 (discussing *Brubaker* v. King, 505 F.2d 534, 536-38 (7th Cir. 1974)). *Brubaker* held that the issue of probable cause litigated at a state suppression hearing is different from the issue in a section 1983 action of whether a law enforcement officer acted in good faith and with reasonable belief that there was probable cause. Thus, the Seventh Circuit concluded that collateral estoppel could not apply. In *McCurry*, the court dismissed this approach because "it would be very difficult, practically speaking, for a federal court to subsequently hold in a section 1983 claim that officers were not acting in good faith or with 'reasonable belief' if the state court has already held the search to be constitutional." 606 F.2d at 798 n.10 (emphasis in original).

25. Because the Eighth Circuit expressly limited its holding, this exception applies only to plaintiffs whose access to the federal forum was affected by *Stone*. *See* 606 F.2d at 798. The size of the group whose members have rights to habeas relief that were affected by *Stone* is far from clear, but it is smaller than the group whose members have claims based on violations of the fourth amendment. Not all of these persons will be "in custody," a key criterion for a federal habeas corpus action. *See* 28 U.S.C. § 2254(a) (1976). On the other hand, the group includes more than just persons who are incarcerated. 3 W. LaFAvE, *supra* note 13, § 11(f), at 750 n.141; *see* note 65 *infra* and accompanying text. For example, the "in custody" requirement has been interpreted to include persons on parole. *See* Jones v. Cunningham, 371 U.S. 236, 243 (1963).
cal conditions, rather than render judgments responsive to the needs and values of the nation as a whole.26 Second, most state judges must stand for reelection, and this might discourage them from taking legally correct but unpopular stands.27 Third, state courts are insulated from the unifying aspects of the federal system. For example, state judges are not obliged to follow precedent established by United States circuit courts.28

Since Stone eliminated federal habeas corpus review of state fourth amendment rulings, the need for a forum in which persons may relitigate their fourth amendment claims requires an exception to the collateral estoppel rules traditionally followed in section 1983 actions.29 Without such a provision, criminal defendants in state courts who desire federal forums for their fourth amendment claims will be compelled to refrain from moving for the suppression of evidence in order to avoid preclusion of fourth amendment issues at a later trial. Failing to move for suppression, however, would increase the likelihood of conviction in state court.30 Few criminal defendants

28. See McCormack, supra note 11, at 264.
29. An exception to the collateral estoppel rules followed in section 1983 actions brought subsequent to state criminal proceedings would not violate 28 U.S.C. § 1738 (1976). See Developments, supra note 5, at 1333-43. Section 1738 implements the full faith and credit clause, U.S. Const. art. IV, § 1, and provides that federal courts must grant prior state determinations the same weight as must courts in the state in which the rulings were made. Although one commentator has argued that an exception to section 1738 allowing federal civil rights claimants to impeach prior state judgments would clearly violate the statute, see Developments, supra note 5, at 1336, it is possible to justify a limited exception allowing relitigation of certain issues determined at the earlier trial. Id. at 1338-43. In other words, a failure to apply the doctrine of merger and bar would violate section 1738, but this does not rule out an exception based on collateral estoppel. An exception for collateral estoppel would not necessarily undermine the integrity of prior judgments. Id. at 1339. Further, without an exception for collateral estoppel, litigants would be discouraged from raising their fourth amendment claims in state trials. They would instead preserve the claims for subsequent section 1983 actions. Removal of constitutional defenses from state litigation cannot be viewed as a desirable result. Id. at 1340. Finally, although an exception to the doctrine of merger and bar would contravene the abstention doctrine of Younger v. Harris, 401 U.S. 37 (1971), the result would not be the same for a McCurry-type exception to the doctrine of collateral estoppel because the interference with the operations of state courts would not be as great. See Developments, supra note 5, at 1341-42.
would be likely to take such a risk, and access to the federal courts would therefore be effectively denied. This result would undermine the special federal interest in providing a federal forum for fourth amendment claims.

Recent Supreme Court doctrine, however, is hostile to the argument that such an interest exists.\textsuperscript{31} In \textit{Stone}, the Supreme Court rejected the notion that all claims based on constitutional violations deserve access to a federal forum:

\begin{quote}
Despite differences in institutional environment and the unsympathetic attitude to federal constitutional claims of some state judges in years past, we are unwilling to assume that there now exists a general lack of appropriate sensitivity to constitutional rights in the trial and appellate courts of the several States.\textsuperscript{32}
\end{quote}

Because the Supreme Court has rejected the proposition that there is a need for federal habeas relief when fourth amendment claims exist, it might appear that there is little basis for the \textit{McCurry} exception to the doctrine of collateral estoppel. A habeas corpus action, in which personal liberty is at stake, has more important consequences than a section 1983 action for damages, in which no such liberty is at issue.\textsuperscript{33} The court recognized that its position in \textit{McCurry} seemed contrary to \textit{Stone},\textsuperscript{34} but did not attempt to demonstrate that the two decisions can coexist.

The \textit{McCurry} court might have emphasized that the effective denial of federal forums for section 1983 actions undermines the primary purpose of the statute. Section 1983, which was enacted as part of the Civil Rights Act of 1871,\textsuperscript{35} owes its existence to a congressional belief that state courts were inade-

\begin{footnotes}
\item[31.] See cases cited in note 32 infra.
\item[32.] 428 U.S. at 493-94 n.35. The Court suggested that the possibility of Supreme Court review of the decisions of state supreme courts was sufficient to ensure uniformity in the application of the fourth amendment and the supremacy clause. See id. In recent cases prior to \textit{Stone}, the Court voiced a similar unwillingness to assume that state courts are inadequate forums for constitutional claims. See, e.g., Huffman \textit{v.} Pursue, Ltd., 420 U.S. 592, 611 (1975); Steffel \textit{v.} Thompson, 415 U.S. 452, 460-61 (1974); Palmore \textit{v.} United States, 411 U.S. 389, 407-08 (1973).
\item[34.] See 606 F.2d at 799. It is not surprising that the Eighth Circuit is hostile to the \textit{Stone} result. The Supreme Court combined \textit{Stone} with a case in which the Eighth Circuit had affirmed a federal district court's grant of habeas corpus to an incarcerated person who claimed that the evidence used to convict him was gained through an unconstitutional search. In \textit{Stone}, the Supreme Court reversed that Eighth Circuit case. See \textit{Stone} \textit{v.} Powell, 428 U.S. 465, 471-74 (1975).
\end{footnotes}
quate forums for litigating civil rights claims. Thus, even if it is within the Supreme Court's authority to determine whether collateral habeas relief is necessary for persons with fourth amendment claims, the Court lacks authority to make a similar determination when civil rights actions based on the Act of 1871 are involved. To make federal forums unavailable in

36. Section 1983 was originally known as the "Ku Klux Klan Act," and was adopted to implement the fourteenth amendment. Congress believed that a civil remedy in federal courts was essential because it doubted the willingness of state courts to determine civil rights claims.

The United States courts are further above mere local influence than the county courts; their judges can act with more independence, cannot be put under terror, as local judges can; their sympathies are not so nearly identified with those of the vicinage . . . . We believe we can trust our United States courts, and we propose to do so.


Courts have recognized that section 1983 was enacted to provide a federal forum for civil rights litigants. See, e.g., Mitchum v. Foster, 407 U.S. 225, 242 (1972) (Congress clearly conceived that it was altering the relationship between states and the nation with respect to protection of federally created rights); Monroe v. Pape, 365 U.S. 167, 180 (1961) (Civil Rights Act passed because prejudice, passion, neglect, or intolerance might cause rights guaranteed by the fourteenth amendment to be denied by states), overruled on other grounds, Monell v. Department of Social Servs. of New York, 436 U.S. 658, 701 (1978); Rimmer v. Fayetteville Police Dep't, 567 F.2d 273, 276 (4th Cir. 1977) (general purpose of Civil Rights Act was to provide access to federal forum for adjudication of federal constitutional rights). Although the Civil Rights Act of 1871 was adopted in response to the particular conditions of the post-Civil War era, its general purposes still apply today. See 365 U.S. at 183.

37. See Stone v. Powell, 428 U.S. 465, 493 n.35 (1976). The assumptions made in Stone supporting the adequacy of state rulings on civil rights claims are contrary to other modern Supreme Court rulings. See, e.g., England v. Louisiana State Bd. of Medical Examiners, 375 U.S. 411, 416 (1964) (mere possibility of direct Supreme Court review of state court decision not sufficient to ensure protection of federal civil rights). Moreover, commentators have questioned the validity of these assumptions. See, e.g., Robbins & Sanders, supra note 13, at 71-72.

38. Federal habeas corpus relief was extended during the post-Civil War era to persons convicted by state courts. See Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385 (current version at 28 U.S.C. § 2254 (1976)). Congress took this action to promote the goals of reconstruction and of the fourteenth amendment. See Fay v. Noia, 372 U.S. 391, 401 n.9, 417 (1963). It might be argued that if the Supreme Court can determine that federal forums no longer serve any special purpose in habeas corpus actions, see Stone v. Powell, 428 U.S. 465, 493 n.35 (1976), then it can also determine that the post-Civil War conditions necessitating a federal forum in section 1983 actions no longer exist. There are, however, a number of important distinctions between federal habeas corpus and section 1983 actions insofar as fourth amendment claims are concerned. First, Congress requires the exhaustion of state remedies as a precondition for habeas, see 28 U.S.C. § 2254(b) (1976), but not for section 1983. See Freiser v. Rodriguez, 411 U.S. 475, 515-18 (1973) (Brennan, J., dissenting). This difference belies Congress' desire to give section 1983 plaintiffs immediate access to federal forums. Second, the fourth amendment habeas action was, in large part, a judicial creation. See Wolf v. Colorado, 338 U.S. 25, 39-40 (1949) (Black, J.,
cases like *McCurry* would clearly violate congressional intent.39

Although prior to *Stone* many federal courts made state criminal court rulings binding on section 1983 claimants, the application of collateral estoppel to section 1983 plaintiffs after *Stone* in cases involving fourth amendment rights would show a great disregard for the intent of the framers of the Civil Rights Act of 1871. The ability to bring a habeas corpus action indirectly preserves the possibility of gaining access to a federal forum for a section 1983 action. If a criminal defendant is successful in his habeas action, the prior state judgment no longer has collateral estoppel effect and he can proceed with his section 1983 action.40 After *Stone*, no such possibility exists for persons with fourth amendment claims.

Habeas corpus and section 1983 actions differ not only in legislative origin, but also in the impact their distinct remedies have on the operation of the criminal justice system. Because of this difference in impact, section 1983 actions dealing with fourth amendment claims should be allowed even if habeas corpus actions are not. In the majority opinion in *Stone*, Justice Powell analyzed fourth amendment habeas claims within the framework of the exclusionary rule,41 pointing out that the “primary” value of the rule is deterrence of police misconduct.42 Thus, the policy justification for allowing federal habeas corpus actions to review the constitutionality of searches and seizures is valid only to the extent that such habeas actions af-

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39. Even if the Supreme Court is correct that the possibility of gaining review of state court decisions upon certiorari obviates the need for federal habeas corpus, see *Stone v. Powell*, 428 U.S. 465, 493 n.35 (1976), the possibility of certiorari seems to fall far short of satisfying the intent of the Civil Rights Act. See note 36 supra and accompanying text. It is only in recent years, however, that the Supreme Court has begun to make section 1983 an effective remedy. *See Developments, supra* note 5, at 1169-70.

40. *See Rimmer v. Fayetteville Police Dep't*, 567 F.2d 273, 277 (4th Cir. 1977) (dictum); *Mastracchio v. Ricci*, 498 F.2d 1257, 1260 n.2 (1st Cir. 1974).


42. *Id.* at 486. In *Mapp v. Ohio*, 367 U.S. 643 (1961), which extended the exclusionary rule to state courts, the majority opinion cited “judicial integrity” as an additional justification for excluding illegally obtained evidence. *Id.* at 659. In *Stone*, the Court undercut this justification, noting that considerations of judicial integrity have played only a “limited role . . . in the determination whether to apply the [exclusionary] rule in a particular context.” 428 U.S. at 485.
fect police behavior. Justice Powell used a balancing test to analyze this relationship. He first weighed the "utility of the exclusionary rule against the costs of extending it to collateral review of Fourth Amendment claims." His conclusion was that the exclusionary rule has high costs because it "deflects the truthfinding process and often frees the guilty," and that these costs "persist" when the rule is applied in collateral review. Assessing the benefits conferred by fourth amendment habeas corpus actions, Justice Powell expressed the belief that the additional deterrence of police misconduct is "small in relation to the costs."

Section 1983 actions fare better under this balancing test. The social costs of section 1983 actions are not as high because such actions do not culminate in the release of guilty persons from custody. In addition, the benefits may be more significant. The deterrence of police misconduct that would result from allowing section 1983 actions for damages against police officers and municipalities might be far greater than that achieved by applying the exclusionary rule upon collateral review. The threat of monetary liability is likely to have a greater impact than the prospect of losing a conviction. Moreover, in

43. 428 U.S. at 489.
44. Id. at 490.
45. Id. at 491.
46. Id. at 493.
47. See notes 49-54 infra and accompanying text.
48. Many believe that the reason the exclusionary rule fails as a means of deterring police misconduct is that it does not directly affect individual police officers or their employers. See, e.g., Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 416 (1971) (Burger, C.J., dissenting); Geller, Enforcing the Fourth Amendment: The Exclusionary Rule and its Alternatives, 1975 WASH. U. LQ. 621, 665-66. Proposals for improving deterrence include new means of extracting damages from law enforcement officers and government units. See, e.g., Stone v. Powell, 428 U.S. 465, 500-01 (1976) (Burger, C.J., concurring); Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 422-23 (1971) (Burger, C.J., dissenting); S. SCHLISINGER, EXCLUSIONARY INJUSTICE 77-84 (1977). For the most part, existing section 1983 and common law tort actions are viewed as inadequate substitutes for the exclusionary rule because they are not applicable to all fourth amendment violations, because of the difficulties which a plaintiff faces in trying to win his suit, and because defendants are too often judgment proof. Geller, supra, at 691-95; Wright, Must the Criminal Go Free If the Constable Blunders?, 50 TEX. L. REV. 736, 738 (1972). See generally Foote, Tort Remedies for Police Violations of Individual Rights, 39 MINN. L. REV. 493 (1955). Indeed, the reason the exclusionary rule was imposed on the states in Mapp was concern over the efficacy of existing alternatives. See Mapp v. Ohio, 367 U.S. 643, 651-53 (1961). Even though section 1983 actions are not viewed as a suitable replacement for the exclusionary rule, these actions—such as McCurry's, in which the plaintiff asked for $1,000,000 in damages—are likely to have some deterrent effect if the plaintiffs are successful. But see Project, Suing the Police in Federal Court, 88 YALE L.J.
cases like *McCurry* it is a mistake to assess the benefits of collateral review solely in terms of deterrence. Section 1983 also serves as a vehicle for victim compensation.\(^{49}\)

A possible criticism of *McCurry* is that it might lead to new opportunities for federal habeas actions, a result inconsistent with *Stone*. A convicted criminal could initiate a section 1983 damage action\(^{50}\) in a case in which he would have sought habeas corpus relief before *Stone*. If he prevailed, he could argue that the decision, which would necessarily be based on a finding of an unconstitutional search and seizure, is evidence that he was denied "an opportunity for full and fair litigation of a Fourth Amendment claim" in the state court.\(^{51}\) He could then seek federal habeas relief under the exception to *Stone* that allows review in cases in which the litigant was denied this opportunity.\(^{52}\)

For a number of reasons, however, this concern seems unfounded. The mere existence of a contrary federal determination would not have much probative value in ascertaining whether an opportunity for full and fair litigation was provided at the state level. The difference in outcomes could be due to differences between the triers of fact or between the records assembled at the two trials. Even if the contrary judgments could be explained solely by divergent interpretations of the

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\(^{49}\) Victim compensation may in fact be its primary purpose. See Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 397 (1971) (not material whether money damages are necessary to enforce fourth amendment); id. at 407-08 (Harlan, J., concurring) (award of compensation for violation of fourth amendment rights does not turn on deterrent effect).


\(^{52}\) Such a result obviously would undermine the Supreme Court's policy in *Stone* of limiting fourth amendment litigation. See id. at 494-95.
Constitution, this would not necessarily mean that the state forum was inadequate. The Stone opinion provides only minimal guidance on the meaning of a full and fair opportunity for litigation. Since Stone, a number of federal courts have ruled that the erroneous nature of a state court determination of a search and seizure issue is not a sufficient ground for a federal habeas hearing. Although a state court might be deemed inadequate if it blatantly misapplied federal law, in such clear-cut cases a successful section 1983 action would not be of much additional value in demonstrating that an opportunity for full and fair litigation was denied.

Despite the possibility of reconciling Stone and McCurry, other criticisms of McCurry remain. These include the likelihood that McCurry would increase the number of section 1983 actions, foster the existence of contrary state and federal decisions, and apply only to plaintiffs “in custody.” Each of these criticisms is balanced, however, by countervailing considerations.

It could be argued that McCurry will create an undue burden for the federal courts by increasing the already large volume of section 1983 litigation. Since the early 1960s, the volume of civil rights actions brought in federal court by state prisoners has increased dramatically, causing some commentators to call for greater restrictions. Although judicial economy was

53. See Stone v. Powell, 428 U.S. 465, 494 & n.36 (1975); 3 W. LaFAve, supra note 13, at 754. See generally Comment, Habeas Corpus After Stone v. Powell: The “Opportunity for Full and Fair Litigation” Standard, 13 HARv. C.R.-C.L. L. REV. 521 (1978). Regardless of the limited guidance the Supreme Court has provided on what constitutes “an opportunity for full and fair litigation,” it would not seem logical after Stone for the Court to say that a procedurally fair state decision was subject to federal habeas review simply because it was at odds with a federal court decision. Stone and its companion case were instances in which state and federal courts differed on the constitutionality of a search and seizure and the Supreme Court denied federal habeas.

54. E.g., Holmberg v. Parratt, 548 F.2d 745, 746 (8th Cir.) (“Erroneous application of Fourth Amendment principles by a state court is no longer relevant to the question of whether the federal court may review the merits of the claim.”), cert. denied, 431 U.S. 969 (1977).

55. See, e.g., United States ex rel. Maxey v. Morris, 591 F.2d 386, 390 (7th Cir. 1979) (correctness of state court determination can be factor if state court is “flagrantly disregarding” a United States Supreme Court opinion) (dictum); Gamble v. Oklahoma, 583 F.2d 1161, 1165 (10th Cir. 1978) (“Opportunity for full and fair consideration . . . contemplates recognition and at least colorable application of the correct Fourth Amendment constitutional standards.”).


57. E.g., H. FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW 90-100
not a major concern expressed by the Court in *Stone*, it was mentioned as one of the reasons for limiting collateral review of previously litigated matters.\(^5^8\)

Imposing collateral estoppel in cases like *McCurry* would hold down the volume of section 1983 litigation, but it would also undercut the purposes of the Civil Rights Act of 1871.\(^5^9\) Congress provided section 1983 relief to protect civil rights, and the grant of jurisdiction was not to be delimited by judicial determinations concerning the capacity of federal courts to handle additional suits.\(^6^0\) Moreover, the *McCurry* exception applies only to a small group of cases in which there is a special need after *Stone* for access to a federal forum. The amount of litigation engendered by *McCurry* will not, for example, even approach that which would result from a general exception to collateral estoppel in section 1983.\(^6^1\)

Although the additional volume of section 1983 cases that will follow *McCurry* is not likely to be substantial, there may be problems with allowing even a small number of contrary state and federal judgments on a constitutional issue to exist. It seems unfair that a federal court could hold that a plaintiff's conviction was obtained by illegal means but, nonetheless, deny him his freedom. This is a criticism of *Stone*, not *McCurry*; it is only because *Stone* denies such a plaintiff habeas corpus relief that he cannot seek his freedom. From the plaintiff's point of view, while his captivity may seem all the more unfair after a favorable section 1983 decision, compensation in the form of money damages is better than nothing at all.

Another related difficulty is that allowing a judgment to stand after a contrary federal ruling may tend to undermine respect for the judicial system.\(^6^2\) Assuming that admission of the

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\(^5^9\) See *Theis*, *supra* note 8, at 881-82.


\(^6^0\) *Cf. Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821) (Marshall, C.J.) (courts "have no more right to decline the exercise of jurisdiction which is given than to usurp that which is not given").

\(^6^1\) In addition, the Federal Rules of Civil Procedure provide methods for quickly dealing with frivolous petitions. See *Fed. R. Civ. P. 12(b)(6) (failure to state claim); Fed. R. Civ. P. 56* (summary judgment).

\(^6^2\) *See Developments, supra* note 5, at 1333 (by preserving the integrity of prior judgments, res judicata promotes respect for the first court); *cf. Stone v. Powell*, 428 U.S. 465, 491 n.31 (1976) (concern for "finality in criminal trials" and "minimization of friction between our federal and state systems of justice") (quoting *Schneckloth v. Bustamonte*, 412 U.S. 218, 259 (1973) (Powell, J., concurring)).
illegally obtained evidence in state court was not harmless error, a successful section 1983 action suggests that the state conviction was illegitimate. But given the assumption that Stone will continue to bar federal habeas relief, the public's image of the judicial system might be less tarnished if plaintiffs like McCurry, who have suffered violations of their civil rights, are able to recover damages, rather than if such plaintiffs go entirely uncompensated.

A final problem with the McCurry exception to collateral estoppel is that it would vanish as soon as the criminal is out of custody. The exception applies only to persons who are denied federal habeas relief by Stone, and habeas is, for the most part, available only to persons in custody. It is doctrinally unsatisfying to have the exception terminate at the end of custody. This adds to the complexity of the law and makes the period of punishment the only time during which relief for vio-

63. It is interesting to note that the Supreme Court tends to de-emphasize the loss of respect for the judicial system associated with public awareness that a conviction turned on the use of illegally obtained evidence. See Stone v. Powell, 428 U.S. 465, 484-86 (1976).

64. See note 25 supra and accompanying text.

65. See 3 W. LaFave, supra note 13, at 750 n.141. If a person files a habeas suit but is released before adjudication, however, he can still proceed with the suit. See Carafas v. LaVallee, 391 U.S. 234, 237 (1968).

If a plaintiff must be "in custody" to take advantage of the McCurry exception, it might seem that he should also have to exhaust state remedies, as in a federal habeas action. See 28 U.S.C. § 2254(b) (1977). If not, it would appear that the McCurry exception applies to a broader class of plaintiffs than those whose access to a federal forum was affected by Stone. Although the court in McCurry did not explicitly require exhaustion of state remedies, its mandate that the district court stay action on McCurry's claim until the Missouri courts reached a final decision on the appeal of his criminal conviction, see note 7 supra, may amount to the same thing.

The court in McCurry did not reveal whether it would have required McCurry to exhaust his opportunities for direct review in the state courts if he had not already initiated his appeal. Some courts seem to require exhaustion in such cases. See Meadows v. Evans, 529 F.2d 385, 386 (5th Cir. 1976) (requiring exhaustion on the ground of comity when section 1983 action for damages goes to validity of conviction). There are reasons why a general exhaustion of remedies requirement is inappropriate for the McCurry exception to collateral estoppel. Foremost among them is that immediate access to a federal forum is one of the hallmarks of section 1983 relief. See Preiser v. Rodriguez, 411 U.S. 475, 515-18 (1973) (Brennan, J., dissenting). Further, although the requirement of direct appeal through state courts is sensible in the context of federal habeas corpus—when the federal remedy of release from custody amounts to roughly the same thing as would be gained through a successful state appeal—section 1983 damages are an entirely different kind of remedy. Finally, even though exhaustion of state remedies is a condition for federal habeas relief, dispensing with that requirement for the McCurry exception would not significantly increase the number of plaintiffs who can take advantage of the remedy; it would simply move the timing of their federal suits forward.
lation is available. Perhaps the ultimate solution for this problem would be to waive the "in custody" requirement for taking advantage of the McCurry exception for those individuals who at some earlier point were in custody and were unable to obtain federal review of their fourth amendment claims by means of habeas corpus.66

Even though McCurry allows federal collateral review of state criminal court rulings on fourth amendment issues, it is compatible with Stone. The Supreme Court's decision in Stone has had a significant impact on access to federal forums for those with fourth amendment claims, heralding an era of diminished rights for criminal defendants. If, however, McCurry is allowed to stand with Stone, and courts follow the Eighth Circuit's lead, the restrictive effects of Stone on fourth amendment liberties will not be as great.

66. Normal rules regarding statutes of limitations for section 1983 actions would still apply.