Habeas Corpus--Prison Management--Custody and Control of Prisoners--Constitutional Law--Former Jeopardy [In re Lamb, 34 Ohio App. 2d 85, 296 N.E.2d 280 (1973)]

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HABEAS CORPUS—PRISON MANAGEMENT—CUSTODY AND CONTROL OF PRISONERS—CONSTITUTIONAL LAW—FORMER JEOPARDY

In re Lamb, 34 Ohio App. 2d 85, 296 N.E.2d 280 (1973).

Historically, the writ of habeas corpus was available only to attack the legality of the prisoner's detention in custody, and the only judicial relief authorized was the release of the prisoner from that custody.\(^1\) The imprisonment of petitioner was upheld as long as the sentencing court had jurisdiction over the subject of the proceedings.\(^2\) Accordingly, the writ was not available to prisoners who merely protested the conditions of their confinement.\(^3\) In Ohio, habeas corpus relief is available under a statute\(^4\) that has been restricted in the past by judicial interpretation to allow relief only in accordance with the traditional scope of the writ.\(^5\) Nevertheless, in In re Lamb,\(^6\) the

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3. See, e.g., Long v. Parker, 390 F.2d 816, 818 (3d Cir. 1968); Roberts v. Pegelow, 313 F.2d 548 (4th Cir. 1963) (petition erroneously filed in habeas corpus entertained as one for injunctive relief); Williams v. Steele, 194 F.2d 32, 34 (8th Cir. 1952), cert. denied, 344 U.S. 822 (1952).

4. OHIO REV. CODE ANN. §§ 2725.01-.38 (Page 1954). § 2725.01 states: "Whoever is unlawfully restrained of his liberty or entitled to the custody of another, of which custody such person is unlawfully deprived, may prosecute a writ of habeas corpus, to inquire into the cause of such imprisonment, restraint, or deprivation."

5. According to this strict judicial interpretation, relief through habeas corpus under the Ohio statute is available only when the court that ordered the petitioner's confinement lacked jurisdiction over the subject matter or the person. In re Edsall, 26 Ohio St. 2d 145, 269 N.E.2d 848 (1971); see Mitchell v. Cardwell, 24 Ohio St. 3d 30, 262 N.E.2d 862 (1970), cert. denied, 401 U.S. 994 (1971). This common law restriction on the availability of habeas corpus is expressed in OHIO REV. CODE ANN. § 2725.05 (Page 1954), which states:

If it appears that a person alleged to be restrained of his liberty is in the custody of an officer under process issued by a court or magistrate, or by virtue of the judgment or order of a court of record,
Court of Appeals of Cuyahoga County rejected this narrow reading of the statute and held that habeas corpus relief was also available to state prisoners protesting detention in solitary confinement, which resulted in forfeiture of "good time" and lengthened their incarceration.

Petitioners, four inmates at a prison facility operated by the City of Cleveland, had each been sentenced on May 4, 1972, to 6 months in that institution for having escaped in February 1972, while awaiting trial on other charges. On May 14, 1972, they were placed in punitive segregation (solitary confinement) for 12 days as additional punishment for their escape. Their requests for a hearing on the issue of this punishment were denied. One of the petitioners was also placed in punitive segregation for an additional 11 days in June 1972, for exchanging words with a prison officer. Again, no opportunity for a hearing or notice of the charges against him were given to the inmate. As a result of this punishment, each petitioner lost good-time credit and thus forfeited the opportunity to benefit from an automatic reduction of his sentence by one month.

The Lamb court's expansion of the scope of the habeas corpus petition to permit an inmate to protest allegedly illegal punitive segregation is of itself a striking innovation in the field of prisoners' rights. The decision is also noteworthy for its resolution of two issues raised by the inmates in support of their petition. First, the court decided on a question of first impression in Ohio that specific extensive procedural requirements must be met in prison disciplinary proceedings. Secondly, the court made a unique determination in

and that the court or magistrate had jurisdiction to issue the process, render the judgment, or make the order, the writ of habeas corpus shall not be allowed. If the jurisdiction appears after the writ is allowed, the person shall not be discharged by reason of any informality or defect in the process, judgment, or order.

See Freeman v. Maxwell, 4 Ohio St. 2d 4, 5, 210 N.E.2d 885, 886 (1965). Under this construction, habeas corpus is not available to protest alleged mistreatment of a prisoner incarcerated in a state prison, since such allegations do not attack the jurisdiction of the trial court. Mitchell v. Cardwell, supra at 30, 262 N.E.2d at 863.

7. Under Ohio Rev. Code Ann. § 2967.19 (Page Supp. 1972), a prisoner not eligible for parole before expiration of a minimum sentence or term of imprisonment, who has faithfully observed the rules of the institution, is entitled to a diminution of his minimum sentence. The diminution is called "good time."

8. 34 Ohio App. 2d at 85-86, 296 N.E.2d at 282-83.
9. Id. at 86, 296 N.E.2d at 283.
10. Id. at 90, 296 N.E.2d at 285.
11. Id. at 93-96, 296 N.E.2d at 286-88.
ruling that the constitutional prohibition against double jeopardy is violated when a prisoner is placed in solitary confinement for having previously escaped, after a court has already convicted and sentenced him for that escape.\textsuperscript{12}

The most significant result of the holding in \textit{Lamb} is the expansion of the classes of custodial restraint that can be attacked under the Ohio writ to include solitary confinement imposed as a prison disciplinary measure. This expansion compares with the evolution that has taken place with respect to the federal writ of habeas corpus. Under federal law, the concept of custody has been broadened to include not only confinement in an institution\textsuperscript{13} but also restraints enforced during confinement, such as the conditions imposed on a parolee's liberty.\textsuperscript{14} This expansion has been accomplished through numerous breaks with the rules of tradition. For example, the requirement that petitioner be confined at the time of final disposition of his petition has been replaced by a rule requiring confinement only at the time of the filing of the petition.\textsuperscript{15} Similarly, the requirement that petitioner seek release from some form of present restraint has been abolished.\textsuperscript{16} More recently, the United States Supreme Court has held that any claim filed by a prisoner challenging either the fact or duration of his incarceration and seeking more speedy or immediate release would be cognizable under federal habeas corpus.\textsuperscript{17}

\textsuperscript{12} \textit{Id.} at 96-98, 296 N.E.2d at 289.
\textsuperscript{13} Wales v. Whitney, 114 U.S. 564, 571-72 (1885).
\textsuperscript{14} Jones v. Cunningham, 371 U.S. 236 (1963).
\textsuperscript{15} Carafas v. LaVallee, 391 U.S. 234 (1968), \textit{overruling} Parker v. Ellis, 362 U.S. 574 (1960) (\textit{Parker} had required confinement at the time the petition was decided to prevent its dismissal for mootness). In contrast to federal law, the general rule in Ohio has been to dismiss a petition for habeas corpus as moot when petitioner is not in confinement at the time of the hearing on the petition. \textit{In re Popp}, 35 Ohio St. 2d 142, 298 N.E.2d 529 (1973). The rule is based upon the proposition that relief under habeas corpus is restricted to release from present restraint and the issuance or refusal to grant the writ must affect the petitioner's freedom of movement. \textit{Id.} at 145, 298 N.E.2d at 531; \textit{see} Page v. Green, 174 Ohio St. 178, 187 N.E.2d 592 (1963). However, Ohio law has recognized an exception to the mootness doctrine when the issue is of public or great general interest. \textit{See} Wallace v. University Hosps., 171 Ohio St. 487, 172 N.E.2d 459 (1961). This "public interest" exception was impliedly invoked in \textit{Lamb} to avoid dismissal of the habeas corpus petition. \textit{See} 34 Ohio App. 2d at 98 n.6, 296 N.E.2d at 289 n.6.

\textsuperscript{16} Peyton v. Rowe, 391 U.S. 54 (1968), held that habeas corpus was properly invoked to challenge the second of two consecutive sentences being served, although the relief sought would not result in immediate release.

In parallel with its development of the concept of custody, the Supreme Court also moved away from the notion that habeas corpus only put in issue the jurisdiction of the sentencing court. Initially, the Court made an effort to bring the new situations being covered by the writ within the concept of lack of jurisdiction. However, as the scope of the writ was extended to take cognizance of violations of the double jeopardy clause, convictions under unconstitutional statutes, and convictions without proper grand jury indictment, it became impossible to insist that jurisdiction was really the issue. Eventually the fiction of an all-embracing lack-of-jurisdiction rationale was completely abandoned, and federal habeas corpus was frankly held to be available for the consideration of certain constitutional claims as well as jurisdictional questions. A further expansion of the scope of the federal writ occurred in *Brown v. Allen*, where the Court held that all federal constitutional questions raised by state petitioners could be determined in a federal habeas corpus proceeding, notwithstanding a prior full and fair consideration of those claims by the state judiciary.

In contrast to this development of federal habeas corpus, judicial interpretation of the Ohio habeas corpus statute has not resulted in broad availability of the writ. Historically the writ was available in Ohio only when the petitioner had been convicted or sentenced by a court lacking jurisdiction over his person or the subject matter.

24. See *Ex parte Hawk*, 321 U.S. 114 (1944), and *House v. Mayo*, 324 U.S. 42 (1945), both of which authorized review under habeas corpus of federal claims by state prisoners, where state review was either inadequate or unavailable and direct federal review was unavailable.
26. In *Kaufman v. United States*, 394 U.S. 217 (1969), the Court held that federal constitutional claims could also be litigated in a proceeding under 28 U.S.C. § 2255 (1970), the postconviction remedy for federal prisoners that is equivalent to a habeas corpus proceeding. A thorough review of the various rationales authorizing relief under federal habeas corpus can be found in *Developments, supra* note 1, at 1072-93.
27. See note 4 supra.
of the offense and was seeking release from present confinement. Recently, however, the expansion of federal habeas corpus to ensure an opportunity to collaterally attack a conviction obtained in violation of certain constitutional rights was mirrored in a similar expansion of the Ohio writ, probably because of the state judiciary's desire to use the "exhaustion of state remedy" rule to determine constitutional claims of state prisoners initially in state courts. The United States District Court for the Northern District of Ohio, in Knox v. Maxwell, enunciated this modification of Ohio habeas corpus in holding that those constitutional claims allowable under the habeas corpus statute were limited to claims of error neither within the prisoner's knowledge nor of a nature that the prisoner should have discovered and raised them during trial or appeal; claims of denial of constitutional rights that were reasonably within the petitioner's knowledge or easily discoverable at the time of trial could not be collaterally attacked by habeas corpus.

28. In re Burson, 152 Ohio St. 375, 89 N.E.2d 651 (1949); Burns v. Tarbox, 76 Ohio St. 520, 81 N.E. 761 (1907); Ex parte Van Hagan, 25 Ohio St. 426 (1874).
30. See notes 20-23 supra and accompanying text.
31. Freeman v. Maxwell, 4 Ohio St. 2d 4, 5-6, 210 N.E.2d 885, 886 (1965).
32. In Ex parte Hawk, 321 U.S. 114, 116-17 (1944), the Court enunciated the "exhaustion of state remedies" rule, under which an application for federal habeas corpus may not be granted unless it appears that the applicant has exhausted the remedies available to him in the state courts, or that there is either an absence of available state corrective process or the existence of circumstances rendering such process ineffective to protect the petitioner's rights. This rule is now codified in 28 U.S.C. § 2254(b) (1970):

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 to him in the state courts, or that there is either an absence of available state corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.
34. E.g., Johnson v. State, 177 Ohio St. 37, 201 N.E.2d 602 (1964) (alleged deprivation of counsel); Poe v. Maxwell, 177 Ohio St. 28, 201 N.E.2d 703 (1964) (alleged illegal conviction because of lack of arrest and search warrants).
35. E.g., Cook v. Maxwell, 177 Ohio St. 18, 201 N.E.2d 597 (1964) (claims of innocence and that court admitted evidence of incompetent witnesses must be raised on appeal); Tinsley v. Maxwell, 176 Ohio St. 185, 198 N.E.2d 673 (1964) (improper denial of transcript for appeal must be raised on appeal and not in habeas corpus). Whether such a clearly defined standard
This expansion of the scope of the writ led to a dramatic increase in the volume of petitions and proceedings and caused the Ohio legislature to devise an alternative remedy to habeas corpus. In 1965, it enacted the Ohio Post-Conviction Act, which applied to all constitutionally based collateral attacks on the validity of judgments of conviction.

This legislation channelled the bulk of habeas corpus petitions into the new post-conviction relief procedure and placed the Ohio Supreme Court in a position to return habeas corpus to its original narrow role of protesting lack of jurisdiction. Recent decisions, moreover, indicate that the court continues to view the writ as being so restricted. In re Lamb, therefore, represents a radical departure to determine availability of the writ really existed is open to doubt. See 26 Ohio St. L.J. 496 (1965).

36. See Freeman v. Maxwell, 4 Ohio St. 2d 4, 6, 210 N.E.2d 885, 886-87 (1965).

37. Ohio Rev. Code Ann. §§ 2953.21-.24 (Page Supp. 1972). These sections provide that a prisoner claiming a right to be released from custody on the ground that there was a denial or infringement of his rights that rendered his conviction void or voidable under the state or federal constitutions may file a petition in the court that imposed sentence for the purpose of vacating or setting aside his sentence. However, under State v. Perry, 10 Ohio St. 2d 175, 226 N.E.2d 104 (1967), if the court that renders judgment of conviction has jurisdiction over the subject matter and person, the doctrine of res judicata will be applied in determining whether postconviction relief is available. The resulting rule is that a final judgment bars relitigation, except on appeal, of any defense or claimed lack of due process that was raised or could have been raised at the trial or on appeal. Id. at 180, 226 N.E.2d at 108. The issues of inadequacy or lack of counsel are not so barred. State v. Juliano, 24 Ohio St. 2d 117, 120, 265 N.E.2d 290, 293 (1970).

38. Freeman v. Maxwell, 4 Ohio St. 2d 4, 6, 210 N.E.2d 885, 886-87 (1965).

39. See, e.g., In re Edsall, 26 Ohio St. 2d 145, 269 N.E.2d 848 (1971); Mitchell v. Cardwell, 24 Ohio St. 2d 30, 262 N.E.2d 862 (1970), cert. denied, 401 U.S. 994 (1971). However, in In re Fisher, 39 Ohio St. 2d 71, 313 N.E.2d 851 (1974), the Ohio Supreme Court allowed the use of habeas corpus to protest an alleged lack of due process in civil hearings resulting in commitment of petitioners to a state mental institution, although the petition did not attack the jurisdiction of the probate court, which had ordered their commitment. The primary holding of the case is that the due process clause of the fourteenth amendment requires that persons subject to involuntary civil commitment proceedings are entitled to be represented by counsel. Relying upon prior United States Supreme Court decisions, the court stated that relief in habeas corpus must lie where it is the only adequate state remedy available by which inmates in mental institutions may raise claims of denial of federal rights, such as their right to representation by counsel at their commitment hearings. Therefore, the court allowed a petition for habeas corpus attacking the probate court's judgment as void because of a denial of federal constitutional rights during the proceedings resulting in the judgment, rather than be-
CASE WESTERN RESERVE LAW REVIEW

from the existing Ohio law. It permits habeas corpus to be used by prisoners to protest their treatment, even though an allegation of wrongful confinement in punitive segregation by prison officials has nothing to do with the jurisdiction of the trial court.⁴⁰

In the past, courts seldom sanctioned such a broad use of the writ. Even in the federal courts, which were expanding the applicability of habeas corpus, use of the writ to attack conditions of incarceration was disallowed on the ground that such a complaint did not attack the legality of confinement.⁴¹ However, inroads into the general policy of limiting the use of the writ to questions dealing with legality of confinement were initiated by Coffin v. Reichard,⁴² in which the scope of federal habeas corpus was expanded to include petitions protesting the conditions of confinement or manner of treatment. In this case, the United States Court of Appeals for the Sixth Circuit held that the writ was available to a prisoner whenever he was deprived of some right to which he was entitled, even though lawfully confined, if the deprivation of that right served to make his imprisonment more burdensome than the law allowed or if it served to restrict his liberty illegally.⁴³ The court reasoned that a prisoner retains all the rights of an ordinary citizen except those expressly taken from him by law or by necessary implication and that these rights should be diligently protected through habeas corpus, even though the petitioner may, in fact, be legally incarcerated.⁴⁴ Although Coffin received sparse approval in other courts,⁴⁵ its influence is manifest in Lamb.⁴⁶

cause of a lack of jurisdiction as is required under the common law. See id. at 73-75, 313 N.E.2d at 854. It might be argued that habeas corpus must similarly be available to prisoners in penal institutions who wish to assert claims of denial of their federal right to procedural due process during prison disciplinary hearings, as recently established in Wolff v. McDonnell, 418 U.S. 539 (1974), although such petitions would attack neither the jurisdiction nor judgment of the court that had originally sentenced the petitioners. The development of an adequate state forum for resolution of prisoners' claims of deprivation of federal constitutional rights during disciplinary proceedings would seem advantageous to the state, permitting initial determination of those claims by state courts. See notes 56-60 infra and accompanying text.


⁴¹ E.g., Long v. Parker, 390 F.2d 816, 818 (3d Cir. 1968); Robert v. Pegelow, 313 F.2d 548 (4th Cir. 1963); Williams v. Steele, 194 F.2d 32, 34 (8th Cir.), cert. denied, 344 U.S. 822 (1952).

⁴² 143 F.2d 443 (6th Cir. 1944), cert. denied, 325 U.S. 887 (1945).

⁴³ Id. at 445.

⁴⁴ Id.

⁴⁵ Coffin was accepted in Coonts v. Wainwright, 282 F. Supp. 893, 894 (M.D. Fla. 1968), aff'd, 409 F.2d 1337 (5th Cir. 1969), and in Thompson v. Cavell, 158 F. Supp. 19, 21 (W.D. Pa. 1957), but in other federal circuits
The United States Supreme Court has adopted the expanded scope of federal habeas corpus proposed in *Coffin*. In *Johnson v. Avery*, the Court impliedly sanctioned the use of habeas corpus to secure release from solitary confinement, although the procedure was not specifically discussed in the opinion of the Court. Two years later, in *Wilwording v. Swenson*, the Court made it clear that *Johnson* would allow a prisoner's petition to challenge his living conditions and the disciplinary measures imposed upon him under a federal writ of habeas corpus. This explicit affirmation of *Johnson* appeared to approve the *Coffin* rule for federal habeas corpus. In contrast, there has been only a scattered acceptance of *Coffin* by the states.

Despite the availability of federal habeas corpus to challenge prison disciplinary procedures, state prisoners have typically preferred to raise their challenges by proceeding under 42 U.S.C. section 1983. Section 1983 is used to assert a variety of prisoners' rights habeas corpus has been restricted to the traditional petition for release from allegedly invalid custody under sentence. *Developments, supra* note 1, at 1085.

46. 34 Ohio App. 2d at 87, 296 N.E.2d at 283.

47. 393 U.S. 483 (1969). In *Johnson v. Avery*, 252 F. Supp. 793 (M.D. Tenn. 1966), the court relied on *Coffin* and released a prisoner from solitary confinement under a writ of habeas corpus when it found that the petitioner had been placed in solitary confinement for violating an unconstitutional prison regulation. It characterized solitary confinement as "a jail within a jail." *Id.* at 787. The case was reversed on appeal, 382 F.2d 353 (6th Cir. 1967), but the Supreme Court upheld the district court's use of habeas corpus and its finding that the regulation was unconstitutional. 393 U.S. 483 (1969), rev'd 382 F.2d 353 (6th Cir. 1967).


49. *Id.* at 251.


including freedom from cruel and unusual punishment, the right to due process in disciplinary hearings, and the right to good-time credit. The relief sought under section 1983 can take the form of damages or an equitable remedy, such as an injunction to restore good time. Relief may also take the form of mandamus and declaratory judgment.

The primary advantage of using section 1983 is that the exhaustion of state remedies rule does not apply. A prisoner, therefore, can obtain a federal court ruling on his claim without having to wait for the initial resolution by a state court. A second advantage of the section 1983 route lies in the availability of normal discovery devices, which are not generally available under habeas corpus.

Recently, however, the Supreme Court has limited the ability of the federal judiciary to hear federal constitutional issues that arise out of state prison disciplinary action when they are raised in section

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.

56. Liability for damages under § 1983 must be satisfied out of the individual defendant's pocket, since the eleventh amendment bars a fine upon the state treasury without its consent for tortious conduct of state prison officials. See Sostre v. McGinnis, 442 F.2d 178, 204-05 (2d Cir. 1971).
61. Harris v. Nelson, 394 U.S. 286, 292-98 (1969). In spite of the obvious advantages of § 1983, use of the provision does have one severe disadvantage when compared to a petition for habeas corpus. Proceedings under 42 U.S.C. § 1983 (1970) are not given priority on a court's docket, and thus a petitioner suffers essentially the same delays in coming to trial as those associated with civil suits. Preiser v. Rodriguez, 411 U.S. 475, 495-96 (1973). In federal habeas corpus cases, on the other hand, a hearing must be held within 8 days after the petition is filed unless good cause for allowing additional time is shown. 28 U.S.C. § 2243 (1970).
1983 proceedings. In Preiser v. Rodriguez, where prisoners were protesting the loss of good-time credits taken away for prison disciplinary reasons, the Court held that a claim of a state prisoner challenging the fact or duration of his confinement and seeking an immediate or a more speedy release can only be filed under a petition for federal habeas corpus and is not cognizable in a section 1983 action. The consequence of declaring such challenges to be cognizable only under habeas corpus is to bring these cases within the rule requiring exhaustion of state remedies. Such cases, therefore, can no longer be brought under section 1983, where the exhaustion doctrine does not apply. Thus, if the Ohio Supreme Court should adopt the appellate court's ruling in Lamb, which transforms Ohio habeas corpus into a state remedy available to prisoners challenging solitary confinement and the resulting loss of good time, the exhaustion doctrine would permit the Ohio judiciary to make initial determination of federal constitutional claims in those cases controlled by Preiser.

Under federal law a state prisoner can effect compliance with the exhaustion of state remedies in one of three ways: he can prove that he has exhausted the remedies available to him in the Ohio courts; he can demonstrate an absence of available state corrective process; or he can show the presence of circumstances that render the process ineffective to protect his rights. In Ohio, the statutory scheme for post-conviction relief is composed of habeas corpus, the Post-Conviction Act, the normal appeal remedy, and the delayed appeal.

62. 411 U.S. 475 (1973). Rodriguez, Katzoff, and Kritsky, respondents, were participants in a New York program under which they could earn reductions in their maximum prison sentence terms through good behavior. These reductions could be withdrawn in full or in part for bad behavior or for violation of prison rules. Each respondent had been charged with bad behavior and as a result lost good-time credit and was placed in solitary confinement. Id. at 478, 480, 481. Each filed suit under § 1983 and a petition for habeas corpus in federal district court, alleging denial of due process by the summary deprivation of good-time credit by prison officials. The district courts ordered restoration of good-time credit. Id. The Court of Appeals for the Second Circuit consolidated the three cases and affirmed. Id. at 482. The Supreme Court reversed. Id. at 500.

63. Id. at 489. The Court suggested that the rule fashioned was an extension of Peyton v. Rowe, 391 U.S. 54 (1968), which held that a prisoner may use habeas corpus to attack the second of two consecutive sentences while still serving the first.

64. See note 32 supra and accompanying text.

65. See note 59 supra and accompanying text.


67. OHIO REV. CODE ANN. §§ 2725.01-.28 (Page 1954).

remedy. The latter three remedies are designed only to permit a challenge of the validity of the prisoner's conviction and, therefore, are not available to a prisoner attacking the constitutionality of prison disciplinary action or alleging mistreatment. Since prior to Lamb the use of habeas corpus was limited by the Ohio cases to the narrow function of attacking the jurisdiction of the trial court, it too was unavailable to challenge disciplinary action against the prisoner. Thus, all four of Ohio's post-conviction remedies were inadequate and ineffective for the end sought, leaving the prisoner free to seek relief under federal habeas corpus without pursuing any state remedies whatsoever.

However, if Ohio were to accept the Lamb decision and permit the use of habeas corpus to protest disciplinary action, under the exhaustion of state remedies rule those claims in which prisoners challenged the fact or duration of confinement and sought immediate release or a speedier release would have to be litigated in Ohio courts before federal habeas corpus proceedings were commenced. This would give the Ohio judiciary the initial opportunity to hear the case, which without Lamb, would not otherwise be possible. Since questions of jurisdiction are not merely procedural questions but questions of power between the states and federal government, the significance of Ohio's obtaining jurisdiction over these cases becomes apparent. First, state judges presumably would ensure that their determinations of the constitutionality of state prison disciplinary procedures would be made only after full and sympathetic consideration of the problems facing prison administrators, as well as their need to exercise broad discretion in regulating prison life. Secondly, in subsequent federal habeas corpus proceedings the federal court would probably give great weight to prior state court resolution of federal constitutional issues, even though the doctrine of res judicata is not wholly applicable. Finally, should the prisoner file

69. Id. § 2953.05.
70. Id.
71. See notes 28-29, 38-39, supra and accompanying text.
75. 28 U.S.C. § 2254(d) (1970):
In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a state court of competent juris-
a section 1983 action for damages arising out of the same disciplinary proceedings which prompted the petition for habeas corpus,\textsuperscript{76} the prior state court resolution of federal constitutional issues would be determinative in the section 1983 proceedings, under the doctrine of collateral estoppel.\textsuperscript{77}

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\textsuperscript{76} See 411 U.S. at 511 (Brennan, Douglas & Marshall, JJ., dissenting).

\textsuperscript{77} Collateral estoppel refers to the effect of a judgment as a bar or estoppel against the prosecution of a second action between the same parties upon a different claim or cause of action than the one upon which the judgment was entered. The judgment in the prior action, if rendered upon the merits, operates as an estoppel only as to those matters in issue or points controverted that were actually litigated in the prior action. \textit{See} Cromwell v. County of Sac, 94 U.S. 351, 352-53 (1876). Under this doctrine, state
Assuming Lamb's interpretation of the habeas corpus statute became Ohio law, the extent to which the writ would have to be sought under the exhaustion rule prior to commencement of a federal habeas corpus action, would be influenced by the rule established in Preiser. Although Preiser appears to be subject to broader interpretations covering a range of cases beyond its facts, it has recently been narrowly construed by the Court in Wolff v. McDonnell. In Wolff a Nebraska prisoner filed a class action under section 1983 alleging that disciplinary proceedings violated due process and that the inmate legal assistance program and prison mail regulations failed to satisfy constitutional standards. In his claim against the disciplinary procedures, the plaintiff sought injunctive relief both to compel prison officials to restore good time lost through disciplinary proceedings, and to require prison officials to submit to the court a plan for disciplinary procedures that would satisfy due process. Plaintiff also sought damages for deprivation of his civil rights in the allegedly unconstitutional proceedings. The Court held that under court resolution of constitutional issues in state habeas corpus proceedings would be binding in subsequent federal proceedings under § 1983. See 411 U.S. at 511.


79. Preiser had the potential to be expanded by later decisions into a rule that would cover a broad range of prisoner complaints. First, interpretation of prisoner complaints seeking release from conditions of confinement, such as solitary confinement, as seeking release from the "fact of confinement" would make such cases subject to the exhaustion of remedies rule and to referral to state courts, when appropriate, for initial resolution. In this respect, the Court has noted the possibility that habeas corpus could lie to remove any additional and unconstitutional restraints imposed during otherwise lawful custody. 411 U.S. at 499. Secondly, interpretation of § 1983 suits for declaratory judgments against the constitutionality of disciplinary procedures under which good time was lost as challenges to the duration of confinement that "seek" immediate or more speedy release would bring such cases under Preiser.

Such expansive readings of Preiser, which multiply the initial opportunities for state courts to resolve questions arising from the administration of state prisons, would not have been surprising in view of the evident sentiment on the Court in favor of greater protection of states' interests in regulation of their prisons. The Court has emphasized the need for promoting federal-state comity, not only by preventing the federal judiciary from interfering in state court affairs before those courts had an opportunity to correct their constitutional errors, but also by curtailing interference in state administrative affairs. 411 U.S. at 491-92, 497. In fact, the Court has viewed the state administration of its prisons as an activity in which states have the strongest of interests and as an area in which the states should be given the first opportunity to correct errors made in internal administration. 411 U.S. at 491-92.


81. Id. at 553.
\textit{Preiser} only an injunction restoring good time was foreclosed in a section 1983 proceeding and that damages, declaratory relief, and other injunctive relief for improper revocation of good time were available.\textsuperscript{82}

As a result of \textit{Wolff}, the rule in \textit{Preiser} now governs only prisoner complaints challenging the fact or duration of confinement and seeking an injunction compelling either immediate release or restoration of good time.\textsuperscript{83} Accordingly, in such cases Ohio habeas corpus (as transformed by \textit{Lamb}) would constitute a mandatory state remedy. If the petitioner were to forgo seeking an injunction, however, he could bypass state court by instituting a federal action under section 1983.

Thus, to guarantee the initial resolution of his constitutional claims in a federal forum while escaping the rule in \textit{Preiser}, a state prisoner need only seek a section 1983 declaratory judgment that the disciplinary procedures imposed upon him are unconstitutional. Since there is no requirement to exhaust state remedies when seeking such declaratory relief,\textsuperscript{84} the petitioner is not required to litigate the issue initially in the state court. He must be careful to refrain from praying for an injunction to compel release or restoration of good time, however, since such an action would be cognizable only under a writ of habeas corpus,\textsuperscript{85} which demands that the petitioner first litigate the matter in state court. Should the petitioner obtain a section 1983 declaratory judgment, he can then achieve the actual restoration of good time by using the federal judgment to obtain a mandatory injunction in state court under the doctrine of res judicata, as emphasized by the Court in \textit{Wolff}.\textsuperscript{86} In addition, the prisoner can also recover damages in the section 1983 proceeding and secure an injunction against the prospective enforcement of any disciplinary procedures declared invalid.\textsuperscript{87}

Yet, in spite of the ease with which a state prisoner could secure initial determination of his federal constitutional claims in a federal court, a prisoner may still prefer to seek relief from an Ohio court under the state writ of habeas corpus. First, his petition would be heard faster than a section 1983 proceeding would be litigated.\textsuperscript{88}

\begin{itemize}
\item \textsuperscript{82} \textit{Id.} at 554-55.
\item \textsuperscript{83} \textit{Id.} at 557-58.
\item \textsuperscript{84} \textit{Id.} at 554-55.
\item \textsuperscript{85} See note \textsuperscript{83} supra and accompanying text.
\item \textsuperscript{86} 418 U.S. at 554 & n.12.
\item \textsuperscript{87} \textit{Id.} at 554-55.
\item \textsuperscript{88} \textbf{OHIO REV. CODE ANN.} § 2725.06 (Page 1954) provides that when a
Secondly, a state court might be just as favorable a forum in which to argue his constitutional claims as a federal district court. Therefore, should Lamb's expansive interpretation of the Ohio writ become state law, it would encourage substantial litigation under the Ohio habeas corpus statute and provide ample opportunity for Ohio courts to consider the interplay of procedural due process and administration of discipline in penal institutions.

Taken together, Wolff's constriction of Preiser and Lamb's expansion of Ohio habeas corpus set up a procedural pattern that funnels a variety of prisoners' claims into the Ohio state courts for initial determination. However, at the same time that the Supreme Court passed this initiative to the states, it also read the due process rights of prisoners narrowly. Thus, in effect, the Court limited the role of state courts to defining more precisely the principles set forth in its ruling on the substantive claim in Wolff. Ironically, the Court's new formulation probably cannot be reconciled with the broad due process protections extended to prisoners in Lamb.

But for Wolff, Lamb would be valuable Ohio precedent for the guarantee of procedural due process rights in the arena of state prison disciplinary proceedings. The Ohio court of appeals held that the following safeguards must be afforded a prisoner faced with the possibility of punitive segregation: (1) an impartial factfinder and decisionmaker at the proceeding; (2) written notice specifying the prison rule allegedly broken, including a statement of facts upon which the charge is based; (3) written notice of the prison rules given before the time of the incident in question; (4) the right to explain his conduct and relevant circumstances; (5) the right to present real and testimonial evidence within reasonable limits; (6) the right to reasonable confrontation and cross-examination of petition for a writ of habeas corpus is presented, if it appears that the writ ought to issue, a court or judge authorized to grant the writ must grant it forthwith and set a time and date for a hearing in accordance with § 2725.09. A court typically has a discretionary power to dispose of habeas corpus cases in advance of the order in which they are entered on the docket. E.g., Ohio Rev. Code Ann. § 2501.09(A) (Page 1954). By contrast, § 1983 proceedings are not given priority on a docket. See note 61 supra.

89. The Lamb court, for example, could certainly be characterized as sympathetic to the federal constitutional rights of state prisoners, in view of the expansion of habeas corpus to facilitate a prisoner's quest for relief from onerous disciplinary treatment. Further, the procedural due process requirements imposed by the court seem to give more protection to a prisoner than those later laid down by the United States Supreme Court in Wolff. See notes 103-09 infra and accompanying text. 90. See text accompanying notes 97-102 infra.
adverse witnesses; and (7) a written decision based solely upon substantial evidence presented at the hearing, stating the reasons for the decision and describing the evidence upon which it was based.\textsuperscript{91}

The resolution of the conflict between affording the protection of due process to state prisoners and maintaining expedient prison discipline was an issue of first impression in Ohio courts.\textsuperscript{92} The court expressed two reasons for its decision to rule upon the issue in this case, even though it entailed advancing a concept of habeas corpus at variance with the traditional nature of the writ under Ohio law. The first rationale offered was that of continuing responsibility of the state courts to protect the basic rights of individuals placed in prison as a result of sentences imposed by those courts.\textsuperscript{93} Secondly, the court expressed a belief in preserving the balance of federal-state relations in the administration of the national system of criminal justice by assuming responsibility for the delineation of prisoners' rights in state custodial institutions.\textsuperscript{94} Although not discussed in the opinion, the apparent willingness of Ohio federal courts to consider the constitutional claims of state prisoners under federal habeas corpus probably spurred the state court to take the initiative in defining the role of procedural due process in state penal institutions.\textsuperscript{95}

The due process protection afforded a prisoner by \textit{Lamb}, however, appears to have been substantially reduced by \textit{Wolff v. McDonnell},\textsuperscript{96} a decision that climaxed a growing trend among lower federal

\textsuperscript{91} 34 Ohio App. 2d at 94-96, 296 N.E.2d at 287-88.
\textsuperscript{92} Id. at 90, 296 N.E.2d at 285.
\textsuperscript{93} Id. at 89-90, 296 N.E.2d at 285.
\textsuperscript{94} Id. at 90, 296 N.E.2d at 285.
\textsuperscript{95} In Jones v. Wittenberg, 330 F. Supp. 707 (N.D. Ohio 1971), \textit{aff'd sub nom.} Jones v. Metzgar, 456 F.2d 854 (6th Cir. 1972), filed under § 1983, the district court ordered extensive changes in the administration of a state penal institution. The court indicated that, on facts similar to those in \textit{Lamb}, it would have invalidated the prison's policy of imposing punitive segregation on escapees who had already been sentenced for that escape. The court stated that the discipline imposed must have no relationship to the acts that led to the prisoner's incarceration and must be directly related to the prison rule violated. \textit{Id.} at 720. The district court's innovative action was affirmed. 456 F.2d 854 (6th Cir. 1972). The Sixth Circuit Court of Appeals, relying on \textit{Coffin v. Reichard}, 143 F.2d 443 (6th Cir. 1944), has also held that a state prisoner's claim based on alleged mistreatment was cognizable under federal habeas corpus. Armstrong v. Cardwell, 457 F.2d 34 (6th Cir. 1972). These decisions may have convinced the \textit{Lamb} court of the need to develop an adequate state means to litigate constitutional issues arising from the internal administration of state penal institutions. \textit{See} 34 Ohio App. 2d at 90, 296 N.E. 2d at 285.
\textsuperscript{96} \textit{See} notes 80-87 \textit{supra} and accompanying text.
In balancing the interests of prisoners against those interests unique to federal courts to intervene in the administration of state prison discipline.97

97. Until recently federal courts have been reluctant to venture into the area of disciplinary proceedings in penal institutions. Several rationales were typically offered to support this policy of nonintervention, called the "hands-off doctrine": First, a desire not to upset a delicate balance in preserving federal-state comity, e.g., Rose v. Haskins, 388 F.2d 91 (6th Cir. 1968), cert. denied, 392 U.S. 946 (1968); second, a belief that prison disciplinary matters were exercised in the discretion of executive officials and should not be subject to judicial review unless the punishment was so unreasonable as to be cruel, e.g., Roberts v. Pegelow, 313 F.2d 548 (4th Cir. 1963); third, dicta in Price v. Johnston, 334 U.S. 266, 285 (1948), stated that lawful incarceration necessarily limits many rights normally enjoyed by a free citizen; and finally, that many matters of concern to prisoners, such as parole, were mere privileges, not rights, which were not attended by constitutional safeguards, e.g., Ughbanks v. Armstrong, 208 U.S. 481, 487-88 (1908). See generally Note, Beyond the Ken of the Courts: A Critique of Judicial Refusal to Review the Complaints of Convicts, 72 YALE L.J. 506 (1963).

Both the hands-off doctrine as a whole and the right-privilege distinction had been eroded as constitutional barriers to judicial intervention into prison affairs prior to Wolff v. McDonnell, 418 U.S. 539 (1974). In Johnson v. Avery, 393 U.S. 483 (1969), the Court had emphasized that state administration of prisons is subject to federal authority when paramount federal rights supervene and that state prison regulations may be invalid when they conflict with these rights. And in Wilwording v. Swenson, 404 U.S. 249 (1971), the Court had approved judicial review of claims by state prisoners challenging disciplinary measures taken against them. The Court had similarly undercut the right-privilege distinction as justification for denying procedural due process safeguards in various types of administrative proceedings. See, e.g., Board of Regents v. Roth, 408 U.S. 564 (1972) (discharge of a tenured professor); Morrissey v. Brewer, 408 U.S. 471 (1972) (parole revocation); Goldberg v. Kelly, 397 U.S. 254 (1970) (termination of welfare benefits). See generally Van Alstyne, The Demise of the Right-Privilege Distinction in Constitutional Law, 81 HARV. L. REV. 1439 (1968).

An increasing number of lower federal courts rejected the hands-off doctrine. The initial decisions upholding the right to procedural safeguards in prison disciplinary proceedings occurred in suits under § 1983. E.g., Landman v. Royster, 333 F. Supp. 621 (E.D. Va. 1971); Clutchette v. Procurier, 328 F. Supp. 767 (N.D. Cal. 1971); Carothers v. Follette, 314 F. Supp. 1014 (S.D.N.Y. 1970). These courts decided that the interests of sentenced inmates in remaining free from segregated detention and in retaining good time were substantial enough to warrant due process protection. Intervention by federal courts has followed after these first examples. See, e.g., United States ex rel. Miller v. Twomey, 479 F.2d 701 (7th Cir. 1973); Rinehart v. Brewer, 360 F. Supp. 105 (S.D. Iowa 1973); Sands v. Wainwright, 357 F. Supp. 1062 (M.D. Fla. 1973). However, not all federal courts were so ready to abandon the hands-off doctrine. See, e.g., Eisenhardt v. Britton, 478 F.2d 855 (5th Cir. 1973); Burns v. Swenson, 430 F.2d 771 (8th Cir. 1970), cert. denied, 404 U.S. 1062 (1972); Poindexter v. Woodson, 357 F. Supp. 443 (D. Kan. 1973). The success of the initial decisions resulted in a large number of similar suits. A total of 3600 civil rights actions were filed in 1972, compared to 233 in 1966. See DIRECTOR, ADMINISTRATIVE OFFICE, UNITED STATES COURTS, ANNUAL REPORT 117, table 19 (1972).
to the administration of penal institutions, the Wolff Court held that disciplinary proceedings to determine serious misconduct that could warrant forfeiture of good time or the imposition of solitary confinement must meet certain minimal due process requirements. These requirements include (1) advance written notice to the inmate not less than 24 hours before any hearing;\(^9\) (2) a written statement by the factfinders as to the evidence relied on and the reasons for any disciplinary action taken;\(^9\) (3) the right of an inmate to call witnesses and present documentary evidence, subject to determination by officials that such action would not jeopardize institutional security or goals;\(^10\) and (4) a qualified right to substitute counsel.\(^10\)

At the same time, however, the Court held that several safeguards, which had been recognized by the Lamb court, were not constitutionally required. For example, the Supreme Court assumed a position wholly contradictory to that taken by Lamb by holding that an inmate has no constitutional right to cross-examine and confront adverse witnesses.\(^10\) The Ohio court, while noting the possibility that permitting cross-examination of prison guards or inmate informants could dilute the authoritarian status of guards or cause friction among prisoners, found the constitutional right to reasonable and relevant cross-examination to be superior to administrative concerns.\(^10\) The United States Supreme Court, however, in its balancing of a prisoner's need for constitutional safeguards against institutional needs, held that prisoners do not possess this fundamental right. The Court cited the potential for prison disruption that would attend recognition of the cross-examination right in prisoners as justification for this position.\(^10\) The Court entrusted to the discretion of the prison authorities decisions regarding the allowance of cross-examination of adverse witnesses by prisoners.\(^10\) Thus, the Court impliedly rejected the assertion in Lamb that fairness of disciplinary proceedings would be fundamentally destroyed if prisoners were denied the right to cross-examination.\(^10\)

In similar fashion the Court subordinated a prisoner's constitutional right to call witnesses and present documentary evidence in

\(^{9}\) 418 U.S. at 564.
\(^{99}\) Id. at 564-65.
\(^{100}\) Id. at 566-67.
\(^{101}\) Id. at 570.
\(^{102}\) Id. at 567-68.
\(^{103}\) 34 Ohio App. 2d at 95, 296 N.E.2d at 288.
\(^{104}\) 418 U.S. at 568.
\(^{105}\) Id. at 569.
\(^{106}\) Id. at 568.
his defense to the exercise of official discretion.\textsuperscript{107} Under \textit{Wolff} prison authorities may refuse to call witnesses requested by a prisoner and may otherwise limit his ability to collect evidence for his defense when they feel it would create a risk of reprisal or undermine official authority.\textsuperscript{108} In contrast, \textit{Lamb} had subjected a prisoner’s right to present evidence only to traditional limits of reasonableness as to amount and relevance.\textsuperscript{109}

The potential of \textit{Lamb} as a “bellwether”\textsuperscript{110} for an expansion of prisoners’ rights in Ohio has thus been diluted by \textit{Wolff v. McDonnell}. Notwithstanding that most prison disciplinary cases turn on issues of fact,\textsuperscript{111} the Supreme Court denies a prisoner accused of misconduct the right to confront and cross-examine his accusers or witnesses, whose memory may be faulty or whose testimony may be perjured or motivated by malice, vindictiveness, prejudice, or jealousy.\textsuperscript{112} Instead, his ability to present an effective defense is at the mercy of the discretion of prison authorities. In view of the Court’s obvious preference to defer to administrative discretion in judging the fairness of disciplinary proceedings, in many such proceedings the exercise of that discretion will render an inmate unable to present any defense to the allegations of his accusers. As Mr. Justice Marshall stated in dissent in \textit{Wolff}:

Without these procedures [confrontation and cross-examination], a disciplinary board cannot resolve disputed factual issues in any rational or accurate way. The hearing will thus amount to little more than a swearing contest, with each side telling its version of the facts—and, indeed, with only the prisoner’s story subject to being tested by

\begin{itemize}
\item \textsuperscript{107} 418 U.S. at 566.
\item \textsuperscript{108} \textit{Id}.
\item \textsuperscript{109} 34 Ohio App. 2d at 95, 296 N.E.2d at 288. \textit{Wolff} does provide one due process protection beyond those required by \textit{Lamb}. Under \textit{Wolff} a prisoner has an absolute right to substitute counsel under circumstances dictating a need for one, 418 U.S. at 570, presumably under a fundamental fairness standard, as applied in Gagnon v. Scarpelli, 411 U.S. 778, 787 (1973) (extending to probationers the right to preliminary and final revocation hearings under conditions specified in Morrissey v. Brewer, 408 U.S. 471 (1972)). Whether this right will effectively aid a prisoner in his defense is questionable, since under \textit{Wolff} the requirement for substitute counsel may be satisfied by providing the prisoner with a member of the prison staff or an inmate selected by the staff, 418 U.S. at 570. Having provided substitute counsel, the authorities may prohibit aid from any other inmates, regardless of how knowledgeable in the law they may be. \textit{Id.} at 577-78.
\item \textsuperscript{110} 34 Ohio App. 2d at 80, 296 N.E.2d at 285.
\item \textsuperscript{111} 418 U.S. at 595 (Douglas, J., dissenting).
\item \textsuperscript{112} \textit{Id.} at 595-96.
\end{itemize}
cross-examination. In such a contest, it seems obvious
to me that even the wrongfully charged inmate will in-
variably be the loser.113

By subordinating the interests of prisoners to the institutional
needs and objectives of prisons, the Court has acted in its capacity
as ultimate arbiter of federal constitutional questions to ensure that
primary control of administration of state prisons remains in the
hands of state officials. This objective having been achieved in
Wolff by resolution of substantive law through the appellate process,
it is now understandable why in the same case the Court restricted
Preiser to its facts.114 At first glance, the Court's narrow interpre-
tation of Preiser, which makes federal courts more accessible to state
prisoners, suggests that the Court is both encouraging federal court
intervention into state prison disciplinary matters and discouraging
state court jurisdiction over federal constitutional issues arising out
of those matters. Such a policy would seem to contradict the Court's
announced desire to protect the power of a state to control the
administration of its prisons and to provide an opportunity for state
officials to correct internal administrative errors.115 But it is now
clear that no contradiction of this sort exists, since both federal and
state courts are bound by the procedural due process requirements
set forth in Wolff, which heavily favor state interests and uphold a
strong element of discretion in the administration of prison dis-
ciplinary proceedings. Therefore, the significance of a state pris-
oner's augmented ability to litigate his constitutional claims in federal
court has been weakened by the Court's conservative shaping of the
procedural due process standards that govern those claims.

Though the strict interpretation of prisoners' rights in Wolff seems
to have vitiated Lamb's potential to be a milestone in the recognition
of Ohio prisoners' due process rights in disciplinary proceedings, it
left to be answered the final question raised by the tripartite holding
in Lamb. For, besides taking a novel stance on the scope of habeas
corpus and the role of procedural due process in prison proceedings,
Lamb also held that a prisoner's constitutional protection from double
jeopardy116 is violated when he is placed in punitive segregation as

113. See id. at 582 (Marshall, J., dissenting).
114. See notes 79-84 supra and accompanying text.
116. The double jeopardy clause is contained in the fifth amendment: "nor
shall any person be subject for the same offense to be twice put in jeopardy
of life or limb . . . ." U.S. Const. amend. V. The double jeopardy provision
of the fifth amendment was held applicable to the states under the due process
punishment for having escaped, if he has already been convicted and sentenced for that escape.\textsuperscript{117} It remains to be determined, then, whether this view of the double jeopardy clause can be squared with existing case law.

The prohibition on double jeopardy generally forbids (1) retrial for the same offense after acquittal,\textsuperscript{118} (2) retrial for the same offense after conviction,\textsuperscript{119} and (3) multiple punishment for the same offense.\textsuperscript{120} The constitutional bar against double jeopardy is a shield only against "criminal" punishment being imposed in violation of the bar. In most instances, it prohibits punishment imposed by a criminal court of law, but may also bar a civil sanction that is punitive rather than remedial in nature.\textsuperscript{121} The Lamb court found that violation of the prohibition against double jeopardy occurred when prison officials imposed "double punishment" for the same offense.\textsuperscript{122} The court reasoned that solitary confinement imposed by prison authorities is a type of punishment within the purview of the clause of the fourteenth amendment in Benton v. Maryland, 395 U.S. 784 (1969).

\textsuperscript{117} The traditional limitations on the use of habeas corpus help to explain why the double jeopardy question of Lamb (whether being sentenced for an offense barred later administrative punishment for that offense) had not been raised previously. Historically the writ could not be used to protest treatment of the prisoner. Therefore, a prisoner alleging that administrative action taken against him violated the double jeopardy clause was denied a forum. See note 41 supra and accompanying text. Moreover, the hands-off doctrine probably discouraged judicial inquiry into the nature of prison discipline under the double jeopardy clause. In contrast, the more common double jeopardy issue involving prison discipline (whether punishment administered for an act barred later prosecution for that offense) was often raised on appeal, e.g., People v. Eggleston, 255 Cal. App. 2d 337, 63 Cal. Rptr. 104 (1967), or by habeas corpus, e.g., Gilchrist v. United States, 427 F.2d 1132 (5th Cir. 1970).

\textsuperscript{118} United States v. Ball, 163 U.S. 662 (1896); Kepner v. United States, 195 U.S. 100 (1904). Under the common law, such retrial was barred by the plea of autrefois acquit (formerly acquitted). Comment, Twice in Jeopardy, 75 YALE L.J. 262, 265 n.11 (1965).

\textsuperscript{119} Ex parte Lange, 85 U.S. (18 Wall.) 163 (1873). At common law retrial was barred by the plea of autrefois convict (formerly convicted) and autrefois attainted (formerly attainted). Comment, Twice in Jeopardy, 75 YALE L.J. 262, 265 n.12 (1965).

\textsuperscript{120} Ex parte Lange, 85 U.S. (18 Wall.) 163 (1873).

\textsuperscript{121} Helvering v. Mitchell, 303 U.S. 391, 397-99 (1938) (holding that the imposition of a penalty tax in a civil proceeding was an administrative sanction and therefore not barred by a prior acquittal on criminal charges arising out of the same conduct that led to the civil proceeding); Murphy v. United States, 272 U.S. 630, 632 (1926).

\textsuperscript{122} 34 Ohio App. 2d at 97, 296 N.E.2d at 289.
double jeopardy clause and that when imposed upon the prisoner for escaping after he has been sentenced by the courts for the same offense, a violation occurs. This reasoning is interesting and will surely be attempted again in later suits. It is not, however, based on stable ground.

The Lamb approach to disciplinary punishment is unlike that usually accepted by the courts. Traditionally, courts have viewed such punishment as administrative in nature and have consistently held that the double jeopardy clause will not bar prosecution for the same acts for which the administrative punishment was imposed, whether the punishment was solitary confinement or forfeiture of good time. The rationale supporting this characterization of prison discipline is that it is an administrative function of the state executive and therefore not "criminal punishment" barred by the double jeopardy clause.

Given the Supreme Court's deference to the discretion of prison authorities set forth in Wolff, it is likely that the Supreme Court would favor the traditional characterization of prison disciplinary sanctions and thus, in all probability, reject the double jeopardy argument accepted in Lamb. In Wolff, the Court stressed that its constitutional judgments had to be made against the background found in many penal institutions today, that of a closed, tightly controlled environment with an ever present potential to erupt into violence. The Court perceived prison disciplinary proceedings as the method by which security and order can be maintained in this environment, and viewed a flexible use of official discretion as essential to maintaining a successful disciplinary program. The experience of prison authorities in handling individual inmates is obviously highly valued by the Court. Depriving officials of the right to use solitary confinement to deter former escapees from future attempts to escape would cut directly against the deference shown by the Court to such administrative decisions. Significantly, in Wolff the Court emphasized the need to judge the acceptability of disciplinary procedures in the light of the threat posed by prisoners who have

124. E.g., Gilchrist v. United States, 427 F.2d 1132 (5th Cir. 1970).
125. E.g., United States v. Stuckey, 441 F.2d 1104 (3d Cir. 1971).
126. See notes 96-108 supra and accompanying text.
127. 418 U.S. at 562-63.
128. Id.
129. Id.
already demonstrated little regard for prison regulations.\textsuperscript{130} Presumably former escapees are such individuals.

Another argument against applying the double jeopardy clause to prison disciplinary measures is that these sanctions serve a remedial, not punitive purpose, and therefore are not criminal punishment,\textsuperscript{131} even when imposed as a result of the nature of the crime for which the inmate was convicted. Prison discipline is viewed by the \textit{Wolff} Court as "a tool to advance the rehabilitative goals of the institution."\textsuperscript{132} Such goals clearly reflect a remedial purpose. Thus, it can be argued that prison discipline is neither a sentence of a criminal court nor a punitive civil sanction, but a remedial device,\textsuperscript{133} which is exempt from application of the double jeopardy concept.

Finally, assuming such use of solitary confinement is applied uniformly to former escapees, the policy would seem to be more properly viewed as merely one aspect of the clear power of prison authorities to classify prisoners for administrative purposes.\textsuperscript{134} Matters of classification typically affect many aspects of daily prison life, such as place of confinement, eligibility for good time, work assignments, access to medical care, likelihood of parole, and opportunity to enjoy a wide range of available privileges.\textsuperscript{135} Inmates also have an interest in the classification of fellow prisoners, such as in segregation of violent individuals and those whose disruption of prison life could cause the removal of privileges for other inmates.\textsuperscript{136} Accordingly, the power to classify prisoners on the basis of their backgrounds and records is fundamental to controlling a prison population and administering its daily activities. The threat to prison security posed by an inmate who has previously demonstrated an ability and willingness to escape is obvious. Prison officials have a strong interest in deterring future escapes by former escapees or other inmates who would be encouraged by inmates who have been successful in the past. The personal safety of prison guards and members of the public are also endangered by escaping prisoners. In view of these factors, the petitioners in \textit{Lamb}, arguably, were

\begin{footnotes}
\item 130. \textit{Id.} at 562.
\item 131. \textit{See} note 121 \textit{supra} and accompanying text.
\item 132. 418 U.S. at 563.
\item 133. \textit{See} note 121 \textit{supra} and accompanying text.
\item 135. H. Kerper & J. Kerper, \textit{supra} note 134, 446-47.
\item 136. \textit{Id.} at 447.
\end{footnotes}
treated leniently in view of their records of escape. At least one court has allowed much more severe disciplinary measures to be imposed because of an inmate's record of escape, even though he had already been convicted and sentenced for his escape.\textsuperscript{137} Thus, it appears that the \textit{Lamb} double jeopardy theory is unstable at best. Chances of its acceptance are, in all probability, slight.

In \textit{In re Lamb}, while proposing an expansion of prisoners' rights to due process and a novel double jeopardy attack upon prison disciplinary sanctions, has major significance as a guidepost in the development of Ohio habeas corpus law. The expansion of the statutory habeas corpus remedy to take cognizance of a prisoner's challenge of disciplinary treatment resulting in the loss of good time would make an effective state remedy available where such did not exist before. As a result of \textit{Preiser}, all challenges seeking injunctions for restoration of good time or immediate release would have to be initially resolved in Ohio habeas corpus proceedings before federal litigation could be commenced.\textsuperscript{138} While it is true that a state prisoner could easily circumvent this exhaustion requirement by proceeding under section 1983, if he does not seek release or an injunction for restoration of good time,\textsuperscript{139} such tactics would take considerably longer than initially petitioning for relief under Ohio habeas corpus.\textsuperscript{140} Regardless of why the Ohio habeas corpus remedy is sought, the importance of having state courts conduct the initial resolution of constitutional issues that directly affect prison administration should not be minimized. State court rulings on these issues can be res judicata on subsequent section 1983 suits by the prisoner and can even influence his subsequent federal habeas corpus hearings.\textsuperscript{141} It is perhaps equally significant that many prisoner complaints will probably allege abuse of discretion by prison officials in their efforts to comply with the due process requirements established in \textit{Wolff v. McDonnell}.\textsuperscript{142} In assessing that exercise of discretion, Ohio courts should be better informed than federal courts on the strengths and weaknesses of Ohio penal policy. As long as state

\textsuperscript{137} Krist v. Smith, 309 F. Supp. 497 (S.D. Ga. 1970). However, this inmate was arguably more dangerous than were the petitioners in \textit{Lamb}. The Georgia prisoner's record consisted of three escapes, one attempted escape, and commission of a kidnapping while escaped.

\textsuperscript{138} See notes 62-66, 82-83 \textit{supra} and accompanying text.

\textsuperscript{139} See notes 84-85 \textit{supra} and accompanying text.

\textsuperscript{140} See note 61 \textit{supra}.

\textsuperscript{141} See notes 74-77 \textit{supra} and accompanying text.

\textsuperscript{142} See notes 96-102 \textit{supra} and accompanying text.
courts are sufficiently sensitive to prisoners' constitutional rights as well as to state interests, their pronouncements on the implementation of the standards in Wolff v. McDonnell are likely to carry great weight in a Supreme Court that has shown a strong desire to leave supervision of state penal institutions as much as possible to state judicial and administrative bodies. 143

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