

# Duke Law Journal

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VOLUME 58

OCTOBER 2008

NUMBER 1

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## HABEAS CORPUS AND STATE SENTENCING REFORM: A STORY OF UNINTENDED CONSEQUENCES

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### ABSTRACT

*This Article tells the story of how fundamental shifts in state sentencing policy collided with fundamental shifts in federal habeas policy to produce a tangled and costly doctrinal wreck. The conventional assumption is that state prisoners seeking habeas relief allege constitutional errors in their state court convictions and sentences. But almost 20 percent of federal habeas petitions filed by noncapital state prisoners do not challenge state court judgments. They instead attack administrative actions by state prison officials or parole boards, actions taken long after the petitioner's conviction and sentencing. Challenges to these administrative decisions create serious problems for federal habeas law, which is designed to structure federal review of state court judgments and is ill suited to review administrators' actions. Courts find themselves trying to squeeze square pegs into round holes, and the confusion is particularly intolerable given the stakes for prisoners, state prison systems, and*

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*federal courts. This Article is the first to identify this significant problem, to analyze its disparate and complicated causes, and to propose a simple and rational way for Congress to respond.*

#### INTRODUCTION

When legislators and judges change legal rules, they necessarily rely on background assumptions about how those rules operate in the world. If their assumptions are incorrect, the legal changes are likely to have unintended consequences. That is the story we tell here about federal habeas corpus law. It is a story that echoes others that have occurred in the wake of the nationwide shift to determinate sentencing and is as significant and as troubling as those better-known tales.

Since the 1950s, developments in the law governing the scope of federal habeas review for state prisoners have proceeded on the assumption that a state prisoner seeking habeas relief is attacking the legality of his confinement by alleging a constitutional error in the decision that led to his incarceration. The conventional assumption is thus that federal habeas petitions ask federal courts to review earlier rulings by state courts. Habeas is considered collateral review precisely because it reviews state court judgments that have already been subjected to direct review. It might come as a surprise, then, to learn that almost 20 percent of federal habeas petitions filed by state prisoners do *not* challenge state court judgments. They attack instead the constitutionality of administrative actions by state prison officials or parole boards, actions taken long after the petitioner's conviction and sentencing.

Challenges to administrative rather than judicial decisions have created two problems that we explore in this Article. First, the habeas remedy overlaps with the federal cause of action for civil rights violations, 42 U.S.C. § 1983. Courts must decide which statutory scheme to apply, and existing doctrines governing that choice are both theoretically and practically unsound. Second, to the extent that the habeas statute is applied, it is designed to structure federal court review of state court judgments and is therefore ill suited for review of actions by prison administrators. Thus, courts reviewing administrative actions under the rubric of habeas corpus find themselves trying to squeeze square pegs into round holes.

In this Article we set out for the first time the story of how this disconnect between statutory remedies and constitutional claims developed and document the magnitude of the resulting jurisprudential morass. We trace how the legislative transformation of sentencing policy generated unanticipated procedural challenges for courts. The confusion we describe is particularly intolerable given the stakes: prisoners in these cases are challenging a deprivation of liberty, already stretched state resources are squandered in the resulting litigation, and federal courts are unnecessarily burdened. The existing patchwork of mismatched laws poorly serves prisoners, state corrections systems, and the federal judiciary. Moreover, the percentage of habeas petitions raising these claims is not likely to decrease anytime soon. We argue that as prison populations and the number of federal habeas claims continue to escalate, it is time for Congress to respond to these developments directly. And despite the depth and breadth of the problems with existing law, we believe they can be remedied with a few simple statutory changes.

We begin in Part I with an introduction to the problem, describing the statutory background and explaining the origin and scope of the current difficulties. Part II focuses on the doctrines that separate habeas claims from § 1983 claims. In Part II.A we provide a theoretical critique of the Court's jurisprudence, arguing that its interpretation of the reach of these two statutory remedies is not consistent with several principles that undergird the general doctrines governing federal court review of state decisions. The Court's distinction between cases that may be filed as civil rights claims and those that must be filed in habeas is also very unclear, and Part II.B shows the effect of this confusion on the lower courts. We turn in Part III to the specific mismatch between the statutory habeas provisions and cases challenging decisions by state officials regarding the administration of sentences, cataloguing five separate aspects of habeas law that have troubled courts trying to review administrative actions. Finally, in Part IV, we suggest a simple solution that is tailored specifically to the problems in these cases that the law can no longer ignore.

## I. AN INTRODUCTION TO THE PROBLEM

A. *The Statutory Background*

State prisoners with constitutional claims have, at least in theory, two different routes to obtain review of those claims in federal district court. First, claims alleging unconstitutional conduct by governmental actors (including prison and parole officials) fall within the scope of 42 U.S.C. § 1983,<sup>1</sup> the general civil rights statute. Section 1983 allows a civil suit—for damages or equitable relief—against any defendant who, “under color of” state law, deprives the plaintiff of “any rights, privileges, or immunities secured by the Constitution and laws.” Challenges to prison conditions make up a large proportion of cases filed nationwide under § 1983.<sup>2</sup> State prisoners suing under § 1983 must satisfy the requirements of the Prison Litigation Reform Act (PLRA),<sup>3</sup> passed in 1996 to address frivolous prisoner lawsuits.<sup>4</sup> Three provisions of the PLRA are important for our purposes. Unlike other § 1983 plaintiffs, who are not required to exhaust any available state remedies,<sup>5</sup> prisoners must first exhaust state administrative remedies before filing suit in federal court.<sup>6</sup> The PLRA also added a monetary

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1. 42 U.S.C. § 1983 (2000).

2. See Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555, 1571 (2003) (listing “general living-conditions claims” as one of the “leading topics” of inmate litigation).

3. Prison Litigation Reform Act, Pub. L. No. 104-134, §§ 801–10, 110 Stat. 1321, 1321-66 to -77 (1996) (codified as amended in scattered sections of 11, 18, 28 and 42 U.S.C.).

4. See, e.g., Brian J. Ostrom, Roger A. Hanson & Fred L. Cheesman II, *Congress, Courts and Corrections: An Empirical Perspective on the Prison Litigation Reform Act*, 78 NOTRE DAME L. REV. 1525, 1525–26 (2003) (attributing the PLRA’s passage to the rapid rise, onerous volume, and low success rate of prisoner litigation in the 1990s); Schlanger, *supra* note 2, at 1559 (noting that concern about frivolous lawsuits eased the PLRA’s passage).

5. See *Patsy v. Bd. of Regents*, 457 U.S. 496, 516 (1982) (reaffirming precedent holding that § 1983 plaintiffs do not need to exhaust administrative remedies).

6. 42 U.S.C. § 1997e(a) (2000). This requirement in the PLRA was new. No statutory provision governed the exhaustion of state remedies by prisoners bringing § 1983 suits until 1980, when the Civil Rights of Institutionalized Persons Act (CRIPA) first authorized judges in their discretion to require exhaustion of administrative remedies if specified conditions were met. See Civil Rights of Institutionalized Persons Act, Pub. L. No. 96-247, § 7, 94 Stat. 349, 352 (1980) (codified as amended at 42 U.S.C. § 1997e (2000)) (authorizing judges to require exhaustion if “appropriate and in the interests of justice”); Eugene Novikov, Comment, *Stacking the Deck: Futility and the Exhaustion Provision of the Prison Litigation Reform Act*, 156 U. PA. L. REV. 817, 818–20 (2008) (contrasting the CRIPA and the PLRA exhaustion requirements); Kermit Roosevelt III, *Exhaustion Under the Prison Litigation Reform Act: The Consequence of Procedural Error*, 52 EMORY L.J. 1771, 1803–05 (2003) (same).

deterrent to frivolous filings: prisoners with sufficient funds must pay a partial filing fee at the time of suit and the balance over time,<sup>7</sup> and prisoners who have filed three suits dismissed as frivolous, malicious, or not stating a claim must pay the full filing fee up front for any subsequent suit.<sup>8</sup> Finally, the PLRA requires the court to screen a prisoner's complaint before ordering the defendant to answer; the court may make such an order only if it finds that "the plaintiff has a reasonable opportunity to prevail on the merits."<sup>9</sup>

The second federal remedy theoretically available to a prisoner is the writ of habeas corpus. Habeas relief is available to those "in custody in violation of the Constitution or laws or treaties of the United States"<sup>10</sup> and is used primarily by prisoners challenging the legality of their convictions or sentences. Unlike § 1983, which until 1996 did not require state prisoners to exhaust state remedies, the habeas statute has expressly required prisoners to raise their claims in state courts since 1948.<sup>11</sup> Congress added new restrictions on habeas relief in 1996 when it enacted the Antiterrorism and Effective Death Penalty Act (AEDPA),<sup>12</sup> including a statute of limitations for filing, a bar to successive petitions, and new barriers to appeal.

We focus in this Article on a particular sort of constitutional claim: a challenge to a state administrative decision that affects how much of a sentence a prisoner must actually serve in custody. We call these sentence-administration claims. These claims do not question the validity of the sentence itself or the underlying conviction. Instead, they contest decisions that parole or corrections officials make *after* conviction and sentence. Administrative decisions relating to sentence administration can be grouped into three main categories:

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7. 28 U.S.C. § 1915(b) (2000); Schlanger, *supra* note 2, at 1628.

8. See 28 U.S.C. § 1915(g) (precluding such prisoners from bringing actions *in forma pauperis*).

9. 42 U.S.C. § 1997e(g)(2).

10. 28 U.S.C. §§ 2241(c)(3), 2254(a) (2000).

11. 2 RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 23.1, at 1049 (5th ed. 2005) (noting that prior to its codification in 1948, state court exhaustion had been required by common law since 1886). In 1996, the Antiterrorism and Effective Death Penalty Act (AEDPA) authorized federal judges to deny (but not grant) unexhausted claims. Pub. L. No. 104-132, § 104, 110 Stat. 1214, 1218 (codified at 28 U.S.C. § 2254(b)(1)(A) (2000)).

12. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of 8, 18, 22, 28, 40 and 42 U.S.C.).

(1) revocation of supervised release or parole; (2) denial or deferral of an inmate's release on parole; and (3) the revocation of earned good-time credits,<sup>13</sup> usually imposed after a disciplinary hearing as a sanction for misconduct.<sup>14</sup> A prisoner challenging one of these administrative decisions typically alleges that he was denied his federal due process rights at the hearing leading to the decision. A prisoner may also allege that in making the decision, state officials applied a revised statute or policy, which violated his rights under the Ex Post Facto Clause.

These sentence-administration claims are neither fish nor fowl: unlike most habeas petitions, they do not challenge state court convictions or sentences; unlike most other prisoner litigation against corrections officials, they do not attack conditions of confinement. As we show in this Article, courts have difficulty both determining which statutory scheme should govern and applying the statutory requirements. These difficulties evolved out of the combination of six significant legal developments that now interact in ways that neither Congress nor the courts anticipated. The next Section describes those developments.

*B. How the Problems Developed: The Perfect Storm*

1. *The Court Expands Liberty Interests (1972–1979)*. The mismatch between claims and remedies that we address in this Article began with the expansion of prisoners' rights under the Due Process Clause during the last phases of the Supreme Court's due process revolution in the 1970s. The constitutional right to due process applies

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13. Good-time credits (sometimes known as earned-release credits, flat-time credits, or "gain time") may accrue with the passage of time at a rate set by statute or regulation, or with participation in particular prison programs, and can be revoked for misconduct. *See* WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 26.2(c), at 1223–24 (4th ed. 2004) (summarizing several states' practices).

14. State prisoners may also allege that corrections officials failed to properly credit them with time served on other sentences or outside prison, or failed otherwise to properly calculate their presumptive release dates. *E.g.*, *Jhanjar v. Cal. Dep't. of Corr. & Rehab.*, No. 1:06-CV-00637AWI-TAGHC, 2008 WL 850195, at \*1, \*7 (E.D. Cal. Mar. 28, 2008) (recommending that the court deny relief to an inmate who claimed that prison officials should have reduced his parole term by credits); *Rider v. Quarterman*, No. 3:07-CV-0789-N ECF, 2007 WL 4226378, at \*1, \*3 (N.D. Tex. Nov. 30, 2007) (denying relief to an inmate who challenged the refusal of the Texas Department of Criminal Justice to give him credit for the "street time" he served on parole before his parole was revoked and he was reincarcerated).

only to governmental decisions that deprive a person of life, liberty, or property. Between 1972 and 1979, the Supreme Court decided three landmark cases identifying new “liberty” interests that dramatically expanded the scope of constitutional claims available to state prisoners.<sup>15</sup>

Before 1972, it was not clear whether sentence-administration decisions by state corrections and parole officials were subject to constitutional regulation at all. Under prior interpretations of due process, a prisoner’s early release from confinement could be seen as a privilege, entirely discretionary with the state, rather than an entitlement that the state could not withdraw without due process.<sup>16</sup> In that year, the Court held in *Morrissey v. Brewer*<sup>17</sup> that parolees do have a liberty interest in their continued release on parole, which states cannot revoke without due process.<sup>18</sup> In 1974, in *Wolff v. McDonnell*,<sup>19</sup> the Court extended *Morrissey* to decisions that revoked earned good-time credits and delayed the date of presumptive release.<sup>20</sup> Five years later in *Greenholtz v. Inmates of Nebraska Penal & Correctional Complex*,<sup>21</sup> the Court recognized a liberty interest in the denial or delay of release on parole if the state parole system created an entitlement to release after a set amount of time served.<sup>22</sup> In particular, the Court held in *Greenholtz* that a state’s decision to

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15. These decisions were among several issued during the same period that increased the categories of interests protected by procedural due process. 2 NEIL P. COHEN, *THE LAW OF PROBATION AND PAROLE* § 18.2, at 18-9 (2d ed. 1999). For an excellent general overview of the development of federal court oversight of state prisons during the 1960s and 1980s, see MALCOLM M. FEELEY & EDWARD L. RUBIN, *JUDICIAL POLICY MAKING AND THE MODERN STATE: HOW THE COURTS REFORMED AMERICA’S PRISONS* 39–46 (1998).

16. See, e.g., Comment, *The Parole System*, 120 U. PA. L. REV. 282, 286–87 (1971) (collecting cases holding parolee had no right to a hearing before revocation because release was considered an act of grace); Sharif A. Jacob, Note, *The Rebirth of Morrissey: Towards A Coherent Theory of Due Process for Prisoners and Parolees*, 57 HASTINGS L.J. 1213, 1214–15 (2006) (tracing developments prior to *Morrissey*).

17. *Morrissey v. Brewer*, 408 U.S. 471 (1972).

18. *Id.* at 483 (“[W]hether the parolee’s liberty is a ‘right’ or a ‘privilege[.]’ . . . the liberty is valuable . . . Its termination calls for some orderly process, however informal.”).

19. *Wolff v. McDonnell*, 418 U.S. 539 (1974).

20. *Id.* at 556–58.

21. *Greenholtz v. Inmates of Neb. Penal & Corr. Complex*, 442 U.S. 1 (1979).

22. See *id.* at 11–12 (concluding that Nebraska’s parole statute gives prisoners an expectation of parole meriting constitutional protection).

deny parole must meet minimum due process standards.<sup>23</sup> These cases made it possible for state prisoners to raise constitutional challenges to sentence-administration decisions that had previously been unregulated by federal law.

Notably, the Court has never recognized a liberty interest in early release if state law leaves the timing of that release entirely to the discretion of the state.<sup>24</sup> Under most state systems in effect in the 1970s, sentences were indeterminate and the decision whether to grant parole was within the parole board's discretion.<sup>25</sup> In such fully discretionary systems, decisions denying release or revoking good-time credit need not comply with the requirements of procedural due process.<sup>26</sup> *Wolff* and *Greenholtz* therefore affected only the states that had adopted presumptive release and eliminated discretionary parole. The next development—a wave of state sentencing reforms that would move the nation away from discretionary to presumptive release—had yet to take hold.

2. *The Decline of Indeterminate Sentencing and the Rise of Presumptive Release (1976–2002)*. When *Wolff* and *Greenholtz* were decided, their impact was limited. Most states had indeterminate sentencing schemes, and as a result their prisoners had no constitutionally protected expectation of release at any particular

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23. See *id.* at 15 (requiring the state to follow a “procedure [that] adequately safeguards against serious risks of error”). The Court held that Nebraska’s procedure satisfied due process by providing each inmate advance written notice of a hearing, an opportunity to be heard at the hearing, and an explanation of the reasons if release is denied. *Id.* at 14–15 & n.6. The Court also held in *Superintendent, Massachusetts Correctional Institution v. Hill*, 472 U.S. 445 (1985), that due process requires that decisions to deny release must be supported by “some evidence,” *id.* at 455.

24. See, e.g., *Teague v. Quarterman*, 482 F.3d 769, 774 (5th Cir. 2007) (contrasting discretionary parole with mandatory release); cf. *Sandin v. Conner*, 515 U.S. 472, 487 (1995) (finding that no due process protections were required for the disciplinary hearing at issue, distinguishing *Wolff*, and noting that the case was not one in which the “State’s action w[ould] inevitably affect the duration of his sentence”).

25. See LAWRENCE A. GREENFELD, PRISON SENTENCES AND TIME SERVED FOR VIOLENCE 1, (Bureau of Justice Statistics, Bulletin No. NCJ 153858, Apr. 1995), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/psatsfv.pdf> (“In 1977, 72% of those released from State prisons had served an indeterminate sentence, and a parole board decided their release.”).

26. See *Teague*, 482 F.3d at 774 (holding that no constitutional right or expectancy to parole exists if the decision to grant parole is “within the . . . unfettered discretion of the State”). All parole *revocations*, however, have been subject to due process constraints since *Morrissey*. See *supra* notes 17–18 and accompanying text.



time prior to the termination of their maximum sentence. In these states administrative decisions altering the expected time of consideration for release did not need to comply with due process. But since the 1970s, there has been a striking shift away from discretionary parole release systems with indeterminate sentences to mandatory release systems with determinate sentences. In a mandatory or presumptive release system, release on parole is required or presumed once the prisoner serves a minimum term, reduced by earned good time.<sup>27</sup> Unlike earlier indeterminate sentencing systems that left the timing of release entirely to the discretion of the paroling authorities once the minimum term had been served, these newer statutes create an entitlement to release upon the expiration of the minimum term, unless the state makes particular findings. A decision to deny or delay consideration for release under these determinate sentencing laws triggers due process requirements because it deprives the prisoner of a liberty interest.

This shift in sentencing law, however, occurred many years after the Supreme Court in *Wolff* and *Greenholtz* first recognized that liberty interests were created by presumptive release statutes. Of the states that chose to abolish discretionary parole between 1976 and 2000—making release mandatory absent particular findings—most did so after 1989.<sup>28</sup> “By the end of 2002, just 16 states still gave their

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27. GREENFELD, *supra* note 25, at 1 (reporting that as of 1995, most state prisoners were serving presumptive sentences and that 90 percent of state inmates could estimate their probable release date). A prisoner’s discharge from prison in 1992 was less likely than in 1977 to be determined by a parole board decision. In 1977, 72 percent of those released from State prisons had served an indeterminate sentence, and a parole board decided their release. In 1992, by contrast, less than 40 percent of prison releases were determined by a parole board. *Id.*; see also Christy A. Visher, *Returning Home: Emerging Findings and Policy Lessons about Prisoner Reentry*, 20 FED. SENT’G REP. 93, 98 (2007) (reporting that the portion of prisoners released by parole boards dropped from 65 percent in 1976 to 24 percent in 1999). For one useful summary of this shift and the forces that brought it about, see JOAN PETERSILIA, *WHEN PRISONERS COME HOME: PAROLE AND PRISONER REENTRY* 55–75 (2003).

28. PETERSILIA, *supra* note 27, at 66–67 tbl.3.1 (noting that the states eliminating discretionary parole release in favor of mandatory release schemes in the 1990s were Arizona (1994), Delaware (1990), Kansas (1993), Mississippi (1995), North Carolina (1994), Ohio (1996), Virginia (1995), and Wisconsin (1999)); see also Daniel S. Medwed, *The Innocent Prisoner’s Dilemma: Consequences of Failing to Admit Guilt at Parole Hearings*, 93 IOWA L. REV. 491, 497–504 (2008) (“Between 1990 and 1999, the number of discretionary parole releases . . . declined nearly twenty percent, while the number of mandatory parole releases almost doubled.”). These changes occurred, at least in part, because of the Truth in Sentencing federal funding initiative. See PAULA M. DITTON & DORIS JAMES WILSON, *TRUTH IN SENTENCING IN STATE PRISONS 1* (Bureau of Justice Statistics, Special Report No. NCJ 170032,

parole boards full authority to release inmates through a discretionary process.”<sup>29</sup> Of the seven states with the largest prison populations in the country—California, Texas, Florida, New York, Georgia, Michigan, and Ohio—all but one use mandatory release schemes for at least some offenders.<sup>30</sup> Moreover, even as states adopted new sentencing laws, it sometimes took years for federal courts to hold definitively that a new state law created a liberty interest. Texas moved to mandatory release in the late 1970s, but it was not until 2007 that the Fifth Circuit held as a matter of first impression that the Texas statute created a liberty interest in release that triggered due process whenever credits were revoked.<sup>31</sup> And it was not until 2002 that the Ninth Circuit squarely held that language in California’s

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Jan. 1999), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/tssp.pdf> (linking Truth in Sentencing reform to parole’s curtailment).

29. PETERSILIA, *supra* note 27, at 65.

30. Michigan is the only one of these states whose parole board retains full discretion to grant parole. *Hopkins v. Mich. Parole Bd.*, 604 N.W.2d 686, 689 (Mich. App. 1999). The other states have moved at least partially to mandatory release regimes. *See Schwartz v. Dennison*, 518 F. Supp. 2d 560, 571–72 (S.D.N.Y. 2007) (holding that although New York’s parole scheme generally does not create a liberty interest, N.Y. Correctional Law § 805, added in 1987, does); PETERSILIA, *supra* note 27, at 66–67 tbl.3.1 (noting that Georgia restricts parole for prisoners who have committed “several felonies”); TEX. DEP’T OF CRIMINAL JUSTICE, FISCAL YEAR 2006 STATISTICAL REPORT 29 (2006), available at [http://www.tdcj.state.tx.us/publications/executive/FY\\_2006\\_Statistical\\_Report.pdf](http://www.tdcj.state.tx.us/publications/executive/FY_2006_Statistical_Report.pdf) (reporting the percentage of prisoners Texas released through discretionary release in 2006); Bureau of Justice Statistics, Reentry Trends in the U.S.: Releases from State Prison, <http://www.ojp.usdoj.gov/bjs/reentry/releases.htm> (reporting that California, New York, and Ohio have abolished discretionary parole at least in part). For a state-by-state listing of prison populations, see WILLIAM J. SABOL & HEATHER COUTURE, PRISON INMATES AT MIDYEAR 2007, at 3 tbl.2 (Bureau of Justice Statistics, Bulletin No. NCJ 221944, June 2008), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/pim07.pdf>.

31. *Teague v. Quarterman*, 482 F.3d 769, 775–78 (5th Cir. 2007) (holding that Texas’s mandatory supervision scheme both before and after it was amended on September 1, 1996 created a liberty interest in release and rejecting Fifth Circuit decisions that had held that *de minimis* changes in the duration of custody did not implicate due process); *Malchi v. Thaler*, 211 F.3d 953, 957–58 (5th Cir. 2000) (holding that Texas’s pre-1996 mandatory release scheme created a liberty interest for prisoners). Texas has both discretionary release and mandatory release. *See* TEX. BD. OF PARDON & PAROLES, PAROLE IN TEXAS 7 (2005), available at [http://www.tdcj.state.tx.us/bpp/publications/PIT\\_eng.pdf](http://www.tdcj.state.tx.us/bpp/publications/PIT_eng.pdf). A large proportion of inmates continue to be subject to mandatory release laws. *See* TEX. DEP’T OF CRIMINAL JUSTICE, *supra* note 30, at 29 (indicating that only 44 percent of prison releases in 2006 were for discretionary parole, whereas the remainder of prison releases occurred because sentences expired or as part of some type of mandatory supervised release). “Texas accounted for one in nine state prisoners released throughout the United States in 2001.” *As Texas’s Prison Population Experiences Five-Fold Growth Since 1980, Urban Centers Contend with Influx of Former Inmates*, URBAN INST., Mar. 19, 2004, <http://www.urban.org/publications/900689.html>.

revised statute, passed in 1976<sup>32</sup> and governing the largest correctional system in the nation,<sup>33</sup> creates a liberty interest in release on parole so that parole hearings must comply with *Greenholtz* and its progeny.<sup>34</sup> As the states enacted (and the courts confronted) schemes that created an entitlement to release, the Court's expansion of procedural due process rights for prisoners thus took on more importance and allowed more prisoner challenges to sentence-administration schemes.

Notably, this was not the only surprise in store for courts once states began to abandon their trust in the discretion of judges and parole authorities to calibrate sentencing, and to replace that discretion with inflexible terms of incarceration. The shift to determinate sentencing in the 1980s and 1990s also produced a wave of challenges alleging that the new sentencing procedures violated the accused's right to have a jury determine guilt beyond a reasonable doubt of every element of an offense, which led ultimately to the Court's stunning constitutional ruling invalidating the application of mandatory guidelines in several jurisdictions.<sup>35</sup> A wave of legislation in reaction has followed, with many states abandoning mandatory guidelines and returning to more discretionary systems.<sup>36</sup> It will be interesting to see if eventually states respond similarly in the context of parole, and reinstate discretionary release as they recognize the litigation consequences of the decision to move to mandatory release. Those consequences were not apparent as states began to eliminate discretionary release. They were shaped by four additional developments in the law, described below.

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32. California Penal Code § 3041, the parole statute, was rewritten as part of California's Determinate Sentencing Law in 1976. 1976 Cal. Stat. 5151.

33. See JOAN PETERSILIA, CAL. POLICY RESEARCH CTR., UNDERSTANDING CALIFORNIA CORRECTIONS 1, 60 (2006), available at [http://www.ucop.edu/cprc/documents/understand\\_ca\\_corrections.pdf](http://www.ucop.edu/cprc/documents/understand_ca_corrections.pdf) (reporting that although California's system holds one of every nine people incarcerated in state prisons across the United States, only 17.4 percent of California's prison population is serving an indeterminate sentence subject to discretionary release).

34. See *McQuillion v. Duncan*, 306 F.3d 895, 901–02 (9th Cir. 2002) (holding that California Penal Code § 3041(b) (2000) was “largely parallel” to the statute addressed in *Greenholtz*); see also *Sass v. Cal. Bd. of Prison Terms*, 461 F.3d 1123, 1127–28 (9th Cir. 2006) (reaffirming that California's parole statute creates a due process liberty interest in release on parole).

35. *Blakely v. Washington*, 542 U.S. 296, 308 (2004); see also *United States v. Booker*, 543 U.S. 220, 266–67 (2005).

36. See WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 26.4, at 39–40 (4th ed. Supp. 2007).

3. *The Court Distinguishes Habeas and § 1983 Cases: Phase I (1973–1974)*. Before this combination of constitutional interpretation and state sentencing reform expanded the decisions subject to constitutional challenge, the Court decided another series of cases that ultimately had the effect of channeling these claims into federal habeas proceedings.

As noted in Part I.A, a prisoner’s allegation that prison officials violated the Constitution when making an administrative decision affecting release appears, on its face, to fall into the intersection of the general civil rights statute, § 1983,<sup>37</sup> and the habeas statute.<sup>38</sup> The choice between these two statutory remedies carries consequences—several procedural restrictions apply in habeas cases but not in § 1983 cases, including a requirement that the prisoners must first exhaust their constitutional claims in the state courts.

Right about the time the Court was recognizing new liberty interests—but well before so many states shifted to determinate sentencing—the Court decided two cases in an attempt to pin down exactly which prisoner claims were cognizable exclusively in habeas and which could be brought under § 1983. The Court first confronted this issue in 1973, in *Preiser v. Rodriguez*.<sup>39</sup> In *Preiser*, state prisoners brought a § 1983 action alleging that prison disciplinary proceedings had unconstitutionally deprived them of good-time credits.<sup>40</sup> They sought restoration of the credits, a remedy that would have “result[ed] in their immediate release from confinement.”<sup>41</sup> The Court first explained that when a prisoner’s suit falls within the “core” of habeas jurisdiction, habeas is the exclusive remedy.<sup>42</sup> The quintessential example of a claim within the core of habeas is a challenge to the validity of the prisoner’s conviction or sentence, that is, a claim that the police, the prosecutor, the defense lawyer, the jury, or the court made a constitutional error resulting in an unlawful conviction or sentence. Habeas was the exclusive remedy for such

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37. 42 U.S.C. § 1983 (2000).

38. 28 U.S.C. §§ 2241(c)(3), 2254(a) (2000).

39. *Preiser v. Rodriguez*, 411 U.S. 475 (1973).

40. *Id.* at 476–77.

41. *Id.*

42. *See id.* at 487–89 (reasoning that in cases within the core of habeas jurisdiction, Congress intended to apply the more specific habeas statute rather than the general civil rights statute).

claims, the Court reasoned, because if prisoners were permitted to challenge their convictions by bringing suit under § 1983, they could evade the procedural restrictions that Congress had imposed on habeas relief.<sup>43</sup> A prisoner challenging the conditions of confinement, continued the Court, is permitted to bring suit under § 1983.<sup>44</sup>

Because the petitioners in *Preiser* challenged neither their state court judgments nor the conditions of their confinement, it was not clear whether their claims arose under habeas or § 1983. Nevertheless, the Court held that they had to file their claims under the habeas statute because they were “attacking the validity of the fact or length of their confinement.”<sup>45</sup> In other words, the Court said, § 1983 cannot be used to seek relief that results in either “immediate release” or “shortening the length of . . . confinement.”<sup>46</sup> The *Preiser* Court explicitly limited its holding to suits seeking accelerated release:

If a state prisoner is seeking damages, he is attacking something other than the fact or length of his confinement, and he is seeking something other than immediate or more speedy release—the traditional purpose of habeas corpus. In the case of a damages claim, habeas corpus is not an available or appropriate federal remedy. Accordingly, as petitioners themselves concede, a damages action by a state prisoner could be brought under the Civil Rights Act in federal court without any requirement of prior exhaustion of state remedies.<sup>47</sup>

A year later, the Court applied the distinction it drew in *Preiser* between habeas and § 1983 claims. In *Wolff v. McDonnell* it held that a prisoner *could* use § 1983 to seek damages and declaratory relief in a class action challenging the procedures used to impose a loss of good-time credits and could also seek a prospective injunction requiring the prison to use constitutionally adequate procedures in

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43. *See id.* at 490–92 (explaining the importance of exhaustion).

44. *See id.* at 498 (citing, *inter alia*, *Haines v. Kerner*, 404 U.S. 519 (1972), and *Houghton v. Shafer*, 392 U.S. 639 (1968)).

45. *Id.* at 490.

46. *Id.* at 487.

47. *Id.* at 494 (emphasis omitted).

the future.<sup>48</sup> Only the actual restoration of good-time credits was a remedy exclusive to habeas and beyond the scope of § 1983.

These early interpretations of the intersection between the federal habeas statute and § 1983 did funnel some sentence-administration cases into habeas during the 1970s. But their real impact was to come later, after more states adopted sentencing laws that conferred an entitlement to release and thus a basis for constitutional challenges to sentence-administration decisions.

4. *Changes in Prison Population (1990–2004)*. The Court's expansion of the liberty interests of prisoners, the shift away from discretionary to mandatory release laws, and the early decisions in *Preiser* and *Wolff* were not the only developments that contributed to an increase in the number of prisoners seeking habeas relief for sentence-administration claims in the last decades of the twentieth century. Beginning in the 1990s, the prison population itself was changing in ways that promised to produce a larger proportion of sentence-administration claims among the habeas petitions filed in federal court.

First, over this period, a decreasing percentage of prisoners were entering prison for their initial sentences, while a growing portion of those admitted were “violators,” coming back to prison after their parole had been revoked. Violators grew to more than a third of all state prison admissions by 1998, double the proportion in 1980.<sup>49</sup>

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48. *Wolff v. McDonell*, 418 U.S. 539, 554–55 (1974); see also *supra* notes 19–20 and accompanying text.

49. See TRACEY L. SNELL, CORRECTIONAL POPULATIONS IN THE UNITED STATES, 1993, at 12 tbl.1.11 (Bureau of Justice Statistics, Report No. NCJ 156241, rev. Oct. 1996), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/cpop93bk.pdf> (reporting that in 1980, 17 percent of inmates admitted to state prisons were violators); CORRECTIONAL POPULATIONS IN THE UNITED STATES, 1998, at 59 tbl.5.10a (Bureau of Justice Statistics, Report No. NCJ 192929, Sept. 2002), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/cpus98.pdf> (reporting that in 1998 violators made up 36 percent of inmates admitted to state prison); see also WILLIAM J. SABOL, TODD D. MINTON & PAIGE M. HARRISON, PRISON AND JAIL INMATES AT MIDYEAR 2006, at 4 (Bureau of Justice Statistics, Bulletin No. NCJ 217675, rev. Mar. 2008), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/pjim06.pdf> (showing that 34 percent of state prison inmates admitted in 2005 were parole violators); Ryan S. King, *Recent Developments in State Parole Reform, 2004–2006*, 20 FED. SENT'G REP. 124, 124 (2007) (describing the boom in parole violator admissions). California, the state with the nation's largest prison population, see *supra* note 33 and accompanying text, had an incredibly high rate of returning violators, see PETERSILIA, *supra* note 33, at 11 (reporting that 61.5 percent of inmates in California returning to prison are violators). Although many states continued to prosecute parolees anew for crimes

Prisoners are limited to one, timely filed petition challenging their conviction and sentence, absent exceptional circumstances.<sup>50</sup> Because violators have already served part of their sentence prior to release, they would have already had the opportunity to file that petition when first incarcerated and would be less likely than new prison admittees to file such a petition. But throughout the remainder of their custody, violators could continue to attack the constitutionality of each and every decision made by state prison and parole authorities affecting the timing of their release. As a result, an increase in the proportion of prisoners returned after release logically would increase the percentage of habeas petitions that attack sentence-administration decisions rather than criminal judgments.

Second, from 1990 to 2002 the average time a state prisoner remained in custody increased.<sup>51</sup> Because decisions affecting the timing of release occur repeatedly during a prisoner's stay, these longer periods of incarceration produce more administrative decisions for prisoners to challenge. Finally, state prison populations grew in absolute terms, jumping from 295,819 in 1980, to 684,544 in 1990, to 1,395,916 in 2007.<sup>52</sup>

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they committed on release, California preferred less demanding administrative revocation procedures to secure reincarceration—80 percent of parolees who returned to prison were reincarcerated for criminal offenses that the state never prosecuted separately. *See id.* at 73–74 (dubbing these violations “administrative criminal returns”).

50. *See infra* Part III.C.

51. *See* MATTHEW R. DUROSE & PATRICK A. LANGAN, FELONY SENTENCES IN STATE COURTS, 2002, at 5 tbls. 4, 6 (Bureau of Justice Statistics, Bulletin No. NCJ 206916, Dec. 2004) available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/fssc02.pdf> (“[I]t is estimated that felons sentenced in 2002 would serve about 2¼ years, or 51% of their average 4½ year prison sentence.”); DITTON & WILSON, *supra* note 28, at 8–9 (reporting that the percentage of sentences that violent prisoners served increased from 47 percent in 1993 to 54 percent in 1997); U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 2003, at 511 tbl.6.44 (Ann L. Pastore & Kathleen Maguire eds., 2005), available at <http://www.albany.edu/sourcebook/pdf/t644.pdf> (reporting that, between 1990 and 1999, the average time served, excluding life sentences, jumped seven months for first releases from state prison, and the percentage of state prison sentence served increased from 38 percent to 49 percent).

52. ALLEN J. BECK & DARRELL K. GILLIARD, PRISONERS IN 1994, at 2 (Bureau of Justice Statistics, Bulletin No. NCJ-151654, Aug. 1995), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/pi94.pdf> (reporting state prison populations for 1980 and 1990); SABOL & COUTURE, *supra* note 30, at 1 tbl.1 (reporting 2007 prison populations). Indeed, in states in which prison construction could not keep up with the explosion in prison population, increasing reliance on good time for early release has served as a stop gap, *see* PETERSILIA, *supra* note 27, at 62, which exacerbates the problem we address in this article.

These three shifts in state prison populations further magnified the effect of *Greenholtz*, *Wolff*, and the ongoing move to determinate sentences, increasing the proportion of habeas petitions that raised sentence-administration claims. These changes, however, were only just developing in the early 1990s,<sup>53</sup> as the Court and Congress decided to modify the availability and nature of the statutory remedies governing these claims, two developments we describe next.

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53. Some state legislators learned the unexpected consequences of eliminating discretionary parole release much later. For example, Colorado's Interim Committee on Criminal Sentencing received this appraisal in 2002:

Returns to prison have increased faster than admissions to prison from court commitments. . . . One reason for the increase in return admissions is the result of mandatory parole passed by House Bill 93-1302. A mandatory parole period for every inmate has contributed to the growth in the parole population and has increased the chances and opportunities for revocation.

Memorandum from Jonathan Lurie, Colo. Legislative Council Staff, to Members of the Interim Comm. on Criminal Sentencing 1-2 (Aug. 13, 2002), available at [http://www.state.co.us/gov\\_dir/leg\\_dir/lcsstaff/2002/research/ParoleRevPopulation.PDF](http://www.state.co.us/gov_dir/leg_dir/lcsstaff/2002/research/ParoleRevPopulation.PDF).



5. *The Court Distinguishes Habeas and § 1983 Cases: Phase II (1994–1997)*. The precarious distinction drawn by *Preiser* and *Wolff* lasted for twenty years. It began to unravel in the mid 1990s, in a series of decisions that forced more sentence-administration claims out of § 1983 and into habeas. The first of these cases the Rehnquist Court took up was that of a prisoner challenging his conviction but seeking damages for constitutional violations rather than release. This was a “core” habeas claim, but it did not seek the traditional habeas remedy. Could it be brought under § 1983? In *Heck v. Humphrey*<sup>54</sup> the Court said no. It held that that a prisoner’s suit for damages is not cognizable under § 1983 (and thus sounds exclusively in habeas) if “a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence,” unless the conviction or sentence had already been invalidated in some other proceeding.<sup>55</sup> The Court dismissed statements to the contrary in *Preiser*<sup>56</sup> as dicta.<sup>57</sup> The *Heck* doctrine has come to be known as the “favorable termination” rule, as it conditions a § 1983 suit on a prior favorable termination of a challenge to the underlying conviction or sentence.

In 1997, the Court extended the application of *Heck* from challenges to state criminal judgments to challenges to decisions made in administering the sentence. In *Edwards v. Balisok*,<sup>58</sup> the Court applied *Heck*’s favorable termination rule to a suit for damages that alleged constitutional flaws in prison disciplinary procedures that had resulted in the deprivation of good-time credits.<sup>59</sup> The plaintiff, Jerry Balisok, explicitly sought damages only, and he sought them for the denial of due process (he argued that prison officials gave him no opportunity to put on a defense and that the hearing officer was biased) and not for the deprivation of good-time credits. Yet the Court held that the due process violations that he alleged “would, if established, necessarily imply the invalidity of the deprivation of his good-time credits.”<sup>60</sup> The invalidity of that deprivation, in turn, would necessarily require a restoration of the credits and therefore a

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54. *Heck v. Humphrey*, 512 U.S. 477 (1994).

55. *Id.* at 487.

56. *See supra* text accompanying note 47.

57. *Heck*, 512 U.S. at 481–82.

58. *Edwards v. Balisok*, 520 U.S. 641 (1997).

59. *Id.* at 643.

60. *Id.* at 646.

shortening of the prisoner's sentence.<sup>61</sup> The claim was therefore not cognizable under § 1983 absent a prior determination of the invalidity of the deprivation by a state court or through a writ of habeas corpus in federal court.

Once *Edwards* was combined with the changes in sentencing and release law described in Part I.B.3, it ultimately channeled more sentence-administration challenges into habeas. The federal courts might have been able to accommodate these claims under the habeas doctrines that applied through the mid-1990s. But yet another development, almost simultaneous to the doctrinal change worked by *Edwards*, altered the law of habeas and made sentence-administration claims more difficult to fit into the habeas framework.

6. *Congress Enacts the Antiterrorism and Effective Death Penalty Act (AEDPA) (1996)*. In 1996, Congress enacted the Antiterrorism and Effective Death Penalty Act,<sup>62</sup> imposing several new requirements on habeas petitions and codifying others that had originally been developed by the Supreme Court. It is the application of AEDPA to sentence-administration claims that has created the specific problems that we detail in Part III. But when Congress adopted AEDPA, it did not anticipate these problems.

Habeas reform in the late 1980s and early 1990s grew out of frustration with federal review of state *capital* convictions and sentences.<sup>63</sup> Some recognized that a change in habeas provisions would reach beyond the tiny fraction of petitions filed by death row inmates, and argued that some of the proposed restrictions were not needed in noncapital cases.<sup>64</sup> But in the years leading up to passage of AEDPA there is no indication in the legislative history that lawmakers anticipated the application of the new provisions to

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61. *Id.* at 647.

62. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of 8, 18, 22, 28, 40 and 42 U.S.C.).

63. H.R. REP. NO. 104-518, at 111 (1996) (Conf. Rep.) (noting the "acute problems of unnecessary delay and abuse in capital cases"); see also *Federal Habeas Corpus Reform: Eliminating Prisoners' Abuse of the Judicial Process: Hearing Before the S. Comm. on the Judiciary*, 104th Cong. *passim* (1995); S. REP. NO. 104-23, at 8 (1995); sources cited *infra* note 68.

64. See, e.g., *Habeas Corpus Legislation: Hearings Before the Subcomm. on the Courts, Intellectual Property, and the Admin. of Justice of the H. Comm. on the Judiciary*, 101st Cong. 430 (1990) (prepared statement of Larry W. Yackle, Professor, Boston University School of Law).

attacks by noncapital state prisoners on *administrative* decisions that affected the timing of their release from prison.

Given the relatively low profile that sentence-administration claims had at the time, this omission is not surprising. AEDPA was enacted in 1996, a full year before the Court in *Edwards* applied the *Heck* rule to sentence-administration claims. In 1996 such claims could still be brought under § 1983 as long as the prisoner did not actually seek release. The most recent Supreme Court decision addressing prison disciplinary proceedings at the time was *Sandin v. Conner*,<sup>65</sup> a § 1983 case that not only did not mention habeas corpus at all but also cited a long string of challenges to disciplinary hearings that had also been brought under § 1983.<sup>66</sup>

Moreover, in 1996, the significant shift from discretionary parole to presumptive release and the impact of that shift on constitutional challenges to prison discipline proceedings probably was not yet understood. Many states did not adopt truth-in-sentencing initiatives limiting discretionary parole for violent offenders until after Congress provided monetary incentives for them to do so in the Violent Crime Control and Law Enforcement Act of 1994,<sup>67</sup> and prisoners sentenced under these revised schemes had yet to reach state prisons. In short, just as the Court in *Preiser* might not have anticipated the subsequent expansion of constitutional challenges to sentence-administration decisions, Congress appears not to have anticipated the application of

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65. *Sandin v. Conner*, 515 U.S. 472 (1995).

66. *Id.* at 477–79 (citing *Washington v. Harper*, 494 U.S. 210 (1990); *Ky. Dep't of Corr. v. Thompson*, 490 U.S. 454 (1989); *Hewitt v. Helms*, 459 U.S. 460 (1983); *Vitek v. Jones*, 445 U.S. 480 (1980); *Greenholtz v. Inmates of Neb. Penal & Corr. Complex*, 442 U.S. 1 (1979); *Montanye v. Haymes*, 427 U.S. 236 (1976); *Meachum v. Fano*, 427 U.S. 215 (1976); *Wolff v. McDonnell*, 418 U.S. 539 (1974)). The Court had just issued its decision rejecting a habeas challenge to parole procedures on ex post facto grounds in 1995. *Cal. Dep't. of Corr. v. Morales*, 514 U.S. 499, 504 (1995).

67. See DITTON & WILSON, *supra* note 51, at 3 (noting that of the fourteen states that had abolished discretionary parole release, eight did so “during the same year a truth-in-sentencing law was passed”); WILLIAM J. SABOL ET AL., URBAN INST. JUSTICE POLICY CTR., THE INFLUENCES OF TRUTH-IN-SENTENCING REFORMS ON CHANGES IN STATES’ SENTENCING PRACTICES AND PRISON POPULATIONS 23–27 (2002), available at [http://www.urban.org/uploadedPDF/410470\\_FINALTISRpt.pdf](http://www.urban.org/uploadedPDF/410470_FINALTISRpt.pdf) (examining the effects of the grants program established by the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, tit. I, subtit. A, 108 Stat. 1796, 1815–19 (codified as amended at 42 U.S.C. §§ 13701–09 (2000)), and concluding that 21 states changed sentencing structures after the Act, and that in five of those states the federal program was a major factor in enacting the state’s truth-in-sentencing law).

the new habeas statute to administrative decisions regarding good time and parole.<sup>68</sup>

C. *The Magnitude of the Problem*

Nearly one-fifth of state prisoners' noncapital habeas petitions filed in federal district courts between 2003 and 2004 challenged not the legality of the conviction or sentence, but the constitutionality of a decision by state corrections or parole officials regarding the administration of the petitioner's sentence.<sup>69</sup> The percentage was even higher in the states with the largest prison populations: 22 percent of noncapital petitions in the Eastern District of California and the Northern District of Florida raised this type of claim, about a third of petitions filed by prisoners in Texas (35 percent) and Pennsylvania's Middle District (32 percent) did so, and *most* (61 percent) of the habeas petitions from Indiana prisoners contested sentence-administration decisions, not criminal judgments.<sup>70</sup>

Thus in Indiana, the primary function of federal habeas review is to examine the decisions of state corrections officials, not state courts, and in several other states it serves this role in a significant

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68. See, e.g., *Crouch v. Norris*, 251 F.3d 720, 724 (8th Cir. 2001) (noting that "[t]he scant legislative history discussing the purpose of AEDPA's habeas restrictions indicates that Congress was concerned with delay and finality" and holding that a challenge to the application of parole statutes does not threaten the validity of the inmate's conviction and sentence, which both state and federal courts have already reviewed). As Judge Tjoflat of the Eleventh Circuit has written about the original rules governing habeas cases:

The Form included in the Rules' appendix also clearly contemplates challenges to trials or sentences, and not to administrative proceedings such as parole hearings. For example, the Form asks whether the petitioner has appealed his conviction, and not whether he has appealed any adverse administrative actions. The Form specifies the ten "most frequently raised grounds for relief in habeas corpus proceedings"—all concerning trial-related rights. Moreover, other than "[d]enial of effective assistance of counsel" and "[d]enial of right of appeal," all the grounds specified in the Form expressly attack the underlying conviction (e.g., "Conviction obtained by use of coerced confession.").

*Thomas v. Crosby*, 371 F.3d 782, 810–11 (11th Cir. 2004) (Tjoflat, J., specially concurring). Nor does anything suggest that drafters of the Rules Governing Section 2254 Cases in the United States District Courts considered this type of challenge when amending the rules in 2002 after Congress passed AEDPA.

69. NANCY J. KING, FRED L. CHEESMAN II & BRIAN J. OSTROM, FINAL TECHNICAL REPORT: HABEAS LITIGATION IN U.S. DISTRICT COURTS 26 (2007), <http://www.ncjrs.gov/pdffiles1/nij/grants/219559.pdf> (reporting that, in study using a nationwide random sample of habeas cases that state prisoners had filed in 2003 and 2004 under AEDPA, 17.8 percent of filers "alleged a constitutional flaw in a post-commitment administrative proceeding").

70. *Id.*

percentage of cases. Nationwide, more habeas petitions are filed including a sentence-administration claim (claim included in 18 percent of all noncapital cases)<sup>71</sup> than are filed challenging a prisoner's conviction or sentence on the basis of lost, suppressed, undisclosed, or false evidence (claim included in 13 percent of all noncapital cases) or on the basis of an invalid plea, *including* those alleging ineffective assistance of counsel regarding the plea process (claim included in 14.8 percent of all noncapital cases).<sup>72</sup>

Moreover, this litigation over sentence-administration claims is extremely unproductive. In the study, of 2,384 noncapital habeas cases randomly selected from those filed nationwide in 2003 and 2004, only about one-third of 1 percent of noncapital habeas petitions filed (seven cases total) received any relief, and *none* of the claims granted relief were sentence-administration claims.<sup>73</sup> A study with a larger sample would probably include some cases granting relief for prisoners' sentence-administration claims,<sup>74</sup> but there is no reason to believe that the win rate for inmates challenging sentence-administration decisions is any greater than the rate for prisoners challenging the legality of their original convictions and sentences. The filing of so many overwhelmingly nonmeritorious claims not only burdens federal courts, but it also prejudices the rare prisoner with a meritorious claim. As Justice Jackson pointed out in a 1953 case expanding the availability of federal habeas, "[h]e who must search a haystack for a needle is likely to end up with the attitude that the needle is not worth the search."<sup>75</sup>

Not only is this litigation voluminous and overwhelmingly futile, but habeas petitions that raise sentence-administration claims also pose unique challenges for federal courts. Litigants and courts in these cases must navigate both the *Preiser* line of cases and AEDPA's restrictions. As we explain in the next two Parts, both have generated

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71. *Id.*

72. *Id.* at 30.

73. *Id.* at 52 (reporting a grant rate of 0.29 percent).

74. Prisoners have raised successful constitutional challenges to sentence-administration decisions. *See, e.g.,* *Hayward v. Marshall*, 512 F.3d 536, 538, 548 (9th Cir. 2008) (finding that a governor denied the prisoner due process when the governor twice reversed the parole board's decision to grant parole to an inmate); *Teague v. Quarterman*, 482 F.3d 769, 781 (5th Cir. 2007) (holding that an inmate is entitled to due process when the inmate faces losing previously earned good-time credit in a disciplinary hearing).

75. *Brown v. Allen*, 344 U.S. 443, 537 (1953) (Jackson, J., concurring in the result).

uncertainty, inconsistency among the circuits, and additional confused litigation. A decade of attempts to make sense of these claims under a statute that did not anticipate them has failed to bring coherence to this sizeable and expensive segment of federal court litigation.

## II. CHOOSING PEGS AND HOLES: HABEAS OR § 1983?

The first problem with the current regime is the line drawn by *Preiser* and its progeny. The Court has never adequately explained why prisoners who are not seeking release as a remedy should nevertheless be required to bring their claims in habeas, nor has it clearly defined the difference between claims that necessarily imply the invalidity of the sentence and claims that do not. In the two sections of this Part, we first argue that the existing doctrinal rules fail to take into account three fundamental principles that permeate the law governing federal court adjudication and then describe the lower court confusion that demonstrates the hopeless indeterminacy of the rules.

### A. *An Unjustifiable Distinction*

In *Preiser* the Court essentially distinguished between claims of unconstitutional incarceration and claims of other unconstitutional acts by prison administrators. The latter may be brought under § 1983, whereas the former must be brought as habeas petitions. To the extent that habeas imposes more onerous procedural obstacles, forcing claims of unconstitutional incarceration into habeas thus treats them less favorably and subjects them to less federal oversight than other constitutional claims against prison administrators. In particular, habeas, unlike § 1983, requires exhaustion of state judicial remedies,<sup>76</sup> has a short statute of limitations,<sup>77</sup> prohibits most attempts to bring a second or successive petition,<sup>78</sup> and imposes sharp limits on appeals.<sup>79</sup>

But treating claims of unconstitutional incarceration stemming from actions by state prison officials less favorably than other constitutional claims against the same defendants—and on par with

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76. See 28 U.S.C. § 2254(b)(1)(A) (2000).

77. See *id.* § 2244(d).

78. See *id.* § 2244(b).

79. See *id.* §§ 2254(d)–(e).

claims of unconstitutional incarceration pursuant to a court judgment—departs from three fundamental principles that are reflected in many other doctrines. In general, the law recognizes (1) that similar claims by state and federal prisoners have similar access to judicial review, (2) that federal courts are more reluctant to interfere with the judgments of state courts than with the actions of other, nonjudicial state actors, and (3) that deprivations of physical liberty are the most egregious invasions of liberty. In this section, we briefly canvas the doctrinal support for these three principles and show how applying the *Preiser* rule to sentence-administration claims is inconsistent with each.

1. *Treating Similar Claims by State and Federal Prisoners Similarly.* The *Preiser* doctrine unjustifiably distinguishes between state and federal prisoners who challenge the constitutionality of decisions by prison administrators. This is inconsistent with the general practice of treating challenges to the constitutionality of state and federal acts similarly.<sup>80</sup> In prison litigation, most challenges other than sentence-administration claims are treated the same whether they are brought by state or federal prisoners. When a state prisoner alleges a defect in his conviction or sentence under § 2254 or a federal prisoner attacks his conviction or sentence under § 2255, the parallel provision governing collateral relief for federal prisoners, federal law treats the claim similarly: AEDPA's exhaustion requirement, one-year statute of limitations, successive petition restrictions, and limits on appeals all apply to both. Similarly, challenges to prison conditions are treated similarly regardless of the prison system.<sup>81</sup> Under *Preiser*,

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80. The Fourteenth Amendment incorporation doctrine, for example, extends most of the Bill of Rights (originally applicable only to federal action) to states. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW § 6.3.3, at 499–500, 503–04 (3d ed. 2006). Limitations on “citizen standing,” which prevent most suits based on generalized grievances against governmental actions, protect both state governments and the federal government. *See, e.g.*, Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 489–90 (1982) (dismissing a challenge to the constitutionality of federal government action); *Doremus v. Bd. of Educ.*, 342 U.S. 429, 434–35 (1952) (dismissing a challenge to the constitutionality of a state statute). Similarly, state and federal legislators get the same level of immunity. *See Jacobson v. Tahoe Reg'l Planning Agency*, 566 F.2d 1353, 1365 (9th Cir. 1977) (acknowledging state and federal legislators are both afforded absolute immunity), *aff'd in relevant part sub nom. Lake Country Estates, Inc. v. Tahoe Reg'l Planning Agency*, 440 U.S. 391 (1979).

81. State prisoners file under § 1983; federal prisoners file under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). *Bivens* and its progeny

however, as we detail in Part III, several of AEDPA's restrictions govern sentence-administration claims by state prisoners but not those brought by federal prisoners.

2. *Stricter Oversight of Administrative Compared to Judicial State Action.* Although existing law thus draws an unwarranted distinction between the review provided state and federal prisoners, it fails to draw a different distinction that *is* warranted: between the review of claims that a state *court* has wrongfully ordered the complainant imprisoned and the review of claims that a state *prison or parole official* has wrongfully done so. As a matter of federalism and comity, federal courts usually tread more lightly when reviewing the actions of state courts than when reviewing the actions of other state actors. This comity is reflected in the greater restrictions imposed on collateral review of state court decisions in habeas compared to review of nonjudicial state officials under § 1983, in which prisoners are not required to exhaust state judicial remedies and the court reviews the official's acts *de novo*. Within habeas, the Supreme Court has recognized that "the need for collateral review is most pressing" when the imprisonment results from executive rather than judicial action.<sup>82</sup> Even leaving habeas aside, the Anti-Injunction Act prohibits federal courts from enjoining state court proceedings but not state administrative proceedings.<sup>83</sup> The Full Faith and Credit Act requires a federal court to give the same preclusive effect to a state court judgment that another court in the state would give it, but the act does not apply to state administrative proceedings.<sup>84</sup> The

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permit suits against federal officers for money damages by implying a cause of action directly from certain constitutional provisions. *Id.* at 392 (implying the cause of action directly from the Fourth Amendment).

82. *Boumediene v. Bush*, 128 S. Ct. 2229, 2269 (2008).

83. 28 U.S.C. § 2283 (2000). As one court has noted, "[w]hile the Supreme Court has expressly declined to address whether the Anti-Injunction Act applies to state administrative proceedings, every circuit to have addressed the question has held that it does not." *Entergy, Ark., Inc. v. Nebraska*, 210 F.3d 887, 900 (8th Cir. 2000) (citation omitted) (citing *Gibson v. Berryhill*, 411 U.S. 564, 573 n.12 (1973)).

84. 28 U.S.C. § 1738 (2000). The Supreme Court instead decides on a statute-by-statute basis whether Congress intended federal courts to give preclusive effect to state agency proceedings. *See, e.g., Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 108, 110–11 (1991) (noting that "the question is not whether administrative estoppel is wise but whether it is intended by the legislature" and finding no preclusive effect in ADEA cases); *Univ. of Tenn. v. Elliott*, 478 U.S. 788, 796, 799 (1986) (holding that state court judgments have no preclusive effect in Title VII cases but have preclusive effect in § 1983 cases).



*Younger* doctrine, which places additional, extrastatutory limits on injunctions and declaratory judgments against state judicial proceedings,<sup>85</sup> is only sometimes applied to state administrative proceedings.<sup>86</sup> Evaluated in light of ordinary distinctions between state judicial and administrative proceedings then, the *Preiser* doctrine has it backward. An approach more consistent with this basic principle that federal courts should be freer to overturn state administrative actions than state judicial actions would be to place fewer procedural limits on prisoners challenging the actions of state administrative officials than on those challenging the actions of state courts.

3. *Stricter Oversight of Deprivations of Physical Liberty.* A more consistent approach would also treat claims of unjustified detention as a result of state officials' unconstitutional actions more favorably than claims that the same officials violated other constitutional guarantees short of deprivations of physical liberty. That the loss of physical freedom is among the greatest trespasses on liberty is almost self-evident. The very existence and structure of the writ of habeas corpus is based on this principle. Habeas, a venerable judicial remedy against governmental action and the only one mentioned by the Constitution,<sup>87</sup> is available only to test the legality of custody (or other restraints on physical liberty).<sup>88</sup> It is also the only remedy that allows lower federal courts to reexamine the judgments of state courts. In an ordinary civil case, only higher state courts and the United States Supreme Court may review state court judgments. If someone brings suit in federal district court asking that court to review or reverse a state court judgment, the suit either will be

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85. *Younger v. Harris*, 401 U.S. 37, 53–54 (1971).

86. See, e.g., *Executive Art Studio, Inc. v. City of Grand Rapids*, 179 F. Supp. 2d 755, 758 (W.D. Mich. 2001) (“[T]he Supreme Court has extended *Younger* to state civil enforcement proceedings and state administrative proceedings *which are judicial in nature.*” (emphasis added)).

87. U.S. CONST. art. I, § 9, cl. 2.

88. See, e.g., Larry W. Yackle, *Explaining Habeas Corpus*, 60 N.Y.U. L. REV. 991, 1000 (1985) (“[T]he ‘custody’ requirement does operate as a gate-keeping device. It screens cases according to the nature of the individual interests at stake, limiting relitigation to cases in which petitioners allege unlawful restraints on liberty.”).

jurisdictionally barred by the *Rooker-Feldman* doctrine<sup>89</sup> or will be dismissed as precluded under the Full Faith and Credit Act.<sup>90</sup> Habeas, however, is an exception to both doctrines.<sup>91</sup> Similarly, although the degree of deference accorded to state court judgments in federal habeas cases has varied over time, federal habeas courts have never been required to give state decisions the same preclusive effect that the Full Faith and Credit Act accords in other contexts. *Preiser* itself recognized that “[p]rinciples of *res judicata* are, of course, not wholly applicable to habeas corpus proceedings.”<sup>92</sup> By exempting habeas petitions—and only habeas petitions—from the ordinary doctrines that prevent lower federal court review of state judgments, American jurisprudence recognizes that custody represents an extraordinary incursion on liberty.

At the same time, however, Congress has chosen to place restrictions on habeas that do not apply when a prisoner sues under § 1983 claiming that prison conditions—but not his incarceration—violate constitutional standards. To the extent that *Preiser* forces “core” challenges to convictions and sentences into habeas, it arguably implements the congressional trade-off between deferring to state court decisions and avoiding unconstitutional incarceration. But extending *Preiser* to sentence-administration claims—which challenge

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89. *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 291–92 (2005); *D.C. Court of Appeals v. Feldman*, 460 U.S. 462, 482 (1983); *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 415–16 (1923); see also Suzanna Sherry, *Judicial Federalism in the Trenches: The Rooker-Feldman Doctrine in Action*, 74 NOTRE DAME L. REV. 1085, 1088 (1999) (describing lower court use of the *Rooker-Feldman* doctrine).

90. 28 U.S.C. § 1738 (2000); see also, e.g., *Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367, 386 (1996) (finding preclusive effect when nothing suggested that Congress “meant to override the ‘principles of comity and repose embodied in § 1738’” (quoting *Kremer v. Chem. Constr. Corp.*, 456 U.S. 461, 463 (1982))); *Migra v. Warren City Sch. Dist. Bd. of Educ.*, 465 U.S. 75, 84 (1984) (“[Section 1738] embodies the view that it is more important to give full faith and credit to state-court judgments than to ensure separate forums for federal and state claims.”); *Allen v. McCurry*, 449 U.S. 90, 96 (1980) (“Congress has specifically required all federal courts to give preclusive effect to state-court judgments whenever the courts of the State from which the judgments emerged would do so.”).

91. *Saudi Basic Indus.*, 544 U.S. at 292 n.8 (“Congress . . . may explicitly empower district courts to oversee certain state-court judgments and has done so, most notably, in authorizing federal habeas review of state prisoners’ petitions.”). The *Rooker-Feldman* doctrine is also inapplicable to suits challenging the actions of state prison officials. See, e.g., *Schnitzler v. Reisch*, No. CIV 06-4064, 2008 WL 895843, at \*1 (D.S.D. Mar. 31, 2008) (mem.) (finding that the *Rooker-Feldman* doctrine did not apply in a challenge to the actions of a state parole board).

92. *Preiser v. Rodriguez*, 411 U.S. 475, 497 (1973).

not the decisions of courts but those of administrators—cannot be justified on this ground. Nor, as we suggested in Part I,<sup>93</sup> is it fair to attribute to Congress any intent to make this trade-off with regard to sentence-administration challenges. Thus, it is one thing for prison-conditions challenges to be easier to bring than challenges to convictions or sentences: the two claims are apples and oranges, with different defendants, different decisionmaking contexts, and different factors to weigh in the balance. It is quite another, however, to place more limits on challenges to decisions by the very same corrections officials if the decisions result in increased incarceration than if they do not.

### B. *Lower Court Chaos*

Not only is the *Preiser* line of cases theoretically incoherent, but it also has created substantial practical difficulties for the federal judiciary. Lower courts evaluating sentence-administration claims have always had trouble applying the *Heck* formulation, which requires a judge to determine whether a judgment in favor of the prisoner “would necessarily imply the invalidity of his conviction or sentence.”<sup>94</sup> In 2005, in *Wilkinson v. Dotson*,<sup>95</sup> the Court made it even

93. See *supra* notes 62–68 and accompanying text.

94. *Heck v. Humphrey*, 512 U.S. 477, 487 (1994). For example, the Court found that it had to clarify that, contrary to the Sixth Circuit’s interpretation of the precedent, *Heck* and *Edwards* apply only to prison disciplinary proceedings that affect the length of the prisoner’s sentence; challenges to changes in confinement conditions that do not affect sentence duration are cognizable under § 1983 even absent a prior favorable termination. *Muhammad v. Close*, 540 U.S. 749, 754–55 (2004) (per curiam). That the Sixth Circuit ever thought otherwise indicates the confusion that this line of precedent engendered. Even in 2008, four years after *Muhammad*, some district courts incorrectly applied *Heck* to challenges to disciplinary sanctions that appear to have no effect on the length of sentence. See, e.g., *Rasulallah v. Norris*, No. 5:07CV00323 SWW, 2008 WL 192959, at \*1–2 (E.D. Ark. Jan. 22, 2008) (finding that *Heck* and *Edwards* applied when an inmate challenged disciplinary proceedings that punished him with segregation and stripped him of privileges); *Chandler v. Rivera*, No. 1:07CV145-MP/AK, 2008 WL 170327, at \*1 (N.D. Fla. Jan. 15, 2008) (distinguishing *Muhammad* and finding that *Heck* and *Edwards* applied when an inmate challenged disciplinary proceedings that placed him on “close management”); *Woods v. Carmichael*, No. 4:07-cv-119-DPJ-JCS, 2007 WL 4268782, at \*2 (S.D. Miss. Nov. 30, 2007) (mem.) (dismissing, based on *Edwards* and *Heck*, an inmate’s challenge to a prison’s disciplinary action); *Maxwell Bey v. Parks*, No. 407-CV-13941, 2007 WL 3038001, at \*1–2 (E.D. Mich. Oct. 18, 2007); *Carter v. Curry*, No. 9:07cv57, 2007 WL 3036425, at \*6 (E.D. Tex. Oct. 17, 2007) (mem.) (“A civil rights lawsuit is not the proper method of challenging disciplinary cases.”).

95. *Wilkinson v. Dotson*, 544 U.S. 74 (2005).

more confusing. Each of the prisoners in *Wilkinson* brought a § 1983 suit for declaratory and injunctive relief alleging that application of parole guidelines enacted after his original conviction and sentence violated the Ex Post Facto and Due Process Clauses of the Constitution.<sup>96</sup> The Court found each of these challenges cognizable under § 1983 because a favorable ruling would not necessarily imply the invalidity of the prisoner's continued incarceration but would at most entitle him to a new, constitutionally adequate, parole hearing.<sup>97</sup> At those hearings, the prisoner might or might not succeed in gaining early release. As Justice Kennedy pointed out in dissent, however, the same could be said of any challenge to any sentencing proceeding: a second sentencing hearing might result in a shorter sentence, but it might also result in the same sentence or even a longer one.<sup>98</sup> Moreover, the same argument that worked for the prisoners in *Wilkinson* should have worked for Jerry Balisok, who had sought only a new disciplinary hearing that might or might not have ended with the same deprivation of good-time credits.<sup>99</sup>

Justice Kennedy's dissent in *Wilkinson* chastised the majority for "blur[ring] the *Preiser* formulation."<sup>100</sup> Justice Kennedy was right about the blurriness of the line between habeas and § 1983 but wrong in attributing the problem solely to the holding in *Wilkinson*. Lower courts have had trouble applying *Preiser* and its progeny both before and after *Wilkinson*.<sup>101</sup>

Let us begin by considering two cases at opposite ends of the *Preiser* spectrum. In one, a state prisoner alleged that a state court

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96. *Id.* at 77.

97. *Id.* at 82.

98. *Id.* at 88 (Kennedy, J., dissenting).

99. *Edwards v. Balisok*, 520 U.S. 641, 643 (1997).

100. *Wilkinson*, 544 U.S. at 92 (Kennedy, J., dissenting).

101. Some commentators, too, lamented the lack of coherence in the Supreme Court's cases even before *Wilkinson*. See, e.g., Martin A. Schwartz, *The Preiser Puzzle: Continued Frustrating Conflict Between the Civil Rights and Habeas Corpus Remedies for State Prisoners*, 37 DEPAUL L. REV. 85, 88 (1988); Maureen A. Dowd, Note, *A Comparison of Section 1983 and Federal Habeas Corpus in State Prisoners' Litigation*, 59 NOTRE DAME L. REV. 1315, 1315-16 (1984); Jason A. Jones, Note, *Prisoner Litigation and the Mistake of Jenkins v. Haubert*, 86 CORNELL L. REV. 140, 140 (2000); Eric J. Savoy, Comment, *Heck v. Humphrey: What Should State Prisoners Use When Seeking Damages from State Officials . . . Section 1983 or Federal Habeas Corpus?*, 22 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 109, 109 (1996); Benjamin Vetter, Comment, *Habeas, Section 1983, and Post-Conviction Access to DNA Evidence*, 71 U. CHI. L. REV. 587, 600-06 (2004).

violated his constitutional rights when it refused to recognize a defense of diminished responsibility at his trial. In the other, a prisoner in one state sued officials of another for constitutional flaws in the process by which they extradited him to the state in which he was convicted and incarcerated. Keep in mind that the Supreme Court has held that “[t]he jurisdiction of the court in which the indictment is found is not impaired by the manner in which the accused is brought before it.”<sup>102</sup> Can the prisoners bring any of these claims under § 1983, or may they only seek habeas relief because a favorable resolution would “necessarily imply the invalidity of [the prisoner’s] conviction or sentence”?<sup>103</sup>

The Eleventh Circuit held the first claim cognizable under § 1983 because “[e]ven with evidence of [the defendant’s] alleged mental state at the time of the offense, a jury would still have the option of convicting [him],” and thus awarding damages and a declaratory judgment would not necessarily imply the invalidity of the conviction.<sup>104</sup> As to the second scenario, two courts of appeals have held that challenges to extradition procedures *cannot* be brought under § 1983, because “the . . . claim for damages would, if proven, necessarily imply the invalidity of the conviction or sentence.”<sup>105</sup> Both answers are wrong: the diminished responsibility case is a classic, “core” habeas challenge to a wrongful conviction, and the extradition cases do not implicate the validity of the conviction or sentence because the conviction stands even if the extradition was unconstitutional. If courts cannot consistently apply *Preiser* and *Heck* to these easy cases, it is no surprise that the cases closer to the line are in disarray.

The *Preiser* questions arise most commonly in several recurring situations. Prisoners often bring § 1983 suits to challenge the procedures used in disciplinary hearings, and courts must determine whether *Heck* bars those claims if the hearings resulted in either the

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102. *Lascelles v. Georgia*, 148 U.S. 537, 544 (1893); *see also Frisbie v. Collins*, 342 U.S. 519, 522 (1952) (“There is nothing in the Constitution that requires a court to permit a guilty person rightfully convicted to escape justice because he was brought to trial against his will.”).

103. *Heck v. Humphrey*, 512 U.S. 477, 487 (1994).

104. *Cooper v. Florida*, 196 F. App’x 793, 795 (11th Cir. 2006) (per curiam).

105. *Knowlin v. Thompson*, 207 F.3d 907, 909 (7th Cir. 2000); *accord Pullen v. Keesling*, 9 F. App’x 882, 883–84 (10th Cir. 2001). Other circuits disagree. *See Weilburg v. Shapiro*, 488 F.3d 1202, 1204 (9th Cir. 2007); *Young v. Nickols*, 413 F.3d 416, 417 (4th Cir. 2005); *Harden v. Pataki*, 320 F.3d 1289, 1291 (11th Cir. 2003).

deprivation of good-time credits or a change in status that impairs the prisoner's ability to earn such credits.<sup>106</sup> Similarly, challenges to the procedures used in parole hearings raise *Heck* issues.<sup>107</sup>

Understandably, some courts, desperate for simplicity, have misinterpreted the Court's precedent as creating bright-line rules. Several courts have suggested that *no* challenge of any sort to the constitutionality of an administrative process may be raised in § 1983 if that process resulted in a sanction that actually affected the duration of custody.<sup>108</sup> According to *Heck* and *Edwards*, however, this is the wrong question; courts are supposed to determine whether a favorable resolution of the prisoner's particular challenge would necessarily imply the invalidity of the decision reached. *Wilkinson* itself is a concrete illustration of a permissible § 1983 challenge to a proceeding that affected the duration of incarceration: in that case, the prisoners were denied parole, but their procedural challenges were permitted to go forward under § 1983 because ruling in favor of the plaintiffs would entitle them to new parole hearings but would not necessarily require them to be granted parole.<sup>109</sup> Courts cannot categorically rely on the mere fact that the proceedings at issue lengthened (or failed to shorten) the time spent in jail, because by doing so they force more cases into habeas than the Court's precedent requires.<sup>110</sup>

Conversely, allowing more rather than less access to § 1983 than the Court's decisions permit, at least one judge has concluded that a

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106. See, e.g., *Shell v. Brzezniak*, 365 F. Supp. 2d 362, 370 (W.D.N.Y. 2005) (deprivation of good-time credits); cases cited *infra* note 125 (earning status).

107. See, e.g., *Adams v. Agniel*, 405 F.3d 643, 644–45 (8th Cir. 2005) (per curiam); *Butterfield v. Bail*, 120 F.3d 1023, 1024 (9th Cir. 1997); *Clark v. Thompson*, 960 F.2d 663, 664 (7th Cir. 1992).

108. See, e.g., *McMillan v. Fielding*, 136 F. App'x 818, 820 (6th Cir. 2005) (good-time credits); *Butterfield*, 120 F.3d at 1024–25 (parole); *Shell*, 365 F. Supp. 2d at 370 (same). Both *McMillan* and *Shell* were decided after *Wilkinson v. Dotson*, 544 U.S. 74 (2005), but neither mention it. For a critique of *McMillan* (and a contrary result), see *Woods v. Lozer*, No. 3:05-1080, 2006 WL 3333521, at \*8 (M.D. Tenn. Nov. 16, 2006).

109. *Wilkinson*, 544 U.S. at 76.

110. A more elaborate—but no more justified—example of this mistake is a district court opinion distinguishing the injunctive relief sought in *Wilkinson* from damages sought for flawed procedures: the court held that because “the only meaningful money damages would be for a wrongful continued confinement,” success in the § 1983 would “imply an erroneous parole decision.” *Swimp v. Rubitschun*, No. 1:06-CV-592, 2006 WL 3370876, at \*3 (W.D. Mich. Nov. 20, 2006). For a contrary case relying on a more careful analysis of *Wilkinson*, see *Armstrong v. Beauclair*, No. CV06-49-S-EJL, 2007 WL 1381790, at \*3 (D. Idaho Nov. 29, 2007) (mem.).

§ 1983 action is viable whenever the plaintiff is seeking “damages for the respondents’ use of the wrong *procedures* rather than for their reaching the wrong *result*.”<sup>111</sup> In a variation on this theme, another court has suggested that all procedural challenges to parole denials (but not necessarily to disciplinary sanctions) are cognizable under § 1983.<sup>112</sup> This process-not-result approach, too, is incorrect under the precedents: some procedural challenges are precluded in § 1983 under the Court’s doctrine, as *Edwards* itself illustrates.<sup>113</sup> What the Court said matters is not whether process or result is challenged but the logical effect that a favorable ruling for the prisoner would have on the validity of the result of the hearing.<sup>114</sup>

Another attempt at a clearer distinction is to suggest that challenges to generally applicable procedural rules fall on the *Wilkinson* and *Wolff* side of the line and claimed errors in particular hearings fall on the *Edwards* side of the line.<sup>115</sup> This is analogous to other doctrines specifying the type of challenges that may be raised in other contexts. For example, the Court has held that determining whether a statute authorizing commitment is civil or punitive depends on the statutory scheme and not on its application in individual cases; a plaintiff cannot argue that an otherwise-civil commitment statute is punitive as applied to him.<sup>116</sup> Under the *Rooker-Feldman* doctrine, federal courts may not hear challenges to particular state court decisions, but they may hear challenges to the state rules that govern such decisions.<sup>117</sup>

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111. Carr v. O’Leary, 167 F.3d 1124, 1128–29 (7th Cir. 1999) (Ripple, J., concurring) (emphasis added).

112. Clark v. Thompson, 960 F.2d 663, 664 (7th Cir. 1992) (“Knock out the parole decision, knock out the rules for future decisions, knock out the entire institution of parole, and the sentence remains, establishing lawful custody.”).

113. Edwards v. Balisok, 520 U.S. 641, 647–48 (1997).

114. *Id.*

115. Some courts explicitly used this distinction prior to *Heck*. See, e.g., Serio v. Members of La. State Bd. of Pardons, 821 F.2d 1112, 1117–18 (5th Cir. 1987). Other courts disagreed. See, e.g., Gwin v. Snow, 870 F.2d 616, 825–26 (11th Cir. 1989). For an early critique of this distinction, see Schwartz, *supra* note 101, at 157–58.

116. Seling v. Young, 531 U.S. 250, 266–67 (2001).

117. See, e.g., D.C. Court of Appeals v. Feldman, 460 U.S. 462, 463 (1983) (holding that the plaintiffs could not challenge the court’s decision to deny them to the bar but could challenge the bar regulations on which the court based its decision); Centifanti v. Nix, 865 F.2d 1422, 1430 (3d Cir. 1989) (holding that a disbarred attorney could not challenge the state supreme court’s refusal to reinstate him to the state bar but could challenge rules governing reinstatement

Decisions purporting to follow this distinction between general and specific challenges when applying the *Preiser* doctrine have nevertheless reached inconsistent results. For example, challenges to the inclusion of particular testimonial or documentary evidence as false, biased, or otherwise inappropriate have sometimes been held cognizable under § 1983 and sometimes not.<sup>118</sup> Cases addressing other challenges to prison administrative proceedings are similarly inconsistent.<sup>119</sup> Even more peculiar, one court has allowed a § 1983

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because the relief requested “could affect *future* decisions of the state supreme court [but] would not require review of a past decision”). Lower courts have applied this distinction unevenly, which suggests that such a rule might not be easy to apply. *See generally* Sherry, *supra* note 89 (surveying and critiquing lower court application of the doctrine). Similarly, the Court has always distinguished between facial and as-applied constitutional challenges, although in this context as-applied challenges are more likely to succeed. *See, e.g.,* Ayotte v. Planned Parenthood of N. New England, 126 S. Ct. 961, 967 (2006).

118. *Compare* Adams v. Agniel, 405 F.3d 643, 644 (8th Cir. 2005) (per curiam) (finding that an allegation that the parole board used erroneous information was cognizable), *and* Kemp v. McFarland, 149 F. App’x 91, 93 (3d Cir. 2005) (per curiam) (finding that allegations that a parole hearing involved false and biased testimony were cognizable), *and* Burnell v. Whidden, No.3:05CV825(MRK), 2005 WL 2739085, at \*3 (D. Conn. Oct. 19, 2005) (finding that an allegation that a probation officer’s misstatement delayed a prisoner’s release on parole was cognizable), *and* Johnson v. Williams, No. 03 C 0764, 2005 WL 1793586, at \*1, \*6 (E.D. Wisc. July 27, 2005) (finding that an allegation that the parole board considered false information was cognizable), *with* Jeffery v. Owens, 216 F. App’x 396, 397 (5th Cir. 2006) (per curiam) (finding that an allegation that the parole board considered expunged arrests when it denied the prisoner parole was not cognizable), *and* Brown v. Dretke, 184 F. App’x 384, 385–86 (5th Cir. 2006) (per curiam) (finding that an allegation that the parole board used inaccurate information in denying parole was not cognizable), *and* Cherfils v. Jones, No. 3:07cv391/MCR/MD, 2008 WL 817098, at \*1 (N.D. Fla. Mar. 25, 2008) (finding that a prisoner’s allegation that corrections officers filed a false disciplinary report against him was not cognizable), *and* Graham v. Washington, No. 7:07CV00381, 2007 WL 4613037, at \*1 (W.D. Va. Dec. 31, 2007) (mem.) (finding that a prisoner’s allegation that corrections officials fabricated evidence when depriving him of good-time credits was not cognizable), *and* Hawn v. Pavlick, No. 07-110, 2007 WL 1063848, at \*1 (W.D. Pa. Apr. 5, 2007) (finding that the prisoner’s allegation that the parole board relied on a false report when denying him parole was not cognizable), *and* Lynch v. Robinson, No. 02 C 4789, 2002 WL 1949731, at \*5 (N.D. Ill. Aug. 22, 2002) (mem.) (finding that an allegation that corrections officials relied on a fabricated disciplinary report when depriving the prisoner of good-time credits was not cognizable); *see also* Gross v. Quarterman, No. H-04-136, 2007 WL 4411755, at \*6 (S.D. Tex. Dec. 17, 2007) (finding that a claim that the parole board denied parole based on inaccurate information was not cognizable but a claim that the parole board failed to give the prisoner an opportunity to correct the inaccurate information was cognizable).

119. Some courts have allowed § 1983 suits alleging the unconstitutional application of parole guidelines or standards adopted after the prisoner’s conviction, *see, e.g.,* Kyles v. Garrett, 222 F. App’x 427, 428, 430 (5th Cir. 2007) (per curiam); Overman v. Beck, 186 F. App’x 337, 338 (4th Cir. 2006) (per curiam), the requirement of participation in certain programs as a condition of parole eligibility, *see, e.g.,* Nelson v. Horn, 138 F. App’x 411, 412 (3d Cir. 2005) (per curiam); Neal v. Shimoda, 131 F.3d 818, 821 (9th Cir. 1997); Armstrong v. Beauclair, No. CV06-49-S-



suit challenging the validity of misconduct reports used to deprive a prisoner of good-time credits, suggesting that whether the reports were “excessive” is “a separate issue from whether [the prisoner] was, in fact, guilty of the conduct alleged in the reports.”<sup>120</sup> Other decisions ignore this general/specific distinction,<sup>121</sup> which the Court never drew in the *Preiser* line of cases.

Even when courts have applied the standard that the Court actually articulated, however, they have not reached consistent results. As several courts have explicitly recognized, this problem

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EJL, 2007 WL 1381790, at \*1, \*15 (D. Idaho Mar. 29, 2007) (mem.); *Wolfe v. Pa. Dep’t. of Corr.*, 334 F. Supp. 2d 762, 764–65 (E.D. Pa. 2004) (mem.), the use of impermissible standards in the parole decision, *Brown v. Johnson*, 169 F. App’x 155, 156–57 (4th Cir. 2006) (per curiam), the routine placement of an inmate charged with a disciplinary violation into administrative confinement, preventing him from collecting evidence for his defense, *Osterback v. Crosby*, No. 4:01CV76-WS, 2003 WL 21976145, at \*1 (N.D. Fla. June 9, 2003), and the policy of conducting of a parole hearing via television hookup instead of in person, *Yourdon v. Johnson*, 128 F. App’x 833, 834–35 (2d Cir. 2005).

Other courts have concluded that prisoners claiming that they were not permitted to call witnesses could not proceed under § 1983 (contrary to the outcome in *Wolff*), *Cervantes v. Pratt*, 224 F. App’x 697, 700 (9th Cir. 2007) (mem.); *Tompkins v. Dep’t. of Corr.*, No. 5:07-CT-3152-H, 2008 WL 717719, at \*7 (E.D.N.C. Mar. 17, 2008); *Brown v. Johnson*, No. 7:07CV00396, 2007 WL 4269234, at \*1 (W.D. Va. Nov. 30, 2007) (mem.), that a challenge to legislative changes to parole standards is equivalent to a challenge to the denial of parole and thus not cognizable under § 1983, *Vaught v. Sampson*, No. 08-CV-11040, 2008 WL 927776, at \*1–2 (E.D. Mich. Apr. 4, 2008), and that challenges to parole conditions must be raised in habeas and not § 1983 despite the fact that they were brought by individuals whose parole had not been revoked and thus were prospective only, *see Lee v. Jones*, No. CV 05-789-MO, 2006 WL 44188, at \*3–4 (D. Or. Jan. 9, 2006) (discussing cases).

120. *Johnson v. Litscher*, 260 F.3d 826, 831 (7th Cir. 2001). Several courts have similarly concluded that success on a claim for excessive use of force does not necessarily imply the invalidity of convictions for battery or resisting arrest, and thus the claims are not always barred under *Heck*. *See, e.g.*, *Bush v. Strain*, 513 F.3d 492, 497–99 (5th Cir. 2008); *Brengettcy v. Horton*, 423 F.3d 674, 683 (7th Cir. 2005); *Smith v. City of Hemet*, 394 F.3d 689, 699 (9th Cir. 2005); *Michaels v. City of Vermillion*, 539 F. Supp. 2d 975, 990 (N.D. Ohio 2008). *But see* *Ballard v. Simien*, No. H-07-0791, 2008 WL 906531, at \*1 (S.D. Tex. Apr. 3, 2008) (mem.). This distinction can give rise to difficult evidentiary questions: in 2008 the Seventh Circuit reversed a district court that had prohibited a prisoner from presenting *any* evidence about the altercation that led to both his disciplinary conviction and his claim of excessive force. *Gilbert v. Cook*, 512 F.3d 899, 902 (7th Cir. 2008).

121. *See, e.g.*, *Sams v. Crawford*, 197 F. App’x 527, 528 (8th Cir. 2006) (per curiam) (allowing prisoners to pursue a § 1983 claim that the defendants allegedly “fail[ed] to inform them of their constitutional rights prior to parole-revocation hearings” without specifying whether the corrections officials’ failure was pursuant to the state’s policy or specific to these inmates).

stems from the lack of clarity of the Supreme Court precedents.<sup>122</sup> In *Wolff*, the Court allowed a § 1983 challenge to disciplinary hearing procedures that denied the prisoner notice, a written statement of the factual findings, and the right to call witnesses and present documentary evidence. But in *Edwards*, the Court held noncognizable under § 1983 a claim that disciplinary proceedings were unconstitutional because the hearing officer “concealed exculpatory witness statements and refused to ask specified questions of requested witnesses.”<sup>123</sup> There is not a lot of daylight between these two claims, and lower courts have understandably had a hard time figuring out the location of the dividing line. *Wilkinson* further complicates the problem because almost every case can be described both as satisfying and as not satisfying the *Wilkinson* standard: if the prisoner wins the procedural challenge, it means both that the first hearing was constitutionally invalid (and thus that the result of the hearing was invalid) and that the plaintiff is entitled to a new, constitutionally adequate, hearing.<sup>124</sup>

One type of challenge to specific disciplinary proceedings particularly bedevils courts. Cases challenging the deprivation of good-time credits are difficult enough to categorize, as we have shown, but what should happen when the challenge is to a proceeding that led to a change in custody status that merely prevented an inmate from *earning* good-time credits for some period of time? Courts have divided over whether such challenges may be brought under § 1983.<sup>125</sup>

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122. *E.g.*, *Richmond v. Scibana*, 387 F.3d 602, 606 (7th Cir. 2004); *Clark v. Thompson*, 960 F.2d 663, 664 (7th Cir. 1992); *Dible v. Scholl*, 410 F. Supp. 2d 807, 815, 820 (N.D. Iowa 2006) (mem.).

123. *Edwards v. Balisok*, 520 U.S. 641, 644 (1997).

124. Prisoners unschooled in the law are sometimes better able to see this tension than are courts. One court described a § 1983 plaintiff’s argument as an assertion “that he would have already been paroled if not for” the use of unconstitutional parole procedures and then held—in an impeccable application of the precedents—that the plaintiff was permitted to seek a new parole hearing but not release. *Bottom v. Pataki*, No. 9:03-CV-835 (FJS/GJD), 2006 WL 2265408, at \*4 (N.D.N.Y. Aug. 7, 2006) (mem.).

125. *Compare, e.g.*, *Worthen v. Franklin*, 186 F. App’x 835, 836–37 (10th Cir. 2006) (cognizable), and *Kemp v. McFarland*, 149 F. App’x 91, 92–93 (3d Cir. 2005) (per curiam) (same), and *Kritenbrink v. Crawford*, 313 F. Supp. 2d 1043, 1053–54 (D. Nev. 2004) (same), with *Bell v. Wilkinson*, 145 F. App’x 169, 170–71 (6th Cir. 2005) (not cognizable), and *Montgomery v. Anderson*, 262 F.3d 641, 644–45 (7th Cir. 2001) (same), and *Payton v. Hubert*, No. 07-506-A, 2007 WL 4303241, at \*1 (M.D. La. Dec. 5, 2007) (same). Another court found that *Heck* barred a claim that prison counselors unlawfully removed the prisoner from group counseling that was a prerequisite for favorable parole consideration. *Brooke v. Stevens*, No. 4:CV-07-2329, 2008

There is, finally, the problem of mixed claims. What if a disciplinary hearing, which is allegedly procedurally inadequate, leads to the imposition of both a sanction with durational implications and a sanction without durational implications? For example, a prisoner might be placed in more restrictive confinement conditions *and* deprived of accumulated good-time credits. The former, if imposed alone, would be cognizable under § 1983 because it does not trigger *Heck* at all. The problem is that prevailing in a procedural challenge to the hearing that imposed restrictive confinement necessarily implies that the other penalty—the deprivation of good-time credits, which is clearly within the *Heck* bar—is also invalid. Two courts have addressed this situation and have come to different conclusions. The Seventh Circuit held, with little discussion, that a prisoner could not use § 1983 to challenge disciplinary segregation in this context.<sup>126</sup> The Second Circuit devised a more ingenious solution: it held that a prisoner may use § 1983 to challenge the nondurational sanction, but only “if he agrees to abandon forever any and all claims he has with respect to the sanctions that affected the length of the imprisonment.”<sup>127</sup>

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WL 80043, at \*1 (M.D. Pa. Jan. 7, 2008) (mem.). Some courts have cast the question as turning on whether officials would retain discretion over the length of the sentence notwithstanding a court ruling in the plaintiff’s favor. *See, e.g.,* Thomas v. Eby, 481 F.3d 434, 440 (6th Cir. 2007); Helm v. Colorado, No. 06-cv-00624-PSF-CBS, 2007 WL 322770, at \*2–3 (D. Colo. Jan. 31, 2007); Beebe v. Heil, 333 F. Supp. 2d 1011, 1015 (D. Colo. 2004) (mem.). This approach is merely a restatement of *Wilkinson*: because of the officials’ discretion, granting relief would not necessarily result in the shortening of the plaintiff’s period of incarceration. But as we have seen, this analysis proves too much, as even invalidating a conviction for errors at trial—the core of habeas—does not necessarily mean that the prisoner will end up with a shorter sentence on retrial. Judges and juries have at least as much discretion as parole officers and prison officials.

126. *Montgomery v. Anderson*, 262 F.3d 641, 643–44 (7th Cir. 2001). The basis for this conclusion is not entirely clear; it might have rested on the erroneous premise that *any* disciplinary sanction, whether or not it has durational implications, is subject to the *Heck* bar.

127. *Peralta v. Vasquez*, 467 F.3d 98, 100 (2d Cir. 2006); *accord* *McEachin v. Selsky*, 225 F. App’x 36, 37 (2d Cir. 2007); *Deal v. Yurack*, No. 9:04-CV-0072 (LEK/DEP), 2007 WL 2789615, at \*13 (N.D.N.Y. Sept. 24, 2007); *Ford v. Krusen*, No. 906-CV-890 FJS/DEP, 2007 WL 804928, at \*1 (N.D.N.Y. Mar. 13, 2007); *see also* *Morales v. Woods*, No. 9:06-CV-15 (TJM/GJD), 2008 WL 686801, at \*5 (N.D.N.Y. Mar. 10, 2008) (mem.) (citing *Peralta* to find that because the plaintiff had been released from prison, his good-time credit claim was moot, so *Heck* did not bar nondurational claims arising from same disciplinary hearing); *Moore v. Schuetzle*, No. 1:06-cv-079, 2006 WL 3612857, at \*7 n.7 (D.N.D. Nov. 20, 2006) (noting the possibility of such a waiver). The *Peralta* court relied on the principle of judicial estoppel to conclude that any waiver by the prisoner would be enforced in later proceedings. *Peralta*, 467 F.3d at 105–06.

In summary, the distinction drawn by the Supreme Court is both unjustifiable in theory and incoherent in practice, leading to conflicting decisions by lower courts. Determining whether a claim is cognizable under § 1983 is not the only problem resulting from the *Preiser* line of cases, however.<sup>128</sup> Sentence-administration challenges that are held to fall on the habeas side of the line face a host of difficulties. The habeas corpus statute and judicial interpretations of it were designed for collateral review of state judicial decisions. Applying habeas doctrines to suits challenging what are essentially state administrative decisions creates a series of mismatches, to which we now turn.

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128. Two side issues under *Preiser* have also troubled lower courts. Although they are beyond the scope of this Article, we mention them briefly. First, if § 1983 *is* available, is it the exclusive remedy? The Supreme Court has not definitively resolved this question, even for prison-conditions claims that are clearly within § 1983 (unlike the sentence-administration claims that are the focus of this article). The circuits are divided. *See, e.g.,* *Levine v. Apker*, 455 F.3d 71, 76–77 (2d Cir. 2006) (allowing, without discussion, claims cognizable under § 1983 to be brought in habeas); *Woodall v. Fed. Bureau of Prisons*, 432 F.3d 235, 242–44 (3d Cir. 2005) (holding that claims cognizable under § 1983 may alternatively be brought in habeas); *Beckley v. Miner*, 125 F. App'x 385, 388–89 (3d Cir. 2005) (same); *United States v. Warmus*, 151 F. App'x 783, 786–87 (11th Cir. 2005) (per curiam) (holding that § 2241 is available to a prisoner whose claim has no effect on the duration of his sentence); *Docken v. Chase*, 393 F.3d 1024, 1030 (9th Cir. 2004) (same); *Montez v. McKinna*, 208 F.3d 862, 864 (10th Cir. 2000) (same); *Brown v. Plaut*, 131 F.3d 163, 169 (D.C. Cir. 1997) (holding that habeas “might conceivably be available” but is not required); *Clark v. Thompson*, 960 F.2d 663, 664–65 (7th Cir. 1992) (holding that claims cognizable under § 1983 may not be brought in habeas); *United States v. Jalili*, 925 F.2d 889, 893–94 (6th Cir. 1991) (same). For a 2007 district court attempt to sort out the Ninth Circuit’s confusing precedent on this question, see *Drake v. Felker*, No. 2:07-cv-00577 (JKS), 2007 WL 4404432, at \*1–2 (E.D. Cal. Dec. 13, 2007). For the effect of our proposal on this particular controversy, see *infra* text accompanying note 230.

Courts have also divided about whether the *Heck* favorable-termination rule applies if the habeas remedy is unavailable (for example, if the person is not in custody). *Compare* *Mendoza v. Meisel*, No. 07-4627, 2008 WL 726860, at \*1 (3d Cir. Mar. 19, 2008) (per curiam) (holding that a person not in custody is not bound by *Heck*), *and* *Nonnette v. Small*, 316 F.3d 872, 875–78 (9th Cir. 2002) (same), *and* *Huang v. Johnson*, 251 F.3d 65, 74–75 (2d Cir. 2001) (same), *with* *Entzi v. Redmann*, 485 F.3d 998, 1003 (8th Cir. 2007) (holding that a person not in custody *is* bound by *Heck*), *and* *Williams v. Consovoy*, 453 F.3d 173, 177–78 (3d Cir. 2006) (same), *and* *Randell v. Johnson*, 227 F.3d 300, 301–02 (5th Cir. 2000) (per curiam) (same), *and* *Gibbs v. S.C. Dep’t. of Prob., Parole, & Pardon Servs.*, 168 F.3d 481, 481 (4th Cir. 1999) (per curiam) (same), *and* *Figueroa v. Rivera*, 147 F.3d 77, 81 n.3 (1st Cir. 1998) (same). In 2008 one commentator argued that *Heck* should not apply if habeas is unavailable. Note, *Defining the Reach of Heck v. Humphrey: Should the Favorable Termination Rule Apply to Individuals Who Lack Access to Habeas Corpus?*, 121 HARV. L. REV. 868, 889 (2008). This issue can be resolved either way under our proposal.

## III. WHERE LANGUAGE AND LOGIC COLLIDE: ATTEMPTING TO FIT SENTENCE-ADMINISTRATION CLAIMS WITHIN AEDPA'S TERMS

*Preiser* distinguishes among different challenges to administrative proceedings, dictating which must be filed in habeas and which can be brought under § 1983. The failings we have catalogued so far arise from that distinction. But the Court's unwillingness in these decisions to consider the difference between challenges to administrative decisions and challenges to state court judgments also has negative consequences. It means that challenges to administrative decisions affecting sentence duration, having nothing to do with the validity of the underlying state court judgment, will be forced into habeas and governed by the provisions of AEDPA. When a state prisoner alleges that the duration of his custody has been affected by a constitutional flaw in a decision by a state official, however, AEDPA's language is a nightmare to navigate. Constitutional attacks on the decisions of corrections and parole officials do not fit easily within AEDPA's terms, which were drafted in contemplation of claims challenging state judicial actions.<sup>129</sup>

One set of difficulties arises because, unlike other habeas petitions challenging convictions and sentences already subject to review by state courts, a habeas petition attacking a sentence-administration decision may be the prisoner's first and only opportunity for judicial review of that decision. Inmates who challenge the actions of prison or parole officials might have had limited access—or no access—to state courts. In all states, a prisoner can object to the officials' actions using administrative remedies such as grievances and appeals within the state corrections system.<sup>130</sup> But after an adverse administrative determination rejecting a prisoner's constitutional claim, an inmate may or may not have an opportunity for review of that determination in state court. All states grant jurisdiction to their courts to review parole revocations,<sup>131</sup> and most

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129. See *supra* notes 62–68 and accompanying text.

130. See Brief for the Jerome N. Frank Legal Services Organization of the Yale Law School as Amicus Curiae Supporting Respondent at 28–31 app., *Woodford v. Ngo*, 546 U.S. 1167 (2006) (No. 05-416), 2006 WL 304573 (collecting and describing state prison grievance policies and procedures).

131. See, e.g., *Jackson v. Walker*, 206 F. App'x 967, 969 (11th Cir. 2006) (per curiam) (Georgia); *Coleman v. Dretke*, 395 F.3d 216, 220–24 (5th Cir. 2004) (Texas); *Dill v. Holt*, 371 F.3d 1301, 1303 (11th Cir. 2004) (Alabama); *Land v. Carroll*, 402 F. Supp. 2d 514, 517 (D. Del.

states provide some judicial review for claims regarding the constitutionality of procedures leading to the loss of good-time credits<sup>132</sup> or the denial of parole without due process<sup>133</sup> or in violation of the Ex Post Facto Clause.<sup>134</sup> But some states, including Indiana,<sup>135</sup> Michigan,<sup>136</sup> Pennsylvania,<sup>137</sup> Texas,<sup>138</sup> and Wyoming<sup>139</sup> provide no

2005) (mem.) (Delaware); Scales v. N.Y. State Div. of Parole, 396 F. Supp. 2d 423, 428 (S.D.N.Y. 2005) (New York).

132. See, e.g., Fleming v. Quinn, 251 F. App'x 447, 447 (9th Cir. 2007) (mem.) (Washington); Aguilar v. Endicott, 224 F. App'x 526, 527 (7th Cir. 2007) (Wisconsin); Sells v. McDaniels, 234 F. App'x 608, 609 (9th Cir. 2007) (mem.) (Nevada).

133. See, e.g., Irons v. Carey, 505 F.3d 846, 850–51 (9th Cir. 2007) (California); Cotten v. Davis, 215 F. App'x 464, 467 (6th Cir. 2007) (per curiam) (Tennessee); Williams v. Bartlett, 201 F. App'x 501, 502 (9th Cir. 2006) (mem.) (Oregon); Whiteman v. Friel, 191 F. App'x 820, 821 (10th Cir. 2006) (Utah).

134. See, e.g., Crank v. Jenks, 224 F. App'x 838, 839 (10th Cir. 2007) (Oklahoma); Dyer v. Bowlen, 465 F.3d 280, 285–86 (6th Cir. 2006) (Tennessee); Burnett v. Lampert, 432 F.3d 996, 998 (9th Cir. 2005) (Oregon); Parker v. Kelchner, 429 F.3d 58, 61 (3d Cir. 2005) (Pennsylvania); Docken v. Chase, 393 F.3d 1024, 1031 (9th Cir. 2004) (Montana); see also Lynce v. Mathis, 519 U.S. 433, 439–47 (1997) (granting a Florida prisoner's habeas challenge to a statute cancelling provisional release credits as violating the Ex Post Facto Clause); Weaver v. Graham, 450 U.S. 24, 35–36 (1981) (granting habeas relief after finding that a statute that retroactively eliminated gain-time release credits violated the Ex Post Facto Clause); Adam Liptak, *Contemplating the Meaning of 'Life,'* N.Y. TIMES, Nov. 12, 2007, at A10. Liptak observes,

Courts in other states have also been struggling with how far states can go in changing their pardon and parole systems retroactively. In 1997, for example, the Pennsylvania board of pardons reserved a seat for a crime victim and required a unanimous rather than majority vote.

Last year, a lower court ruled that those changes violated the ex post facto clause.

*Id.* For a fifty-state survey of postconviction remedies for state prisoners, see the three-volume work by DONALD E. WILKES, JR., STATE POSTCONVICTION REMEDIES AND RELIEF HANDBOOK WITH FORMS (2007 ed. 2006).

135. Moffat v. Broyles, 288 F.3d 978, 981 (7th Cir. 2002) (“Indiana does not provide judicial review of decisions by prison administrative bodies . . .”).

136. Jackson v. Jamrog, 411 F.3d 615, 617, 621 (6th Cir. 2005) (upholding a state statute passed in 2000 that removed access of prisoners denied parole to state courts but preserved the power of prosecutors and victims to appeal to state courts); Rouse v. Lafler, No. 06-10724, 2007 WL 4239209, at \*2 (E.D. Mich. Dec. 3, 2007) (explaining that Michigan law offers three possible avenues to challenge administrative actions in state courts, but prisoners cannot appeal a denial of parole under any of them).

137. McAleese v. Brennan, 483 F.3d 206, 210 (3d Cir. 2007) (permitting a prisoner to file a habeas corpus petition in federal court without exhausting state court remedies because Pennsylvania law provides no way to challenge a decision to deny discretionary parole); DeFoy v. McCullough, 393 F.3d 439, 445 (3d Cir. 2005) (“[C]laims of constitutional violations in the denial of parole in Pennsylvania need not be presented to the state courts via a petition for writ of mandamus in order to satisfy the requirement of exhaustion.”).

judicial review whatsoever of at least some of these constitutional claims. These circumstances complicate the application of the habeas statute, which was designed to provide limited collateral review of state court decisions, not direct review of state administrative decisions.

Since AEDPA was enacted, courts have divided over the application of at least five different specific aspects of habeas review to these cases.<sup>140</sup> We examine each of these five disputes in turn.

*A. Jurisdictional Basis—§ 2241 or § 2254?*

The analysis of any federal case begins with identifying the specific statute that provides jurisdiction. When the claim is a state prisoner's habeas petition challenging a sentence-administration decision, judges cannot even get this far without disagreeing. The problem that has split the lower courts is whether § 2241 or § 2254 is the appropriate basis for claims by state prisoners challenging, not the imposition, but the administration of their sentences. The problem arises because § 2254 (but not § 2241) applies only to persons "in custody pursuant to the judgment of a state court."<sup>141</sup> Prisoners who raise sentence-administration challenges can be characterized as both within and outside this language: the *initial* decision to incarcerate the inmate is pursuant to a state-court judgment, but the *challenged* decision, to keep him incarcerated, is not.

Section 2241 of the habeas statute sets out the general authority to grant the writ and includes the requirement that the custody be "in violation of the Constitution or laws or treaties of the United

138. *Morgan v. Dretke*, 433 F.3d 455, 456–57 (5th Cir. 2005) (noting that filing "step one" and "step two" administrative grievances exhausts state remedies when challenging a disciplinary proceeding in Texas).

139. *Brown v. Wyo. Dep't of Corr. State Penitentiary Warden*, 234 F. App'x 874, 876–77 (10th Cir. 2007) (holding that a prisoner did not have to challenge in state court a due process violation during the disciplinary process to exhaust state remedies). Until 2006, Oklahoma courts did not review constitutional challenges to disciplinary hearings. *See Gamble v. Calbone*, 375 F.3d 1021, 1026–27 (10th Cir. 2004) (determining that Oklahoma law did not permit state courts to review a disciplinary board's decision to revoke good-behavior credits), *overruled by Magar v. Parker*, 490 F.3d 816, 818–19 (10th Cir. 2007).

140. For a review of some early cases as of the end of 2002, see Eric Johnson, *An Analysis of the Antiterrorism and Effective Death Penalty Act in Relation to State Administrative Orders: The State Court Judgment as the Genesis of Custody*, 29 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 153, 162–66, 181–90 (2003).

141. 28 U.S.C. § 2254(a) (2000).

States.”<sup>142</sup> This section was untouched by AEDPA and continues to provide for federal review of those claims of unconstitutional custody raised by state and federal prisoners that do not fall within either § 2254 or § 2255, which contain AEDPA’s restrictive requirements.<sup>143</sup>

In AEDPA, Congress attempted to streamline collateral remedies for both state and federal prisoners. Congress’s efforts to streamline collateral remedies for federal prisoners are found in § 2255,<sup>144</sup> while the primary limitations on collateral remedies for state prisoners are found in §§ 2244 and 2254.<sup>145</sup> Additionally, § 2253(c)(1) requires both state and federal prisoners to secure a certificate of appealability before appealing a district court’s decision.<sup>146</sup> Section 2254 applies to constitutional challenges brought by inmates who are “in custody pursuant to the judgment of a State court,”<sup>147</sup> and the relevant portions of § 2244 either use the same phrase or specify that they apply to petitions brought “under section 2254” and thus incorporate the same language by reference.<sup>148</sup> The parallel provision for federal prisoners (§ 2255), however, applies to claims by a federal prisoner that his “sentence” was “*imposed* in violation of the Constitution.”<sup>149</sup> This difference in language has led courts to treat state and federal prisoners raising identical claims very differently.

Lower courts agree that challenges to the administration of a *federal* sentence, including prison decisions affecting good-time credits, are not among the collateral attacks on the sentence itself that must be brought under § 2255. Instead, because they are not alleging that their sentences were “imposed” unconstitutionally, federal prisoners attacking the administration of their sentences may proceed under § 2241. They need not comply with the AEDPA restrictions in § 2255.<sup>150</sup>

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142. *Id.* § 2241(c)(3).

143. *See* *INS v. St. Cyr*, 533 U.S. 289, 314 (2001).

144. 28 U.S.C. § 2255.

145. *Id.* §§ 2244, 2254.

146. *Id.* § 2253(c)(1).

147. *Id.* § 2254(a).

148. *Id.* §§ 2244(b)(1)–(2), (c), (d)(1).

149. *Id.* § 2255 (emphasis added).

150. *See, e.g., Woodall v. Fed. Bureau of Prisons*, 432 F.3d 235, 241–43 (3d Cir. 2005) (collecting authorities).



Of the circuits that have examined this issue for state prisoners, however, most have held that state prisoners with sentence-administration claims are “in custody pursuant to the judgment of a State court” and thus must file under § 2254, even though the alleged constitutional violation did not affect the validity of the state court judgment.<sup>151</sup> The Tenth Circuit, however, disagrees. In the Tenth Circuit, sentence-administration claims by both federal and state prisoners must be filed under § 2241.<sup>152</sup>

Judging by the hundreds of pages that have been devoted to this issue in briefs and federal decisions, one might think that it would be a key determinant of which of the various AEDPA restrictions courts will apply in these cases. Remarkably, the resolution of this question actually makes little difference in which restrictions courts will apply. The Seventh Circuit insists that sentence-administration petitions be filed under § 2254, then refuses to apply many of the statutory restrictions that govern other § 2254 cases.<sup>153</sup> The Tenth Circuit insists that these petitions be filed under § 2241, then applies the restrictions governing § 2254 cases anyway.<sup>154</sup> Courts are divided over the application of three restrictions in particular: the statute of limitations, the successive petition bar, and the certificate of

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151. These courts reason that any other interpretation would undercut the congressional goal of limiting habeas review for state prisoners through restrictions found in § 2254. *See, e.g.*, *White v. Lambert*, 370 F.3d 1002, 1008 (9th Cir. 2004) (“If we were to allow White to proceed under [§ 2241], he would not be subject to: (1) the one-year statute of limitations . . . ; (2) the extremely deferential review of state court decisions under [§§ 2254(d)(1) and (2)]; (3) AEDPA’s limitations on successive petitions . . . ; and (4) state court exhaustion requirements.”); *Medberry v. Crosby*, 351 F.3d 1049, 1060 (11th Cir. 2003) (“To read §§ 2241 and 2254 other than as we do would effectively render § 2254 meaningless because state prisoners could bypass its requirements by proceeding under § 2241.”); *see also Dill v. Holt*, 371 F.3d 1301, 1303 (11th Cir. 2004) (finding that § 2254(e)’s exhaustion requirement applied to a parole revocation challenge because the parolee was “in custody pursuant to the judgment of a state court” even though the parole board, an administrative body, returned him to prison); *Greene v. Tenn. Dep’t of Corr.*, 265 F.3d 369, 371–72 (6th Cir. 2001) (deferring to the statute’s “plain and broad language”).

152. *Montez v. McKinna*, 208 F.3d 862, 865 (10th Cir. 2000); *see also Medberry*, 351 F.3d at 1062 n.8 (characterizing Tenth Circuit precedent that “permits state prisoners to proceed under § 2241 when it would permit a federal prisoner to file a similar petition” as “disregard[ing] crucial textual differences between § 2254 and § 2255”). Judge Tjoflat has offered a third interpretation, that both theories of exclusivity are wrong and that Congress created “two routes to achieving the same goal [when] one is easier or otherwise more attractive than the other.” *See Thomas v. Crosby*, 371 F.3d 782, 812 (11th Cir. 2004) (Tjoflat, J., concurring).

153. *See infra* notes 163, 188 and accompanying text.

154. *See infra* notes 162, 187 and accompanying text.

appealability. A fourth aspect of habeas review—procedural default—has also proved problematic.

*B. Statute of Limitations*

One of the most important new restrictions that AEDPA added to habeas review was the statute of limitations in § 2244(d)(1), which by its terms applies only to prisoners “in custody pursuant to the judgment of a State court.”<sup>155</sup> It was designed to ensure that federal courts grant relief only to those state prisoners who speed their way to federal court after exhausting state judicial remedies. Delay in capital cases was the primary target of this provision.<sup>156</sup> Nevertheless, AEDPA’s text applies to all prisoners who claim they have been convicted and sentenced in violation of the Constitution.

The limitations period advances two goals. First, it reduces the possibility of losing evidence the state needs for retrial or resentencing: if the writ is granted, less time will have elapsed since the state judgment was first entered. Second, the time limit assures the finality of the state prisoner’s conviction and sentence. Once the filing period has passed, victims can rest assured that no further challenge to the judgment is possible unless the claim fits within the statute’s narrow exceptions. That, at least, was the idea behind adding a statute of limitations. The filing deadline advanced the finality of state criminal judgments and protected the state against the loss of the proof it might need should retrial be required. It had nothing to do with how states administered criminal judgments that were *already final*.

Given this mismatch, courts understandably have had difficulty determining when to apply the statute of limitations provision to habeas petitions challenging sentence-administration decisions. The most popular approach has been to apply the limitations period to all claims raised by state prisoners. This approach relies on the “judgment of a state court” language of § 2244. These courts do not apply the statute of limitations to claims of unconstitutional pretrial and prejudgment detention (when petitioners also have little

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155. 28 U.S.C. § 2244(d)(1) (2000).

156. See *supra* note 63.

incentive to delay filing)<sup>157</sup> but do apply it to claims that after the prisoner was committed to prison, state officials violated the Constitution by revoking release<sup>158</sup> or deferring release through the denial of parole,<sup>159</sup> revocation of good-time credits,<sup>160</sup> or other action.<sup>161</sup> Even the Tenth Circuit, which concluded that these sentence-administration claims do not fall within § 2254 generally, has held that they do for purposes of the statute of limitations.<sup>162</sup> For these courts, a prisoner's custody is "pursuant to the judgment of a state court" as long as the custody was *initially* authorized by a state court judgment.

The Seventh Circuit interprets the very same language in § 2244 differently, requiring a tighter causal link between specific custody and a state court judgment. If a prisoner would have been released sooner but for a decision by state administrative officials, then the prisoner is not "in custody pursuant to the judgment of a state court";

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157. See, e.g., *Walck v. Edmondson*, 472 F.3d 1227, 1235 (10th Cir. 2007) (holding, and collecting authority from other circuits, that § 2241 is the proper avenue by which to challenge pretrial detention on the ground of double jeopardy); *Stringer v. Williams*, 161 F.3d 259, 262 (5th Cir. 1998) (concluding that petitioners held pursuant to state court judgments should file habeas petitions under 28 U.S.C. § 2254 but petitioners attacking their pretrial detention should bring habeas petitions under 28 U.S.C. § 2241).

158. See, e.g., *Peoples v. Chatman*, 393 F.3d 1352, 1353 (11th Cir. 2004) (per curiam); *Cook v. N.Y. State Div. of Parole*, 321 F.3d 274, 278–79 (2d Cir. 2003).

159. See, e.g., *Gonzales-Mendoza v. Morgan*, 235 F. App'x 534, 535 (9th Cir. 2007) (mem.) (holding that AEDPA's statute of limitations applies to a challenge to a denial of parole); *Shelby v. Bartlett*, 391 F.3d 1061, 1063, 1065 (9th Cir. 2004) (holding that the statute of limitations applied and characterizing the Seventh Circuit's interpretation as "strained" and "unpersuasive"); *Wade v. Robinson*, 327 F.3d 328, 331 (4th Cir. 2003) (finding that the prisoner's habeas petition was time-barred under the statute of limitations).

160. See *Allen v. White*, 185 F. App'x 487, 491 (6th Cir. 2006) (per curiam) (holding that the statute of limitations applies to petitions challenging a decision to revoke good-time credits); *White v. Lambert*, 370 F.3d 1002, 1007–08 (9th Cir. 2004) (holding that a prisoner attacking an administrative decision is still a person in custody pursuant to a state court judgment for purposes of § 2254 and therefore the statute of limitations applies); *Medberry v. Crosby*, 351 F.3d 1049, 1062 (11th Cir. 2003) (applying the statute of limitations to prison disciplinary actions).

161. See *Rutledge v. Quarterman*, No. H-07-3160, 2008 WL 548792, at \*2 (S.D. Tex. Feb. 26, 2008) (applying the statute of limitations to an ex post facto challenge alleging that the state retroactively enforced new parole regulations); *Rider v. Quarterman*, No. 3:07-CV-0789-N, 2007 WL 4226378, at \*2 (N.D. Tex. Nov. 30, 2007) (applying the statute of limitations to a habeas petition challenging an alleged miscalculation of street-time credit).

162. See *Dulworth v. Evans*, 442 F.3d 1265, 1267 (10th Cir. 2006) (deciding, as a matter of first impression, that the statute of limitations in § 2244 applies to petitions challenging administrative decisions because such challenges are filed by persons in "custody pursuant to the judgment of a State court" but reiterating that such challenges must be filed under § 2241 as attacks on the administration of a sentence).

he is in custody pursuant to that administrative decision, and no time bar applies.<sup>163</sup> The Third Circuit has in dicta suggested yet another approach—distinguishing between administrative decisions that *reincarcerate* a prisoner who was previously released and decisions that delay the initial release of a presently incarcerated prisoner.<sup>164</sup>

As for the courts that do apply the statute of limitations to these claims, they do not agree about when the limitations period begins to run: is it when the administrative decision is first made,<sup>165</sup> when the administrative appeal of that decision becomes final,<sup>166</sup> or some other time?<sup>167</sup> The Ninth and Tenth Circuits have also extended equitable

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163. The Seventh Circuit reasoned that

Cox is in prison pursuant to the judgment of a state court; otherwise he would not be eligible for federal habeas corpus. . . . But the custody he is challenging, as distinct from the custody that confers federal jurisdiction, is the additional two years of prison that he must serve as the result of the “judgment” not of a state court but of the prison disciplinary board.

Cox v. McBride, 279 F.3d 492, 493 (7th Cir. 2002).

164. See *McAleese v. Brennan*, 483 F.3d 206, 214 (3d Cir. 2007) (suggesting that it would make sense to apply the time bar to those claims challenging disciplinary and parole decisions made before release but not to those challenging a revocation of release).

165. See *Bachman v. Bagley*, 487 F.3d 979, 983–84 (6th Cir. 2007) (holding that the statute of limitations begins when administrative decision is first made but is tolled during pendency of prison grievance procedures); see also *Wade v. Robinson*, 327 F.3d 328, 333 (4th Cir. 2003) (holding that the limitations period for a parole denial claim begins when parole was denied); *Kimbrell v. Cockrell*, 311 F.3d 361, 364 (5th Cir. 2002) (same); *Rutledge*, 2008 WL 548792, at \*3 (finding that an ex post facto challenge to parole procedures filed in 2007 was time barred because the limitations period began to run when the prisoner was first denied parole using those procedures in 2002).

166. See *Dulworth v. Evans*, 442 F.3d 1265, 1268 (10th Cir. 2006) (holding that the limitations period for an Oklahoma prisoner’s ex post facto challenge did not commence until the decision rejecting his administrative appeal became final); *Ali v. Tenn. Bd. of Pardon & Paroles*, 431 F.3d 896, 897 (6th Cir. 2005) (assuming, without deciding, that the statute of limitations period begins to run when the administrative decision to deny parole becomes final and is tolled during state judicial review).

167. See *Shelby v. Bartlett*, 391 F.3d 1061, 1066 (9th Cir. 2004) (holding that the limitations period for a habeas claim challenging a disciplinary hearing began one day after the prisoner received notice that his administrative appeal was denied); *Cook v. N.Y. State Div. of Parole*, 321 F.3d 274, 280 (2d Cir. 2003) (holding that the limitations period began when the petitioner was notified of the decision); *Burger v. Scott*, 317 F.3d 1133, 1138 (10th Cir. 2003) (holding that the limitations period for a parole deferral challenge started on the date the petitioner learned of the change in parole date); see also *Roberts v. Vaughn*, 203 F. App’x 130, 131 (9th Cir. 2006) (mem.) (holding that the limitations period begins when the factual basis for a claim could have been discovered with due diligence if that basis is not the decision itself); *Goodwin v. Dretke*, 150 F. App’x 295, 298 (5th Cir. 2005) (per curiam) (same).

tolling to sentence administrative challenges;<sup>168</sup> other courts have yet to do so.<sup>169</sup>

### C. *Successive Petition Bar*

Another problematic AEDPA provision is the bar against successive petitions, § 2244(b).<sup>170</sup> By its terms the bar applies to applications under § 2254—which, as noted,<sup>171</sup> itself applies only to prisoners “in custody pursuant to the judgment of a State court.” Because the same language describes both cases subject to the successive petition bar and those subject to the statute of limitations bar,<sup>172</sup> one might expect that courts would interpret these two provisions to cover the same cases. Instead, the Seventh Circuit has held that the successive-petition provision applies to sentence-administration challenges by state prisoners, but the statute of limitations provision does not;<sup>173</sup> while the Second, Fifth, and Tenth

168. See *Burger*, 317 F.3d at 1144 (explaining that on the “unique facts of [this] case,” petitioner “diligently pursued his judicial remedies and failed to timely file his federal petition due solely to extraordinary circumstances beyond his control”); see also *Gonzales-Mendoza v. Morgan*, 235 F. App’x 534, 535 (9th Cir. 2007) (mem.) (finding that the statute of limitations applied to a Washington prisoner’s challenge to a denial of parole but instructing the district court, on remand, to determine if the limitations period should be equitably tolled because the state created an impediment to discovering the constitutional violation under 28 U.S.C. § 2244 (d)(1)(B) by failing to provide the prisoner with a Spanish language translation of the board’s decision); cf. *Rutledge*, 2008 WL 548792, at \*5 (assuming that equitable tolling may be available but finding that the prisoner’s claim was not tolled because he failed to exercise reasonable diligence and no “rare and exceptional” conditions existed to justify tolling the limitations period).

169. See, e.g., *Rider v. Quarterman*, No. 3:07-CV-0789-N, 2007 WL 4226378, at \*3 (N.D. Tex. Nov. 30, 2007) (denying equitable tolling and noting that the petitioner should have filed his petition within a year of revocation when claiming that he was denied street-time credit for the time he spent out on parole).

170. 28 U.S.C. § 2244(b) (2000).

171. See *supra* note 147 and accompanying text.

172. Compare, however, *Rittenberry v. Morgan*, 468 F.3d 331 (6th Cir. 2006), a case presenting a second challenge to an underlying conviction. The Sixth Circuit agreed that because AEDPA changed the successive petition provision from language referencing petitions on behalf of persons “in custody pursuant to a state court judgment” to language referencing applications “under Section 2254,” Congress “apparently chose to distinguish between petitions filed under section 2254 in section 2244(b) as opposed to petitions filed on behalf of persons in custody pursuant to a state court judgment.” *Id.* at 335. The court held that the successive petition bar applies anyway, noting that although there is “no meaningful way to explain the inconsistencies in the wording,” it “reveals nothing more than poor draftsmanship.” *Id.* at 336–37.

173. See *Harris v. Cotton*, 296 F.3d 578, 578–79 (7th Cir. 2002).

Circuits apply to these cases the statute of limitations provision, but *not* the successive-petition bar.<sup>174</sup>

And those courts that apply the successive-petition provision to sentence-administration claims have also reached different conclusions about how it works. The first issue is determining when a petition seeking relief for an unconstitutional sentence-administration decision is successive to a petition challenging the underlying sentence itself. Generally, because the two petitions challenge two separate decisions, they would not be considered successive any more than two petitions challenging two separate successive convictions.<sup>175</sup> But if the sentence-administration claim was *ripe* by the time an

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174. Consider, for example, *Vasquez v. Parrott*, 318 F.3d 387 (2d Cir. 2003), in which the Second Circuit stated: “It is manifest that in designing the standards under which a second or successive petition would be allowed, Congress was contemplating only petitions that challenged the lawfulness of the conviction and not the sort of petition” advanced in that case. *Id.* at 392. The court also noted that federal prisoners who bring similar challenges would have filed under § 2241 and would not have had to seek a certificate from the court of appeals and that “we have no reason to believe that Congress intended its second or successive petition rule to function differently in this respect as between federal and state prisoners.” *Id.* at 392 n.1. The Second Circuit has interpreted the language “second or successive” petition to mean only when the claim asserted did exist at the time of the earlier petition. *James v. Walsh*, 308 F.3d 162, 168 (2d Cir. 2002).

The Fifth and Tenth Circuits use the pre-AEDPA abuse-of-the-writ doctrine to screen successive sentence-administration challenges. *See, e.g., Maxwell v. Janecka*, 191 F. App’x 717, 718 (10th Cir. 2006) (holding that a New Mexico prisoner’s § 2241 petition, which presented no new grounds for relief, was subject to dismissal as a successive petition “unless the ends of justice require consideration of the merits” and noting that when a successive § 2241 petition raises a new claim, a court may decline to hear the claim under the doctrine of abuse of the writ); *In re Cain*, 137 F.3d 234, 236–37 (5th Cir. 1998) (“Congress did not intend for the interpretation of the phrase ‘second or successive’ to preclude . . . relief for an alleged procedural due process violation relating to the administration of a sentence of a prisoner who has previously filed a petition challenging the validity of his conviction or sentence, but is nevertheless not abusing the writ.”).

175. *See, e.g., Benchoff v. Colleran*, 404 F.3d 812, 817 (3d Cir. 2005) (“[A] subsequent petition that challenges the administration of a sentence is clearly *not* a ‘second or successive’ petition within the meaning of § 2244 if the claim had not arisen or could not have been raised at the time of the prior petition.”); *Hill v. Alaska*, 297 F.3d 895, 898–99 (9th Cir. 2002); *Crouch v. Norris*, 251 F.3d 720, 725 (8th Cir. 2001) (“‘[S]econd or successive’ remains a term of art that must be given meaning by reference to both the body of case law developed before the enactment of AEDPA and the policies that prompted AEDPA’s enactment.”). *But cf. Spivey v. State Bd. of Pardons & Paroles*, 279 F.3d 1301, 1304 n.4 (11th Cir. 2002) (per curiam) (concluding that a death row prisoner’s allegation that the state’s clemency process violated due process was successive because the prisoner brought it after his first habeas petition); *id.* at 1305–06 (Barkett, J., dissenting) (arguing that the challenge was not successive because the alleged violation had not occurred at time the prisoner filed his first petition).

earlier petition challenging the underlying sentence was filed, is the sentence-administration petition successive? The Sixth and Ninth Circuits have answered yes,<sup>176</sup> the Fifth Circuit has said maybe,<sup>177</sup> the Tenth Circuit has said no,<sup>178</sup> and other circuits have yet to weigh in. A second difficulty in applying the successive-petition provision to these claims is determining when one administrative challenge is “successive” to another petition challenging a similar, but separate, sentence-administration decision.<sup>179</sup>

Finally there are the statutory exceptions to the successive petition bar, which make little sense in these cases. As written, the exceptions appear to have no applicability whatsoever to claims challenging the decisions of prison and parole officials. The first exception allows a successive petition that raises a claim that “relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court.”<sup>180</sup> It is difficult to imagine a context in which the Supreme Court would recognize a new constitutional right for parole and good-time proceedings and apply that rule retroactively. The second exception will never apply: it requires that the petitioner show that but for the error alleged “no reasonable fact-finder would have found the applicant guilty of the *underlying offense*,”<sup>181</sup> and prisoners challenging sentence-

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176. See, e.g., *In re Marsch*, 209 F. App'x 481, 482 (6th Cir. 2006) (holding that by the time petitioner had filed his first habeas petition, the petitioner could have discovered the factual predicate for his parole denial claim and thus his subsequent petition was a successive petition); *Rosas v. Nielsen*, 428 F.3d 1229, 1232–33 (9th Cir. 2005) (per curiam) (finding that a sentence-administration claim was successive and denying the prisoner's petition).

177. See *Crone v. Cockrell*, 324 F.3d 833, 836–37 (5th Cir. 2004) (finding that a prisoner's second habeas application was an abuse of the writ because he failed to bring the jail-time credit-calculation claim in his initial petition despite knowing the miscalculation, although he did not exhaust that claim in the preceding filing).

178. *Heckard v. Tafoya*, 214 F. App'x 817, 820 (10th Cir. 2007) (“Mr. Heckard's § 2254 petition is not a ‘second or successive’ petition because it is his first collateral challenge to his state conviction, whereas his prior § 2241 habeas petition challenged the administration of his sentence.”).

179. In 2007 the Third Circuit went out of its way to “express no opinion as to whether the restrictions on filing second or successive habeas corpus claims in [§ 2244] might have been applicable if McAleese filed or sought permission from us to file a petition challenging [his later] parole denials.” *McAleese v. Brennan*, 483 F.3d 206, 219 n.19 (3d Cir. 2007).

180. 28 U.S.C. § 2244(b)(2)(A) (2000).

181. *Id.* § 2244(b)(2)(B)(ii) (emphasis added).

administration decisions do not contest their guilt of the underlying offense.<sup>182</sup>

*D. Certificate of Appealability*

Courts also divide over whether a petitioner must obtain a certificate of appealability prior to appealing a district court's disposition of a sentence-administration challenge. Section 2253(c)(1)(A) requires a petitioner to obtain a certificate of appealability before appealing orders in a habeas corpus proceeding "in which the detention complained of arises out of process issued by a State court."<sup>183</sup> If the provision applies, then the prisoner must demonstrate that "jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further."<sup>184</sup> If the provision does not apply, no permission is needed prior to filing the appeal.

The Third, Fifth, Sixth, and Eleventh Circuits all apply other § 2254 limitations to these administrative challenges and have disregarded the difference in statutory language between § 2254's phrase "pursuant to a judgment of a state court" and § 2253's terms "detention complained of arises out of process issued by a state court." These courts either find that the more natural reading is to conclude that these two different phrasings mean the same thing<sup>185</sup> or apply the certificate-of-appealability requirement without

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182. The underlying offense is the original state crime for which the prisoner is serving time. *See, e.g., Vasquez v. Parrott*, 318 F.3d 387, 391 (2d Cir. 2003). Struggling to make sense of this statute as applied to sentence-administration claims, however, at least one court has decided that the phrase "underlying offense" in another context refers to a subsequent infraction for which the prisoner was convicted at a later disciplinary hearing and formed the basis for an adjustment in an otherwise early release date. *See infra* note 198.

183. 28 U.S.C. § 2253(c)(1)(A).

184. *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

185. *See Medberry v. Crosby*, 351 F.3d 1049, 1063 (11th Cir. 2003); *Greene v. Tenn. Dep't of Corr.*, 265 F.3d 369, 372 (6th Cir. 2001) (holding that a petitioner who appeals the resolution of a § 2241 petition challenging the administration of a sentence must obtain a certificate); *Coady v. Vaughn*, 251 F.3d 480, 486 (3d Cir. 2001) (requiring a petitioner to obtain a certificate of appealability before challenging a denial of parole); *see also Madley v. U.S. Parole Comm'n*, 278 F.3d 1306, 1310 (D.C. Cir. 2002) (holding that a certificate is required "when the [District of Columbia's] prisoner's detention originated in state court process, even if a later decision of a parole board to deny parole or rep parole is the more immediate cause of the prisoner's continuing detention").



discussion.<sup>186</sup> The Tenth Circuit agrees that § 2253 governs sentence-administration claims even though it continues to maintain that § 2254 does not.<sup>187</sup> The Seventh Circuit's position (which it admits is "contradictory" with its other decisions) is that although jurisdiction under § 2254 for sentence-administration challenges is established because "custody" in such cases is "pursuant to a state court judgment," the "detention" of a prisoner challenging the administrative decision that is keeping him incarcerated "arises out of" that administrative decision. It is not a "process issued by" a state court; therefore, no certificate of appealability is required.<sup>188</sup> Like the Seventh, the Ninth Circuit does not require a certificate in these cases.<sup>189</sup>

### *E. Procedural Default*

Finally, there is one further difficulty in applying AEDPA to sentence-administration claims, although it does not arise (as the other problems do) from the mismatch between the claims and the

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186. See *Houser v. Dretke*, 395 F.3d 560, 561 (5th Cir. 2004) (denying a certificate to a petitioner alleging that he was denied due process at a disciplinary hearing).

187. See *Magar v. Parker*, 490 F.3d 816, 818 (10th Cir. 2007); *Boutwell v. Keating*, 399 F.3d 1203, 1211 n.2 (10th Cir. 2005); *Montez v. McKinna*, 208 F.3d 862, 866–89 (10th Cir. 2000).

188. See *Walker v. O'Brien*, 216 F.3d 626, 637 (7th Cir. 2000) (holding that when the immediate cause of a prisoner's detention is a prison disciplinary proceeding, the resulting detention does not arise out of process issued by a state court); see also *Andersen v. Benik*, 471 F.3d 811, 814 (7th Cir. 2006) ("In *Walker*, we explained that 'we do not see how we can construe the words, 'process issued by a State court' to mean 'process not issued by a State court, but instead the outcome of an internal prison disciplinary proceeding.' . . . Because Anderson is challenging the actions of corrections officials, rather than his conviction or sentencing in state court, we determined that Anderson did not need a COA. We see no reason to revisit that decision or to overturn *Walker* as the state requests."). But see *Walker*, 216 F.3d at 642–44 (Easterbrook, J., dissenting from denial of rehearing en banc) (arguing that Congress could not have intended to limit federal review of a sentence imposed by a state court but allow unfettered appeals from parole decisions). Judge Easterbrook dissented in *Walker* and, writing in a later case, reminded his colleagues that the opinion contains an internal contradiction, terming it based on a "counter-textual conclusion." *Moffat v. Broyles*, 288 F.3d 978, 980 (7th Cir. 2002).

189. See *White v. Lambert*, 370 F.3d 1002, 1012 (9th Cir. 2004) (considering a case in which the petitioner was in custody pursuant to a state court judgment but challenging his imprisonment that "originate[d]" or "spr[un]g[]" from the decision of the department of corrections and noting that "[h]ad Congress intended that every state prisoner obtain a COA before appealing, irrespective of the nature of the challenge, it easily could have said so"); *Hess v. Bd. of Parole & Post-Prison Supervision*, 514 F.3d 909, 912 (9th Cir. 2008) ("Because Hess is challenging an administrative decision to postpone his parole and not his underlying state court conviction, he did not need to obtain a certificate of appealability . . .").

text of the statute. State prisoners seeking relief under § 2254 must exhaust “the remedies available in the courts of the State.”<sup>190</sup> Courts agree that any state prisoner seeking habeas relief under either § 2254 or § 2241 from an administrative decision must exhaust available state court remedies when those remedies exist.<sup>191</sup> They also agree—both before and after AEDPA—that despite what appears to be an express legislative command to exhaust judicial remedies, administrative remedies must be exhausted as well.<sup>192</sup>

But what happens if a prisoner fails to present his sentence-administration claim to a state court at the time (or in the manner) specified by state law and the state court thus refuses to consider that claim? He has no further state remedies available, but he did at one time. In typical habeas petitions challenging the constitutionality of a state criminal judgment, such a claim is considered procedurally “defaulted,” and will not be reviewed by a federal court unless the petitioner can show either: (1) cause for his default and prejudice from the absence of federal court review or (2) that it is more likely than not that the constitutional violation resulted in the conviction of an innocent person (known as the “miscarriage of justice” exception).<sup>193</sup>

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190. 28 U.S.C. § 2254 (b)(1)(A) (2000).

191. *See, e.g.*, *Parker v. Kelchner*, 429 F.3d 58, 61 (3d Cir. 2005) (holding that a prisoner challenging parole denial on the ground of ex post facto must seek relief first in Pennsylvania courts, but not if the challenge to denial is on other grounds for which there is no state court review); *Jackson v. Jamrog*, 411 F.3d 615, 621 (6th Cir. 2005) (holding that Michigan inmates wrongfully denied parole on a basis recognized as illegal must seek relief through state habeas actions and mandamus unless they are challenging the board’s discretionary determination not to grant release); *McAtee v. Cowan*, 250 F.3d 506, 508 (7th Cir. 2001) (per curiam) (noting that Illinois and Wisconsin provide judicial review of prison disciplinary hearings, which inmates must exhaust before filing in federal court, but Indiana does not); *Callwood v. Enos*, 230 F.3d 627, 634 (3d Cir. 2000) (holding that prisoners challenging parole after committing a territorial offense must exhaust their remedies in the territorial court).

192. *See, e.g.*, *Dulworth v. Evans*, 442 F.3d 1265, 1269 (10th Cir. 2006) (post-AEDPA). Courts also reached this conclusion before AEDPA. *See Markham v. Clark*, 978 F.2d 993, 994 (7th Cir. 1992) (holding that an Indiana state prison’s disciplinary panel was tantamount to a “state court” for purposes of the § 2254(b) exhaustion requirement and explaining that the court “[d]id not think ‘courts’ in section 2254(b) should be interpreted as being limited to tribunals presided over by persons who are called judges and wear robes” and that “the term as it appears in this statute should be read to embrace any tribunal that provides available and effective corrective process”).

193. *See Murray v. Carrier*, 477 U.S. 478, 499 (1986) (Stevens, J., concurring in the judgment). A prisoner can also overcome procedural default by showing that the procedural

Because a prisoner with a sentence-administration claim must pursue administrative as well as judicial appeals (if available), applying the rules of procedural default to these claims is challenging. The difficulty of determining when the prisoner's failure to meet an administrative regulation bars federal review has begun to plague federal courts that are considering challenges to administrative decisions under § 1983. The Supreme Court held in 2006 that the PLRA requires proper exhaustion of administrative remedies by prisoners bringing § 1983 claims but left open the possibility that a failure to exhaust could be excused.<sup>194</sup> The same problems arise when the same decisions of state prison and parole officials are challenged in habeas.<sup>195</sup> Both of the exceptions designed for habeas claims challenging criminal judgments—"cause" and "miscarriage of justice"—are difficult to apply to sentence-administration claims.<sup>196</sup> Arguably, the miscarriage of justice exception has no meaning in this context because it requires a showing that the challenged action led to the conviction of an innocent person. No matter what prison and parole officials do, their actions take place *after* the underlying conviction and cannot affect the accuracy of that conviction one way or the other.<sup>197</sup> Nevertheless, the Tenth Circuit has extended the

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rule is not "firmly established and regularly followed." *See James v. Kentucky*, 466 U.S. 341, 348 (1984).

194. *See Woodford v. Ngo*, 126 S. Ct. 2378, 2382–83 (2006); *id.* at 2403 (Stevens, J., dissenting); *see also, e.g.*, Robin L. Dull, Note, *Understanding Proper Exhaustion: Using the Special-Circumstances Test to Fill the Gaps Under Woodford v. Ngo and Provide Incentives for Effective Prison Grievance Procedures*, 92 IOWA L. REV. 1929, 1947 (2007).

195. *See, e.g.*, *Hamm v. Saffle*, 300 F.3d 1213, 1217 (10th Cir. 2002) (holding that the rule was regularly and evenhandedly applied and the claim procedurally barred); *Moffat v. Broyles*, 288 F.3d 978, 981–82 (7th Cir. 2002) (holding that an Indiana prisoner objecting to a disciplinary decision must seek review from the warden and then from a statewide body called the Final Reviewing Authority and failure to do so constitutes default).

196. The most common "cause" alleged in ordinary habeas claims for the failure to raise a claim is the ineffective assistance of counsel, but there is generally no right to counsel in either state administrative or state collateral review of these decisions. These proceedings are navigated by prisoners without attorneys, just as in § 1983 cases. *See, e.g.*, *Greene v. Bartlett*, 213 F. App'x 597, 600 (9th Cir. 2006) (mem.) (holding that a petitioner defaulted his ex post facto claim regarding parole denial when he failed to raise it in Oregon state courts); *Whiteman v. Friel*, 191 F. App'x 820, 821 (10th Cir. 2006) (holding that a Utah prisoner's due process claims regarding a parole hearing were not exhausted because he failed to seek timely review from the Utah Supreme Court and were also procedurally defaulted).

197. *See, e.g.*, *Bain v. Hofmann*, No. 2:06-CV-59, 2007 WL 4268919, at \*7 (D. Vt. Nov. 30, 2007) (finding that the petitioner did not raise his claim that corrections officials failed to count good time properly until after his good-time credits were revoked and holding that because Bain

miscarriage of justice exception to this context, considering not whether the petitioner may be innocent of the underlying crime, but whether the petitioner may be innocent of the prison misconduct that led to the state's refusal to allow earlier release.<sup>198</sup>

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This chaotic precedent among the circuits concerning the application of a federal statute warrants legislative intervention. These cases impose a serious cost, especially considering that thousands of them are filed each year and that the best estimate is that courts end up rejecting the inmates' claims in 99.7 percent of them.

#### IV. A NEW APPROACH

If, for these sentence-administration claims, the *Preiser* doctrine and the existing statutory provisions have outlived their usefulness, what is a better approach? Any satisfactory solution to this problem should meet five requirements: (1) it should clarify the distinction between cases that must be filed in habeas and cases that need not be, so that it is easier to administer (thus eliminating the problem we identified in Part II.B); (2) it should be consistent with the principles governing federal review of state decisions identified in Part II.A; (3) it should reduce or eliminate the square-peg problems raised by trying to fit these claims into AEDPA's language, problems identified in Part III; (4) it should improve (or at least not decrease) the accuracy and efficiency with which federal courts deal with the tidal wave of complaints filed by state prisoners, helping them to identify potentially meritorious cases and to dispose of nonmeritorious ones

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"[wa]s not challenging his underlying conviction . . . the refusal to consider his petition will not result in a miscarriage of justice, [and] his default should not be excused"); *Kelly v. Quarterman*, No. C-07-259, 2007 WL 4267165, at \*5 (S.D. Tex. Nov. 30, 2007) (refusing to excuse the procedural default because the "[p]etitioner has offered neither good cause for his default nor new evidence of innocence").

198. *Magar v. Parker*, 490 F.3d 816, 820 (10th Cir. 2007) (considering an allegation of innocence of the disciplinary offense); *Hamm*, 300 F.3d at 1216 (rejecting a petitioner's claim as defaulted when he was unable to show he was actually innocent of drinking alcohol while in the pre-parole conditional supervision program, "the offense for which he [had] been punished"); *cf. Wilson v. Penn. Bd. of Prob. & Parole*, 2008 U.S. Dist. LEXIS 14325, at \*8-9 (M.D. Pa. 2008) (mem.) (finding no basis for the prisoner's allegation that he was innocent of the parole violation leading to his parole revocation, the failure to attend anger management class).

quickly; and (5) it should strike an appropriate balance between state responsibility for state prison systems and federal oversight of the constitutional rights of prisoners.

Of these requirements, we have already discussed the first four; only the last needs elaboration. An appropriate balance between state and federal supervision of state prisons should both encourage states to provide their own judicial safeguards against the errors or abuses of state corrections officials and provide federal oversight when it is needed. Encouraging states to provide judicial as well as administrative review of the actions of prison administrators serves both state and federal interests. It allows states the first opportunity to interpret their own statutes and regulations and to remedy their own failings. At the same time, it reduces the burdens on federal courts by encouraging a remedy that may obviate the need for federal review. In addition, federal judicial review need not be as searching if state courts have already reviewed an inmate's claims and the federal courts are not providing the sole opportunity for judicial review, a premise underlying much of AEDPA itself. Any proposed scheme should recognize this distinction and reward states that provide judicial review with less intrusive federal oversight.

In this Part, we offer a tentative outline of one possible scheme that satisfies these five requirements. Section A lays out (and justifies) the basic lines of demarcation and Section B provides the procedural details.

#### A. *Three Easy Pieces*

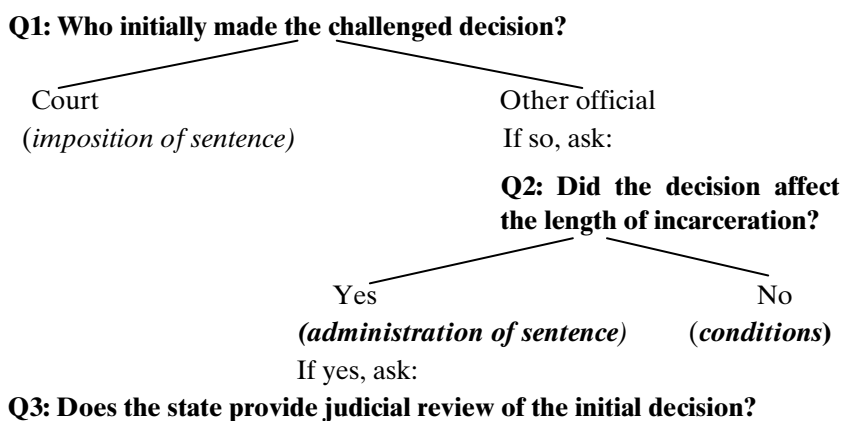
The *Preiser* doctrine requires a court to ask only one question: would granting the requested relief necessarily imply the invalidity of the fact or duration of the prisoner's incarceration?<sup>199</sup> But the question itself is difficult to answer, it is the wrong question from the perspective of principle, and the consequences that follow from the answers under the two existing statutory schemes create even more difficulties. We propose instead to substitute three easy questions and a statutory modification designed specifically to accommodate these intermediate cases.

The first question is whether the challenged decision was made initially by a state court or by a state administrator (such as a prison

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199. See *Preiser v. Rodriguez*, 411 U.S. 475, 490 (1973).

or parole official). This first question divides the universe of prisoner cases into two groups: those that attack a state court's imposition of sentence and all other cases. If the prisoner is not attacking the imposition of sentence, and an administrator made the decision being challenged, the second step is to ask whether that decision affected the duration of incarceration. This step subdivides the cases attacking administrative decisions into two groups: those challenging decisions that have an effect on the duration of incarceration—administration of sentence claims—and those challenging everything else—prison conditions claims. Finally, for cases challenging sentence administration, the court should ask whether the state provides judicial review of the initial decision. Graphically, the scheme looks like this:



*Question #1: Who initially made the challenged decision?* The distinction drawn by answering the first question needs little further explanation. Suits that challenge a conviction or sentence imposed by a court all fall into the category of sentence imposition. Under existing law, all of these challenges must be brought as habeas petitions, and we do not suggest here any change to that result nor to the statutory standards for reviewing such claims under AEDPA.<sup>200</sup> This is also the line drawn between § 2241 and § 2255 for federal

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200. See *supra* text accompanying notes 45–50. This is not to say that both of us agree with all of the policy choices Congress made when enacting AEDPA. Section 2254(d) in particular gives more deference to state courts than one of us would find optimal. Nevertheless, we agree that the deference due the decisions of state courts should be greater than that given to the decisions of other state officials.

prisoners. Section 2255 is available for challenges to sentence imposition, and § 2241 for challenges to sentence administration.<sup>201</sup> The fact that federal courts seem to have no difficulty applying this distinction for federal prisoners suggests its simplicity. What makes this distinction so much simpler than the one in *Preiser* is that, unlike *Preiser*, it does not attempt to distinguish *among* decisions made by administrators. Our second question then turns to the difficult cases under *Preiser*.

*Question #2: Did the decision affect the length of incarceration?* Under *Preiser*, whether § 1983 is available depends on whether granting the prisoner the relief he requests would necessarily imply the invalidity of the administrative decision reached through the challenged procedure.<sup>202</sup> As we demonstrated in Part II.B, this question can almost always be answered either way, and so it is no surprise that courts have trouble with it. Some challenges to procedures used in the course of deferring or denying parole or revoking credits will be found to qualify, and some will not.

The key to our proposal lies in its substitution of the second question, which focuses on the *actual* effect of the administrative decision, for the current question under *Preiser*, which focuses on the necessary effect of the requested relief. Asking whether the administrative decision itself actually affected the duration of incarceration is much more tractable than speculating about whether particular relief necessarily implies particular results and provides an easy way to distinguish between challenges to prison conditions and challenges to sentence administration. It is almost always easier to determine whether an event in the past has some present effect than it is to determine whether a proposed judicial ruling now will have some effect in the future.

Our scheme also eliminates the subsidiary questions that courts have asked when they try to apply *Preiser*. Under our regime, it does not matter whether the prisoner is asking for damages, a new hearing, or the reinstatement of good-time credits. It does not matter whether the prisoner attacks the procedure or the result. It does not matter

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201. *See supra* notes 149–50 and accompanying text. For federal prisoners, § 2241 is also the appropriate vehicle for challenging parole revocation, and thus parole revocation should fall into the sentence-administration category for state prisoners as well.

202. *Preiser*, 411 U.S. at 490.

whether the alleged constitutional defect was a general policy or a specific application of that policy. What matters is only that state officials made a decision that extended the duration of custody.

In effect, the first two questions together take all of the hard, could-go-either-way-under-*Preiser* challenges to administrative decisions and place them into a new category. The first question separates out challenges to the original conviction or sentence from challenges to postcommitment administrative decisions, and the second question separates this second group into two: prison-conditions claims and the new category, sentence-administration claims. Challenges that courts have always categorized as § 1983 cases—deprivation of work or library privileges and the like—will remain in the prison-conditions category; the new category is for challenges to administrative decisions that actually affected the duration of custody.

So far, then, we have satisfied requirement (1): both of the first two questions are easy to administer. By creating a new category of claims, we can both tailor remedies to the core principles identified earlier (requirement (2)) and address directly the square-peg problems (requirement (3)), through a separate statutory scheme for sentence-administration challenges. We propose not the dichotomous scheme under which sentence-administrations claims must conform to provisions designed for other sorts of claims, but a three-tiered system of federal review: habeas for challenges to custody imposition, § 1983 (as modified by the PLRA) for challenges to prison conditions, and a separate scheme for sentence-administration challenges (those attacking decisions that affected the duration of custody). Creating a third type of review reduces the square-peg problems by recognizing what is unique about sentence-administration claims: they challenge decisions made by nonjudicial actors (like prison-conditions claims but unlike custody-imposition claims), *and* they challenge decisions that affect physical liberty (like custody-imposition claims, but unlike prison-conditions claims).

Because federal review of claims attacking administrative decisions that affect custody itself should be at least as rigorous as, and perhaps more rigorous than, federal review of challenges to state court judgments or administrative decisions affecting only the conditions of custody, the baseline for these challenges should be the PLRA rather than habeas. Applying a PLRA-like regime rather than



trying to squeeze sentence-administration claims into AEDPA's poorly fitting text satisfies requirement (3), because most of the square-peg problems arise from the attempt to apply the court-focused habeas requirements to decisions made by administrators.

Using the PLRA as the baseline for the procedures that should apply to sentence-administration claims also helps to satisfy requirement (4) by allowing courts to more easily separate meritorious from nonmeritorious claims. The PLRA offers several innovations that have helped to "filter out the bad claims and facilitate consideration of the good."<sup>203</sup> It requires exhaustion of administrative remedies,<sup>204</sup> makes prisoners with sufficient funds pay a partial filing fee at the initiation of the suit and the balance over time,<sup>205</sup> conditions future filings upon the payment of the full filing fee from the prisoner's account if the prisoner has previously filed three or more nonmeritorious claims,<sup>206</sup> and requires the court to screen the complaint before requiring an answer from the defendant.<sup>207</sup> Imposing these requirements on prisoners challenging sentence-administration decisions should help reduce their incentive to file nonmeritorious

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203. *Jones v. Bock*, 127 S. Ct. 910, 914 (2006). Commentators have assessed the effect of the PLRA. *E.g.*, MARGO SCHLANGER & GIOVANNA SHAY, ISSUE BRIEF: PRESERVING THE RULE OF LAW IN AMERICA'S PRISONS: THE CASE FOR AMENDING THE PRISON LITIGATION REFORM ACT 2 (2007), <http://www.acslaw.org/node/4587> (arguing that the "PLRA has had a salutary effect" on the problem of frivolous filings, has "drastically shrunk the number of cases filed," and "further reduce[d] the burden on correctional officials by requiring courts to dispose of prisoner civil rights cases if they are legally insufficient without even notifying the sued officials that they have been sued," but arguing that it has also prevented "legitimate claims"); Ostrom et al., *supra* note 4, at 1528 ("Our goal is to assess the manner in which the PLRA has affected the volume, trend, and outcomes of prisoner lawsuits."); Schlanger, *supra* note 2, at 1584, 1634–64 (stating that the PLRA has reduced the number of inmate filings but has not facilitated successful outcomes in potentially meritorious cases).

204. 42 U.S.C. § 1997e(a) (2000).

205. 28 U.S.C. § 1915(b) (2000).

206. *See id.* § 1915(g).

207. 42 U.S.C. § 1997e(g)(2). We recognize that the PLRA itself is controversial and that many scholars believe that it unnecessarily restricts the ability of prisoners to challenge prison conditions. *See, e.g.*, SCHLANGER & SHAY, *supra* note 203, at 2; Susan N. Herman, *Slashing and Burning Prisoners' Rights: Congress and the Supreme Court in Dialogue*, 77 OR. L. REV. 1229, 1231 (1998); Schlanger, *supra* note 2, at 1664. We express no opinion on whether the PLRA might be too harsh in other respects or whether it should be amended. We suggest only that whatever balance is appropriate for prison-conditions claims (attacking not the decisions of courts but the actions of those who work within a state's corrections system) should presumptively apply to sentence-administration claims attacking decisions made by those same corrections officials.

claims and thus make the federal courts' task easier. But wholesale shifting of all sentence-administration claims into § 1983 creates some difficulties for requirement (5) that any better approach must satisfy, which leads to the third of our three simple questions.

*Question #3: Does the state provide judicial review of the initial decision?* The one difficulty with starting with the PLRA standards as a baseline for sentence-administration claims, however, is that if the PLRA or its analog applies to sentence-administration challenges as well as to prison-conditions cases, states would have no incentive to provide their own judicial review of administrative decisions affecting the duration of custody. When state judicial remedies for these claims already exist, allowing prisoners to bypass those remedies would mean not only that the state would lose its own judiciary's expertise in applying the state's parole and good-time laws and regulations (as well as whatever remedies are available under state law) but also that the federal courts would lose this expertise as well. When state judicial remedies do not exist, states would have no incentive to provide them. Requirement (5) is not satisfied.

The last of our proposed questions matters because whenever a challenge to an administrative decision affecting the duration of custody is not reviewable in state court, the PLRA baseline should apply. When a state does provide judicial review of the sentence-administration claim, a more deferential approach—containing elements of both the PLRA and habeas—is appropriate. In the next Section, we turn to that structure.

### *B. A Tailored Statutory Scheme*

To recap, we have discussed a number of important distinctions. Challenges to decisions by administrators that affect the duration of custody deserve federal review that is at least as generous as that afforded administrative actions affecting the conditions of confinement, hence the PLRA rather than AEDPA should serve as the baseline. Put differently, when a federal judge provides the only opportunity for judicial review of the constitutionality of the actions of corrections officials, a prisoner who alleges that the custody itself is unconstitutional should not for that reason be disadvantaged compared to a prisoner who alleges unconstitutional *conditions* of custody.

Moreover, AEDPA restricts federal review of state prisoners' constitutional challenges to the legality of confinement, but the restrictions are designed to channel *collateral* federal review of state criminal judgments. The restrictions in AEDPA make little sense when the review that a federal judge provides does not supplement judicial remedies provided by the state but is instead the first and only judicial review available to the prisoner. Collateral review may be more restricted than primary review. Indeed, a dual approach that limits collateral but not primary review finds support in the different provisions of AEDPA applicable to federal prisoners. Section 2255 requires that a federal prisoner who claims that "the sentence was imposed in violation of" federal law, like a state prisoner attacking a criminal judgment, must comply with filing deadlines, successive petition bars, and more. These requirements presuppose that federal prisoners have the opportunity to challenge the constitutionality of their convictions and sentences on direct appeal. Federal prisoners who do not claim that their sentences were "imposed" illegally need not comply with these requirements.

Our proposed solution for sentence-administration claims by state prisoners builds upon these important distinctions. When a state does not provide judicial review of a claim alleging that the decisions of corrections or parole officials violated the Constitution and affected the duration of custody, then the procedures that govern cases alleging other unconstitutional actions by prison officials should apply. In other words, unless federal judicial review is collateral to state judicial review, the PLRA, not AEDPA, should govern. Section A.1 discusses in more detail the procedures that should be applied to these claims for which state court review is unavailable. When federal review of sentence-administration claims by state prisoners is collateral to state judicial review, more restrictions on federal relief make sense, but as we have seen, some of the particular restrictions specified in AEDPA for challenges to state criminal judgments do not fit this context at all. Section A.2 outlines the procedures that should be applied when federal review of sentence-administration claims is collateral to state judicial review.

1. *When Federal Court Review Is the Only Judicial Review Available.* Consider a case like that of a prisoner from Indiana claiming a constitutional flaw in the hearing that led to the revocation of good-time credits. For this prisoner, the only judicial review

available for his constitutional claim is in federal court. That claim should be governed by the same rules that would apply if the prisoner was alleging any other unconstitutional action by prison officials under the PLRA.<sup>208</sup> It makes little sense to apply to such a claim the four procedural limitations applied in habeas cases, all of which were designed to restrict federal habeas review of state court judgments—the statute of limitations, the successive petition bar, the certificate of appealability requirement, and the unique procedural default rules of habeas. Thus, when the state has not authorized its courts to review a sentence-administration claim, the following rules should apply:

1. The filing deadlines that courts impose in § 1983 cases, instead of AEDPA's statute of limitations provision;
2. The same simple collateral estoppel and res judicata rules for civil litigation that now control repeated challenges to the same administrative decisions in § 1983 litigation, instead of the successive petition provisions of AEDPA;
3. The right to appellate review of an adverse decision of the district court absent certification by the trial court that the appeal is not taken in good faith, as in any § 1983 case,<sup>209</sup> instead of the prior authorization for appeal required by AEDPA; and
4. The exhaustion and procedural default rules that courts use in cases filed under the PLRA, instead of the habeas procedural-default rules that were designed to respect the decisions of state courts.<sup>210</sup> We recognize that the default and exhaustion limitations for § 1983 plaintiffs under the PLRA are new and controversial.<sup>211</sup>

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208. This includes the filing fee and screening provisions of the PLRA, which we also suggest should apply even when a state does provide judicial review. See *supra* text accompanying notes 203–208.

209. 28 U.S.C. § 1915(a)(3) (“An appeal may not be taken in forma pauperis if the trial court certifies in writing that it is not taken in good faith.”).

210. An additional analysis of the original data from KING ET AL., *supra* note 69, showed that the default defense was rarely discussed in sentence-administration decisions. Moreover, cases raising sentence-administration claims in which at least one claim was dismissed as defaulted tended to take twelve days longer, on average, than cases with sentence-administration claims in which no claims were dismissed as defaulted, which suggested that avoiding the merits through default actually takes longer than discussing and then denying each claim on the merits.

211. Jones v. Bock, 127 S. Ct. 910, 914–16 (2007); Woodford v. Ngo, 126 S. Ct. 2378, 2382–83, 87 (2006). For criticism of extending procedural default rules to the PLRA exhaustion, see Roosevelt, *supra* note 6, at 1774–76; Giovanna Shay & Johanna Kalb, *More Stories of*

We propose only that whatever approach to exhaustion and default is adopted for § 1983 claims, it should also apply whenever a state court provides no judicial review of a prisoner's challenge to an administrative decision regarding the administration of sentence, regardless of whether the prisoner seeks release, damages, or injunction.

Eliminating these habeas-specific requirements would also bring the procedure for federal review of these claims closer into line with the procedure applied when federal prisoners raise identical sentence-administration claims under § 2241.<sup>212</sup>

2. *When Federal Review Is Collateral to State Review.* When a state does provide an opportunity for judicial review of a sentence-administration claim, *collateral* review of the claim in federal court need not be as exacting as it is when federal review is the only judicial review available. In such a situation, existing habeas law provides a useful baseline, modified to avoid the mismatches we detailed in Part III.

a. *Exhaustion, Procedural Default, and Certificates of Appealability.* Of the four habeas-specific restrictions we canvassed in Part III, two—the procedural default rules, and the certificate for appeal—can easily continue to apply to sentence-administration cases when state judicial review is available, just as they do in other habeas cases.<sup>213</sup> State court review, enforced through default rules, advances

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*Jurisdiction-Stripping and Executive Power: Interpreting the Prison Litigation Reform Act (PLRA)*, 29 CARDOZO L. REV. 291, 297, 329–30 (2007).

212. See *supra* notes 151 and 174 (stating that the statute of limitations and successive petition provisions in § 2255 do not apply to federal prisoners who are not challenging the imposition of sentence and instead are filing under § 2241). It is not necessary for a federal prisoner to obtain a certificate of appealability before appealing a final decision of a district court on a § 2241 claim. See *McIntosh v. U.S. Parole Comm'n*, 115 F.3d 809, 810 n.1 (10th Cir. 1997).

213. We recognize that one aspect of procedural default for federal collateral review of sentence-administration claims may generate disagreement: whether the “miscarriage of justice” exception should apply. Because the rules of procedural default are judicially created rather than established under AEDPA, any decision about whether to apply this exception can be accomplished by judicial action and need not be formalized in a statute. The purpose of the exception in ordinary habeas cases is to reduce the likelihood that a procedural misstep prevents relief for someone who is both innocent and the victim of a constitutionally defective process. The Tenth Circuit has concluded that this same reasoning applies if a constitutionally flawed administrative hearing results in the continued incarceration of someone who does not deserve

the timely consideration of these claims by state officials who are in a position to correct problems sooner and allows state courts to interpret their own state laws and regulations. Providing an opportunity for state judicial review also could support narrowing of federal review through screening appeals.

Two other AEDPA provisions, however, are so ill suited to these claims that they should not carry over to sentence-administration cases, even to those with state judicial review.

*b. Statute of Limitations.* It is inappropriate to insist that sentence-administration claims adhere to the rigid statute of limitations period that is designed to limit delay in filing challenges to the judgment itself. The reasons that support a filing deadline do not really apply in these cases. First, the time bar protects the finality of the criminal judgment. But a rigid statute of limitations for sentence-administration claims does nothing to protect the finality of the underlying criminal judgment. The validity or finality of original convictions and sentences are never in jeopardy, no matter how long prisoners delay raising their sentence-administration claims.

The filing deadline for challenges to convictions and sentences also reduces the risk that delay in seeking collateral relief could result in the loss of witness testimony or other evidence, thereby jeopardizing the state's capacity to reconvict should relief be granted.<sup>214</sup> But the same risk is not present when the challenge is to an administrative decision resulting in the denial of early release from a lawfully imposed term. If an administrative decision affecting the timing of release is flawed, relief can often be provided without a

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to serve his full time because he has not committed misconduct. *See supra* note 198. Under this approach, if a prisoner procedurally defaults a claim attacking the constitutionality of a hearing that found misconduct, the miscarriage of justice exception should be satisfied when the prisoner can show factual innocence of that misconduct. An alternative approach would be to conclude that the miscarriage of justice exception should be unavailable except when reviewing defaulted claims by prisoners who are probably innocent of the underlying crime. Because challenges to the administration of sentence contest only the inability to obtain release earlier than the lawfully imposed sentence term, under this approach a petitioner could never show that unconstitutional action by the state after his commitment to prison for an offense somehow operated to taint the earlier conviction or sentence for that offense.

214. There are reasons to doubt this rationale for noncapital filers. Tellingly, several states that impose a statute of limitations for filing state postconviction challenges in capital cases still prefer to use the doctrine of laches in noncapital cases. *See, e.g.*, 1 WILKES, *supra* note 134, §§ 7.13, 7.50 (California); 2 WILKES, *supra* note 134, §§ 7.14–15 (Indiana); 3 WILKES, *supra* note 134, §§ 39.9–10 (Oklahoma); *id.* §§ 46.12, 46.20 (Texas).

rehearing, merely by correcting good-time calculations or the date of projected release. Even if administrators opted to hold a new administrative hearing, a successful challenge would never force the state to return to the state courts to establish guilt or aggravating sentencing factors beyond a reasonable doubt. Moreover, no special incentive is needed to encourage noncapital prisoners to file their challenges to sentence-administration decisions promptly.<sup>215</sup>

Not only is the statute of limitations unjustified in this context, it appears to be counterproductive. The 2007 empirical study of litigation under AEDPA suggests that in cases raising sentence-administration claims, applying AEDPA's statute of limitations provision fails even as an efficiency-promoting measure. Applying the present statute of limitations provision to these claims may very well have increased litigation costs for the states and the federal courts, instead of reducing them. If we look at a sample of *all* noncapital habeas cases, those dismissed as filed too late do tend to be dismissed more quickly than others, suggesting that the time bar at least saves time for the federal courts and presumably for the state attorneys who must defend these cases.<sup>216</sup> But examining solely the cases within the sample that raised sentence-administration challenges, suggests that applying the time bar may have the opposite effect. Cases with sentence-administration challenges that were dismissed as time-barred took longer, on average, to complete in district court than cases with sentence-administration claims that were not dismissed as time-barred.<sup>217</sup> One likely explanation is that these particular claims

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215. Proponents of the time bar enacted as part of AEDPA pointed to death row prisoners who appeared to be in no hurry to complete postconviction proceedings in state court or who were waiting until execution was upon them before commencing what might be their last chance at relief, that is, habeas corpus review in federal court. *See, e.g., Federal Habeas Corpus Reform: Eliminating Prisoners' Abuse of the Judicial Process*, *supra* note 63, at 29 (statement of Daniel E. Lungren, Att'y Gen. of California); *id.* at 58 (statement of Gale A. Norton, Att'y Gen. of Colorado); *id.* at 72 (testimony of Daniel E. Lungren, Att'y Gen. of California). The vast majority of inmates in state prisons, however, are not death row inmates and will eventually be released. These prisoners, serving noncapital sentences other than life without the possibility of parole, would presumably be less inclined to deliberately postpone federal review of the legality of their custody.

216. KING ET AL., *supra* note 69, at 74.

217. Additional means comparisons using the original data collected for the study, *id.*, revealed that cases with sentence administration claims that were dismissed as time-barred averaged several weeks longer from filing to disposition in the district court than cases with sentence-administration claims that were not dismissed for this reason, *see id.* at 84. Cases with time-barred claims took longer on average to resolve than cases without time-barred claims

tend to be easier to resolve on the merits than the variety of claims that prisoners raise to challenge their state criminal judgments, and the statute of limitations questions are harder. The law regarding the limited class of constitutional violations alleged in these cases is relatively cut and dried, the hearing records are compact and readily available, and the low standard of proof required at these administrative hearings means that courts will find most violations harmless anyway.<sup>218</sup> And as we showed in Part III, applying the AEDPA statute of limitations to these claims is anything but cut and dried.

In sum, applying the complicated timing rules of AEDPA's statute of limitations in a context in which they were not intended to apply has real costs for federal courts and state attorneys that may dwarf any savings that result from avoiding the merits in these particular cases. Congress already recognized the better policy when it decided not to hold similarly situated federal prisoners to the one-year deadline.<sup>219</sup> The rule of laches applied to federal prison petitions raising sentence-administration claims (and governed all state petitions prior to AEDPA) is more appropriate than the statute of limitations provision for any case that challenges an administrative decision by parole and corrections officials.

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even after excluding cases filed in districts within the Seventh Circuit, which does not apply the statute of limitations to challenges to decisions made by administrators, *see Cox v. McBride*, 279 F.3d 492, 493–94 (7th Cir. 2002), and where district courts are generally speedier at resolving noncapital habeas petitions than elsewhere, KING ET AL., *supra* note 69, at 75. This difference in the speed of resolution between cases with and without time-barred claims held true even when comparing cases within individual circuits and states.

218. For example, consider *Grossman v. Bruce*, 447 F.3d 801 (10th Cir. 2006), in which a prison official who denied a prisoner's request to have a guard testify did not make the required individualized determination that the testimony would be unduly hazardous to institutional safety or correctional goals, but the court concluded that the error was harmless:

We have held in the context of a 42 U.S.C. § 1983 suit, that a prisoner cannot maintain a due process claim for failure to permit witness testimony if he fails to show that the testimony "would have affected the outcome of his case." Every other circuit to consider the precise question before us has applied harmless error review to habeas petitions in similar contexts.

*Id.* at 805. The Second Circuit has also held that any procedural error in inmates' disciplinary proceedings was harmless. *Powell v. Coughlin*, 953 F.2d 744, 750 (2d Cir. 1991).

219. The Sixth Circuit has admitted that applying the statute of limitations to sentence-administration cases creates "the arguably anomalous situation that state prisoners challenging the execution of their sentences are subject to the one-year statute of limitations, while similarly situated federal prisoners are not subject to such a time limit." *Ali v. Tenn. Bd. of Pardon & Paroles*, 431 F.3d 896, 898 (6th Cir. 2005).



*c. Successive Petition Bar.* The successive petition bar of AEDPA should also be abandoned for these claims even when federal review is collateral to state review.<sup>220</sup> The same preclusion rules used for § 1983 claims would be a less troublesome option. Alternatively, a return to the familiar pre-AEDPA standard for abuse of the writ, articulated in *McCleskey v. Zant*<sup>221</sup> and applied whenever federal prisoners bring sentence-administration claims, would be an improvement and would also align the standards for state and federal prisoners.<sup>222</sup>

*d. Filing Fees.* In addition to exempting these cases from the statute of limitations and successive petitions bar, we suggest one last statutory amendment that would depart from existing habeas rules. Sentence-administration claims, like other claims brought by prisoners challenging what happens to them while they are in custody, suffer from three broad problems: prisoners have every incentive to file suit and little reason not to, the vast majority of claims are nonmeritorious,<sup>223</sup> and inmates almost always lack counsel so it is difficult to find the meritorious needle in the nonmeritorious haystack. Thus, despite the fact that these sentence-administration claims implicate physical liberty, it makes sense to impose on them the same disincentives, screening devices, and procedural hurdles applied to other challenges to administrative actions by corrections officials. Of the innovations of the PLRA designed to reduce the burdens of frivolous filings, two already have analogs in habeas: administrative exhaustion and screening before the defendant is required to respond.<sup>224</sup> But the five-dollar filing fee still applied in

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220. It is not clear whether any savings to the state follow from the application of a federal successive-petition bar in this context. Although the number of cases in the study sample was too small to make definitive findings, additional analysis of the original data from KING ET AL., *supra* note 69, showed that cases with sentence-administration claims that were dismissed as successive did not take any less time to complete than cases with sentence-administration claims that were not dismissed for this reason. Federal district courts do not often apply the successive petition bar to these sorts of claims. Only eight of the cases including sentence-administration claims were determined to be successive, and they took longer, on average, to complete than cases that were not dismissed for this reason. A larger sample would be required to assess whether applying the successive petition bar is associated generally with longer disposition times. Nor is it known whether there are savings to the state from appellate denials of successive petition applications.

221. *McCleskey v. Zant*, 499 U.S. 467, 467–68 (1991).

222. *See Vasquez v. Parrott*, 318 F.3d 387, 391–92 (2d Cir. 2003).

habeas cases<sup>225</sup> (and waived with a showing of *in forma pauperis* status in about 36 percent of cases<sup>226</sup>) offers no disincentive to filers of frivolous allegations regarding disciplinary and parole decisions.<sup>227</sup> We suggest, therefore, that the PLRA filing fee and penalty scheme should also be applied to sentence-administration claims, even those reviewable in state court and brought under the proposed new habeas section for such claims. Applying the penalty and screening provisions of the PLRA to sentence-administration claims both improves the efficiency with which federal courts deal with such cases and provides a disincentive to filing meritless claims.

### C. Implementation

Achieving this more rational system would require two relatively straightforward statutory amendments. First, and most important, would be a new provision added to the habeas statute that would specifically govern claims challenging the constitutionality of a state administrative decision that affected the duration of custody.<sup>228</sup> This

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223. See *supra* text accompanying notes 73–75.

224. Courts already required administrative exhaustion of claims filed under the habeas statute that attacked administrative decisions affecting the duration of sentence. See *supra* text accompanying note 192. The screening requirement that the PLRA added for § 1983 cases, see 42 U.S.C. § 1997e(g)(2) (2000), resembles the screening already required for all habeas petitions under Rule 4 of the Rules Governing Section 2254 Cases in the U.S. District Courts, see 28 U.S.C. § 2254 (2000).

225. See 28 U.S.C. § 1914(a) (2000).

226. KING ET AL., *supra* note 69, at 23 (noting that of the study sample, 2384 noncapital cases, 56.1 percent included an IFP motion, and 64.4 percent of these were granted by either the trial or appellate court).

227. Keeping the lower fee makes sense, however, for inmates who challenge the legality of their convictions and sentences in federal habeas. The stakes are higher: federal habeas challenges to convictions and sentences determine whether the state can lawfully punish the person *at all*, and access to federal habeas review may be the petitioner's only chance other than certiorari to raise either new evidence of innocence or a rule of constitutional procedure that is so fundamental that the Court has decided to apply it retroactively.

228. An alternative would be to amend each of the problematic sections of AEDPA (§§ 2244, 2253, and 2254) individually to specify the circumstances under which they would and would not apply and craft a new section covering only brand new requirements, such as the filing fee provisions. Although this would be an improvement over the status quo, a separate section detailing the specific procedures for these claims is probably simpler, minimizes the risk that changes to existing sections would have unintended effects for challenges to state criminal judgments, enables a tailored response to these unique claims, including the imposition of filing fees, and allows for adjustments in the future should other problems arise regarding these claims.

new statutory section would provide that these claims are governed by §§ 2254 and 2253(c);<sup>229</sup> that the filing fee requirements of the PLRA apply; that the statute of limitations and successive petition provisions (§§ 2244(b) and (d)) do *not* apply; and that if the state has provided an opportunity for judicial review, the new provision is the exclusive statutory source of relief, but that if the claim is one for which the state provides no judicial review, the inmate may seek relief under either § 1983 or the new section.<sup>230</sup>

Second, an amendment to the PLRA would authorize for this latter category of cases—challenges to administrative decisions affecting the duration of custody but unreviewable in state court—the relief available under the habeas statute, that is, release from custody.

These changes would solve all of the problems we have identified, problems that will only get worse as prison populations, sentence lengths, and habeas filings continue to swell.<sup>231</sup> Creating a separate statutory provision for sentence-administration claims eliminates any guesswork about where to file each type of claim or which of the various provisions in AEDPA applies. Exempting these claims from the restrictions of §§ 2244(b) and (d) means that courts no longer have to fit square pegs into round holes. Adding the filing fee requirements increases the efficient resolution of meritorious claims by reducing the number of frivolous claims.

Finally, our proposal provides an incentive for states to authorize state *judicial* review of administrative decisions that affect the duration of custody, because it ensures that federal courts will exercise more exacting review of decisions of corrections officials in states that have not authorized judicial review. When states authorize

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229. Thus the exhaustion, standard of review, record, and counsel provisions in § 2254 would all continue to apply. Section 2253(c)(1)(A) would also require some adjustment of the troublesome “arises out of process issued by a State court” language.

230. Thus, for prisoners in states that provide no judicial review, § 1983 and the new section in habeas would both be available. This resolves (for prisoners raising sentence-administration claims in these states) the circuit split identified *supra* note 128, on whether § 1983 is the exclusive remedy when it is available.

231. See *supra* text accompanying notes 49–53. For statistics on the continued rise in habeas filings, see FRED L. CHEESMAN II ET AL., NAT’L CTR. FOR STATE COURTS, A TALE OF TWO LAWS REVISITED: INVESTIGATING THE IMPACT OF THE PRISONER LITIGATION REFORM ACT AND THE ANTITERRORISM AND EFFECTIVE DEATH PENALTY (2004), available at [http://www.ncsconline.org/WC/Publications/Res\\_PreCiv\\_TwoLawsRevPub.pdf](http://www.ncsconline.org/WC/Publications/Res_PreCiv_TwoLawsRevPub.pdf), and Tables B1-A and C2 of the annual reports of the Administrative Office of the Courts, Judicial Business of the U.S. Courts, available at <http://www.uscourts.gov/judbususc/judbus.html>.

judicial review of sentence administration claims, prisoners under our proposal must exhaust those state court remedies and file their claims under the new habeas section, which would require a federal habeas court to apply the heightened deference to legal and factual findings made in “State court proceedings.”<sup>232</sup> When state courts provide no judicial review, prisoners may opt to file their claims in § 1983 with no habeas restrictions at all or file under the new habeas section for challenges to administrative decisions. Either option would subject the state’s action to more intrusive federal review than would be the case if state judicial review of the claim had been made available by the state, because there would be no state court proceedings to trigger the heightened deference required by § 2254. In other words, by declining to review these claims in its own courts, a state forfeits the deference its decisions would otherwise receive.<sup>233</sup> A state interested in assuring that prisoners litigate all sentence-administration claims under the new habeas provision for these claims and not under § 1983 need only grant jurisdiction to its courts to review these claims in the first instance.

#### CONCLUSION

Congress has recognized repeatedly that when it comes to federal review of claims of unconstitutional state action raised by prisoners, one size does not fit all. It has developed in the PLRA and AEDPA two separate remedial routes: one governing allegations of unconstitutional action by prison officials and the other governing allegations of unconstitutional state court judgments. Within habeas, it has decided that federal prisoners’ claims ought to be subject to different restrictions depending on whether the claims challenge the imposition or the administration of a federal sentence. Even within AEDPA, for review of the same sort of claim, that is, the alleged unconstitutionality of a state judgment in a capital case, it concluded

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232. See *Williams v. Taylor*, 529 U.S. 420, 424 (2000).

233. As the Seventh Circuit has noted, when a state “has chosen not to make judicial process available to review prison disciplinary board decisions . . . the state may not benefit from § 2254(d)’s limitation on the scope of collateral attack with respect to those decisions.” *Piggie v. McBride*, 277 F.3d 922, 925 (7th Cir. 2002) (per curiam) (explaining *White v. Ind. Parole Bd.*, 266 F.3d 759 (7th Cir. 2001)); see also *Scruggs v. Jordan*, 485 F.3d 934, 938 (7th Cir. 2007); *Pannell v. McBride*, 306 F.3d 499, 502 (7th Cir. 2002) (per curiam). The same approach applies to factual findings under § 2254(e). See *Piggie*, 277 F.3d at 926.

that restrictions on federal review could vary based on the opportunities for redress in state court.<sup>234</sup> These statutory responses followed profound changes in the law defining the claims that prisoners can raise as well as changes in prison populations. Similar changes warrant another look at the set of neglected claims we examine in this Article. In particular, we suggest statutory reforms that recognize the distinctive nature of sentence-administration claims. These reforms need not be extensive: make § 1983 available for sentence-administration claims that are not reviewable in state courts, exempt all sentence-administration claims from the parts of AEDPA that are ill suited to such claims, and impose the PLRA's filing-fee incentive structure on sentence-administration claims brought in habeas.

The story we relate here about the litigation of sentence-administration claims also echoes another familiar pattern, repeated throughout the American criminal justice system, as changes in the substantive law of sentencing generate unanticipated procedural challenges for courts. The consequences for state corrections administration of the fundamental change from indeterminate to determinate sentencing are only now coming to light.<sup>235</sup> This Article uncovers yet another set of problems that no one saw coming. The curious tale of state prisoner attacks on the administration of their sentences is a pointed reminder of the interdependency of substance and procedure<sup>236</sup> in the enforcement of criminal law.

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234. See 28 U.S.C. §§ 2261–64 (2000) (providing even more restricted procedures for capital cases from states certified as having “established a mechanism for providing counsel in postconviction proceedings”).

235. See PETERSILIA, *supra* note 33, at 61 (“California’s use of determinate sentencing has had an extraordinary and destructive effect on the operation of the state correctional system, the result of structural consequences that were not anticipated when the measure was passed in the 1970s.”); *supra* text accompanying notes 27–36 (describing the litigation and legislative developments following the Court’s decision in *Blakely v. Washington* clarifying scope of the right to jury under mandatory guidelines schemes).

236. This critical relationship was recognized famously by Professor William Stuntz. See William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 *YALE L.J.* 1 (1997).