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Lisa N. Beckmann

Arthur O. Brown

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Lisa N. Beckmann*

Arthur O. Brown**

I. THE PUZZLE REVISITED

This Article is about a legal phenomenon known as the *Preiser* Puzzle. More precisely, the article concerns a possible solution to the *Preiser* Puzzle articulated by the United States Court of Appeals for the Eleventh Circuit. In part, this Article has a descriptive aim: The Authors will explain the Eleventh Circuit's solution both in the abstract (this section, below), and by giving issue–specific examples in section three that may prove useful to practitioners. Important issues at present include: (a) challenges to parole procedures, (b) method of execution challenges, and (c) requests for release from administrative segregation. Yet this Article also has an important normative aim.

To appreciate both aims, one must first revisit the *Preiser* Puzzle,[1] and the eponymous case of *Preiser v. Rodriguez*.[2] *Preiser* concerned a prisoner's claim for the restoration of good-time credits, withdrawn for bad behavior, that would have led to a speedier release.[3] The prisoner advanced this claim in an action under 42 U.S.C. § 1983,[4] but the Supreme Court of the United States held that the prisoner should instead have raised the claim in a habeas action.[5] The Court stated that

*Mercer University School of Law (J.D., 1992).

**Cornell Law School (J.D., 2013).

1. For an example of earlier scholarship to address the *Preiser* Puzzle, *see* 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 (1988).

2. 411 U.S. 475 (1973).

3. *Id.* at 477 ("[A] prisoner serving an indeterminate sentence may . . . earn up to 10 days per month good-behavior-time credit toward [a] reduction of the maximum term of his sentence.").

4. 42 U.S.C. § 1983 (1996).

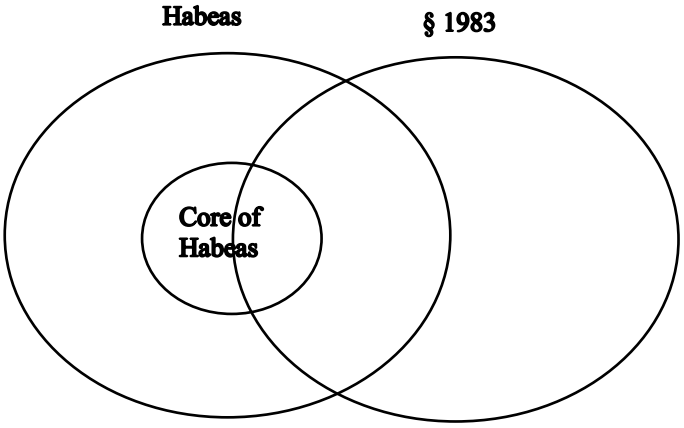
5. *Preiser*, 411 U.S. at 489.

claims "attacking the very duration of . . . physical confinement" fall within the "core of habeas."[6] *Preiser* thus stands for the proposition that core habeas claims must be raised in a habeas action, not a § 1983 action.[7]

Where there is a core, there is an implied penumbra, so *Preiser* left open the possibility of residual overlap between habeas and § 1983, which is to say that *Preiser* created a puzzle. In truth, though, the puzzle arises from broad statutory language. Section 1983 grants, on the one hand, a cause of action for the "deprivation of any rights . . . secured by the Constitution."[8] The prisoner in *Preiser*, for example, asserted a due process violation based on the deprivation of good-conduct-time credits without notice of the underlying grounds, or an opportunity to challenge those grounds.[9]

Habeas, on the other hand, affords a remedial avenue for persons "in custody in violation of the Constitution."[10] Again, *Preiser* explains that core habeas claims seek a shorter duration of custody.[11] Suppose, though, that a prisoner argues his circumstances of confinement are inhumanly "cruel" in Eighth Amendment jargon. This claim, if valid, could be remedied through an outright release obtained in a habeas action, but the cruel nature of the prisoner's confinement might alternatively be remedied through corrective changes to the custodial facility, or by a transfer to a less cruel facility. Conceivably, these latter remedies could be obtained in either a habeas action or in a § 1983 action, although prevailing thought prefers the § 1983 route. The crucial point is that by carving out a core of habeas, *Preiser* acknowledged an overlap between § 1983 and penumbral habeas issues, and it left to lower courts the delicate task of navigating this overlap.[12]

6. *Id.* at 487–88.
7. *Id.* at 489–90.
8. 42 U.S.C. § 1983.
9. *Preiser*, 411 U.S. at 482.
10. 28 U.S.C. § 2254(a) (1996).
11. *Preiser*, 411 U.S. at 489–90.
12. *Id.* at 503–04.



The *Preiser* Model

The residual overlap between habeas and § 1983 is undesirable for two reasons. One reason is the goal of judicial efficiency in face of steadily numerous prisoner filings. During the twelve-month period ending on March 31, 2020, for example, state prisoners commenced in the federal district courts approximately 42,400 habeas and § 1983 actions combined.[13] The *Preiser* Puzzle impedes the courts' ability to efficiently process these cases.

A second reason is fairness to litigants, who must untangle the *Preiser* Puzzle in an effort merely to present their claims for a hearing on the merits. Courts and scholars have, for decades now, expressed frustration over *Preiser*'s lack of guidance and workability.[14] If trained jurists cannot solve the *Preiser* Puzzle, then it is unreasonable to expect *pro se* prisoners to do so.[15]

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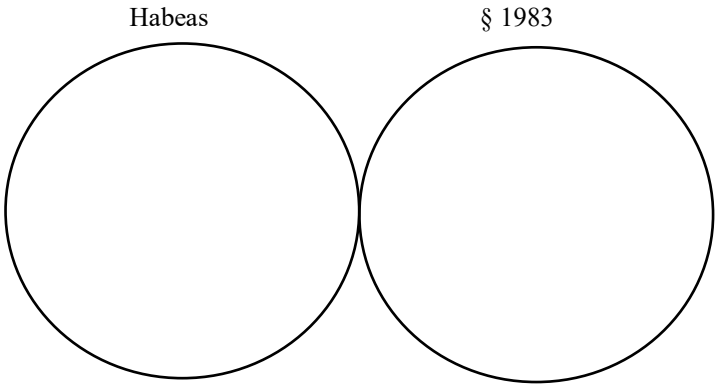
13. *Federal Judicial Caseload Statistics 2020 Tables*, U.S. COURTS, https://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2020-tables (last updated Mar. 31, 2020).

14. *See* Schwartz, *supra* note 1, at 179 ("[f]ifteen years of uncertainty and confusion is long enough. It is up to Congress and the Supreme Court finally to provide the rosetta stone for solving *Preiser* puzzles.").

15. Of course, a cynic might argue that *Preiser*'s complexity is a feature, not a flaw. *See, e.g.*, Porter v. Nussle, 534 U.S. 516, 522 (2002) (observing a Congressional aim to "curtail suits" by prisoners).

It is in this context that one should adjudge a possible solution to the *Preiser* Puzzle articulated by the Eleventh Circuit. Beginning with *Hutcherson v. Riley*,[16] the Eleventh Circuit declared that habeas and § 1983 offer "mutually exclusive" avenues for relief.[17] This possible answer to *Preiser*, what this Article dubs the *Hutcherson* approach, obviates the need for any notion of a core of habeas.[18] Rather, the *Hutcherson* approach elides core and penumbral habeas issues, thereby creating a seemingly simple binary choice that is the product of a bright-line rule. Under *Hutcherson*, courts simply ask whether a claim should be raised in habeas or § 1983.[19]



The *Hutcherson* Solution to the *Preiser* Puzzle

Bright line rules promote clarity, and for that reason, it is the Authors' opinion that the *Hutcherson* approach is, on balance, desirable. That normative conclusion, though, is a close call because the Eleventh Circuit's rule of mutual exclusivity is dubious for many reasons. Section four of this Article discusses practical problems, such as the burden of determining, through a trial-and-error process, what claims correspond to which action type, either habeas or § 1983. Section four also addresses the critical problem of application errors. That problem is critical because it threatens to erode *Hutcherson's* primary selling point, clarity.

16. 468 F.3d 750 (11th Cir. 2006).
17. *Id.* at 754.
18. *Preiser*, 411 U.S. at 487.
19. *Hutcherson*, 468 F.3d at 754.

Although the bulk of this Article will focus on practical points—section three addresses mechanics, section four addresses practical problems, and section five offers a final assessment—the following section attempts to refute certain abstract criticisms that the *Hutcherson* approach will undoubtedly face. Chief among those criticisms is the solution's discreditable origin. In brief, the Eleventh Circuit's rule of mutual exclusivity arises from (1) a stray misstatement of *Preiser*'s holding, and (2) a subsequent enforcement of that misstatement as a rule of law. As explained below, the *Hutcherson* approach appears to be a successful legal meme.

The Authors hope to give in this Article a clear-eyed assessment of the *Hutcherson* approach, and to explain why, despite its dubious origin and some significant drawbacks, the *Hutcherson* approach offers an attractive solution to the *Preiser* Puzzle. If the Eleventh Circuit's rule of mutual exclusivity is indeed a meme, it is nevertheless a felicitous one worthy of close consideration and potential adoption by other circuits.

II. METAPHYSICS AND MEMES: ABSTRACT CRITICISMS OF *HUTCHERSON*

Before diving into the practicalities of the *Hutcherson* approach—namely, the questions of how and whether *Hutcherson* will work—the Authors hope to refute three abstract criticisms that *Hutcherson* is likely to face. Those criticisms, addressed in turn below, are (1) the metaphysical erosion of habeas, (2) the Eleventh Circuit's failure to provide analysis, and (3) the accusation that *Hutcherson* is a legal meme. None of these criticisms should forestall an adoption of *Hutcherson*'s rule of mutual exclusivity.

A. The Metaphysical Erosion of Habeas

The mutually exclusive treatment of habeas and § 1983 is bound to require judicial line drawing, and critics will argue that some such lines erode the right to habeas corpus, as enshrined by reference in Article I, section 9, clause 2 of the United States Constitution.[20] That is, when judges employing the *Hutcherson* approach declare that a penumbral habeas issue should be raised in a § 1983 claim, as opposed to a habeas action, critics will argue that these judges are eroding the constitutional right to habeas. That criticism is premised on the unlikely, but theoretically possible premise that Congress might repeal or significantly modify § 1983. According to critics, a penumbral habeas

20. U.S. CONST. art. 1, § 9, cl. 2 ("[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.").

claim channeled into § 1983 litigation may "go poof" if § 1983 is repealed.

For reasons discussed below, the Authors believe that this criticism of *Hutcherson* approach is too metaphysical to take very seriously. The criticism needs mention, though, if only because members of the federal judiciary have already voiced it. Judge Berzon's dissent in *Nettles v. Grounds*,[21] a United States Court of Appeals for the Ninth Circuit decision, offers the clearest example yet:

> More broadly, the PLRA's restrictions on prisoner suits demonstrate the hazards of limiting habeas corpus due to potential overlap with other remedies. The writ of habeas corpus is protected by the Constitution. *See* U.S. Const. art. I, § 9, cl. 2. There is no such explicit protection for the remedy afforded by § 1983 (which, indeed, did not even exist until after the Civil War). As the PLRA shows, Congress can alter § 1983 at will, to make it more or less available to particular groups like prisoners. Relying on the existence of alternative statutory remedies to justify narrowing the breadth of habeas thus may create gaps that widen over time as Congress alters those remedies. This potential problem is made more likely if we read the existence *vel non* of other statutory schemes to indicate Congress's implicit intent to limit habeas's scope. Such an arrangement risks encroachment on the "grand purpose" of one of the most important remedies of our legal order.[22]

Of course, the criticism's appearance in a dissent suggests that it has not been overly persuasive. Yet the conventional judicial response to the criticism is not altogether convincing either because it depends upon a divining of Congressional intent. That is, the conventional judicial response, as advanced by the *Nettles* majority opinion, cites a supposed Congressional intent, divined from the Antiterrorism and Effective Death Penalty Act (AEDPA)[23] and the Prison Litigation Reform Act (PLRA),[24] to "channel prisoner litigation," and specifically to make § 1983 "the exclusive vehicle for suits about prison life," and "the exclusive vehicle for claims that are not within the core of habeas."[25] In full, the most relevant part of the *Nettles* majority opinion reads as follows:

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21. 830 F.3d 922 (9th Cir. 2016).
22. *Id*. at 945 (Berzon, J., dissenting).
23. 28 U.S.C. § 2254 (1996).
24. 42 U.S.C. § 1997e(a) (2013).
25. *Nettles*, 830 F.3d at 931, 933.

> Just as Congress's amendments to the habeas statute indicated an intent to make habeas the exclusive remedy for claims at the core of habeas . . . Congress's enactment of the Prison Litigation Reform Act . . . indicated an intent to make § 1983 the exclusive remedy for all inmate suits about prison life[.] The PLRA was intended to promote administrative redress, filter out groundless claims, and foster better prepared litigation of claims aired in court . . . . Before the PLRA, plaintiffs pursuing actions under § 1983, including prisoner suits alleging constitutional deprivations while incarcerated[,] did not have to exhaust administrative remedies before filing suit in court[.] But Congress enacted § 1997e(a) to reduce the quantity and improve the quality of prisoner suits by requiring exhaustion . . . . Congress intended this exhaustion requirement to have broad scope[.] . . . . Congress's intent that state prisoners satisfy PLRA requirements for all § 1983 suits about prisoner life (other than claims at the core of habeas) suggests that Congress wanted § 1983 to be the exclusive vehicle for such claims. As in *Preiser*, it would wholly frustrate explicit congressional intent to hold that prisoners could evade the requirements of the PLRA by the simple expedient of putting a different label on their pleadings . . . . Moreover, because Congress enacted the Antiterrorism and Effective Death Penalty Act of 1996 . . . at the same time as it enacted the PLRA, we infer that Congress did not intend to make § 1983 and habeas regimes interchangeable or overlapping. AEDPA added procedural requirements for prisoners bringing habeas corpus petitions that are separate and distinct from those imposed on § 1983 claims by the PLRA . . . indicating an intent to make these regimes independent and mutually exclusive.[26]

The *Nettles* majority's reasoning is unlikely to satisfy readers skeptical of the courts' ability to divine Congressional intent from a statutory synthesis.[27] Similarly, some readers (along with the Authors) are bound to disagree with the assertion, by the *Nettles* majority, that Supreme Court precedent "strongly suggest[s] that habeas is available only for state prisoner claims that lie at the core of habeas (and is the exclusive remedy for such claims), while § 1983 is the exclusive remedy for state prisoner claims that do not lie at the core of habeas."[28] As discussed in section three, there is tension between a mutually

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26. *Id.* at 932.

27. John F. Manning, *Essay: Without the Pretense of Legislative Intent*, 130 HARV. L. REV. 2397, 2407 (2017) ("in the hard cases, 'Congress' has not actually formed an intention on (*viz.* resolved) the precise question at issue . . . . [W]hen meaning runs out, judges must acknowledge their own creative or lawmaking function rather than pretend to reconstruct legislative intent.").

28. *Nettles*, 830 F.3d at 930.

exclusive paradigm on the one hand, and existing Supreme Court precedent on the other.

In truth, Judge Berzon's metaphysical criticism of the *Hutcherson* approach calls for a metaphysical response that is likely better suited to the forum of legal scholarship, rather than a judicial opinion. By offering the following two observations, the Authors hope to give at least the beginnings of such a metaphysical response.

First, Judge Berzon's assertion that habeas is "protected by the Constitution" is not a useful starting point for a comparison between habeas and § 1983.[29] As with § 1983, the reality is that state prisoners lacked access to federal habeas review until 1867, after the Civil War, with the passage of the Act of Feb. 5, 1867.[30] Prior to that time, the courts interpreted Article I, § 9, clause 2 of the Constitution as enshrining a right to seek federal habeas review only for persons detained in federal custody.[31] Given this historical background, and in an age where *Bivens*[32] is disfavored, critics like Judge Berzon must, to be taken seriously, first explain whether and how state prisoners now possess a constitutional cause of action to seek federal habeas relief. Does Judge Berzon, for example, view the Suspension Clause as "a one-way ratchet that enshrines in the Constitution every [statutory] grant of habeas jurisdiction[?]"[33] Absent such an explanation, there is little reason to fear that *Hutcherson*'s rule of mutual exclusivity is eroding a constitutional right to habeas.

Second, and more importantly, there is little reason to worry that *Hutcherson* mutual exclusivity will erode anything, because the scope of federal habeas review is fluid. Upon the unlikely repeal of § 1983, history suggests that the judiciary would adapt by expanding the scope of habeas—that is, by drawing new lines permitting courts to entertain penumbral habeas claims in habeas corpus actions. Habeas fluidity is well established. Beginning as a mere "nuisance," federal habeas review of state prisoners' claims briefly swelled to become a surrogate for Supreme Court appellate review before retrenching to a compromise point, as later codified (more or less) by AEDPA.[34] The Court has

29. *Id.* at 945 (Berzon, J., dissenting).

30. *See* Felker v. Turpin, 518 U.S. 651, 659 (1996); Act of Feb. 5, 1867, Ch. 28, 14 Stat. 385.

31. *See Ex parte* Dorr, 44 U.S. 103, 105 (1844).

32. Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971).

33. I.N.S. v. St. Cyr, 533 U.S. 289, 342 (2001) (Scalia, J., dissenting).

34. *See* Anna S. Roy, *Constitutional Law—Eleventh Circuit Rejects Federal "Look Through" Approach on Federal Habeas Corpus Petitions*, 50 SUFFOLK U. L. REV. 375, 378–79 (2017) ("federal habeas review has expanded and contracted").

continued to employ fluidity even after the passage of AEDPA, most notably by injecting a doctrine of equitable tolling into AEDPA's statutory timeliness scheme. It is difficult to rationalize this fluidity—the courts say, cryptically, that habeas is "governed by equitable principles,"[35] while scholars note that habeas appears to be "respons[ive] to the contemporary political landscape."[36] The critical point, though, is not how habeas fluidity works, but generally that it works.

Even if one accepts the highly improbable repeal of § 1983 as a genuine risk for the sake of argument, the circuit courts may and should dismiss as too metaphysical Judge Berzon's speculative constitutional concerns, along with her concern that the judiciary would passively watch as penumbral habeas claims "go poof." As in the past, the courts will alter the scope of habeas review as necessary to preserve The Great Writ.

B. A Failure to Communicate

A second criticism is that the Eleventh Circuit failed to offer sufficient explanation or analysis when developing its *Hutcherson* approach. This criticism is valid, but it is not specific to *Hutcherson*, and it should not forestall an adoption of the *Hutcherson* approach.

In setting a rule of mutual exclusivity between habeas and § 1983, *Hutcherson* stated the following, while citing only Supreme Court caselaw for support:

> An inmate convicted and sentenced under state law may seek federal relief under two primary avenues: a petition for habeas corpus, 28 U.S.C. § 2254, and a complaint under the Civil Rights Act of 1871 . . . as amended, 42 U.S.C. § 1983 . . . . These avenues are mutually exclusive: if a claim can be raised in a federal habeas petition, that same claim cannot be raised in a separate § 1983 civil rights action.[37]

As discussed in section three (and as illustrated by section one's graphics), neither *Preiser* nor any other Supreme Court case has held that habeas and § 1983 are mutually exclusive. Rather, *Preiser* and its progeny preserve the possibility of penumbral overlap while also holding that core habeas claims must be raised in habeas. It is the *Hutcherson* approach, a circuit court creation, that develops the law by

35. Munaf v. Geren, 553 U.S. 674, 693 (2008) (quoting Fay v. Noia, 372 U.S. 391, 438 (1963)).

36. Roy, *supra* note 34, at 378.

37. *Hutcherson*, 468 F.3d at 754.

eliding core and penumbral habeas issues, and by placing claims on either side of a bright line separating habeas from § 1983.

One can confidently say, therefore, that the *Hutcherson* opinion suffers from at least one of three possible errors. First, it is possible that *Hutcherson*'s reference to "mutual exclusivity" is a stray misstatement, and that the *Hutcherson* panel did not intend to work any development in the law. This seems unlikely, because the *Hutcherson* opinion comes close also to describing its rule of mutual exclusivity in functional terms: "When an inmate challenges the circumstances of his confinement but not the validity of his conviction and/or sentence, then the claim is properly raised [meaning exclusively raised?] in a civil rights action under § 1983."[38]

Second, it is possible that the *Hutcherson* panel simply misinterpreted Supreme Court caselaw, incorrectly believing that the high Court already had set a rule of mutual exclusivity.[39] Third, it is instead possible that the *Hutcherson* panel was consciously attempting to develop the law, but that it chose to do so by fiat rather than reasoned elaboration.

Better judicial process could have prevented errors two and three. If the *Hutcherson* panel incorrectly believed that Supreme Court precedent dictated mutual exclusivity (error two), then a written analysis of that precedent might have revealed to the *Hutcherson* panel its error. Similarly, if the *Hutcherson* panel was attempting independently to develop mutual exclusivity, then it should have done so through an opinion of better quality—that is, an opinion, like the Ninth Circuit's opinion in *Nettles*, offering some measure of legal reasoning (error three). In either case, the *Hutcherson* opinion stands as a small source of reputational harm for the Eleventh Circuit Court of Appeals.

On balance, the Authors are inclined to believe that the *Hutcherson* opinion suffers from error three, meaning that the *Hutcherson* panel was attempting to develop a rule of mutual exclusivity through a "poorly reasoned and unilluminating opinion."[40] It is no contradiction, though, to say that a poor judicial opinion may yield a sound rule or

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38. *Id*.

39. The question of habeas and § 1983 overlap, expressly perceived as open in Bell v. Wolfish, has never been resolved by the Supreme Court. 441 U.S. 520, 526 n.6 (1979) ("[w]e leave to another day the question of the propriety of using a writ of habeas corpus to obtain review of the conditions of confinement, as distinct from the fact or length of the confinement itself.").

40. David Wolitz, *Alexander Bickel and the Demise of Legal Process Jurisprudence*, 29 CORNELL J. L. PUB. POL. 153, 173–74 (2019) ("reason is the life of the law and not just votes for your side.").

result with *Brown v. Board of Education*[41] serving, perhaps, as the archetypal example. Criticisms of the *Hutcherson* opinion's reasoning, therefore, should not forestall careful consideration and the potential adoption by other circuits of *Hutcherson*'s rule of mutual exclusivity, which may in the end prove a sound solution to the *Preiser* Puzzle.

C. Wariness of Legal Memes

As a third and final abstract criticism, consider that the *Hutcherson* approach is likely to be categorized as a legal meme. In the remainder of this section, the Authors hope to explain what a legal meme is, why the *Hutcherson* approach fits the definition of a legal meme, and why the *Hutcherson* approach, even if a legal meme, is nevertheless a felicitous one.

First, take as the definition of a meme, a "conceptual form[] that replicate[s] through a community of people."[42] Memes are purposefully "analogous to [their] biological correlate, the gene," and the impetus behind scholarly meme theory is to determine whether evolutionary principles might help to explain the successful (or unsuccessful) dispersion of ideas.[43] In principle, a legal meme is simply any meme that has, as its substance, a legal concept. By this broad and largely unhelpful definition, any legal opinion, *Hutcherson* included, amounts to a legal meme.

In practice, the term legal meme bears a negative connotation because it typically refers to (1) judicial errors, that (2) create successive, rippling errors (namely, that spread). For instance, consider the example offered by Michael Fried in his article, *The Evolution of Legal Concepts: The Memetic Perspective*.[44] A certain Supreme Court of the United States case, *United States v. Detroit Timber & Lumber Co.*,[45] is routinely cited within the Court's opinions to explain that the "syllabus is not part of the Court's opinion and should not be treated as authoritative."[46] The 1979 mislabeling of this opinion as simply *United States v. Detroit Lumber Co.* "survived over thousands of subsequent copyings," going on to become the most frequently but wrongly cited decision in the Supreme Court Reporter.[47] As Mr. Fried puts it, the

41. 344 U.S. 1 (1952).

42. Michael S. Fried, *The Evolution of Legal Concepts: The Memetic Perspective*, 39 JURIMETRICS J. 291, 292 (1999).

43. *Id.*

44. Fried, *supra* note 42.

45. 200 U.S. 321 (1906).

46. Fried, *supra* note 41, at 302.

47. *Id.* at 303.

episode provides an "insignificant [but] clear example of a basic application of memetics to the legal system."[48] The *Hutcherson* opinion's mutual exclusivity fits the negative-connotation definition of a legal meme, meaning a judicial error that has successfully spread.

In the previous subsection, the Authors described three errors from which the Eleventh Circuit's *Hutcherson* opinion may suffer, and the Authors concluded that the likeliest error was error three, meaning a judicial attempt to develop the law without sufficient explanation or analysis offered in support. Now consider that this error by the *Hutcherson* panel was unforced. That is, the plaintiff in *Hutcherson* sought to stay his execution based on a core habeas claim: that Alabama failed to provide adequate legal representation in capital cases, requiring the federal habeas court "to vacate his conviction and/or sentence on constitutional grounds (ineffective assistance of counsel)[.]"[49] Because this claim fell squarely within the core of habeas—it directly challenged the lawfulness, rather than circumstances, of custody—there was no cause for the *Hutcherson* panel to address the penumbral overlap between habeas and § 1983. Strictly speaking, therefore, *Hutcherson*'s discussion of mutual exclusivity was dicta.

Given this fact, one might well ask: why does the *Hutcherson* opinion matter? The answer is that a succession of subsequently published, and hence binding, opinions have cited *Hutcherson*'s mutually exclusive language as explaining the outcome in, for example, cases involving procedural challenges to the clemency process (§ 1983),[50] and method-of-execution challenges (generally, § 1983).[51] A host of unpublished decisions have similarly cited *Hutcherson* as explaining the outcome in cases involving procedural challenges relating to parole requests under § 1983.[52] Dicta or not, the Eleventh Circuit's fifteen-year repetition of *Hutcherson*'s rule of mutual exclusivity has caused that rule to become entrenched.

Moreover, in at least one area, *Hutcherson* has yielded questionable results. In *Daker v. Warden*,[53] the Eleventh Circuit perceived an old United States Court of Appeals for the Fifth Circuit decision—binding upon the Eleventh Circuit[54]—as holding that requests for release from

48. *Id.*

49. *Hutcherson*, 468 F.3d at 754.

50. *See, e.g.*, Valle v. Sec'y, Fla. Dept. of Corrs., 654 F.3d 1266 (11th Cir. 2011).

51. *See, e.g.*, McNabb v. Comm'r Ala. Dept. of Corrs., 727 F.3d 1334 (11th Cir. 2013).

52. *See, e.g.*, Thomas v. McDonough, 228 F. App'x 931 (11th Cir. 2007).

53. 805 F. App'x 648 (11th Cir. 2020).

54. *See* Bonner v. City of Prichard, Ala., 661 F.2d 1206, 1210 (11th Cir. 1981).

administrative segregation may be raised in habeas.[55] When paired with *Hutcherson*, this Fifth Circuit holding compels the conclusion that requests for release from administrative segregation must be raised in a habeas action.

The result in *Daker* is questionable for two reasons. First, and as discussed in subsequent sections, *Daker* is in tension with Supreme Court precedent suggesting that prisoners may challenge administrative segregation in a § 1983 action. Second, *Daker* is also in tension with the Eleventh Circuit's own description of the dividing line between habeas and § 1983. Since prisoners seeking release from administrative segregation will remain imprisoned regardless of whether they succeed or fail, it is arguable that these prisoners are challenging only the conditions, rather than the lawfulness, of their custody. Hence, there is a strong analytical argument that under a mutually exclusive paradigm, § 1983 should provide the exclusive cause of action for challenges to administrative segregation.

Subsequent sections will revisit the problematic *Daker* case, but for the present purpose, it is sufficient to note that (1) the *Hutcherson* opinion is problematic in that its discussion of mutual exclusivity was unnecessary dicta unsupported by sufficient explanation or analysis, and that (2) fifteen years of subsequent Eleventh Circuit opinions have, by reciting *Hutcherson*'s dicta, elevated that dicta to the status of a binding rule that must be followed, even when it yields questionable results.

There are, undoubtedly, many ways to criticize *Hutcherson*'s rippling effect—one might, for example, validly criticize the Eleventh Circuit for language fetishism or for lack of analytical rigor. Yet the criticism that *Hutcherson* is a legal meme best describes what happened. *Hutcherson* mutual exclusivity conquered messy penumbral overlap based on a straightforward memetic principle: "a meme that is short, easily remembered, and readily understood will likely beat out a more cumbersome competitor in the contest for replication."[56]

The Authors' preemptive response to any legal meme criticism of *Hutcherson* takes the form of an affirmative defense. There are generally good reasons to be wary of legal memes, and critics are right to expect that federal appellate courts ought to possess the wherewithal to wrestle with analytical complexity. Yet the fact that *Hutcherson* is a legal meme should not stymie an objective assessment of its rule. In the following sections, the Authors argue that mutual exclusivity is desirable because it gives clear guidance to litigants and lower courts

55. Krist v. Ricketts, 504 F.2d 887, 887–88 (5th Cir. 1974).

56. Fried, *supra* note 42, at 299–300.

alike. Hence, even as the Authors agree that legal memes are generally problematic, *Hutcherson* is something of a happy accident—if it is a legal meme, it is a felicitous one.

III. MECHANICS: HOW DOES MUTUAL EXCLUSIVITY WORK?

It is firmly established that when a state prisoner challenges the fact or duration of imprisonment and seeks an immediate or speedier release from that imprisonment, she must do so in a habeas action.[57] But the Supreme Court of the United States has not had an "occasion to address the question whether § 1983 [is] the exclusive vehicle for claims outside the core of habeas."[58] In *Preiser*, the Supreme Court stated in dicta that habeas may be available to challenge prison conditions but refused to "explore the appropriate limits of habeas corpus as an alternative remedy to a proper action under § 1983."[59] Post-*Preiser*, however, the Supreme Court has "suggest[ed] that § 1983 [is] the sole remedy for" claims outside the core of habeas.[60]

Given the lack of guidance by the Court, it is not surprising that the circuits do not agree on the overlap of habeas and § 1983. The Third, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits all have held that habeas and § 1983 are mutually exclusive.[61] In these circuit courts, "a

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57. *Preiser*, 411 U.S. at 499.

58. *Nettles*, 830 F.3d at 929.

59. *Preiser*, 411 U.S. at 499–500 (stating that "[w]hen a prisoner is put under additional and unconstitutional restraints during his lawful custody, it is arguable that habeas corpus will lie to remove the restraints making the custody illegal.").

60. *Nettles*, 830 F.3d at 929; Muhammad v. Close, 540 U.S. 749, 751 n.1 (2004) (stating that the "Court has never followed the speculation in *Preiser* . . . that . . . a prisoner subject to 'additional and unconstitutional restraint' might have a habeas claim independent of § 1983") (quoting *Preiser*, 411 U.S. at 499); *But see also* Ziglar v. Abbasi, 137 S. Ct. 1843, 1862–63 (2017) (noting that it is still an open question "whether [prisoners] might be able to challenge their confinement conditions via a petition for a writ of habeas corpus.").

61. Leamer v. Fauver, 288 F.3d 532, 540, 544 (3d Cir. 2002) (holding that habeas and § 1983 "are not coextensive," habeas is "clearly quite limited," "[t]here is only a narrow subset of actions that arguably might properly be brought as either, that is, where the deprivation of rights is such that it necessarily impacts the fact or length of detention" but "the Supreme Court has made it clear that for those cases . . . the habeas petition, is the only available avenue of relief[,]" and state prisoner's claim regarding placement in a restricted activities program, which would not impact his release date, would "not be properly brought under habeas at all"); Moran v. Sondalle, 218 F.3d 647, 650–51 (7th Cir. 2000) (holding that "[s]tate prisoners who want to challenge their convictions, their sentences, or administrative orders revoking good-time credits or equivalent sentence-shortening devices, must seek habeas corpus," and "prisoners who want to raise a constitutional challenge to any other decision, such as transfer to a new prison, administrative segregation, exclusion from prison programs, or suspension of privileges,

suit that does not 'seek[] a judgment at odds with [a prisoner's] conviction or . . . sentence' may be brought only under section 1983."[62] In contrast, the First, Second, Fourth, Sixth, and D.C. Circuits have all held, or stated in dicta, that some claims may be raised in habeas although they do not attack a conviction or sentence and will not necessarily result in a speedier release.[63] The Fifth Circuit has taken inconsistent positions regarding the issue.[64]

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must instead employ § 1983"); Spencer v. Haynes, 774 F.3d 467, 469–70 (8th Cir. 2014) (holding prisoner's claim that being put in four-point restraints for an extended period of time violated his Eighth Amendment right against cruel and unusual punishment cannot be brought in habeas); Kruger v. Erickson, 77 F.3d 1071, 1073 (8th Cir. 1996) (holding habeas may be used only when the prisoner attacks the "validity of his sentence or the length of his state custody" otherwise § 1983 must be used); *Nettles*, 830 F.3d at 927 (holding that § 2254 cannot be used to expunge a disciplinary violation that may, but will not necessarily, accelerate a prisoner's chances for parole); Palma Salazar v. Davis, 677 F.3d 1031, 1035 (10th Cir. 2012) (holding that federal prisoner could not challenge conditions of confinement in a Section 2241 petition); *Hutcherson*, 468 F.3d at 754 (holding that habeas and § 1983 "are mutually exclusive: if a claim can be raised in a federal habeas petition, that same claim cannot be raised in a separate § 1983 civil rights action.").

62. Nance v. Comm'r, Ga. Dep't of Corr., 981 F.3d 1201, 1206 (11th Cir. 2020), *reh'g denied*, Nance v. Comm'r, Ga. Dep't of Corr., 994 F.3d 1335 (11th Cir. 2021), *pet. for cert. granted*, 142 S. Ct. 858 (U.S. Jan. 14, 2022) (No. 21–439).

63. United States v. DeLeon, 444 F.3d 41, 59 (1st Cir. 2006) (stating in dicta that "[i]f the conditions of incarceration raise Eighth Amendment concerns, habeas corpus is available"); Thompson v. Choinski, 525 F.3d 205, 209 (2d Cir. 2008) (stating habeas applies "to challenges to the execution of a federal sentence, 'including such matters as the administration of parole, . . . prison disciplinary actions, prison transfers, type of detention and prison conditions'"); Roba v. United States, 604 F.2d 215, 219 n.4 (2d Cir. 1979) (stating in dicta that a conditions of confinement claim by state prisoner may be brought under § 2254); Farabee v. Clarke, 967 F.3d 380, 395 (4th Cir. 2020) (holding that the substantive due process claim that prison officials used medication and solitary confinement to treat prisoner's mental illness and behavioral issues could proceed in habeas); *In re* Campbell, 874 F.3d 454, 464 (6th Cir. 2017) (overruling precedent to the extent that it held method-of-execution claims could be raised in habeas or § 1983 but stating that "§ 1983 and habeas are not mutually exclusive as a *per se rule*"); Terrell v. United States, 564 F.3d 442, 447–49 (6th Cir. 2009) (holding that a federal prisoner could raise procedural challenge to parole process in a § 2241 petition even though success would not necessarily mean earlier release); *But see* Martin v. Overton, 391 F.3d 710, 714 (6th Cir. 2004) (holding that the district court should have dismissed habeas petition requesting transfer to receive medical treatment so prisoner could re-file as a § 1983 action); Hudson v. Hardy, 424 F.2d 854, 855 n.3, 856 (D.C. Cir. 1970) (holding that prisoner complaints of "disciplinary restrictions," were properly raised in habeas because "[h]abeas corpus tests not only the fact but also the form of detention.").

64. Poree v. Collins, 866 F.3d 235, 243–44 (5th Cir. 2017) (recognizing the Circuit's inconsistent position regarding the mutual exclusivity of § 1983 and habeas); *Compare* Coleman v. Dretke, 409 F.3d 665, 670 (5th Cir. 2005) (stating in dicta that § 1983 is not the "exclusive avenue by which to attack conditions of confinement"), *with* Carson v.

The Circuits that consider habeas and § 1983 mutually exclusive

> [C]onsider[] the claims the Supreme Court held *must* be brought as habeas actions pursuant to the *Preiser* line of cases . . . as coextensive with the claims that *can* be brought under habeas in its totality. In other words, there are no 'suits outside of the core habeas claims identified in *Preiser*,' . . . for which jurisdiction might overlap with § 1983.[65]

This approach has the potential to offer significant benefits, including curtailing abusive prisoner litigation, providing more efficient resolution of claims, and promoting clarity and ease of administration.

As stated previously, Congress enacted the PLRA, in part, to "curtail abusive prisoner litigation."[66] Due to several restrictions in the PLRA, requiring prisoners to raise claims involving all aspects of "prison life" under § 1983 furthers this goal.[67] These restrictions include the requirements that (1) administrative remedies be exhausted before filing suit;[68] (2) prisoners pay the full filing fee even when allowed to proceed *in forma pauperis*;[69] and, (3) with limited exceptions, pre-payment of the full filing fee if the prisoner has had three previous civil actions dismissed as frivolous, malicious, or for failing to state a claim.[70] If a prisoner could avoid these requirements by bringing conditions of confinement claims in a habeas action, Congress' goal of curtailing abusive prisoner litigation would be thwarted.

The administrative grievance procedure, which prisoners must exhaust for all "action[s] . . . brought with respect to prison conditions," is better suited than the courts to address prisoners' conditions of confinement complaints.[71] Exhaustion allows prison officials to take corrective action in a speedy and efficient manner, without resorting to

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Johnson, 112 F.3d 818, 820–21 (5th Cir. 1997) (acknowledging that the Fifth Circuit has at times "adopted a simple, bright-line rule" that all claims for which "'a favorable determination . . . would not automatically entitle [the prisoner] to accelerated release,'" must be raised in a § 1983 action and holding that prisoner's claims regarding placement in segregation must be raised in a § 1983 action) (alteration in original), *and* Cook v. Hanberry, 592 F.2d 248, 249 (5th Cir. 1979) (stating that "[h]abeas corpus is not available to prisoners complaining only of mistreatment during their legal incarceration.").

65. *Terrell*, 564 F.3d at 448.

66. Dupree v. Palmer, 284 F.3d 1234, 1236 (11th Cir. 2002).

67. *Nettles*, 830 F.3d at 932.

68. 42 U.S.C. § 1997e(a).

69. 28 U.S.C. § 1915(b)(1) (1996).

70. 28 U.S.C. § 1915(g) (1996).

71. 28 U.S.C. 1997e(a); *see Porter*, 534 U.S. at 525.

the courts.[72] "And for cases ultimately brought to court, adjudication could be facilitated by an administrative record that clarifies the contours of the controversy."[73] Thus, requiring all suits regarding prison conditions (except those at the core of habeas) to proceed through § 1983 results in more efficient resolution of claims.[74]

Mutual exclusivity between habeas and § 1983 provides much needed clarity for the parties and the district courts.[75] Both prisoners and courts should find it easier to follow a bright line rule—only core of habeas claims (those for which success will "necessarily lead to immediate or speedier release") can be brought in habeas—versus a rule that requires a "probabilistic analysis" to determine under which cause of action to bring a claim.[76] Prisoners are more likely to know the necessary steps to take before filing suit,[77] and less likely to suffer negative consequences from filing the wrong type of suit.[78] Mutual exclusivity allows the district court to determine the proper cause of action and process cases accordingly more easily. The only inquiry the court must make is whether the claim, if successful, would necessarily shorten a prisoner's length of confinement.[79] If so, the claim must be raised in habeas and if not, it must be raised in § 1983.[80] The courts are not required to engage in an analysis of just how likely it might be that the plaintiff will receive an immediate or earlier release if successful. As the Ninth Circuit stated in *Nettles*, when habeas and § 1983 are mutually exclusive, district courts are "not require[d] . . . to guess at the

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72. *Porter,* 534 U.S. at 525.

73. *Id.*

74. *Nettles*, 830 F.3d at 933.

75. *Id*.

76. *Id*. at 934.

77. Prisoners filing a § 1983 complaint must exhaust available administrative remedies before filing suit while those filing a habeas petition must exhaust by giving the state's highest court a chance to rule on all claims. O'Sullivan v. Boerckel, 526 U.S. 838, 844–45 (1999); Ward v. Hall, 592 F.3d 1144, 1156 (11th Cir. 2010). Failure to take the appropriate steps to exhaust will result in dismissal.

78. Filing under the wrong cause of action can have financial consequences. Specifically, a prisoner who requests and is allowed to proceed without prepayment of the filing fee, is still required to pay the full $350.00 when proceeding under § 1983. This is true even if the complaint is summarily dismissed because the prisoner filed under § 1983 when she should have filed under habeas. Additionally, a prisoner may be barred from seeking relief on claims not properly raised. For example, a prisoner who fails to raise a claim in her first habeas petition because she mistakenly believes it can be raised in a later § 1983, may be barred from filing a second or successive habeas petition to raise the claim. 28 U.S.C. § 2244(b) (1996).

79. *O'Sullivan*, 526 U.S. at 844.

80. *Nettles*, 830 F.3d at 931.

discretionary decisions of state officials in order to determine whether an action sounds in habeas or § 1983, and which prerequisites must be met."[81]

The clarity offered by mutual exclusivity is demonstrated in cases involving challenges to parole procedures. The circuits that employ the *Hutcherson* approach agree that when a prisoner challenges the procedure of a parole hearing and success would, at most, mean a new or speedier review of a parole petition or parole hearing, his challenge must be raised in under § 1983. If, however, a prisoner attacks the outcome of a parole hearing, seeks to overturn the results of that hearing, and receives immediate or earlier release, the challenge must be raised in habeas.

But it can "sometimes [be] difficult to draw the line between claims that are properly brought in habeas and those that may be brought under 42 U.S.C. § 1983."[82] This is demonstrated by both method-of-execution challenges and requests for release from administrative segregation. For example, the Eleventh Circuit's recent decision in *Nance v. Commissioner, Georgia Department of Corrections*, holding that certain method-of-execution claims must be brought under habeas, is directly at odds with the United States Court of Appeals for the Sixth Circuit's opinion in *In re Campbell*,[83] holding that method-of-execution claims must be brought under § 1983.[84] Regarding requests for release from administrative segregation, the Eleventh Circuit's recent unpublished *Daker* opinion is at odds with other circuits that have found such claims must be raised in § 1983. Additionally, *Daker* is at odds with the Eleventh Circuit's own precedent. Despite the Eleventh Circuit's determination that habeas and § 1983 are mutually exclusive, it currently allows requests for release from administrative segregation to proceed under both habeas and § 1983.

A. Challenges to Parole Procedures

In *Wilkinson v Dotson*,[85] two prisoners brought § 1983 lawsuits challenging Ohio's parole procedures as unconstitutional. The prisoners sought new parole hearings. The Respondent argued that the "prisoners' lawsuits . . . attack the duration of their confinement," so their claims "may only be brought through a habeas corpus action, not

81. *Id.* at 934.

82. DA's Office v. Osborne, 557 U.S. 52, 76 (2009) (Alito, J., concurring).

83. 874 F.3d 454, 464 (6th Cir. 2017).

84. *Nance*, 981 F.3d at 1206, 1212.

85. 544 U.S. 74 (2005).

through § 1983."[86] The Supreme Court disagreed, holding that success for the prisoners would, at most, mean a new or speedier review of parole petitions or parole hearings.[87] "Because neither prisoner's claim would necessarily spell speedier release," the Court concluded that the "actions may be brought under § 1983."[88] The Court, however, did "not seem to deny that [a challenge to parole procedures] indeed could be cognizable in habeas corpus proceedings."[89]

Circuits employing the *Hutcherson* approach, however, have held that when a prisoner challenges parole procedures and requests a new parole hearing or review of a parole petition, he must proceed under § 1983.[90] Thus, mutual exclusivity has provided clarity with respect to parole procedure challenges. The *Wilkinson* framework provides that if success on a challenge to parole procedures means only a new parole hearing or new review of a parole petition at which the state "authorities may, in their discretion, decline to shorten [the] prison term," the action may be raised in § 1983.[91] Conversely, if success on a challenge to the outcome of a parole hearing or petition means the parole board has no discretion to deny immediate or speedier release, the challenge must be raised in a habeas petition.[92] For circuits employing the *Hutcherson* approach, this framework has been turned into a bright-line rule: challenges to parole procedures that may be raised under § 1983, must be raised under § 1983, while challenges that seek to nullify a parole board's decision and obtain immediate release must be raised under habeas. This bright-line rule enables prisoners or

86. *Id*. at 78.

87. *Id*. at 82.

88. *Id*. at 76, 82.

89. *Id*. at 89 (Kennedy, J. dissenting).

90. *Nettles*, 830 F.3d at 934–35; Carson v. Johnson, 112 F.3d 818, 819 (5th Cir. 1997); Cook v. Tex. Dep't of Criminal Justice Transitional Planning Dep't, 37 F.3d 166, 168 (5th Cir. 1994) (holding that claims attacking the parole process "that would *merely enhance* eligibility for accelerated release" must proceed through § 1983 while "those that would *create entitlement* to such relief" must proceed through habeas); Kerlin v. Barnard, 742 F. App'x 488, 489 (11th Cir. 2018); Miller v. Nix, 346 F. App'x 422, 423 (11th Cir. 2009) (holding district court properly dismissed habeas petition in which prisoner complained of parole process and sought new parole hearing because action cognizable only in § 1983); Flemings v. Covello, No. 19-cv-0944-JAH-AGS, 2020 U.S. LEXIS 38512, at *1 (S.D. Cal. Mar. 5, 2020). If, however, a prisoner seeks to nullify the parole board's decision and "seeks an injunction ordering . . . immediate or speedier release into the community," his action would need to proceed through habeas. *Wilkinson*, 544 U.S. at 82; Coady v. Vaughn, 251 F.3d 480, 485–86 (3d Cir. 2001); Dimmick v. Bourdon, 769 F. App'x 616, 618–20 (10th Cir. 2019).

91. *Wilkinson*, 544 U.S. at 82.

92. *See id*.; *Dimmick*, 769 F. App'x at 620.

their lawyers to file the appropriate action and allows district courts to easily classify and process the actions that are filed.

B. Method-of-Execution Challenges

"The Supreme Court has never held that a challenge to a method of execution was not cognizable as a complaint under § 1983."[93] But it has specifically declined to "reach . . . the difficult question of how to categorize method-of-execution claims."[94] Instead, it has recognized that such claims "fall at the margins of habeas."[95] The test for whether a method-of-execution claim must be raised in habeas is whether success on the claim would "*necessarily* prevent [the State] from carrying out its execution."[96] Generally, when "an inmate . . . challenges . . . the means by which the State intends to execute him," success will not prevent the State from carrying out the execution by some other means.[97] These claims, therefore, either can or, in States where habeas and § 1983 are mutually exclusive, must be brought under § 1983.[98]

Currently, only the Eleventh Circuit holds that a method-of-execution challenge must, in some situations, be raised in habeas.[99] This holding is based almost exclusively on dicta from three Supreme Court cases: *Nelson v. Campbell*,[100] *Hill* v. *McDonough*,[101] and *Bucklew v. Precythe*.[102] Ironically, the Sixth Circuit, which has found "§ 1983 and habeas are not mutually exclusive *as a per se rule*," holds that method-of-execution challenges can never be raised in habeas.[103] To understand how the Eleventh and Sixth Circuits arrived at these differing positions, it is necessary to review the procedural and substantive development of method-of-execution challenges through the Supreme Court.

In *Nelson v. Campbell*, a death row inmate filed a § 1983 action seeking, *inter alia*, to permanently enjoin the use of a "cut down"

93. *Nance,* 981 F.3d at 1206.

94. Nelson v. Campbell, 541 U.S. 637, 644 (2004).

95. *Id*. at 646.

96. *Id*. at 647.

97. *McNabb*, 727 F.3d at 1344.

98. *Id.* (holding prisoner's claim that "an ineffective first drug or improper administration of a first drug in a three-drug protocol would violate the [C]onstitution" was improperly brought in a habeas petition).

99. *Nance*, 981 F.3d at 1209.

100. 541 U.S. at 646.

101. 547 U.S. 573, 583 (2006).

102. 139 S. Ct. 1112, 1128 (2019); *Nance,* 981 F.3d at 1203, 1206–07.

103. *In re Campbell*, 874 F.3d at 464.

procedure to access his severely compromised veins.[104] The Eleventh Circuit found the district court correctly construed the action as a habeas petition and dismissed the petition as second or successive.[105] The Supreme Court reversed, finding that success on the prisoners Eighth Amendment claim would not necessarily prevent Alabama from executing him.[106] The cut-down procedure was not statutorily mandated and there were alternatives that could be used to carry out the execution.[107] Thus, the claim could be raised in § 1983. In dicta, however, the Court indicated that there may be instances in which a claim must be raised in habeas, for example, "a constitutional challenge seeking to permanently enjoin the use of lethal injection may amount to a challenge to the fact of the sentence itself" if the state law required the use of lethal injection.[108]

In *Hill v. McDonough*, a death row inmate filed a § 1983 complaint seeking to enjoin the three-drug lethal injection sequence Florida likely would use to execute him.[109] Just as it had in *Nelson*, the Eleventh Circuit found the district court correctly construed the complaint as a habeas petition and dismissed the action as second or successive.[110] Again, the Supreme Court reversed, holding the case was controlled by *Nelson*.[111] If successful, the State would not necessarily be prevented from using lethal injection to execute the prisoner.[112] The prisoner acknowledged there were alternative methods of lethal injection that would be constitutional, the State did not argue that an injunction would leave it with no way to execute the inmate, and State law did not require use of the challenged procedure.[113] Thus, the claim could be brought under § 1983. As it did in *Nelson*, the Court stated in dicta that if the relief sought under § 1983 would "foreclose the State from implementing the [inmate's] sentence under present law," then "recharacterizing a complaint as an action for habeas corpus might be proper."[114]

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104. 541 U.S. at 639.
105. *Id.* at 642–43.
106. *Id.* at 647.
107. *Id.* at 644–45.
108. *Id.* at 644.
109. 547 U.S. at 578.
110. *Id.*
111. *Id.* at 580.
112. *Id.* at 580–81.
113. *Id.* at 580.
114. *Id.* at 582–83.

The substantive requirements for a successful method-of-execution challenge are set out in *Baze v. Rees*,[115] and *Glossip v. Gloss*.[116] The prisoner must "establish that the method presents a risk that is *sure or very likely* to cause serious illness and needless suffering, and give rise to sufficiently *imminent* dangers."[117] He must also identify an alternative method of execution.[118] The *Baze-Glossip* test requires a prisoner present "a feasible and readily implemented alternative method of execution that would significantly reduce a substantial risk of severe pain and that the State has refused to adopt without a legitimate penological reason."[119]

In *Bucklew v. Precythe*, the issue was whether a prisoner bringing an as-applied, as opposed to a facial, Eighth Amendment method-of-execution challenge in a § 1983 action must satisfy the *Baze-Glossip* test.[120] The Court held that he must and clarified that when "seeking to identify an alternative method of execution" the prisoner "is not limited to choosing among those presently authorized by a particular State's law."[121] Instead, he "may point to a well-established protocol in another State as a potentially viable option."[122] In dicta, the Court stated that

> [E]xisting state law might be relevant to determining the proper procedural vehicle for the inmate's claim. *See Hill v. McDonough*, 547 U.S. 573, 582–583, 126 S. Ct. 2096, 165 L. Ed. 2d 44 (2006) (if the relief sought in a 42 U. S. C. § 1983 action would "foreclose the State from implementing the [inmate's] sentence under present law," then "recharacterizing a complaint as an action for habeas corpus might be proper").[123]

Relying almost entirely on this dicta and explanatory parenthetical, the Eleventh Circuit recently held that "[a] complaint seeking an injunction against the only method of execution authorized in a state must be brought in a habeas petition, because such an injunction necessarily implies the invalidity of the prisoner's death sentence."[124] In *Nance*, the prisoner filed a § 1983 complaint alleging that "Georgia's

115. 553 U.S. 35 (2008).
116. 576 U.S. 863 (2015).
117. *Id.* at 877.
118. *Baze*, 553 U.S. at 52.
119. *Bucklew*, 139 S. Ct. at 1125.
120. *Id.* at 1122.
121. *Id*. at 1128.
122. *Id*.
123. *Id*. (citing *Hill*, 547 U.S. at 582–83).
124. *Nance*, 981 F.3d at 1209.

lethal-injection protocol, as applied to his unique medical situation, violates the Eighth Amendment and that the firing squad is a readily available alternative."[125] Lethal injection is, however, the only method of execution allowed by Georgia law.[126] Thus, according to the Eleventh Circuit, the prisoner sought to bar Georgia from executing him by any available method and such a claim must be raised in habeas.[127] Just as it did in *Nelson* and *Hill*, the court found the § 1983 complaint should be construed as a habeas petition and dismissed as second or successive.[128]

The Sixth Circuit reached the opposite conclusion, holding that all method-of-execution claims must be raised exclusively in § 1983.[129] The court reasoned that "a death-penalty challenge is not cognizable in habeas unless a defect impairs the very fact of the death sentence itself."[130] Only when a prisoner asserts that all available means of execution are unconstitutional would the death penalty be rendered "void and unenforceable."[131] Thus, only when a prisoner asserts there are no alternative means of execution can he raise a method-of-execution challenge in habeas.[132] But in *Glossip*, the Supreme Court held that a prisoner bringing a method of execution challenge, "has no claim unless he can identify a constitutional means by which he can be executed."[133] There is, therefore, no way for a prisoner challenging his method of execution to maintain all means of execution are unconstitutional, which is the only claim that could be raised in a habeas petition. According to the Sixth Circuit, with *Glossip*, the Supreme Court "close[d] the final path into habeas court."[134]

In an unpublished decision with facts indistinguishable from those in *Nance*, the Sixth Circuit held that *Bucklew* in no way impacted its holding in *Campbell*.[135] Smith, like Nance, maintained that "his unique characteristics are such that he can never be executed in a constitutionally valid manner" by lethal injection and State law allowed

125. *Id*. at 1203.

126. *Id*.

127. *Id*. at 1209.

128. *Id*. at 1211–14 (*pet. for cert. granted*, 142 S. Ct. 858, (U.S. Jan. 14, 2022) (No. 21–439).

129. *In re* Campbell, 874 F.3d at 464.

130. *Id*. at 462.

131. *Id*.

132. *Id*.

133. *Id*.

134. *Id*.

135. *In re* Smith, 806 F. App'x 462, 464–65 (6th Cir. 2020).

only for lethal injection.[136] Unlike Nance, Smith raised the challenge in a habeas petition, arguing that *Bucklew* abrogated *Campbell*.[137] Relying on the same dicta on which the Eleventh Circuit relied in *Nance*, Smith argued that "*Bucklew* abrogated *Campbell* and permits his challenges to the lethal-injection method to be raised in [a] habeas petition[]."[138] The Sixth Circuit disagreed, explaining that "[w]hether an as-applied method-of-execution claim may be brought in habeas is not implicated by the question presented in *Bucklew*, its holding, or its primary legal reasoning."[139] The Sixth Circuit refused to find "that the parenthetical, combined with the [Supreme] Court's statement that the question of state law '*might* be relevant to determining the proper procedural vehicle for the inmate's claim,' meaningfully alter[ed] the analysis in *Campbell*."[140]

The Eleventh and Sixth Circuits have, therefore, taken diametrically opposed positions. In the Eleventh Circuit, a method-of-execution challenge that proposes an unauthorized alternative execution method, must be raised in habeas.[141] Meanwhile, in the Sixth Circuit, the same claim must be raised in a § 1983 action.[142] After *Nance*, some method-of-execution challenges in the Eleventh Circuit must now be brought under § 1983, while others must be brought under habeas.[143] Given this, there is concern that *Nance* may "generate confusion in [the Eleventh] [C]ircuit about how to bring method-of-execution claims."[144]

C. Challenges to Administrative Segregation

When a state prisoner challenges the fact or duration of his custody and seeks immediate or speedier release, he must proceed through habeas.[145] Thus, when a prisoner loses good-conduct-time credits or other sentence shortening devices following a disciplinary proceeding, he must seek restoration of those through habeas.[146] Unlike loss of

136. *Id*. at 463.

137. *Id*.

138. *Id*. at 464.

139. *Id*.

140. *Id*. (quoting *Bucklew*, 139 S. Ct. at 1128).

141. *Nance*, 981 F.3d at 1209.

142. *Campbell*, 874 F.3d at 464.

143. *Compare McNabb*, 727 F.3d at 1344, *with Nance*, 981 F.3d at 1209.

144. Nance v. Comm'r, Ga. Dep't of Corr., 994 F.3d 1335, 1340 (2021) (Martin, J., dissenting from the denial of cert.).

145. *See Preiser*, 411 U.S. at 489–90.

146. *Id.*; Additionally, a prisoner who loses good-time credits and seeks damages or a declaration that the disciplinary procedures violated due process may not proceed under § 1983 unless he can show that the disciplinary finding has been invalidated. Edwards v.

good-conduct-time credits, however, placement in administrative segregation following a disciplinary proceeding does not change the fact or length of confinement, it changes the prisoner's conditions of confinement.[147] Generally, a prisoner challenging the conditions of his confinement must seek relief under § 1983.[148] But confinement in administrative segregation seems to resist easy classification into these discrete categories. As is shown below, requests for release from administrative segregation seem to have evolved from habeas to § 1983 over time. In the Eleventh Circuit, however, this evolution has not been linear, and currently a prisoner seeking release from administrative segregation may proceed under either § 1983 or habeas.

In *Sandin v. Conner*,[149] an inmate placed in administrative segregation filed a § 1983 action seeking removal of the misconduct charge from his prison record on the grounds that his due-process rights were violated during the disciplinary proceedings.[150] The Supreme Court did not discuss whether the claim was properly brought under § 1983.[151] It did, however, address the claim and held there was no liberty interest protecting against a thirty-day assignment to segregated confinement because it did not "present a dramatic departure from the basic conditions of [the inmate's] sentence."[152]

In *Wilkinson v. Austin*,[153] inmates sought declaratory and injunctive relief in a § 1983 suit, alleging Ohio's policies for placement and retention in its highest security prison, known as a "Supermax" prison

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Balisok, 520 U.S. 641, 648 (1997); Heck v. Humphrey, 512 U.S. 477, 486–89 (1994). In other words, *Heck's* "favorable termination requirement" applies in such situation. *Muhammad*, 540 U.S. at 755; *Wilkinson*, 544 U.S. at 81–82 (stating that "a state prisoner's § 1983 action is barred (absent prior invalidation)–no matter the relief sought (damages or equitable relief), no matter the target of the prisoner's suit (state conduct leading to conviction or internal prison proceedings)–*if* success in that action would necessarily demonstrate the invalidity of confinement or its duration"); *Edwards*, 520 U.S. at 646–47.

147. *Muhammad*, 540 U.S. at 754–55.

148. The Supreme Court has held that *Heck's* "favorable termination requirement" does not bar a § 1983 suit for damages related to disciplinary proceedings that resulted in placement or retention in administrative segregation. *Muhammad*, 540 U.S. at 754–55 (stating that if the disciplinary proceedings did not "affect the duration of time to be served . . . . [a] § 1983 suit challenging [the proceedings] could not . . . be construed as seeking a judgment at odds with [the prisoner's] conviction or with the State's calculation of time to be served in accordance with the underlying sentence.").

149. 515 U.S. 472 (1995).

150. *Id*. at 475–77.

151. *Id*.

152. *Id*. at 485.

153. 545 U.S. 209 (2005).

(OSP), violated due process.[154] On the eve of trial, Ohio promulgated new regulations to be followed in the future for placement and retention in OSP.[155] As in *Sandin*, the Supreme Court did not address the cognizability of the claim under § 1983 but did reach the merits of the claim.[156] The Court held that prisoners had a constitutionally protected liberty interest in avoiding assignment at OSP because such an assignment, "'imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life.'"[157] The Court found that Ohio's newly adopted procedures were sufficient to satisfy the Due Process Clause.[158]

After *Sandin* and *Wilkinson*, it would seem that circuits holding habeas and § 1983 mutually exclusive would find that challenges to administrative segregation must be raised in a § 1983 action. In other words, the Supreme Court allowed a challenge to administrative segregation and placement in a restrictive supermax prison to be brought under § 1983 and if an action may be brought under § 1983, it must be brought under § 1983.

The Eleventh Circuit, however, found that while the Supreme Court allowed the procedural due process claim in *Sandin* to proceed under § 1983, it did not "address the cognizability of such claims in those proceedings."[159] Thus, according to the Eleventh Circuit, the Supreme Court merely "suggested that such claims might not be cognizable in a habeas proceeding," which did not overrule the circuit's precedent that challenges to administrative segregation "may proceed in a habeas petition."[160] Interestingly, the court did not state that the claim must proceed through habeas, which would be consistent with the *Hutcherson* approach, it stated only that the claim may proceed through habeas.[161]

In *Krist v. Ricketts*,[162] the precedent to which the Eleventh Circuit refers, the former Fifth Circuit found that the district court erred in re-construing a prisoner's habeas petition as a § 1983 action when the

154. *Id*. at 218.
155. *Id*.
156. *Id*. at 230.
157. *Id*. at 223–24 (quoting *Sandin*, 515 U.S. at 484).
158. *Id*. at 228.
159. *Daker*, 805 F. App'x at 650 (citing *Sandin*, 515 U.S. at 477–87).
160. *Id*. at 650.
161. *Id*.
162. 504 F.2d 887 (5th Cir. 1974).

prisoner sought release from administrative segregation.[163] The court held:

> [H]abeas corpus [is] available to persons who seek release from solitary confinement within the context of general incarceration . . . . Such release falls into the category of 'fact or duration of . . . physical imprisonment' delineated in *Preiser* . . . and reserved for habeas jurisdiction.[164]

Contrary to the Eleventh Circuit's language in *Daker* that a request for release from administrative confinement "*may* proceed in a habeas petition," *Krist* held that such a request must proceed in a habeas petition.[165]

The Eleventh Circuit has not always found itself bound by *Krist*. Despite its insistence that habeas and § 1983 are mutually exclusive, it has allowed prisoners seeking release from administrative segregation to proceed under both causes of action.[166]

While the Fifth Circuit has not explicitly overruled *Krist*, it has changed its position and, unlike the Eleventh Circuit, now finds that challenges to administrative segregation must be raised under § 1983. In *Carson v. Johnson*,[167] a prisoner, proceeding *in forma pauperis*, filed a habeas petition in which he alleged that his placement and retention in administrative segregation violated the Constitution and rendered him ineligible for parole. The district court construed the habeas petition as a § 1983 complaint and dismissed it because the prisoner had accrued three strikes under 28 U.S.C. § 1915(g).[168] On appeal, the Fifth Circuit recognized that the distinction between habeas and § 1983

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163. *Id*. at 888.

164. *Id*. at 887–88 (quoting *Preiser*, 411 U.S. at 498–99).

165. *Daker*, 805 F. App'x at 650.

166. Sheley v. Dugger, 833 F.2d 1420, 1422 (11th Cir. 1987) (inmate's due process challenge to administrative segregation allowed to proceed under § 2254); McKinnis v. Mosely, 693 F.2d 1054, 1056 (11th Cir. 1982) (holding that "[a]lthough there may well be an 'ambiguous borderland' between habeas corpus and section 1983, . . . we have no difficulty in concluding that" a case in which the prisoner alleges denial of due process in connection with his placement in administrative segregation and seeks damages, transfer, and expungement of record, "falls within the territory governed by section 1983"); Quintilla v. Bryson, 730 F. App'x 738, 745 (11th Cir. 2018) (holding that prisoner stated plausible claims in his § 1983 complaint, in which he sought damages and injunctive relief based on his years-long confinement in Tier II segregation); Al Amin v. Donald, 165 F. App'x 733, 734 (11th Cir. 2006) (addressing on the merits a § 1983 complaint in which prisoner sought damages and release from administrative segregation).

167. 112 F.3d 818 (5th Cir. 1997).

168. *Id*. at 819.

can be "blurry" in these situations.[169] It had, however, "adopted a simple, bright-line rule for resolving such questions. If a favorable determination . . . would not automatically entitle [the prisoner] to accelerated release, the proper vehicle is a § 1983."[170] The Court explained that while removal from administrative segregation would make the prisoner eligible for parole consideration, it would not automatically shorten his sentence or lead to immediate release.[171] Thus, relief could not be sought through habeas.[172]

The United States Court of Appeals for the Seventh Circuit previously cited *Krist* to support its holding that "habeas corpus can be used to get from a more to a less restrictive custody."[173] Years later, the court expressed doubt that habeas was the appropriate cause of action when a prisoner "contends that his custody should take one form (the prison's general population) rather than another (segregation)."[174] Finally, in *Montgomery v. Anderson*,[175] the Seventh Circuit reversed the position it had taken in *McCollum*,[176] finding that "more-restrictive custody must be challenged under § 1983."[177]

The Third, Ninth, and Tenth Circuits have held that prisoners seeking release from administrative confinement must proceed through § 1983.[178] The Eight Circuit has stated in dicta that "prisoners who

169. *Id*. at 820.

170. *Id*. at 820–21.

171. *Id*. at 821.

172. *Id*.; *See also* Pichardo v. Kinker, 73 F.3d 612 (5th Cir. 1996) (addressing on the merits an action brought under § 1983 in which prisoner alleged retention in administrative segregation violated due process rights); Johnson v. Thaler, No. 2:10-cv-141, 2012 U.S. LEXIS 24581, at *5–6 (N.D. Tex. Feb. 14, 2012) (dismissing habeas in which prisoner sought release from administrative segregation because the district court was bound by "bright line rule" established in *Carson* as opposed to *Krist*).

173. McCollum v. Miller, 695 F.2d 1044, 1046 (7th Cir. 1982); Graham v. Broglin, 922 F.2d 379, 381 (7th Cir. 1991) (stating in dicta that if the prisoner seeks "the run of the prison in contrast to the approximation to solitary confinement that is disciplinary segregation—then habeas corpus is his remedy.").

174. Sylvester v. Hanks, 140 F.3d 713 (7th Cir. 1998).

175. 262 F.3d 641, 644 (7th Cir. 2001).

176. The Court did not expressly overrule *McCollum*.

177. *Montgomery*, 262 F.3d at 644; *See also Moran*, 218 F.3d at 651 (stating in dicta that "[s]tate prisoners who want to raise a constitutional challenge to . . . administrative segregation . . . must . . . employ § 1983.").

178. *Leamer*, 288 F.3d at 544 (holding that prisoner's challenge to placement in the close custody unit and restrictive activities program "would not be properly brought under habeas[,]" but must proceed through § 1983); Ramirez v. Galaza, 334 F.3d 850, 859 (9th Cir. 2003) (holding "that habeas jurisdiction is absent, and a § 1983 action proper" when a prisoner challenges segregation because "a successful challenge . . . will not necessarily

challenge disciplinary rulings that do not lengthen their sentence are probably outside the habeas statute[.]"[179]

Thus, most of the circuits that employ the *Hutcherson* approach find that challenges to and requests for removal from administrative segregation must be brought under § 1983. The Eleventh Circuit appears to be the outlier on this issue. Perhaps this difference of opinion is not surprising because the issue is capable of two sound conceptualizations. On the one hand, since release from administrative segregation does not mean release from prison altogether, one could reasonably characterize a request for release from segregation as challenging only the conditions or circumstances of confinement, rather than the lawfulness or duration of confinement. By this conceptualization, § 1983 is the appropriate vehicle. On the other hand, one could reasonably view administrative segregation as a distinct type of custody-within-custody, and of course, habeas is the appropriate vehicle for requesting a release from custody. This latter view, though, may be in tension with Supreme Court cases like *Sandin* and *Wilkinson*, which appear to contemplate the adjudication of administrative segregation claims within § 1983 actions.

As is shown by the circuit courts' handling of method-of-execution challenges and requests for release from administrative segregation, classification as habeas versus § 1983 can be problematic. Given the difficulty of drawing lines between claims that are properly raised in habeas and those that may be brought under § 1983, one might legitimately question the value of the *Hutcherson* approach. As discussed below, mutual exclusivity has its problems. It, however, offers the most efficient structure for processing the ever-increasing volume of prisoner litigation.

IV. PRACTICAL PROBLEMS: WILL MUTUAL EXCLUSIVITY REALLY WORK?

The Federal Reporter suggests that the circuit courts are now adopting mutual exclusivity without fear of the abstract criticisms raised in part two of this Article. Again, mutual exclusivity means a clear division between habeas and § 1983 along the following lines:

> When an inmate challenges the circumstances of his confinement but not the validity of his conviction and/or sentence, then the claim is properly raised in a civil rights action under § 1983. However, when an inmate raises any challenge to the lawfulness of confinement or

shorten the prisoner's sentence"); Gee v. Murphy, 325 F. App'x 666, 670 (10th Cir. 2009) (holding that challenge to administrative segregation may not be brought under habeas).

179. Sheldon v. Hundley, 83 F.3d 231, 234 (8th Cir. 1996).

> the particulars affecting its duration, his claim falls solely within the province of habeas corpus under § 2254.[180]

As discussed in section three, the courts are currently laboring to categorize liminal claims as implicating either habeas or § 1983. That is, the courts are laboring to explain how mutual exclusivity works, including in the hard cases. In this section, the Authors consider whether that project is achievable. Addressed below are four practical problems that the courts will encounter in their work. Notwithstanding these problems, the Authors believe that mutual exclusivity offers a viable framework for prison litigation.

A. Circuit Splits and Supreme Court Tension

Mutual exclusivity is not a magic bullet, and it will not dispel analytical hardship arising from liminal issues that fall midway between the core of habeas and the core of § 1983. Yet it is helpful to distinguish between two types of liminal problems: (1) those arising from a remedy (addressed below, in subsection (C)), and (2) those arising from category choice—that is, from the judicial decision about which "bucket," habeas or § 1983, in which to place a certain type of claim.

Regarding the latter problem of category choice, the courts will face two interrelated difficulties. First, courts may reach different conclusions or "split" about whether to categorize a particular claim as sounding in habeas or § 1983. Second, court categorizations under a mutually exclusive paradigm might create tension with Supreme Court precedent, which historically has preserved the possibility of overlap between habeas and § 1983. Both difficulties can be demonstrated by revisiting the topic of administrative segregation.

As described in section three, a federal circuit split already exists over what category, habeas or § 1983, should encompass requests for release from administrative segregation. Of those circuits employing mutual exclusivity, the Ninth and Tenth Circuits have consistently held that administrative segregation claims must be raised under § 1983.[181] The Fifth and Seventh Circuits have flip-flopped, such that both Circuits now also fall into the § 1983 camp.[182] At present, only the

180. *Hutcherson*, 468 F.3d at 754.

181. *See Ramirez*, 334 F.3d at 859; *Gee*, 325 F. App'x at 670.

182. *See Carson*, 112 F.3d at 821; *Montgomery*, 262 F.3d at 644.

Eleventh Circuit may require[183] litigants to seek release from administrative segregation exclusively in a § 2254 action.[184]

The current makeup of this split could, of course, change as other circuits adopt mutual exclusivity and begin to make category choices. The Authors predict that new circuits will adopt the majority position, making the Eleventh Circuit an increasing outlier on the issue of administrative segregation. The weight of consensus partly justifies this prediction,[185] but undoubtedly, new circuits will also seek to avoid tension with Supreme Court precedent.

Regarding that topic, a handful of Supreme Court decisions have analyzed the propriety of procedures accompanying a prisoner's transfer to harsher "segregation" quarters, and all of those decisions invoked § 1983. *Sandin v. Connor* is the posterchild, but there are other cases too—*Wilkinson v. Austin*, *Hewitt v. Helms*,[186] and *Hughes v. Rowe*[187] are examples. These cases suggest that the Eleventh Circuit's position on administrative segregation is tenuous, either because mutual exclusivity is itself improper, or because administrative segregation claims should be raised under § 1983. The Eleventh Circuit's response to this apparent tension is bold indeed: the Eleventh Circuit contends that the Supreme Court labored in its past cases without pausing to "address the cognizability of such claims in [§ 1983] proceedings."[188]

What is the general takeaway from these specific administrative segregation examples? The Authors believe the takeaway should be that circuit splits and precedential tension are ordinary incidents of litigation in difficult areas of law. These problems, in other words, are not specific to mutual exclusivity, and they should not forestall an adoption, by new circuits, of a mutually exclusive paradigm. Ensuing problems, such as those described above, will resolve themselves in time by time-tested means. For example, if the Eleventh Circuit ruled incorrectly in *Daker*, then a correction will soon arrive in one form or another. A new Eleventh Circuit panel could disclaim *Daker* as unpublished, and hence non-binding. Or the Eleventh Circuit might sit

183. As discussed in part three, the *Daker* case is itself inconsistent with earlier Eleventh Circuit caselaw. *See, e.g.*, *Al-Amin*, 165 F. App'x at 735–36 (entertaining a request for "removal from administrative segregation" in a § 1983 action).

184. *See Daker*, 805 F. App'x at 650.

185. *See* Stephen L. Wasby, *Intercircuit Conflicts in the Courts of Appeals*, 63 MONT. L. REV. 119, 160 (2002) ("[w]hen a conflict exists and more courts of appeals have adopted one of the competing positions, there may be a pull from the majority position.").

186. 459 U.S. 460 (1983).

187. 449 U.S. 5 (1980).

188. *Daker*, 805 F. App'x at 650.

en banc to revise *Krist v. Ricketts*, the old Fifth Circuit decision underlying *Daker*.

It is also possible that the Supreme Court could intercede to declare that requests for release from administrative segregation are cognizable in § 1983 actions. Such intercession, though, is unlikely, and hence it is not a ready source for clarity. The better prospect is for the circuit courts to forge ahead by adopting *Hutcherson* mutual exclusivity, and by continuing to make and revise category choices, including in difficult, liminal areas of law.

B. State Court Application

Federal courts lack exclusive jurisdiction over § 1983 actions, so plaintiffs may opt to bring their § 1983 actions in state court. If a plaintiff makes this choice, should the presiding state court apply *Hutcherson*'s rule of mutual exclusivity? If so, should the state court also track regional federal court category choices (that is, what claims fall into which "bucket")?

The Authors will not long dwell on these difficult forum shopping questions except to offer three brief observations. First, the more one associates *Hutcherson* mutual exclusivity with Congressional intent divined from AEDPA and the PLRA, the likelier one is to conclude that the Supremacy Clause requires state courts to apply mutual exclusivity under the reverse-*Erie* doctrine.[189] In other words, a given jurist's answers to the above questions are likely to be contingent upon that jurist's jurisprudential understanding of the origin of *Hutcherson* mutual exclusivity.

Second, as a descriptive matter, some state courts are, at present, implicitly declining to follow federal circuit adoptions of a mutually exclusive paradigm. For example, the Tenth Circuit has adopted mutual exclusivity.[190] Yet within the Tenth Circuit's territorial ambit, Kansas state courts continue to entertain requests for release from administrative segregation in habeas actions, *Jamerson v. Heimgartner*,[191] and in § 1983 actions.[192] This seeming incongruity is reconcilable, even in theory: reverse-*Erie* doctrine asks state courts to "try to determine what the U.S. Supreme Court would rule,"[193] and

189. Reverse-*Erie* refers to the process by which "federal law flows down to govern in state court." Kevin M. Clermont, *Reverse-Erie*, 82 NOTRE DAME L. REV. 1, 5 (2006).

190. *See* Gee, 325 F. App'x at 666.

191. 372 P.3d 1236 (Kan. Sup. Ct. 2016).

192. *See* Astorga v. Leavenworth Cnty. Sheriff, 475 P.3d 385 (Kan. Ct. App. 2020).

193. Clermont, *supra* note 189 at 31.

Kansas state judges may be skeptical about whether the Supreme Court will ultimately condone *Hutcherson* mutual exclusivity.

Third and finally, it is interesting to note that within the Eleventh Circuit's territorial ambit, Florida and Georgia state courts maintain a tradition of declining to entertain requests for release from administrative segregation in § 1983 actions. Instead, these courts tend to redirect these claims into mandamus or habeas actions.[194] It may be, therefore, that *Erie*-like considerations[195] induced the Eleventh Circuit to adopt its present, outlying position on administrative segregation as falling into the category or bucket of habeas.

C. Remedial Exceptions to Category Choices

A different liminal problem will arise as courts make category choices, but then face ensuing remedial problems. One such problem, addressed in *Nance*, has already arisen in the method-of-execution context. The Authors anticipate that system-wide prison issues like overcrowding will also prove problematic.

The case of *Brown v. Plata*,[196] is a useful starting point for illustrating the problem of remedial exceptions to category choices. In *Brown*, a class of prisoners secured a federal provisional release order as a remedy for significant, persistent overcrowding (and accompanying healthcare deficiencies) within the California state prison system. *Brown* was commenced under § 1983, and singly, the Eighth Amendment claims raised in *Brown* are typical § 1983 fodder.[197] *En masse*, though, claims relating to system-wide deficiencies necessarily implicate the remedy of release—the alternative remedy of constructing additional prisons, after all, is problematic. In a mutually exclusive paradigm, *Brown*-like, system-wide claims implicating the remedy of release threaten to cross over the mutually exclusive boundary line, moving from § 1983 territory into habeas territory. *Brown*-like situations, in other words, strain category choices—such as that Eighth

194. *See, e.g.*, Taylor v. Gee, No. 8:08-CV-2557-T-30MAP, 2009 U.S. LEXIS 61052, at *2 (M.D. Fla. 2009) ("[t]he remedy of an extraordinary petition, specifically, a writ of mandamus or of habeas corpus, is available in the Florida Courts"); *Accord* Daker v. Allen, No. 6:17-cv-23, 2020 U.S. LEXIS 52883, at *13 (S.D. Ga. Mar. 3, 2020) ("[u]nder Georgia law, issues regarding discipline in the prison context . . . are typically raised in a mandamus action") (internal quotations omitted).

195. *See* Adam N. Steinman, *What is the Erie Doctrine? (And What Does it Mean for the Contemporary Politics of Judicial Federalism)*, 84 NOTRE DAME L. REV. 245, 311–12 (2008).

196. 563 U.S. 493 (2011).

197. *Id*. at 499–500.

Amendment conditions-of-confinement claims always fall exclusively into the bucket of § 1983.

The *Nance* case addresses the same problem, but in a different context. Like most courts employing mutual exclusivity, the Eleventh Circuit has assigned method-of-execution challenges to the category of § 1983. Most states now use lethal injections as their method of execution, and a typical challenge attacks some aspect of the injection process for creating an unnecessary risk of pain, as compared to an authorized, alternative process. The plaintiff in *Nance*, however, attacked Georgia's lethal injection process based not on some aspect of that process, but rather on his own health issues.[198] Specifically, Nance cited his (1) compromised veins, which would make intravenous injection of any kind problematic, and (2) prolonged treatment with gabapentin, which "altered his brain chemistry in a way that would diminish the efficacy of the lethal injection drug[s] and leave him sensate and in extreme pain during his execution."[199] Nance asked for death by firing squad as an alternative process, but Georgia law only authorizes lethal injections as its sole method of execution.[200] In effect, therefore, Nance's lawsuit sought to have his sentence commuted from death to life imprisonment.[201]

The Eleventh Circuit's *Nance* panel in essence held that while method-of-execution challenges generally are raised under § 1983, the peculiar nature of Nance's attack implicated the core of habeas, and therefore needed to be raised in habeas.[202] A petition for certiorari review of *Nance* has been granted, and perhaps the Supreme Court will offer guidance. Absent such guidance, cases such as *Nance* and *Brown* reveal a lingering problem associated with the *Hutcherson* approach. Even in a superficially mutually exclusive paradigm, the lower courts may need to remain mindful of the Supreme Court's cryptic notion of a "core of habeas."[203] Difficulties will continue to arise as claims generally associated with the category of § 1983 require remedies that implicate core habeas concerns.

D. Application Errors

A fourth and final problem is the risk that courts will not follow their own rules when applying the doctrine of mutual exclusivity.

198. *Nance*, 981 F.3d at 1203.
199. *Id.* at 1204.
200. *Id*. at 1205.
201. *Id*. at 1203.
202. *Id*.
203. *Preiser*, 411 U.S. at 489.

Arbitrariness is, of course, a commonplace jurisprudential concern, but it has special bite here because it threatens to undermine the primary, and perhaps only, selling point for the *Hutcherson* approach, clarity.

The Eleventh Circuit's opinion in *Daker*, well illustrates this problem. The Authors have already discussed the *Daker* case at length for its dubious assignment of administrative segregation claims to the category of habeas, but the *Daker* case, it seems, is a font of perplexity. The case is also problematic for its intermingling, within a single action, both habeas claims and § 1983 claims. For context, Waseem Daker, the plaintiff-*cum*-petitioner, is an abusive prison litigator[204]—that is, precisely the type of litigant targeted by the PLRA's reforms. Daker commenced the case using a standard-form § 2254 petition, but to this form, Daker attached a brief inconsistently invoking relief under § 1983, as well as the Religious Land Use and Institutionalized Persons Act (RLUIPA).[205] Daker's substantive claims wrought similar confusion: Daker asked for release from segregation, but Daker also argued that his conditions of confinement violated the Eighth Amendment, and that denials of Daker's worship opportunities and ability to access the courts violated his First Amendment rights.[206] In a mutually exclusive paradigm, these latter claims should fall within the category of § 1983.

Upon review of Daker's filing, the district court "construed the petition as a 42 U.S.C. § 1983 complaint and dismissed it pursuant to 28 U.S.C. § 1915(g)," a screening authority not applicable in habeas actions.[207] The Eleventh Circuit "affirm[ed] the dismissal of Daker's properly construed § 1983 claims," suggesting that Daker's action was a § 1983 action.[208] Yet the Eleventh Circuit also "vacate[d] the district court's order to the extent that it concluded that Daker's procedural-due-process claim was not cognizable in a § 2254 proceeding, and [it] remand[ed] for further proceedings as to that claim."[209] This latter ruling suggests that Daker's action was instead a habeas action. All of this begs the question, is the *Daker* case, or the notion of a hybrid § 1983-habeas action generally, reconcilable with *Hutcherson* mutual exclusivity? In lieu of an answer, the Authors offer the following two observations.

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204. *See* Daker v. Ward, 999 F.3d 1300, 1302–03 (11th Cir. 2021) ("[D]aker's History as a Serial Litigant.").

205. 42 U.S.C. §§ 2000cc-1–2000cc-5 (2000).

206. *Daker*, 999 F.3d at 1303–04.

207. *Daker*, 805 F. App'x at 649; 28 U.S.C. § 1915(g); *see* Pickett v. Wise, 849 F. App'x 904 (11th Cir. 2021) ("[h]abeas corpus petitions brought under 28 U.S.C. § 2254 are not civil actions for purposes of the PLRA.").

208. *Daker*, 805 F. App'x at 652.

209. *Id.* at 651.

First, the *Daker* case might stand for the proposition that when lower courts receive filings which intermix § 1983 claims with habeas claims, those lower courts should perform a hypothetical screening under 28 U.S.C. § 1915 and § 1915A.[210] If that hypothetical screening would eliminate all § 1983 claims, then perhaps the lower courts should construe the action as a habeas action and ignore the potential § 1983 claims. One problem with this interpretation is that it does not fit what the Eleventh Circuit said in *Daker*. After all, the *Daker* panel affirmed the district court's "dismissal of Daker's properly construed § 1983 claims."[211] A more serious problem is the notion of a hypothetical ruling. Even claims-processing determinations such as the appropriate filing fee—$402.00 for § 1983, $5.00 for habeas—or the three strikes bar, 42 U.S.C. § 1915(g), are appealable and reversible, so it would be conceptually difficult to deem these determinations merely "hypothetical."

Second, it could be that hybrid actions are procedurally impermissible, but that the appropriate remedy is a severance of habeas claims and § 1983 claims into separate actions. If this is the case, one wonders why the *Daker* panel did not instruct the district court to work a severance on remand. A related issue is whether a severance might, in essence, be achieved through a partial dismissal, without prejudice, of either the § 1983 claims or the habeas claims raised in a hybrid petition/complaint. On this point, Eleventh Circuit caselaw provides that even *pro se* litigants are "subject to the relevant law and rules of court, including the Federal Rules of Civil Procedure."[212] If the impermissibility of hybrid actions is a procedural rule that even *pro se* parties must obey, why then did the district court abuse its discretion by enforcing that rule in *Daker v. Warden* through a non-prejudicial dismissal of Daker's tag-along habeas claims?

The Authors' take is that the *Daker* panel found nothing amiss in permitting a hybrid action because the panel simply failed to apply *Hutcherson*. In any event, in *Daker*'s wake, lower courts within the Eleventh Circuit's ambit must now confront added analytical difficulty when facing prisoner filings that intermingle claims sounding in habeas and § 1983. *Hutcherson* suggests that these avenues for relief are mutually exclusive, but *Daker* suggests that litigants can intermingle habeas and § 1983 claims after all.

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210. 28 U.S.C. § 1915A (1996).

211. *Daker*, 805 F. App'x at 652.

212. Moon v. Newsome, 863 F.2d 835, 837 (11th Cir. 1989).

V. AN ASSESSMENT

The puzzling aspect to the Supreme Court's *Preiser v. Rodgriguez* opinion was always its cryptic reference to a core of habeas. The quintessential habeas case involves a request for release from prison (if only temporarily) based on an irregularity in criminal process. But habeas, we know, can do much more, and the line between a quintessential habeas case and a peripheral one is murky.

By jettisoning the notion of a core of habeas, the Eleventh Circuit in *Hutcherson* may well have solved the *Preiser* Puzzle. Mutual exclusivity between habeas and § 1983 brings clarity and ease of administrability by pushing difficult choices to peripheral areas of law. There remains, of course, the immediate problem of categorizing claims which is troublesome because it involves arbitrariness, as all line-drawing exercises do. Judges will resolve categorization problems in time through trial and error. The truly difficult issues remaining after *Hutcherson*, though—issues such as remedial exceptions to category choices and the fluidity of the bounds of habeas—will arise only infrequently.

The most damning indictment of the Eleventh Circuit's *Hutcherson* approach is that its rule embodies a legal meme. Other circuits have since offered better analytical backing for mutual exclusivity, with the Ninth Circuit's opinion in *Nettles*, offering perhaps the best guidance. Developments within the Eleventh Circuit, however, have been discreditable. The *Hutcherson* panel failed to give any initial justification for a rule of mutual exclusivity, and subsequent Eleventh Circuit panels parroted *Hutcherson*'s rule without exploring its validity.

Federal appellate courts should be able to wrestle with analytical complexity in written, public opinions. Yet sometimes, the simple answer is the right answer. This appears to be the case with *Hutcherson* mutual exclusivity. If the courts can avoid application errors by punctiliously enforcing both the general rule and claim–specific category choices, then mutual exclusivity offers a viable framework for streamlining prison litigation. If *Hutcherson* is a legal meme, then it is a felicitous one that, almost forty years on, may have finally solved the *Preiser* Puzzle.