"AS LAW AND JUSTICE REQUIRE": A TRADITIONAL HABEAS APPROACH TO MODERN PRISONER RIGHTS

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Abstract: This article argues that, contrary to general understanding, the writ of habeas corpus is available to challenge not only claims of unlawful conviction but also unlawful conditions of confinement. In a series of habeas cases beginning in the nineteenth century, the Supreme Court articulated a common law approach for extending habeas jurisdiction to habeas petitions that seek less than immediate or speedier release. During the 1950s and 1960s, the federal circuit drew on this nineteenth century approach to habeas in vindicating the rights of prisoners and those committed to psychiatric care. As a product of this historical context, the current habeas statutory framework allows for habeas challenges to detention conditions. Treating habeas in this way has two impacts. First, it helps ensure that detainees, who often file pro se, are heard on the merits of their claims and do not have their cases dismissed for lack of jurisdiction. Second, this reading has a procedural impact, in that courts may treat the habeas statutes as providing emergency relief where other federal statutes impose severe procedural requirements.

I. INTRODUCTION

On September 18, 2006, Viktoriya Ilina self-surrendered to federal authorities on charges of federal conspiracy and racketeering and was sentenced to forty-eight months in federal prison.[1] When she was a teenager, Ms. Ilina learned her body did not naturally produce normal amounts of progesterone.[2] Left untreated, such a condition leads to severe pain and profuse bleeding.[3] In fact, complications related to the condition contributed to Ms. Ilina's 1999 diagnosis of cervical cancer.[4] Ms. Ilina needed to take medication to manage her abnormal levels of estrogen/progesterone.[5] Accordingly, the Bureau of Prisons ("BOP") placed Ms. Ilina in a prison where she could continue receiving treatment.[6] Ms. Ilina was able to use her medication every day until April 17, 2007.[7]

1 Second Amended Petition for Writ of Habeas Corpus at ¶ 9, Ilina v. Zickefoose, 591 F. Supp. 2d 145 (D. Conn. 2008) (No. 3:07-CV-1490(JBA)).
2 *Id.*
3 *Id.* at ¶¶ 5–8.
4 *Id.*
5 *Id.*
6 *Id.*
7 *Id.*

On April 17, Ms. Ilina was transferred to FCI Danbury, where officials refused to continue her treatment.[8] Multiple appeals to the BOP doctors and administrators were to no avail.[9] It did not matter that Ms. Ilina received treatment at the previous prison, nor that she had received treatment for the condition during the previous ten years.[10] Even after exhausting the administrative appeals process, receiving an outside diagnosis of her condition, and an MRI revealing an unidentified growth in her uterus, the doctors and administrators at FCI Danbury refused her treatment.[11] The best the BOP doctor at FCI Danbury could offer was to condition Ms. Ilina's treatment on her submitting to an exploratory surgery without anesthetic.[12]

Ms. Ilina filed a habeas petition in federal court challenging the conditions of her imprisonment.[13] When a federal prisoner is held in custody in violation of the Constitution or laws of the United States, they may file a writ of habeas corpus in federal court and seek relief, usually in the form of release from detention.[14] Ms. Ilina argued that the prison officials were deliberately indifferent to her medical condition in violation of the Eighth Amendment's protections against cruel and unusual punishment.[15] Based on this theory, the district court ruled in Ms. Ilina's favor, finding that when a habeas petitioner challenges the "execution of a sentence"—i.e., when a petitioner challenges the manner in which prison officials administer the conditions of detention—then the writ of habeas corpus is available to provide relief.[16] As for the relief in Ms. Ilina's case, she could either request a transfer back to her original prison, or she could seek an injunction against FCI Danbury.[17]

While Ms. Ilina was successful in her habeas petition, things could have ended differently had she filed in a different circuit.[18] There is a stark divide across the federal circuits as to whether habeas can challenge unconstitutional or unlawful prison conditions.[19] In some circuits, people held in custody may never use habeas to challenge conditions of confinement.[20] Were Ms. Ilina to file her petition in one of these circuits, her claim would have been rejected and she would have had to re-file her claim under a different federal statute.[21] One can only speculate on the further deterioration of Ms. Ilina's medical condition had she been forced to re-file. In other circuits, such as the Second Circuit, petitioners can challenge conditions of confinement, and they may properly seek immediate

8 *Id.* at ¶¶ 10–21.
9 *Id.*
10 *Id.*
11 *Id.*
12 *Id.*
13 Ilina v. Zickefoose, 591 F. Supp. 2d 145, 145 (D. Conn. 2008).
14 *Id.* at 146–47.
15 *Id.*
16 *Id.* at 148.
17 *Id.* at 148–50.
18 *See infra* Part I.
19 *See infra* Parts I–II.
20 *E.g.*, Luedtke v. Berkebile, 704 F.3d 465, 465–66 (6th Cir. 2013).
21 For instance, § 1983 is also available to challenge unlawful prison conditions like those faced by Ms. Ilina. Section 1983 states any person who has been deprived a federal or constitutional right, by the federal or a state government, may seek equitable relief. 42 U.S.C. § 1983.

release from custody, transfer to another prison, or even injunctions prohibiting certain prison practices.[22]

This split as to the scope of habeas to challenge conditions of confinement originates in the Supreme Court case *Preiser v. Rodriguez*.[23] The Court held that habeas is the sole remedy for prisoners seeking immediate release from custody, meaning that prisoners could not rely on other federal statutes to secure release.[24] In essence, other federal statutes cannot tread on habeas's territory when it comes to claims for release.[25] However, the Court failed to resolve whether habeas is ever available to seek a relief less than release, such as in Ms. Ilina's case.[26]

This article argues that habeas is in fact available to challenge conditions of confinement. In a series of habeas cases beginning in the nineteenth century, the Court articulated a common law approach for extending habeas jurisdiction to habeas petitions that seek less than immediate or speedier release.[27] During the 1950s and 1960s, the lower courts drew on this nineteenth century approach to habeas in vindicating the rights of prisoners and those committed to psychiatric care.[28] These circuit decisions treated habeas as the primary mechanism for detainees seeking to challenge prison administrative decisions that result in unlawful conditions of confinement.[29] As a product of this historical context, the current habeas statutory framework allows for habeas challenges to detention conditions.

Treating the scope of habeas in this expansive way has an obvious impact on someone like Ms. Ilina. First, it helps ensure that people who file pro se are heard on the merits and do not have their cases dismissed for lack of jurisdiction. Second, the reading has an important procedural impact. One of the habeas statutes, 28 U.S.C. § 2241, only imposes prudential procedural requirements.[30] This means a court may at its own discretion excuse the common law procedural requirements applied to § 2241 habeas petitions.[31] In emergency situations, such as a pandemic, federal courts can act swiftly on § 2241 petitions by providing emergency relief for at-risk detainees.[32] In fact, in light of the COVID-19 pandemic, some courts waived § 2241's procedural requirements in the name of emergency relief.[33]

The purpose of this article is to show how reading habeas broadly does more than merely increase court efficiency. Section 2241's prudential requirements also mean that the statute is particularly suited to plaintiffs confronting emergency situations.

This article proceeds in five parts. Part I provides a primer to the substantive and procedural requirements of the federal habeas statutes. Part II closely examines the Supreme Court's

22 *See infra* Part I.
23 *See* Preiser v. Rodriguez, 411 U.S. 475, 475 (1973).
24 *Id.* at 500.
25 *Id.*
26 *Id.* at 499–500.
27 *In re* Bonner, 151 U.S. 242 (1894).
28 *See* Coffin v. Reichard, 143 F.2d 443, 445 (6th Cir. 1944) (citing *In re Bonner*, 151 U.S. at 242); Lake v. Cameron 364 F.2d 657 (D.C. Cir. 1966) (en banc).
29 *See Coffin*, 143 F.2d at 443; *Lake*, 364 F.2d at 657.
30 Sun v. Ashcroft, 370 F.3d 932, 938 n.7 (9th Cir. 2004).
31 *Id.*
32 28 U.S.C. *§* 2241.
33 *E.g.,* Xuyue Zhang v. Barr, --- F. Supp. 3d ---, 2020 WL 1502607, at *4–5 (C.D. Cal. Mar. 27, 2020).

Preiser decision, to show where courts have erred in using *Preiser* to deny habeas relief for conditions of confinement claims. Part III solves the federal circuit's *Preiser* problem by tracing the development of a nineteenth century habeas doctrine that supports interpreting habeas as available to seek relief from unconstitutional conditions of confinement. Part IV shows how the Second Circuit's case law bridges the gap between the historical approach to habeas and the modern statutes. Finally, Part V applies the theories described to two short case studies from recent COVID-19 habeas petitions.

II. The Modern Habeas Statutes: Substance and Procedure

In 1867, Congress passed the modern habeas statutes.[34] This was the first time the writ extended to all prisoners seeking relief from unlawful confinement, marking the advent of the use of the writ as we know it today: a collateral attack on a prisoner's unlawful conviction.[35] Since the passage of the 1867 laws, the writ has played a pivotal role in securing the rights of prisoners and remedying the abuses of the criminal legal and penal systems.[36] This Part of the article provides a brief overview of the substantive and procedural differences between three sections of the modern habeas statute, 28 U.S.C. §§ 2241, 2254, and 2255, in explaining how habeas may be used to challenge prison conditions as an unlawful "execution of a sentence."[37] Doing so highlights § 2241's position as a "catchall" or gap-filling writ.[38]

Section 2254 states that federal habeas relief is available to a petitioner held in custody on the judgement of a state court whenever the individual is held in custody "in violation of the Constitution or laws . . . of the United States."[39] Courts have interpreted this language as applying to state prisoners seeking relief from either the imposition *or* the execution of a sentence.[40] Petitioners seeking relief from an unlawful imposition of a sentence attack the

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[34] Charles Doyle, Congressional Research Service, *Federal Habeas Corpus: A Brief Legal Overview*, *in* CRS REPORT FOR CONGRESS 1, 4 (Apr. 26, 2006) https://fas.org/sgp/crs/misc/RL33391.pdf, https://fas.org/sgp/crs/misc/RL33391.pdf.

[35] *Id.*

[36] *Id.* at 7.

[37] *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, 85 n.3 (1988) (discussing differences in jurisdiction to grant § 2241 versus § 2254).

[38] While the Supreme Court has never spoken directly on the textual analysis, lower courts have employed it in distinguishing § 2241 as a catchall provision, and the Court has implicitly accepted § 2241 role as a catchall. *See, e.g.*, Rasul v. Bush, 542 U.S. 466 (2004) (recognizing that § 2241 confers jurisdiction to grant habeas relief for detainees at Guantanamo Bay); Calcano-Martinez v. INS, 533 U.S. 348 (2001) (finding § 2241 jurisdiction for immigration detainees). For academic recognition of § 2241 as a "catchall" provision, see Megan A. Fernsten-Torres, *Who Are We to Name? The Applicability of the "Immediate-Custodian-As-Respondent" Rule to Alien Habeas Claims Under 28 U.S.C. § 2241*, 17 GEO. IMMIGR. L.J. 431, 431 (2003) ("28 U.S.C. § 2241, the so-called 'catchall' habeas provision" (citing JOSEPHINE R. POTUTO, PRISONER COLLATERAL ATTACKS: FEDERAL HABEAS CORPUS AND FEDERAL PRISONER MOTION PRACTICE 11 (1991))). *See also* Schwartz, *supra* note 37 (discussing differences in jurisdiction to grant § 2241 versus § 2254).

[39] 28 U.S.C § 2254(a).

[40] *See, e.g.*, *In re* Wright, 826 F.3d 774, 778 (4th Cir. 2016) ("The majority view is that § 2241 habeas petitions from convicted state prisoners challenging the execution of a sentence are governed by § 2254."); Bailey v. Hill, 599 F.3d 976, 982–83 (9th Cir. 2010) (describing how § 2254 permits challenges to the imposition and execution of a state

validity of the underlying conviction.[41] This is the classic formulation of habeas, where a petitioner alleges some constitutional defect with the trial process or underlying conviction, seeking to overturn the conviction and secure release from custody.[42] On the other hand, petitioners seeking relief from an unlawful execution of a sentence attack the manner or duration of confinement.[43] This type of challenge does not touch on the validity of the underlying conviction itself.

For an uncontroversial example of this claim, imagine a petition whose resolution requires immediate or speedier release from prison, like the restoration of "good-time" credits that lessens the number of days a prisoner must serve before release from custody.[44] For this type of petition, the challenge does not attack the validity of the underlying conviction, but rather the execution—or carrying out—of an otherwise valid sentence.

The text of § 2254 makes no distinction between the applicability of habeas relief to petitioners challenging the validity of a conviction or the execution of a sentence, so courts have interpreted the statute as encompassing any claim that questions the constitutionality or legality of the custody.[45]

When the habeas petitioner claims actual innocence or a defect with the trial process, the adequate remedy is obvious: immediate release or re-trial.[46] However, when the habeas petitioner claims the unlawful execution of a sentence, circuits are split both as to the types of harms that petitioners may challenge as well as the scope of relief available.[47]

Courts have not settled on either the meaning or scope of habeas challenges to the unlawful execution of a sentence.[48] Some courts have interpreted the execution of a sentence broadly, granting writs for petitions that challenge the conditions or place of confinement and seek relief through, for example, medical treatment via a prison transfer.[49]

sentence); James v. Walsh, 308 F.3d 162, 167 (2d Cir. 2002) ("[A] state prisoner may challenge either the imposition or the execution of a sentence under Section 2254.").

41 *See, e.g.*, *Walsh*, 308 F.3d at 167.

42 *Id.*

43 Dhinsa v. Kreuger, 917 F.3d 70, 81 (2d Cir. 2019) ("challeng[ing] 'the *execution* of a sentence' include[es] challenges to disciplinary actions, prison conditions, or parole decisions" (Adams v. United States, 372 F.3d 132, 135 (2d Cir. 2004)(emphasis in original)).

44 This hypo is taken from Preiser v. Rodriguez, 411 U.S. 475 (1973).

45 28 U.S.C. § 2254(a) ("The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.").

46 Leah M. Litman, *Legal Innocence and Federal Habeas*, 104 VA. L. REV. 417, 459, 490–92 (2018).

47 *See* cases cited *infra* note 49 and accompanying text.

48 *Compare Dhinsa,* 917 F.3d at 81 ("challeng[ing] 'the *execution* of a sentence' include[es] challenges to disciplinary actions, prison conditions, or parole decisions" (*Adams*, 372 F.3d at 135) (emphasis in original)), *with* Luedtke v. Berkebile, 704 F.3d 465, 465–66 (6th Cir. 2013) ("The district court properly dismissed without prejudice Luedtke's first three claims because [habeas] is not the proper vehicle for a prisoner to challenge conditions of confinement.").

49 *See, e.g.*, Muniz v. Sabol, 517 F.3d 29, 33–34 (1st Cir. 2008) (stating execution of a sentence includes challenges to the place of confinement); *Dhinsa,* 917 F.3d at 81 ("challeng[ing] 'the *execution* of a sentence' include[es] challenges to disciplinary actions, prison conditions, or parole decisions" (*Adams*, 372 F.3d at 135) (emphasis in original)); Hope v. Warden York Cnty. Prison, 972 F.3d 310, 324 (3d Cir. 2020) ("We have never held that a detainee cannot file a habeas petition to challenge conditions that render his continued detention unconstitutional."); United States v. Jalili, 925 F.2d 889, 893–94 (6th Cir. 1991) (holding execution of a sentence petitions may challenge the place of confinement); Creek v. Stone, 379 F.2d 106, 109 (D.C. Cir. 1967) ("[I]n general habeas corpus is available not only to an applicant who claims he is entitled to be freed of all restraints, but also to an applicant who protests his confinement in a certain place, or under certain conditions, that he claims vitiate the justification for confinement.").

Other courts, reflecting both inter and intra-circuit splits, have taken a narrower view of what constitutes a proper petition challenging the execution of a sentence and limit relief solely to petitioners seeking immediate or speedier release from custody.[50]

This means that the scope of habeas relief available to a detainee suffering from inadequate medical treatment as a result of a prison transfer,[51] or languishing in solitary confinement without adequate justification from prison officials,[52] or denied a right to transfer to community confinement,[53] is purely a function of *where* the detainee was placed in detention. The rights and remedies available to a detainee to redress in federal court should not be so arbitrarily limited.

Returning to the text of the statutes, just as § 2254 allows courts to grant writs to state prisoners, § 2255 allows courts to grant writs to *federal* prisoners.[54] However, unlike § 2254, which applies when state prisoners challenge either the imposition *or* execution of a sentence, § 2255 applies when federal prisoners challenge solely the imposition of a sentence.[55] The text of § 2255(a) makes clear that courts may grant habeas relief under § 2255 only when "[a] prisoner in custody under sentence of a court established by Act of Congress [is] claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States."[56]

Section 2255, however, does not preclude federal prisoners from challenging the unlawful execution of a sentence. Courts are undeterred by the lack of textual hook. Working around the apparent gap in habeas coverage, the lower courts have interpreted § 2241 as a catchall statute that extends habeas relief to petitions that do not fit neatly into either § 2254 or § 2255.[57]

Section 2241 states that "[w]rits of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions."[58] For example, in *McGhee v. Hanberry*, the Fifth Circuit held that § 2241 is

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50 *See, e.g.*, Leamer v. Fauver, 288 F.3d 532, 542 (3d Cir. 2002) ("Conversely, when the challenge is to a condition of confinement such that a finding in plaintiff's favor would not alter his sentence or undo his conviction, an action under § 1983 is appropriate."); Carson v. Johnson, 112 F.3d 818, 820–21 (5th Cir. 1997) ("The distinction is blurry, however, when, as here, a prisoner challenges an unconstitutional condition of confinement or prison procedure. . . . If 'a favorable determination . . . would not automatically entitle [the prisoner] to accelerated release,' . . . the proper vehicle is a § 1983 suit." (quoting Orellana v. Kyle, 65 F.3d 29, 31 (5th Cir. 1995) (per curiam))); *Luedtke*, 704 F.3d at 465–66 ("The district court properly dismissed without prejudice Luedtke's first three claims because [habeas] is not the proper vehicle for a prisoner to challenge conditions of confinement.").

51 *E.g.*, Ilina v. Zickefoose, 591 F. Supp. 2d 145, 150 (D. Conn. 2008).

52 *E.g.*, United States v. Bout, 860 F. Supp. 2d 303, 312 (2d Cir. 2012).

53 Gonzalez-Fuentes v. Molina, 607 F.3d 864, 875 n.9 (1st Cir. 2010).

54 28 U.S.C. § 2255(a).

55 *Id.*

56 *Id.*

57 *See, e.g.*, Dhinsa v. Kreuger, 917 F.3d 70, 81 (2d Cir. 2019) ("To challenge 'the execution of a sentence,' including challenges to disciplinary actions, prison conditions, or parole . . . 28 U.S.C. § 2241 provides the 'proper means.'" (internal citation omitted)); Luedtke v. Berkebile, 704 F.3d 465, 466 (6th Cir. 2013) ("The district court was also right to conclude that Luedtke's fourth claim is cognizable under § 2241 as a challenge to the execution of a portion of his sentence."); Muniz v. Sabol, 517 F.3d 29, 33–34 (1st Cir. 2008) ("[J]urisdiction is appropriate because a habeas petition seeking relief from the manner of execution of a sentence is properly brought under 28 U.S.C. § 2241."); Coady v. Vaughn, 251 F.3d 480, 485 (3d Cir. 2001) ("[F]ederal prisoners challenging some aspect of the execution of their sentence, such as denial of parole, may proceed under Section 2241.").

58 28 U.S.C. § 2241(a).

available "where the petitioner establishes that the remedy provided for under § 2255 'is inadequate or ineffective to test the legality of his detention.'"[59] Because § 2255 precluded petitioners from challenging the execution of a sentence, § 2241 was the relevant habeas statute.[60] While the text of § 2241 does not affirmatively describe § 2241 as a catchall habeas statute, courts have come to interpret § 2241 as such by juxtaposing §§ 2254–55's explicit text against § 2241's ambiguous text.[61]

Section 2241's role as a catchall provides courts broad authority in overseeing the administration of criminal justice and in remedying harms to detainees caused by unlawful or unconstitutional administration decisions.[62]

This doctrinal approach is peculiar because the text of § 2241 differs significantly from § 2255 or § 2254. For instance, the first subsection of § 2255 specifically states that habeas relief is available for federal prisoners when the prisoner is in custody "claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States."[63] This language is significant because it explicitly describes the types of habeas petitions to which § 2255 applies: federal prisoners challenging the imposition of a sentence.[64]

Similarly, the first subsection of § 2254 states that a court may hear a habeas petition from a state prisoner who alleges that their "custody [is] in violation of the Constitution or laws or treaties of the United States."[65] Again, just like Congress explicitly limited § 2255 relief to habeas petitions from federal prisoners challenging the imposition of a sentence, Congress explicitly limited § 2254 relief to state prisoners challenging the imposition or execution of a sentence.[66] While lower courts have applied this analysis in distinguishing § 2241 from the other habeas statutes, the Supreme Court has not endorsed any particular approach.[67]

Unlike the other habeas statutes, § 2241 provides no guidance for when its provisions are applicable—it reads like an open-ended power for courts to grant habeas relief. Section 2241 states that "[w]rits of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions."[68]

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59 McGhee v. Hanberry, 604 F.2d 9, 10 (5th Cir. 1979) (per curiam) (citing Wood v. Blackwell, 429 F.2d 62, 63 (5th Cir. 1968)).

60 *See, e.g.*, Kahane v. Carlson, 527 F.2d 492, 496 (2d Cir. 1975) (Friendly, J., concurring).

61 For academic recognition of § 2241 as a "catchall" provision, see Megan A. Fernsten-Torres, *Who Are We to Name? The Applicability of the "Immediate-Custodian-As-Respondent" Rule to Alien Habeas Claims Under 28 U.S.C. § 2241*, 17 GEO. IMMIGR. L.J. 431, 431 (2003) ("28 U.S.C. § 2241, the so-called 'catchall' habeas provision" (citing JOSEPHINE R. POTUTO, PRISONER COLLATERAL ATTACKS: FEDERAL HABEAS CORPUS AND FEDERAL PRISONER MOTION PRACTICE 11 (1991))). *See also* Schwartz, *supra* note 37 (discussing differences in jurisdiction to grant § 2241 versus § 2254).

62 While other federal statutes, like § 1983, may overlap in jurisdiction with habeas in their availability to challenge prison administrative decisions, there are substantive and procedural differences between the statutes that can sometimes make habeas the preferable vehicle for detainees. *See* Schwartz, *supra* note 37, at 150.

63 28 U.S.C. § 2255(a).

64 *Id.*

65 28 U.S.C. § 2254(a).

66 See *id.*

67 *See, e.g.*, Rasul v. Bush, 542 U.S. 466 (2004) (recognizing that § 2241 confers jurisdiction to grant habeas relief for detainees at Guantanamo Bay); Calcano-Martinez v. INS, 533 U.S. 348 (2001) (finding § 2241 jurisdiction for immigration detainees).

68 28 U.S.C. § 2241(a).

Specifically, the statute extends whenever someone "is in custody under or by color of the authority of the United States or is committed for trial before some court thereof."[69] Where § 2255(a) is clear that its provisions apply to federal prisoners seeking release from an unlawful conviction, and where § 2254(a) is clear that it applies to a state prisoner in custody in violation of the law, § 2241(a) is ambiguous as to when its provisions apply and which types of habeas petitions must be interpreted through its statutory provisions.

Because of § 2241's unadorned language, courts have interpreted the statute as applicable to all habeas petitions that do not fall under the other statutes.[70] Some circuits follow similar reasoning: § 2241 begins where §§ 2254–55 end.[71] Sections 2254, 2255 only apply to federal and state *prisoners*, where § 2254 is a broad grant of jurisdiction to all habeas claims from state prisoners and § 2255 is limited just to claims challenging the imposition of a sentence.[72]

Because §§ 2254–55 are limited to these specific challenges, courts use § 2241 to grant habeas relief to federal prisoners solely challenging the execution of a sentence and, more generally, to all federal and state jail detainees,[73] immigration detainees,[74] Guantanamo Bay detainees,[75] and those who are civilly committed.[76] For the two million people held behind bars in 2022, 1.042 million were held in state prison.[77] This means that for the almost one million people held outside of state prison during 2022, § 2241 was the only form of federal habeas relief available.[78] In this context, § 2241's role as a catchall is not that of a limited provision that only applies in limited circumstances. Rather, § 2241 plays a significant role in the habeas statutory framework. For the circuits to have no clear answer as to the scope of jurisdiction to hear habeas challenges to the execution of a sentence is to do a disservice to all who must rely on § 2241 as their only avenue for federal habeas relief.

Ultimately, these distinctions are important not only for their substantive differences, but also for their procedural differences. The most important distinction for this paper is that § 2254 has strict, statutory procedural requirements that may keep a federal court from ruling on the merits of a state prisoner's petition.[79]

A federal court cannot grant a habeas writ under § 2254 unless one of these three conditions has been met: 1) "the applicant has exhausted the remedies available in the

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69 28 U.S.C. § 2241(c)(1).

70 *E.g.*, United States v. Jalili, 925 F.2d 889, 893–94 (6th Cir. 1991) (holding execution of a sentence petitions may challenge the place of confinement).

71 *See, e.g.*, Kahane v. Carlson, 527 F.2d 492, 496 (2d Cir. 1975) (Friendly, J., concurring); Coady v. Vaughn, 251 F.3d 480, 485 (3d Cir. 2001).

72 28 U.S.C. §§ 2254(a), 2255(a).

73 *See, e.g.*, Jackson v. Clements, 796 F.3d 841, 843 (7th Cir. 2015) ("The appropriate vehicle for a state pre-trial detainee to challenge his detention is § 2241.").

74 *E.g.*, Hope v. Warden York Cnty. Prison, 972 F.3d 310 (3d Cir. 2020).

75 Rasul v. Bush, 542 U.S. 446 (2004).

76 Timms v. Johns, 627 F.3d 525, 530–31 (4th Cir. 2010); *see also* Archuleta v. Hedrick, 365 F.3d 644, 648 (8th Cir. 2004).

77 Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2022*, PRISON POL'Y INITIATIVE, https://www.prisonpolicy.org/reports/pie2022.html.

78 Except of course for federal prisoners challenging the imposition of a sentence. However, those prisoners must still file under § 2241 when seeking relief from the execution of a sentence.

79 28 U.S.C. § 2254(b). Section 2254, unlike §§ 2241, 2255, is the only habeas statute with statutory exhaustion requirements.

courts of the State;"[80] (2) "there is an absence of available State corrective process;"[81] or (3) "circumstances exist that render such process ineffective to protect the rights of the applicant."[82] The exhaustion condition is met whenever the habeas petitioner has litigated their argument through the highest level of state court—i.e., a federal court cannot grant habeas relief until the state supreme court has first denied relief to the petitioner.[83]

The other two § 2254(b)(1)(B) conditions excuse the state court exhaustion requirement "only if there is no opportunity to obtain redress in state court or if the corrective process is so clearly deficient as to render futile any effort to obtain relief."[84] These two exceptions limit a federal court's ability to excuse § 2254's exhaustion requirement.[85] A court can only excuse exhaustion if a petitioner has essentially no opportunity whatsoever to redress or gain effective relief in state court.[86]

Section 2241, however, does not by its own force require exhaustion. While courts do in fact impose exhaustion on § 2241 petitions as a prudential requirement, this means that § 2241's requirements are not limited by statute.[87] Courts can and do provide flexibility in adapting § 2241's exhaustion procedure to emergency circumstances.[88] Where courts are limited to extreme cases for excusing exhaustion in § 2254 petitions,[89] for § 2241 petitions, courts can excuse exhaustion as a matter of discretion.[90] This is exactly what happened for many detainees held in local jails, federal prisons, and immigration detention centers during the pandemic: courts across the country excused § 2241's exhaustion requirements in light of immediacy of the danger posed by COVID-19.[91] If courts were more limited in their oversight of detention centers during the pandemic, the risk to detainees would have been significantly higher.[92]

Thus, despite the relative lack of textual guidance as to when § 2241's substantive and procedural rules apply, the statute plays a significant role both as a form of emergency relief and as a catchall providing for habeas relief for federal prisoners, state and federal jail detainees, immigration detainees, and those who are civilly committed.

III. A MODERN HABEAS PROBLEM: THE *PREISER* DOCTRINE

The modern approach for how to interpret habeas challenges to the execution of a sentence comes from the 1973 Supreme Court decision, *Preiser v. Rodriguez*.[93] Part II

[80] 28 U.S.C. § 2254(b)(1)(A).
[81] 28 U.S.C. § 2254(b)(1)(B)(i).
[82] 28 U.S.C. § 2254(b)(1)(B)(ii).
[83] *See* O'Sullivan v. Boerckel, 526 U.S. 838, 839 (1999).
[84] Duckworth v. Serrano, 454 U.S. 1, 3 (1981).
[85] *Id.*
[86] *Id.*
[87] *E.g.*, Perez v. Wolf, 445 F. Supp. 3d 275, 284–86 (N.D. Cal. 2020).
[88] *Id.*
[89] 28 U.S.C. § 2254(b)(1)(B)(ii).
[90] *E.g.*, Singh v. Holder, 638 F.3d 1196, 1203 n.3 (9th Cir. 2011) ("On habeas review under § 2241, exhaustion is a prudential rather than jurisdictional requirement.").
[91] *E.g.*, *Perez*, 445 F. Supp. 3d at 284–86.
[92] *See* Lee Kovarsky, *Pandemics, Risks, and Remedies*, 106 VA. L. REV. ONLINE 71 (2020).
[93] Preiser v. Rodriguez, 411 U.S. 475 (1973).

closely analyzes *Preiser* to show that, despite how many lower courts have come to interpret *Preiser*, the Court's decision does not limit a lower court's ability to grant habeas relief to petitioners challenging the unlawful execution of a sentence for conditions of confinement claims. [94] By using *Preiser* to limit a detainee's right to use habeas in correcting harmful administrative decisions, the lower courts have unnecessarily stifled the administration of justice for detainees who otherwise have little access to relief.[95]

In *Preiser*, three state prisoners alleged that the prison had unconstitutionally revoked their good-time credits.[96] Via a § 1983 action, the petitioners sought "injunctive relief to compel restoration of the credits, which in each case would result in their immediate release from confinement."[97] The question before the Court was whether the petitioners could obtain the good-time credits and secure release under § 1983, or whether petitioners seeking release must file under the federal habeas corpus statute, specifically § 2254.[98] Section 1983 is a federal statute that allows any person to sue any state or the federal government for "the deprivation of any rights, privileges, or immunities secured by the Constitution and laws."[99] By its own terms, as the petitioners argued, § 1983 is coextensive with the habeas statutes in challenging unlawful or unconstitutional forms of confinement.[100]

Allowing the prisoners to pursue relief under § 1983 would open an avenue for release that would not require first exhausting administrative remedies in state court,[101] since exhaustion would otherwise be required by statute under § 2254.[102] Ultimately, the Court's decision rested on fine distinctions between the traditional role of habeas petitions in the common law and the role of habeas in the modern federal statutes.[103]

The *Preiser* decision has led many circuit courts to adopt a narrow view of the types of harm and scope of relief available to habeas petitions challenging the execution of a sentence and conditions of confinement.[104] Given the centrality of *Preiser* to the circuit split as to the extent of habeas jurisdiction to remedy administrative decisions, *Preiser* warrants careful review.

The Court contextualized *Preiser* within the common law history of *habeas corpus ad subjiciendum*.[105] Looking back to early seventeenth century decisions, the traditional purpose

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94 *See, e.g.*, Palma-Salazar v. Davis, 677 F.3d 1031, 1035–36 (10th Cir. 2012) (holding that a prisoner's habeas petition seeking transfer out of a maximum security prison had to be brought pursuant to *Bivens*) (citing *Preiser*, 411 U.S. at 484)); Brown v. Bledsoe, 405 Fed. Appx. 575, 577 (3d Cir. 2011) (finding no habeas jurisdiction to transfer a prisoner back to the federal prison where he had been receiving psychological treatment (citing *Preiser*, 411 U.S. at 484, 487)). *But see* Aamer v. Obama, 742 F.3d 1023, 1030–34 (D.C. Cir. 2014) (finding habeas jurisdiction for Guantanamo Bay detainees challenging guidelines for force-feeding protocols (citing *Preiser*, 411 U.S. at 475)).

95 *See supra* Part I.

96 *Preiser*, 411 U.S. at 476.

97 *Id.*

98 *Id.* at 477.

99 42 U.S.C. § 1983.

100 *See Preiser*, 411 U.S. at 488–89.

101 Section 1983 does not by its own terms require administrative exhaustion.

102 *See Preiser*, 411 U.S. at 477.

103 *Id.* at 483–87.

104 *See* cases cited *infra* note 136.

105 *Preiser*, 411 U.S. at 484–86 (citing *Ex parte* Bollman, 8 U.S. 75, 79–80 (1807)).

of the writ was to secure release from illegal detention.[106] Yet the early American approach to habeas differed from the English common law. For instance, unlike English courts, federal courts had permitted challenges to unconstitutional criminal statutes,[107] unlawful places of confinement,[108] and unconstitutional trials and convictions.[109] Habeas may have been more limited during the halcyon days of the early republic, but the writ's ability to redress illegal custody had grown considerably by the late nineteenth century.[110]

Abstracting from the particularities of the English common law and the nineteenth century evolution of habeas law in the United States, the Court found that the traditional and core function of the habeas writ is to secure release from unlawful detention.[111] For the detainees in *Preiser*, because granting good-time credits would lead to the immediate release, and because the deprivation of the good-time credits was allegedly unlawful, the Court held that the plaintiffs' claims "fell squarely within this traditional scope of habeas."[112]

But just because habeas is the traditional writ for securing release does not preclude Congress from extending similar jurisdiction under § 1983 petitioners. Consequently, Congress could have intended overlapping jurisdiction for the two statutes.

In distinguishing between § 1983 and the habeas statutes, the Court looked to the policies underlying § 2254's statutory exhaustion requirements and federal–state comity.[113] Requiring petitioners to exhaust state remedies before filing a habeas petition respects "state functions" by providing a state "the first opportunity to correct [its own] errors."[114] While the Court sympathized with the petitioners' worry that state courts might not adequately address a habeas complaint, and that state courts may move too slowly in emergency situations, the Court did not find these issues dispositive given the limited exceptions to § 2254's exhaustion requirements.[115] Because Congress did not apply the same comity protections for claims under § 1983, the Court concluded that Congress intended for only the habeas statutes to be used to secure release.[116]

The consequence of this rule for § 1983 is clear: If the remedy sought necessarily implies immediate or speedier release—i.e., touches on the very fact or duration of confinement—then release is the only appropriate remedy and habeas is the only appropriate vehicle.

However, just because § 1983 is inappropriate to secure relief traditional to habeas does not mean that habeas cannot secure relief that falls within § 1983. In other words, *Preiser* did not explicitly hold that habeas and § 1983 can *never* overlap, only that § 1983 cannot secure traditional habeas relief. In fact, the Supreme Court directly injected this

[106] *Id.* at 484 (citing Darnel's Case, 3 How. St. Tr. 1–59 (K.B. 1627); Bushnell's Case, Vaughn, 135, 124 Eng. Rep. 1006 (1670)).
[107] *Ex parte* Siebold, 100 U.S. 371 (1880) (unconstitutional act of Congress).
[108] *In re* Bonner, 151 U.S. 242, 254–55 (1894) (holding that statute did not grant court jurisdiction to confine prisoner in a state penitentiary).
[109] Johnson v. Zerbst, 304 U.S. 458 (1938) (reversing denial of habeas where petitioner alleged violation of Sixth Amendment right to counsel).
[110] *Preiser*, 411 U.S. at 485–86.
[111] *Id.* at 486–87.
[112] *Id.*
[113] *Id.* at 491.
[114] *Id.* at 492.
[115] *Id.* at 493–97.
[116] *Id.*

uncertainty into *Preiser* when it said in dicta that "[t]his is not to say that habeas corpus may not also be available to challenge . . . prison conditions" also open to attack under § 1983.[117] It is precisely this dicta that has so vexed the lower courts.[118] The courts take *Preiser* to mean that, because § 1983 cannot secure release, so also habeas cannot secure less than full release.[119] In other words, any claim that "does not fall within the 'core of habeas corpus,' . . . must be brought, if at all, under 42 U.S.C. § 1983."[120]

However, in dicta, the Court considers specific instances where habeas may in fact be available to challenge prison conditions and seek forms of relief that fall short of immediate or speedier release.[121] In the waning pages of the opinion, the Court mused that habeas is arguably available to remove additional unconstitutional restraints on otherwise lawful custody, such as denied prison transfer requests for prisoners to receive medical treatment.[122]

If habeas is indeed available to challenge unconstitutional conditions of confinement—like prisoners seeking transfer to "a valid[,] and perhaps physically identical[,] confinement" for access to proper medical treatment—then habeas would be available to remove conditions of confinement that would not automatically require full release of the detainee.[123] The consequence of *Preiser*'s dicta is that habeas may in fact be available to challenge conditions of confinement or a custodian's administrative decisions. So, for the lower courts to delay or deny habeas relief to a detainee on the basis of *Preiser*'s definition of § 1983 jurisdiction is to delay or deny the efficient administration of justice to detainees who may otherwise be facing serious consequences, like in Ms. Ilina's case.

The Court revisited this issue in *Bell v. Wolfish*.[124] In *Bell*, federal pre-trial detainees held at the Metropolitan Correctional Center in New York City filed habeas petitions challenging unconstitutional conditions of confinement, ranging from overcrowded cells to inadequate recreational, educational, and employment resources.[125] Because the petitioners used habeas to seek remedies other than release from unconstitutional detention, *Bell* was poised to resolve *Preiser*'s dicta.[126] However, the Court declined that opportunity, despite the government conceding the point.[127] The detainees had filed an amended complaint asserting jurisdiction under 28 U.S.C. § 1361(a), providing federal jurisdiction to compel a federal officer to perform their duty.[128]

Despite *Bell*'s unwillingness to confront the habeas issue, the opinion hints at a path forward. Specifically, the Court "le[ft] 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

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[117] *Id.* at 499.

[118] *E.g.*, Nettles v. Grounds, 830 F.3d 922, 924–25 (9th Cir. 2016) (en banc) ("We conclude that because Nettles's claim does not fall within the 'core of habeas corpus,' it must be brought, if at all, under 42 U.S.C. § 1983." (quoting *Preiser*, 411 U.S. at 487)).

[119] *Id.*

[120] *Id.*

[121] *Preiser*, 411 U.S. at 499.

[122] *Id.* (citing Note, *Developments in the Law–Habeas Corpus*, 83 HARV. L. REV. 1038, 1084 (1970)).

[123] Note, *Developments in the Law–Habeas Corpus*, 83 HARV. L. REV. 1038, 1084 (1970).

[124] Bell v. Wolfish, 441 U.S. 520, 520 (1979).

[125] *Id.* at 526–27.

[126] *Id.* at 526 n.6.

[127] *Id.*

[128] *Id.*

the fact or length of the confinement itself."[129] The "as distinct" language shows that there are two possible types of conditions of confinement habeas petitions, only one of which the Court would leave to answer another day.[130]

The first category—which the Court seems to indicate is already available to challenge in a habeas petition—are those claims indistinct from the fact or length of confinement itself, where the relief sought is immediate or speedier release.[131] The COVID-19 habeas cases are good examples of this type of claim. In these cases, the petitioners allege that the only relief from the dangerous conditions in the prison is immediate release from detention.[132] These challenges to conditions of confinement are indistinct from "fact or length of confinement itself" because the plaintiffs allege that the only adequate remedy is release.[133]

The second category of conditions of confinement habeas petitions are those distinct from the fact or length of confinement itself.[134] These are run-of-the-mill conditions of confinement claims, where relief would not alter the fact or length of confinement—think prison transfers, medical treatment, or other forms of relief short of immediate or speedier release.

While neither *Preiser* nor *Bell* use the phrase "execution of a sentence," lower courts have interpreted habeas petitions challenging conditions of confinement—whether distinct or indistinct from the duration of confinement—as challenging the execution of a sentence.[135] Thus, *Preiser* has loomed large for how circuits understand habeas petitions challenging the unlawful execution of a sentence and conditions of confinement claims.

On one end of the spectrum, the Fifth, Sixth, Ninth, and Tenth Circuits all have decisions precluding habeas petitioners from challenging conditions of confinement when the relief sought falls *short* of release.[136] On the other end of the spectrum, the First, Second, Third, Fifth, and Sixth Circuits all have decisions operating on the premise that habeas and § 1983 may overlap in challenging conditions of confinement and securing relief outside of immediate or speedier relief.[137] *Preiser* has produced both inter and intra-circuit splits.

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[129] *Id.*

[130] Schwartz, *supra* note 37, at 150 ("[T]he Court explicitly left open whether habeas corpus may be used to review the constitutionality of conditions of confinement.").

[131] *See id.* at 148, 150; *Bell*, 441 U.S. at 526, n.6.

[132] *E.g.*, McPherson v. Lamont, 457 F. Supp. 3d 67 74–78 (D. Conn. 2020).

[133] *Bell*, 441 U.S. at 526 n.6.

[134] *Id.*

[135] *E.g.*, McIntosh v. U.S. Parole Comm'n, 115 F.3d 809, 811–12 (10th Cir. 1997).

[136] Carson v. Johnson, 112 F.3d 818, 820–21 (5th Cir. 1997) (holding habeas is never appropriate unless granting the writ would result in speedier release); Luedtke v. Berkebile, 704 F.3d 465, 465–66 (6th Cir. 2013) ("The district court properly dismissed without prejudice Luedtke's first three claims because § 2241 is not the proper vehicle for a prisoner to challenge conditions of confinement."); Nettles v. Grounds, 830 F.3d 922, 933 (9th Cir. 2016) ("We have long held that prisoners may not challenge mere conditions of confinement in habeas corpus[.]"); Palma-Salazar v. Davis, 677 F.3d 1031, 1035 (10th Cir. 2012) ("This court has stated 'that a request by a federal prisoner for a change in the place of confinement is properly construed as a challenge to the conditions of confinement and, thus, must be brought pursuant to [*Bivens*].'" (quoting United States v. Garcia, 470 F.3d 1001, 1003 (10th Cir. 2006) (alteration in the original))).

[137] Guerro v. Mulhearn, 498 F.2d 1249, 1253 n.9 (1st Cir. 1974) ("Although habeas may be used to secure relief relating to the conditions of confinement, as well as its duration, the Preiser circumvention rule was meant only to protect the integrity of the latter, traditional, function of habeas.") (citations omitted); Thompson v. Choinski, 525 F.3d 205, 209 (2d Cir. 2008) ("First, to the extent Thompson was seeking injunctive relief from federally imposed conditions of confinement . . . . This court has long interpreted § 2241 as applying to challenges to the execution of a federal sentence,

This article is not alone in teasing out the puzzle left in the wake of *Preiser*. In his article *The Preiser Puzzle: Continued Frustrating Conflict Between the Civil Rights and Habeas Corpus Remedies for State Prisoners*, Professor Martin A. Schwartz showed how the Court in *Preiser* failed to fully settle the doctrinal boundaries between § 1983 and habeas.[138] Professor Schwartz recognized that "*Preiser* . . . is filled with ambiguities and unresolved questions."[139]

In surveying circuit decisions in the fifteen years following *Preiser*, Professor Schwartz found the lower courts consistently recognized that § 1983 is available to challenge conditions of confinement claims *distinct* from the fact of confinement.[140] However, the lower courts were split on *Preiser*'s guidance as to the scope of habeas jurisdiction to challenge conditions of confinement distinct from the *length* of confinement.[141] "[T]he weight of circuit court authority supports the use of federal habeas corpus to test the constitutionality of conditions of confinement" distinct from the fact or length of confinement.[142]

The case law has become more muddied and confusing in the thirty-three years since Professor Schwartz's article.[143] In those intervening years, some circuits, like the Second Circuit, have adopted a robust and consistent case law that finds jurisdiction to grant habeas relief to all conditions of confinement claims.[144] Other circuits, however, like the Tenth Circuit, have consistently found habeas is unavailable to challenge conditions of confinement distinct from the fact or length of confinement.[145]

The most immediate consequence for courts that interpret *Preiser* as limiting habeas jurisdiction is that they deny relief and direct detainees to file a new complaint under a different statute, like § 1983. Courts kick the can down the road and direct the petitioners to follow the "right" rules next time. While this clears the docket, detainees remain aggrieved, and a new petition is incoming.

Even if courts prefer such deferral, *Preiser* does not provide an adequate basis for it. In fact, both *Preiser* and *Bell* hint at the possibility of habeas relief for claims distinct from the fact or duration of confinement.[146] If courts consistently adopted a broad approach to habeas jurisdiction, then detainees who file pro se could receive justice without having to file yet another federal claim under another statute that is equally opaque to the non-expert.

'including such matters as . . . prison conditions.'") (quoting Jiminian v. Nash, 245 F.3d 144, 146 (2d Cir. 2001)); Coady v. Vaughn, 251 F.3d 480, 485 (3d Cir. 2001) (holding that a court may grant a habeas petition challenging the execution of a sentence and seeking transfer to community corrections); Gallegos-Hernandez v. United States, 688 F.3d 190, 194 (5th Cir. 2012) (per curiam) (extending habeas jurisdiction to a petitioner seeking placement in drug treatment program at a halfway house that did not automatically result in accelerated release); United States v. Jalili, 925 F.2d 889, 894 (6th Cir. 1991) (holding that habeas is proper to secure transfer from federal prison to a community treatment center).

138 Schwartz, *supra* note 37, at 85.

139 *Id.* at 112.

140 *Id.* at 147–48.

141 *Id.* at 150.

142 *Id.*

143 *Id.*

144 *See infra* Part III.

145 *See* Thompson v. Choinski, 525 F.3d 205, 209 (2d Cir. 2008) ("First, to the extent Thompson was seeking injunctive relief from federally imposed conditions of confinement . . . This court has long interpreted § 2241 as applying to challenges to the execution of a federal sentence, 'including such matters as . . . prison conditions.'").

146 Bell v. Wolfish, 441 U.S. 520, 526 n.6 (1979); Preiser v. Rodriguez, 411 U.S. 475, 493–500 (1973).

Ultimately, this article fills in a gap in the literature and case law by providing historical support for the more robust approach for finding habeas jurisdiction to challenge any conditions of confinement claim.[147] The Supreme Court's failure to affirmatively define the jurisdictional overlap between § 1983 and habeas to challenge conditions of confinement has proved problematic to say the least. Whether habeas challenges to the execution of a sentence include conditions of confinement claims that do not seek immediate or speedier release is a live question that the Court must resolve.[148]

IV. *IN RE BONNER* AND THE NINETEENTH CENTURY APPROACH TO HABEAS CHALLENGES TO THE EXECUTION OF A SENTENCE

In articulating where habeas corpus law should go from here, this article argues that the Court should return to a nineteenth century common law approach to habeas only glossed over in *Preiser*.[149] By drawing on this common law approach to the execution of confinement cases, the Supreme Court can finally put to rest jurisdictional issues left unresolved by *Preiser*.

My intervention is significant because scholarship on the problem posed by *Preiser* has yet to draw on this rich historical support.[150] In fact, the historical approach that this article takes is more in line with pre-*Preiser* student scholarship that tracked the development of habeas law during the 1950s through 1970s.[151] In picking up where student scholars left off in the 1950s, 60s, and 70s, this article fills the gap in scholarship and case law by linking post-*Preiser* case law to a rich common law tradition.

A. THE NINETEENTH CENTURY HABEAS COMMON LAW: *IN RE BONNER* AND *IN RE MILLS*

In a series of habeas cases beginning in the nineteenth century, the Court articulated a common law approach for extending habeas jurisdiction to execution of a sentence habeas

147 *See infra* Parts III–IV.

148 *See, e.g.*, Skinner v. Switzer, 562 U.S. 521, 525 (2011) ("Habeas is the exclusive remedy, we reaffirmed, for the prisoner who seeks 'immediate or speedier release' from confinement." (quoting Wilkinson v. Dotson, 544 U.S. 74, 82 (2005))).

149 *Preiser*, 411 U.S. at 486 (citing *In re* Bonner, 151 U.S. 242 (1894)).

150 *See, e.g.*, Nancy J. King & Suzanna Sherry, *Habeas Corpus and State Sentencing Reform: A Story of Unintended Consequences*, 58 DUKE L.J. 1 (2008) (arguing, based on case law post-1972, that § 2254 should not be available to challenge unlawful conditions of confinement); Schwartz, *supa* note 37, at 85 (using careful analysis of post-*Preiser* case law to demonstrate that habeas and § 1983 have coextensive jurisdiction to challenge any conditions of confinement claim); Maureen A. Dowd, Note, *A Comparison of Section 1983 and Federal Habeas Corpus in State Prisoners' Litigation*, 59 NOTRE DAME L. REV. 1315 (1984) (suggesting to abandon § 1983 in favor of habeas for all conditions of confinement claims); John Amble Johnson, Essay, *I Just Dropped in to See What Condition My Condition Was in: The Availability of Habeas Corpus to Contest Conditions of Confinement at Guantánamo Bay*, 50 GA. L. REV. ONLINE 1 (2016) (arguing that habeas is only available to challenge conditions of confinement when no other adequate remedy exists).

151 *See, e.g.*, Note, *supra* note 123, at 1072 (discussing developments of habeas law in protecting the rights of detainees); Martha F. Alschuler, Note, *Insane Persons*, 45 TX. L. R. 777 (1967) (same); Note, *Constitutional Rights of Prisoners: The Developing Law*, 110 U. PA. L. REV. 985 (1962) (same); Note, *Prisoners' Remedies for Mistreatment*, 59 YALE L.J. 800 (1950) (same); Note, *The Freedom Writ - the Expanding Use of Federal Habeas Corpus*, 61 HARV. L. REV. 657 (1948) (same).

petitions that seek less than immediate or speedier release.[152] The two relevant cases are *In re Bonner*[153] and *In re Mills*.[154] In both decisions, the Supreme Court granted writs without ordering immediate release.[155] Despite *Preiser*'s insistence that the core function of habeas is release from confinement, the nineteenth Century Court applied a much more dynamic view.[156]

i. *In re Mills*, 1890

In re Mills provides useful insight into the types of conditions of confinement claims that habeas should be available to challenge as unlawful executions of a sentence.[157] Following his conviction on two separate charges, Mills directly petitioned the Supreme Court for a writ of habeas corpus, alleging the original sentencing court lacked jurisdiction to sentence him to his particular place of confinement.[158] The details of each charge were key to the Court's analysis.

On the first charge, the Arkansas trial court sentenced Mills to one year of imprisonment and a $100 fine because he had sold liquor without paying the proper tax.[159] On the second charge, the trial court sentenced Mills to six-months of imprisonment and a $50 fine because he had illegally sold whiskey in "Indian territory."[160] The trial court then ordered Mills to serve the entire first sentence before serving the second sixth-month sentence—for a total of one and a half years—in a state penitentiary in Columbus, Ohio.[161]

The issue presented was whether the sentencing court had jurisdiction to order Mills to serve his sentence in a state penitentiary.[162] Under § 5541 of the Revised Statutes, a federal court could order a sentence be executed in state penitentiary "in every case where any person convicted of any offense against the United States is sentenced to imprisonment for a period longer than one year."[163]

In one sense, because Mills was sentenced to serve a year and a half in total, he would end up serving more than one year in prison.[164] However, because neither sentence on its own exceeded one year, the sentencing court had "transcended its powers" in directing that each sentence be executed in a state penitentiary.[165] Under this rationale, there was no question about the fact of Mills' confinement; i.e., even if Mills could not be imprisoned in state prison, he would still be imprisoned *somewhere*.[166] Nor did the Court question the validity of the *length* of Mills' confinement; i.e., no matter where Mills served his sentence, his total

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152 *Preiser*, 411 U.S. at 486 (citing *In re* Bonner, 151 U.S. 242 (1894)).
153 *In re* Bonner, 151 U.S. 242 (1894).
154 *In re* Mills, 135 U.S. 263 (1890).
155 *In re Bonner,* 151 U.S. at 262; *In re Mills,* 135 U.S. at 270–71.
156 *In re Bonner,* 151 U.S. at 262; *In re Mills,* 135 U.S. at 270–71; *see also* Note, *supra* note 123 at 1038, 1080–81 (discussing *In re Bonner* as the common law source for habeas petitions challenging the execution of a sentence).
157 *See generally In re Mills*, 135 U.S. at 270–71.
158 *Id.* at 264.
159 *Id.*
160 *Id.*
161 *Id.*
162 *Id.* at 265.
163 *Id.* at 269 (internal quotation marks omitted).
164 *Id.* at 270.
165 *Id.*
166 *Id.*

time in custody would be a year and a half.[167] Rather, the place of confinement, or one of the conditions of his confinement, was unlawful, even though the underlying conviction itself was valid.[168]

One aspect of the dissonance between *In re Mills* and the modern habeas doctrine is that the nineteenth century Supreme Court did not hesitate in exercising its authority to oversee the administration of Mills' sentence. While *Preiser* held that release from detention is the traditional function of habeas, *In re Mills* seemingly has no qualms ordering Mills' removal from state detention.[169] The Supreme Court granted habeas relief in recognition of Mills' right to be confined in the proper place.[170] Many lower courts today would outright deny Mills' petition for lack of jurisdiction.[171] Furthermore, *In re Mills* may seem surprising in light of the views of prisons and prisoners during the era which scholars have described as a "hands-off" approach to judicial oversight of the criminal legal system.[172] Just nineteen years prior to *In re Mills*, the Supreme Court of Virginia said that the rights of prisoners are limited because prisoners are essentially "slaves of the State."[173]

ii. *In re Bonner*, 1894

In re Bonner reaffirms *In re Mills*' interpretation of the scope of habeas jurisdiction while elaborating on the range of remedies available to successful petitioners.[174]

As was the case in *In re Mills*, *In re Bonner* involved the lawfulness of imprisonment in a state penitentiary pursuant to § 5541 of the Revised Statutes.[175] *In re Bonner* explains:

> [I]n all cases where life or liberty is affected by its proceedings, the court must keep strictly within the limits of the law authorizing it to take jurisdiction and to try the case and to render judgment. It cannot pass beyond those limits in any essential requirement in either stage of these proceedings . . . in rendering judgment, the court keeps within the limitations prescribed by law, customary or statutory.[176]

The Court further explained that petitions may properly challenge "the mode, extent, or place" of an imposed sentence.[177] *In re Bonner* took a broad view of habeas jurisdiction for courts to hear petitions that allege an unlawful execution of a sentence.

The Court's dual emphasis on custom and statute is analytically significant. That habeas is available to challenge conditions of confinement that violate a statute is obvious—the

[167] *Id.*
[168] *Id.*
[169] *Id.* at 270–71.
[170] *Id.*
[171] *E.g.*, Nettles v. Grounds, 830 F.3d 922, 924–25 (9th Cir. 2016) (en banc).
[172] Dora Schriro, *Improving Conditions of Confinement for Criminal Inmates and Immigrant Detainees*, 47 AMER. CRIM. L. REV. 1441, 1442 (2010).
[173] Ruffin v. Commonwealth, 62 Va. 790, 796 (1871).
[174] For a discussion of *In re Bonner's* influence on the availability of habeas to seek remedies less than release from detention, *see* Note, *supra* note 123, at 1080–81 (discussing *In re Bonner* as the common law source for habeas petitions challenging the execution of a sentence that seek remedies less than release from custody).
[175] *In re* Bonner, 151 U.S. 242, 254–55 (1894).
[176] *Id.* at 257.
[177] *Id.* at 260.

confinement is unlawful because it violates the clear limits of the statute.[178] The extension of habeas to "customary" violations, however, suggests habeas can evolve as a common law writ subject to substantive and procedural control by the courts.[179] By indicating the possibility of customary violations to the form of confinement, *In re Bonner* opens its holding to cover forms of illegal confinement not yet heard by the court.[180] Just as § 2241 has evolved to provide habeas relief to new forms of confinement that were not necessarily imagined when the statute was written in 1948—like individuals held in ICE custody or civilly committed to psychiatric hospitals—*In re Bonner* similarly makes room for courts to adapt its common law authority to grant habeas relief to meet an evolving criminal legal system.[181]

Moving to the available remedies imagined by *In re Bonner*, the Court granted broad discretion to the original sentencing court to correct its error.[182] Recognizing that not all forms of unlawful confinement will necessarily require immediate or speedier release from prison, the Court held that Bonner must be returned to the trial court so that the trial may correct its error "as law and justice require."[183]

In re Bonner presents an expansive view of habeas relief. The trial court may correct the unlawful confinement: "as law and justice require."[184] The trial court had discretion to dictate whatever relief may adequately remedy that injury, barring release of that detainee.[185] In fact, the Court explicitly held that release is *not* an available remedy for a petition challenging the unlawful execution of a sentence that concerns solely the wrong place of confinement.[186] That petitioner must be relocated.[187]

In re Bonner's rationale may appear in tension with *Preiser*. *Preiser* held that challenges to the unlawful execution of a sentence may properly seek release when the petition challenges the fact or length of confinement.[188] *In re Bonner* explained that there are cases where "no correction can be made of the judgement . . . and the prisoner must then be entirely discharged."[189] In this way, *In re Bonner* and *Preiser* are in accord. The two cases acknowledge that habeas petitions might be used to challenge both: 1) conditions of confinement *indistinct* from the fact or duration of confinement; and 2) conditions of confinement *distinct* from the fact or duration of confinement.

The significance of reading *In re Bonner* with *In re Mills* is that the two cases paint a picture of habeas as a flexible statute that may correct a form of unlawful confinement, so long as law and justice require. Between these two cases, the Supreme Court recognized that

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178 Preiser v. Rodriguez, 411 U.S. 475, 484 (1973).

179 Note, *supra* note 123, at 1079 n.39 ("[C]ertainly there is no evident intent [from Congress] to alter the common law limits of the writ by expanding the class of situations calling for habeas.").

180 *Id.*

181 *See supra* Part I.

182 *In re Bonner,* 151 U.S. at 260.

183 *Id.*

184 *Id.*

185 *Id.*

186 *Id.*

187 *Id.*

188 *Id.*; *see supra* Part II. While *Preiser* cited to *In re Bonner* in passing, it did not actively engage the case, its analysis, or its progeny.

189 *In re Bonner,* 151 U.S. at 262.

certain prison administrative decisions may directly impinge in the rights and liberties that the prisoner maintains despite the imposition of an otherwise lawful sentence.

Because a prisoner's sentence may be unlawfully executed, it is the proper place of the courts to step in to oversee and ensure the lawful execution of a sentence. This is not judicial overreach into areas of prison administrative expertise. Rather, the nineteenth century approach to habeas shows provides judicial oversight over its own validly imposed sentences.

B. The Twentieth Century Evolution of *In re Bonner*

In the decades following these nineteenth century habeas decisions, other lower courts adopted similar reasoning. During the 1940s and 1950s, in part a reaction to the rise of prison hospitals and modern psychiatry, habeas case law expanded even further.[190] Two circuits, the Sixth Circuit and the D.C. Circuit, are illustrative.

i. The Sixth Circuit

One such innovative application of *In re Bonner* comes in *Coffin v. Reichard*.[191] In *Coffin*, a habeas petitioner sought a writ of habeas corpus, alleging that he had been subjected to "assaults, cruelties and indignities from guards and his co-inmates" while in custody at the United States Public Health Service Hospital at Lexington, Kentucky.[192] The hospital's failure to protect Coffin from "assault or injury" impinged on the liberties he retained despite his conviction and incarceration.[193] A prisoner's liberty does not dissipate at the threshold of the prison.[194] There is an indissoluble core of civil liberties that the prison cannot transgress in executing a prisoner's sentence, even if those civil liberties were not explicitly preserved as part of the statute or as conditions of the sentence or as explicit provisions in the criminal statute.[195]

Where *In re Bonner* was decided in an era where prisoners were treated as "slaves of the state" and without rights or liberties, the court's rationale found new life as in a new era of prisoner's rights.[196] Opened in 1935, the Public Health Services Hospital at Lexington was the first prison facility created for the sole purpose of addressing addiction in detainees.[197] The prison was originally named the United States Narcotic Farm.[198]

Detainees were referred to as "patients," and were expected to participate in vocational training as well as farm work as part of the hospital's self-sustaining pastoral mission.[199]

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190 *E.g.*, Coffin v. Reichard, 143 F.2d 443 (6th Cir. 1944); Lake v. Cameron, 364 F.2d 657, 658, 658 (D.C. Cir. 1966) (en banc).

191 *Coffin*, 143 F.2d at 443.

192 *Id*. at 444.

193 *Id*. at 445.

194 *Id.*

195 *Id.*

196 *Ruffin v. Commonwealth*, 62 Va. 790, 796 (1871).

197 Clary Estes, "The Narcotic Farm And The Little Known History America's First Prison For Drug Addicts," FORBES (Nov. 18, 2019), https://www.forbes.com/sites/claryestes/2019/11/18/the-narcotic-farm-and-the-little-known-history-americas-first-prison-for-drug-addicts/?sh=27a9e0967b3b.

198 *Id*.

199 *Id*.

The prison was among the first to experiment with the use of methadone to treat heroin addiction.[200] This is not merely colorful background to the case, but it provides important historical context for how and why *In re Bonner* took on a new life. Courts may have begun to vindicate the rights of detainees through the writ of habeas corpus because prisons became sites of therapy and rehabilitation. Instead of slaves to the states, detainees retained certain rights of citizenship.

In interpreting the scope of habeas jurisdiction, the Sixth Circuit operated within this view of rehabilitative custody. Specifically, the Sixth Circuit found that: "Any unlawful restraint of personal liberty may be inquired into on habeas. This rule applies although a person is in lawful custody. His conviction and incarceration deprive him only of such liberties as the law has ordained he shall suffer for his transgressions."[201] Detainees retain certain rights of citizenship despite incarceration.[202] *Coffin* builds on *In re Mills* and *In re Bonner* by holding that whenever the execution of a sentence deprives a detainee of certain "substantial right[s]" or "personal libert[ies]," then habeas is available to challenge the conditions of confinement.[203]

The liberty-focused rhetoric charted new territory beyond *In re Bonner*. Where *In re Bonner* focused on the jurisdiction created by the exact terms of a criminal statute, *Coffin* extended that rationale to prisoners who retain certain rights even in the face of otherwise-lawful detention and imprisonment.[204] Whether the right was found in the criminal statute itself or the rights and liberties retained by incarcerated people, under *Coffin's* rationale, habeas is available.[205]

In terms of remedy, the *Coffin* court directed the trial court to "dispose of the party 'as law and justice require,'" which included transfer to another institution.[206] In this way, one can see *In re Bonner*'s influence in *Coffin*, where courts used habeas law to meet the challenges of the modern carceral state. Not only do detainees have a right to a specific manner of confinement based on the limits of the criminal statute, like *In re Bonner* holds, but so do detainees have the right to challenge prison administrative decisions that violate the rights and liberties retained despite their criminal conviction.[207] This means that habeas is available to challenge conditions of confinement and seek relief less than immediate or speedier release from confinement.

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200 Patrick Reed, "*Narcotic Farm*," KET: PBS, https://www.ket.org/program/narcotic-farm/; *William S. Burroughs, Junkie* (1953) (Offering a more color description of the experimental prison and the author discussing, in part, his time at "Narco.").

201 Coffin v. Reichard, 143 F.2d 443, 445 (6th Cir. 1944).

202 *See id*.

203 *Id*.

204 *Id*.; *In re* Bonner, 151 U.S. 241, 254–55 (1894).

205 *Coffin*, 143 F.2d at 444–45.

206 *Id.* at 445 ("[T]he court may order the prisoner placed in the custody of the Attorney General of the United States for transfer to some other institution.").

207 *Id.* at 445 (citing *In re* Bonner, 151 U.S. 241 (1894)).

ii. The D.C. Circuit

The D.C. Circuit also has a line of cases that exemplify how habeas developed to allow challenges to prison conditions that were distinct from the fact of confinement.[208] Just like *Coffin* emerged in response to the modern carceral state, the D.C. cases involved challenges to the conditions of confinement at Saint Elizabeth's Hospital, a psychiatric hospital in Washington, D.C.[209]

As background, in three decisions during the 1940s, the D.C. Circuit held that habeas was unavailable to patients at Saint Elizabeth's Hospital who sought to prove that they were of sound enough mind for release from court-ordered psychiatric confinement.[210] The courts concluded that an individual seeking revaluation of his or her psychological condition must submit a petition to a statutorily created mental health commission, rather than filing a habeas petition with the trial court that had originally sentenced the individual to psychiatric confinement.[211]

The D.C. Circuit reversed course in 1950 with *Overholser v. Boddie*.[212] Sitting en banc, the D.C. Circuit found that the legislation creating the mental health commission omitted procedures instructing detainees on how to submit petitions for psychological revaluations to secure release from their indefinite detention at Saint Elizabeth's.[213] Because the statute omitted procedures for revaluation and release, the only remedy available to patients held in custody at Saint Elizabeth's was a habeas petition filed in the original sentencing court.[214]

Starting with *Miller v. Overholser*, the D.C. Circuit began exploring the more expansive habeas jurisdiction identified in its repudiation of the 1940s Saint Elizabeth's cases.[215] Miller was sentenced to a term of indefinite therapeutic-confinement after a conviction under "the so-called Sexual Psychopath Act."[216] The court ordered Saint Elizabeth's Hospital to hold Miller in psychiatric confinement until he had "sufficiently recovered."[217] Miller then filed a habeas Corpus petition seeking revaluation of his mental health to secure release from the hospital.[218] In addition to seeking revaluation of his mental health, Miller also alleged mistreatment by the fellow inmates housed in the ward for the "criminal[ly] insane."[219] These abuses alone rendered his detention illegal and justified Miller's transfer to another hospital or prison to ensure his safety.[220] Citing *In re Bonner*, the court concluded

[208] *See* Note, *supra* note 123, at 1072, 1082 (discussing the D.C. Circuit hospital cases); *see also* Martha F. Alschuler, Note, *Insane Persons*, 45 Tx. L. R. 777 (1967) (same).
[209] *See* Note, *supra* note 123, at 1072, 1082 (discussing the D.C. Circuit hospital cases).
[210] Overholser v. Treibly, 147 F.2d 705 (D.C. Cir. 1945); Dorsey v. Gill, 148 F.2d 857 (D.C. Cir. 1945); Overholser v. DeMarcos, 149 F.2d 91 (D.C. Cir. 1945).
[211] Overholser v. Boddie, 184 F.2d 240, 241 (D.C. Cir. 1950) (en banc).
[212] *Id*.
[213] *Id.* at 242–43.
[214] *Id.*
[215] Miller v. Overholser, 206 F.2d 415 (D.C. Cir. 1953).
[216] *Id*. at 416.
[217] *Id*. at 417–18.
[218] *Id*.
[219] *Id.* at 418.
[220] *Id.* at 419–20.

that habeas "[wa]s available to test the validity not only of the fact of confinement but also of the place of confinement."[221]

In 1966, in a second major en banc decision, the D.C. Circuit extended *Miller's* rationale.[222] In *Lake v. Cameron*, Lake, a sixty-year-old woman suffering from a degenerative brain disorder, was picked up by a police officer and taken to the D.C. General Hospital.[223] Lake then filed a habeas petition when the district court transferred her to Saint Elizabeth's for evaluation for commitment proceedings.[224] After dismissing her habeas petition, the district court found Lake to be "of 'unsound mind'" and committed her to indefinite detention at Saint Elizabeth's.[225] The D.C. appellate court remanded Lake's petition for a hearing on the merits, but the district court denied Lake relief on the merits.[226]

On her second appeal, Lake sought transfer or release to "another institution or hospital . . . or at home, even though under some form of restraint."[227] While both the majority and dissents in *Lake* agreed that *Miller* supported the use of habeas to secure release or transfer from detention, the judges disagreed as to habeas's availability to secure other forms of relief.[228] Drawing on the language of the D.C. code under which Lake was detained, the majority held that a habeas petition could seek a full range of mental health treatments including: full release, home confinement, or even treatments in the hospital itself.[229] In dissent, then-Judge Warren Burger accepted the view that habeas could be available to detainees challenging the place of confinement, but argued against the wisdom of extending that jurisdiction to someone who had been adjudged of unsound mind.[230]

One interesting aspect of the overlap between the majority and Judge Burger's dissent is that *Lake*'s view of habeas jurisdiction is even further removed from the "traditional" understanding of habeas espoused in *Miller*.[231] Where *Miller* couched its holding in conservative language about the particular necessities of the case that required the court permit a habeas application for purposes other than securing release, *Lake* was less conservative.[232]

Lake seemingly takes it as self-evident that habeas—regardless of the underlying facts and nature of the conviction—is available to challenge the execution of a sentence as distinct from the fact or length of confinement.[233] Rather than wholly deferring to the discretion of the prison and hospital system, *Lake* found that the statute's clear terms gave

[221] *Id*. at 420 (citing *In re* Bonner, 151 U.S. 242 (1894)).
[222] Lake v. Cameron, 364 F.2d 657, 658 (D.C. Cir. 1966) (en banc).
[223] *Id.*
[224] *Id*.
[225] *Id*.
[226] *Id*. at 659.
[227] *Id*.
[228] *Id*. at 661 (Bazelon, J.); *Id*. at 663 (Burger, J. dissenting).
[229] Lake, 364 F.2d at 662.
[230] *Id*. at 664 (Burger, J. dissenting) ("This city is hardly a safe place for able-bodied men, to say nothing of an infirm, senile, and disoriented woman to wander about with no protection except an identity tag advising police where to take her.").
[231] *See id.*
[232] *Id*. at 661.
[233] *See id.* at 659 ("Habeas corpus challenges not only the fact of confinement but also the place of confinement.").

the district court justification for placing lawful—or removing unlawful—conditions on Lake's sentence.[234]

Coffin, *Lake*, and *In re Bonner* show that courts have interpreted habeas broadly enough to secure a dynamic range of remedies that often fall short of immediate release.[235] That the core of habeas is *associated* with securing release does not preclude its use to secure other remedies for illegal conditions of confinement. In allowing courts to vindicate the rights of detainees through a habeas petition, courts are not abrogating Supreme Court precedent or obfuscating Congressional intent. Rather, opening habeas to challenges to the conditions of confinement or prison administrative decisions is rooted in a historical practice that dates back to at least the late nineteenth century.

Granted, the federal docket is already filled with prisoner litigation, and this is an obvious response to this article's proposal.[236] But, as this article discussed in Part II, recognizing the broad grant of habeas jurisdiction that has evolved since *In re Bonner* is unlikely to increase the docket of the federal courts.[237] When courts deny a habeas petition for lack of jurisdiction to challenge conditions of confinement, they simply direct the plaintiff to refile under the more appropriate statute.[238] By adopting the approach advocated for in this article, the courts will no longer have any excuse but to address the merits of a detainee's complaint and provide for the efficient administration of justice.

V. ADAPTING *IN RE BONNER* TO THE MODERN EXECUTION OF A SENTENCE FRAMEWORK: THE SECOND CIRCUIT APPROACH

This Part focuses on the Second Circuit's case law that draws a line from *In re Mills* and *In re Bonner* through to the modern habeas statutory framework. The focus here is exclusively on the Second Circuit because the case law is robust, the circuit quickly responded to *Preiser*, and the circuit has employed a case law that is in accord with the nineteenth century habeas doctrine.

The Second Circuit has interpreted habeas jurisdiction broadly to include circumstances where the unlawful execution of a sentence is distinct from the fact or length of confinement itself. Specifically, the Second Circuit extends § 2241 jurisdiction to "such matters as the administration of parole, computation of a prisoner's sentence by prison officials, prison disciplinary actions, prison transfers, type of detention and prison conditions."[239] For these reasons, the Second Circuit's habeas law is a perfect case study for exploring how the modern habeas statutes meet *In re Bonner* and its progeny.

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234 *Id*.

235 *See* Coffin v. Reichard, 143 F.2d 443, 445 (6th Cir. 1944); Lake, 364 F.2d at 659–60; *In re* Bonner, 151 U.S. 242, 261–62 (1894).

236 Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555, 1558–60 (2003).

237 *See supra* Part II.

238 *E.g.*, Cureno Hernandez v. Mora, 467 F. Supp. 3d 454, 456–57 (N.D. Tex. 2020).

239 McPherson v. Lamont, 457 F. Supp. 3d 67, 74 (D. Conn. 2020) (quoting Jiminian v. Nash, 245 F.3d 144, 146 (2d Cir. 2001)).

The Second Circuit's § 2241 precedent first traces back to in a 1975 concurring opinion from Judge Henry J. Friendly.[240] In *Kahane v. Carlson*, a federal prisoner, and an Orthodox Jewish Rabbi, sought to compel prison authorities to provide kosher meals.[241] The majority of the court held that the district court had authority to compel the prison to provide kosher meals through a writ of mandamus, as provided for by 28 U.S.C. § 1361, which "compel[s] an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff."[242] While Judge Friendly agreed with the majority of the court that the prison should provide kosher meals to Kahane, he disagreed that § 1361 was the proper vehicle for the petitioner's claim.[243]

Judge Friendly argued that § 2241 was the most appropriate vehicle.[244] Because Kahane's complaint sought to change prison conditions that infringed on his religious liberty, Friendly reasoned that *Preiser* held that habeas provides proper relief.[245] Not unlike this article's analysis of *Preiser*, Judge Friendly interpreted *Preiser* as primarily concerned with preventing detainees from using § 1983 to circumvent habeas exhaustion requirements.[246]

In particular, Judge Friendly found that § 2241 is the appropriate vehicle to challenge conditions of confinement because § 2255 is textually committed to claims seeking "the right to be released."[247] Since Kahane alleged an illegal execution of his sentence, and because § 2255 was only available to detainees seeking immediate or speedier release because of an unlawfully imposed sentence, § 2241 would therefore be the most appropriate source of jurisdiction.[248] Judge Friendly's concurrence is one of the first instances in the Second Circuit case law where § 2241 was used as a catchall permitting claims challenging the execution of a sentence as distinct from the fact of confinement.

The Second Circuit provided further justification for this interpretation of the statutory framework in *Chambers v. United States*.[249] *Chambers* held that § 2241 is available for all claims that challenge the "execution" of the prisoner's sentence.[250] Key to the court's analysis was that § 2255's text clearly limits the ways in which a federal prisoner can challenge the validity of a conviction.[251] Because Congress specifically limited § 2255 to attacks on

[240] Kahane v. Carlson, 527 F.2d 492, 496 (2d Cir. 1975) (Friendly, J., concurring). Judge Friendly is well-known for his concern that the federal docket should not be inundated with habeas corpus collateral attacks that maintain no claim for actual innocence. Henry J. Friendly, Is Innocence Irrelevant? Collateral Attack on Criminal Judgements, 38 U. CHI. L. REV. 142 (1970). In this context, it may seem curious to turn to Judge Friendly for support in finding habeas jurisdiction for these types of collateral claims. However, Judge Friendly's criticism of collateral attacks without a claim for innocence was that federal courts were releasing prisoners who were not innocent. While the approach outlined in this article may sometimes result in situations where people held in custody are released without a claim for innocence, these are exceptional circumstances, like during the pandemic or for the restoration of good-time credits.

[241] *See Kahane*, 527 F.2d at 493.

[242] *Id*. (quoting 28 U.S.C. § 1361).

[243] *See id.* at 497 (Friendly, J., concurring).

[244] *See id*. at 498.

[245] *See id*. at 500 ("[A] prisoner attacking the conditions of confinement may bring his claim under [§] 2241, in the district where he is confined.").

[246] *Compare id*. at 498–500 (distinguishing § 2255 from § 2241), *with supra* Part I (highlighting § 2241 as a catchall statute).

[247] *Kahane*, 527 F.2d at 500 (Friendly, J., concurring).

[248] *Id*. at 496.

[249] Chambers v. United States, 106 F.3d 472, 474 (2d Cir. 1997).

[250] *Id*.

[251] *Id*.

the trial court's unconstitutional or illegal imposition of a sentence, § 2255 could only be used to attack the legality of a petitioner's sentence and underlying conviction.[252] This meant that § 2255 petitions could not pursue conditions of confinement claims because conditions of confinement concern the execution of a sentence and *not* the validity of the underlying conviction.[253] Thus, because § 2255 was unavailable to challenge the execution of a sentence, the Second Circuit held that § 2241 was the appropriate habeas vehicle for pursuing conditions of confinement claims.[254]

Although the phrase "execution of a sentence" is ambiguous as to the exact types of claims cognizable under the habeas statutes, the Second Circuit has further clarified the meaning of this phrase.[255] In *Jiminian v. Nash*, the Second Circuit defined execution of sentence challenges as including "such matters as the administration of parole, computation of a prisoner's sentence by prison officials, prison disciplinary actions, prison transfers, type of detention and prison conditions."[256] Because administration of parole could lead to speedier release and because prison conditions and places of detention affect the overall restrictiveness of a detainee's confinement, all of these claims touch on the execution of a prisoner's sentence by virtue of the *conditions* they place on the sentence. By distinguishing § 2241 from § 2255, the Second Circuit essentially codified the nineteenth century federal common law approach to habeas corpus law, creating a powerful judicial remedy for individuals whose sentences are executed in unlawfully restrictive or dangerous ways.[257]

Relying on this interpretation of what constitutes a proper challenge to an unlawful execution of a sentence, the Second Circuit has further extended its interpretation of habeas to petitions seeking the expungement of disciplinary records,[258] transfer to prisons with less restrictive environments (like community correction centers)[259] or prisons with greater access to specialized medical care.[260]

Even with this robust set of case law defining when the unlawful execution of a sentence is open to challenge through habeas corpus, there are still emerging areas of law within the circuit. While the appellate court has yet to publish a decision directly on the issue of solitary confinement, many district courts in the circuit have decisions extending the Second

[252] 28 U.S.C. § 2255(a).

[253] *Chambers*, 106 F.3d at 474 (citing Diorguardi v. United States, 587 F.2d 572, 573 (2d Cir. 1978)). Following the thread of "execution of a sentence" eventually leads to two federal appellate decisions in the 1950s. Freeman v. United States, 254 F.2d 352, 353–54 (D.C. Cir. 1958) ("If appellant's sentence is being executed in a manner contrary to law, though we do not suggest that it is, he may seek habeas corpus in the district of his confinement. Section 2255 is not broad enough to reach matters dealing with the execution of sentence.") and Costner v. United States, 180 F.2d 892, 892 (4th Cir. 1950) ("We think it clear, however, that the court has no jurisdiction to entertain a motion of this sort under 28 U.S.C.A. § 2255, which merely provides a remedy in the nature of writ of error coram nobis for attacking the judgment and sentence under which a prisoner is incarcerated. The attack here is not upon the judgment of the court, but upon action of the prison authorities.").

[254] *Chambers*, 106 F.3d at 474.

[255] *See* Ilina v. Zickefoose, 591 F. Supp. 2d 145, 146–47 (D. Conn. 2008).

[256] Jiminian v. Nash, 245 F.3d 144, 146 (2d Cir. 2001).

[257] *See supra* Part I.

[258] Carmona v. U.S. Bureau of Prisons, 243 F.3d 629, 632 (2d Cir. 2001).

[259] Levine v. Apker, 455 F.3d 71, 78 (2d Cir. 2006).

[260] *E.g.*, *Ilina*, 591 F. Supp. 2d at 150.

Circuit's approach to habeas jurisdiction to challenges to solitary confinement, where the relief sought is a return to the general run of the prison.[261]

From challenging solitary confinement to securing transfers to prisons with less restrictive environments, the Second Circuit's broad interpretation of § 2241 provides a flexible remedial vehicle for those held in custody to remedy injuries that require emergency relief. As Parts II and III discuss, because § 2241 execution of a sentence jurisdiction overlaps with § 1983, the Second Circuit's approach supports § 2241's use as relief for medical treatment[262] for federal prisoners on death row challenging the method of their execution,[263] or for detainees held in custody during a pandemic.[264] Most courts that oppose applying habeas to conditions of confinement cases frame their argument within the context of *Preiser* and the idea that § 1983 and habeas are totally and completely separate claims that may never overlap.[265] However, as this article has argued, this interpretation of *Preiser* is not supported by the history of habeas case law or even by *Preiser* itself. Given that *Preiser* left undecided whether habeas is available to challenge conditions of confinement, the argument that habeas should be limited because *Preiser* demands such a reading is not persuasive.

A possible argument against adopting the Second Circuit's habeas jurisdiction is that it will unnecessarily inundate the federal docket. While opening judicial review to complaints about a detainee's allegedly unlawful execution of a sentence could theoretically open a floodgate of prison litigation, the Second Circuit's approach won't necessarily lead to overly expansive judicial review. For one, as this article has already indicated, a broad habeas law actually will not expand the federal docket, it will only force the courts to properly deal with the merits of the claims before them. Where under the current circuit split, some courts may get away with kicking the can and forcing detainees to re-submit their complaints under a different federal statute, an expansive reading of habeas will not allow this type of jurisdictional argument.[266]

Second, the Second Circuit narrowly limits the claims that touch on the execution of a sentence as distinct from the fact of confinement to a discrete set of claims rooted in a historical approach dating back to *In re Bonner*.[267] While the Second Circuit does not provide robust guidance as to how to determine whether a novel claim can be pursued under the execution of a sentence framework, the Seventh and First Circuits provide useful doctrinal frameworks.

The Seventh Circuit has adopted a "quantum of confinement" test, which only grants habeas relief for habeas challenges to conditions of confinement whenever the habeas petitioner seeks what can fairly be described as a change in the quantum of confinement, which are those claims that implicate a prisoner's liberty interests.[268] The First Circuit grants

[261] United States v. Bout, 860 F. Supp. 2d 303, 307 n.12 (S.D.N.Y. 2012); United States v. Basciano, 369 F. Supp. 2d 344, 348 (E.D.N.Y. 2005); Giano v. Sullivan, 709 F. Supp. 1209, 1212–13 (S.D.N.Y. 1989).

[262] *Ilina*, 591 F. Supp. 2d at 150.

[263] Adams v. Bradshaw, 644 F.3d 481 (6th Cir. 2011).

[264] *E.g.*, McPherson v. Lamont, 457 F. Supp. 3d 67, 74 (D. Conn. 2020).

[265] *E.g.*, Nettles v. Grounds, 830 F.3d 922, 925 (9th Cir. 2016) (en banc).

[266] *E.g.*, Xuyue Zhang v. Barr, No. 20-00331-AB, 2020 WL 1502607, at *1 (C.D. Cal. Mar. 27, 2020).

[267] *See generally* United States v. Bout, 860 F. Supp. 2d 303, 307 n.12 (S.D.N.Y. 2012); United States v. Basciano, 369 F. Supp. 2d 344, 348 (E.D.N.Y. 2005); Giano v. Sullivan, 709 F. Supp. 1209, 1212–13 (S.D.N.Y. 1989).

[268] Graham v. Broglin, 922 F.2d 379, 381 (7th Cir. 1991).

habeas relief to novel habeas claims that challenge conditions of confinement "closely related" to the fact, length, or duration of confinement.[269] The issue of how to identify novel execution of a sentence claims cannot be resolved in the limited space provided by this article, but it is enough to know that the bar is high and the relief circumscribed.

Ultimately, the need to correct illegal forms of confinement must outweigh the burdens placed on prisons and courts by a broad habeas review. The government's lax response to the pandemic only exacerbated the systemic problems posed by mass incarceration.[270] Since the only barrier to hearing the merits of a conditions of confinement habeas petition is the court's view as to proper habeas jurisdiction, the cost of forcing detainees to re-submit a claim and wait even longer for relief is outweighed by the benefit of corrected administrative malfeasance and the harms suffered by detainees and their communities.[271]

VI. Case Studies: § 2241 as Emergency Relief

As we have seen, reading habeas broadly increases efficiency, by enabling courts to rule on the merits of habeas petitions challenging the conditions of confinement instead of having to dismiss habeas complaints only to later rule on the merits of a subsequent civil complaint. Another benefit of reading habeas broadly is that, because § 2241's exhaustion requirements are prudential, courts may excuse those requirements at their discretion. A final benefit is that, because habeas is a unique statute that is not quite civil in nature, courts do not have to apply the Prison Litigation Reform Act's ("PLRA") stringent substantive and procedural requirements for habeas challenges to conditions of confinement.[272]

In teasing out these benefits, this Part discusses two recent COVID-19 habeas cases. One case, from the Central District of California, serves to demonstrate how courts may exercise their discretion in excusing exhaustion requirements in emergency situations.[273] The other case, from the Northern District of Illinois, shows the impact of the court wrongly applying the PLRA to the habeas petition.[274]

A. Xuyue Zhang v. Barr

In *Xuyue Zhang v. Barr*, a 63-year-old asylum seeker from China filed a § 2241 petition seeking release from ICE detention in light of the pandemic.[275] Before the court could turn to the merits of the petition, the preliminary issue was whether the court was required to

[269] Brennan v. Cunningham, 813 F.2d 1, 5 (1st Cir. 1987).

[270] *See generally* Elias Rodriques, *Abolition is a Collective Vision: An Interview with Mariame Kaba*, The Nation (Mar. 29, 2021) (discussing the harms to prisoners within the prison industrial complex that were exacerbated by the government's response to the pandemic).

[271] *New Report Shows That Mass Incarceration Led to Huge Increase In National COVID-19 Caseloads*, Prison Pol'y Initiative (Dec. 15, 2020), https://www.prisonpolicy.org/blog/2020/12/15/covid-spread-pressrelease/ (discussing role of prisons and jails as super-spreaders to communities outside the detention center walls).

[272] Harrison v. Nelson, 394 U.S. 286, 293–94 (1969).

[273] Xuyue Zhang v. Barr, No. 20-00331-AB, 2020 WL 1502607, at *1 (C.D. Cal. Mar. 27, 2020).

[274] Mays v. Dart, 453 F. Supp. 3d 1074, 1083, 1089 (N.D. Ill. 2020).

[275] *Xuyue Zhang*, 2020 WL 1502607, at *1.

dismiss Xuyue Zhang's petition for failure to exhaust administrative remedies.[276] Because the petitioner had filed a motion in immigration court seeking release, it meant that Xuyue Zhang had not yet exhausted his administrative remedies in immigration court.[277]

In surveying the case law for § 2241's exhaustion requirements, the court found that the requirements are prudential, meaning that those requirements may be excused at the court's discretion.[278] Because the petitioner was "entering his ninth month of immigration detention," the court worried that, if immigration court closed, Xuyue Zhang be at a much higher risk of contracting the virus.[279] Leaving Xuyue Zhang to the vagaries of immigration court would raise serious health risks.[280] Despite the fact that Xuyue Zhang's request for relief was only in the *process* of administrative review, the district court excused exhaustion.[281]

The court found support for its decisions in examples from outside the context of a global pandemic. Specifically, the court pointed to the fact that government shutdowns and court closures had in the past significantly impacted the ability of immigration detainees to seek redress from administrators claims of unlawful detention.[282] That the court found a comparable emergency situation from outside the pandemic context shows the pandemic is not a one-off event that is so unique that only its circumstances could merit judicial discretion in waiving exhaustion requirements.[283] Courts have also excused exhaustion requirements in other situations where they already had reason to distrust the administrative process.[284] Granted, the most significant and wide-spread use has been during the pandemic; individuals like Ms. Ilina, who had to wait months for relief, during which she suffered from severe medical complications, could conceivably rely on § 2241 for emergency relief.[285]

B. MAYS V. DART

Turning to the PLRA issue, in *Mays v. Dart*, two pretrial detainees held in state custody filed habeas petitions challenging unlawful conditions of confinement under § 2241, seeking release from Cook County Jail in light of the COVID-19 pandemic.[286] The *Mays* petitioners alleged that no conditions of confinement could be corrected so as to make the confinement lawful—i.e., the very fact of their confinement was made unlawful by the

[276] *Id*. at *3–4.
[277] *Id*. at *4.
[278] *Id*. at *3–4.
[279] *Id*. at *4.
[280] *Id*.
[281] *Id*.
[282] *Id*. (citing Gonzalez v. Bonnar, No.18-cv-05321-JSC, 2019 WL 330906, at *5 n.5 (N.D. Cal. Jan. 25, 2019)).
[283] *Id*.
[284] United States v. Bout, 860 F. Supp. 2d 303, 310 (S.D.N.Y. 2012).
[285] Second Amended Petition for Writ of Habeas Corpus at ¶ 9, Ilina v. Zickefoose, 591 F. Supp. 2d 145 (D. Conn. 2008) (No. 3:07-CV-1490(JBA)).
[286] Mays v. Dart, 453 F. Supp. 3d 1074, 1083 (N.D. Ill. 2020).

dangerous prison conditions.[287] However, the *Mays* court never definitively ruled on this issue, in part because the court misapplied the PLRA.[288]

For civil proceedings initiated by prisoners, the Prison Litigation Reform Act imposes a series of procedural and substantive rules beyond those rules normally required by the civil statute.[289] However, the PLRA should not apply to § 2241 because habeas petitions are not civil proceedings, even though they are often labeled as such.[290] Doing so muddies the complex position of habeas within federal law.[291] While habeas challenges to the unlawful execution of a sentence may have overlapping jurisdiction with conditions of confinement claims under § 1983, the PLRA should not apply to a habeas petition for this reason alone, because habeas is in fact a unique, not-quite-civil, statute.[292]

The court started with the premise that the PLRA applies to "any civil action with respect to prison conditions,"[293] where a civil action is "any civil proceeding arising under Federal law with respect to the conditions of confinement . . . but does not include habeas corpus proceedings challenging the fact or duration of confinement in prison."[294] Then the court reasoned that, because the petitioners challenged the conditions of confinement and not the fact or duration of confinement, the PLRA must apply.[295]

One issue with the court's PLRA analysis is that conditions-of-confinement claims can be indistinct from the fact of confinement itself.[296] Thus, a court must do more than merely label a habeas petition as a "condition of confinement" in determining that the claim is distinct from the fact or duration of confinement. The COVID-19 habeas cases are properly understood as challenges to conditions of confinement indistinct from the fact of confinement: the petitioners alleged that no change of conditions within the prison itself could remedy the harm caused by the pandemic.[297] By virtue of this fact alone, specifically that the habeas petition *did* concern the fact of confinement, the PLRA should not have applied.

The larger issue, however, is that interpreting habeas as a strictly civil proceeding muddies the complex position of habeas within federal law.[298] In *Harris v. Nelson*, the Supreme Court noted that while habeas corpus proceedings are characterized as civil, that that "label is gross and inexact[,] [e]ssentially, the proceeding is unique."[299] Even though habeas proceedings

[287] *Id*.
[288] *Id*. at 1089.
[289] ACLU, *Know Your Rights: Prison Litigation Reform Act*, https://www.aclu.org/sites/default/files/images/asset_upload_file79_25805.pdf.
[290] Harris v. Nelson, 394 U.S. 286, 293–94 (1969).
[291] *See id*.
[292] *Id*. at 294.
[293] *Mays*, 456 F. Supp. 3d 966, 995 (N.D. Ill. 2020) (quoting 18 U.S.C. § 3626(a)(1)(A)).
[294] *Id*. at 995–96 (quoting 18 U.S.C. § 3626(g)(2)).
[295] *Id*. at 996–97.
[296] *See supra* Part II.
[297] *Mays*, 456 F. Supp. 3d at 995.
[298] *See* Harris v. Nelson, 394 U.S. 286, 293–94 (1969).
[299] *Id*.

have over time adopted *some* forms of civil practice and procedure, the "complex history"[300] of habeas makes the writ unique from either civil or criminal proceedings.[301]

This is not to say the *Mays* court's analysis is entirely misplaced. The court's argument, that the PLRA should apply to a habeas challenge to an unlawful execution of a sentence that is distinct from the fact of confinement, is well taken.[302] Because habeas jurisdiction overlaps with § 1983, it makes intuitive sense to treat similar petitions similarly. Because challenges to conditions of confinement usually proceed civilly, it makes some sense to apply the PLRA when that similar challenge is made in the habeas context.[303] However, doing so overlooks habeas' unique role within the constitutional framework and federal case law.[304] Most circuits use a bright-line rule in separating habeas from PLRA coverage.[305]

Taking the exhaustion and PLRA issues together, it becomes clear that § 2241 serves an important role as an emergency relief statute. First, because exhaustion is prudential, a court may waive exhaustion at its own discretion.[306] Second, because habeas is a not quite civil statute, a court should not apply the PLRA to habeas petitions.[307]

When time is of the essence and the person in custody needs relief as soon as possible, that person should first turn to § 2241. Granted, the statute cannot be used by state prisoners (at any time) or federal prisoners (when challenging the underlying conviction), but that still leaves nearly one million detainees in local and federal jails, ICE detention, Guantanamo Bay, and in civil commitment who can and should look to § 2241 and take advantage of its flexible provisions for securing emergency relief.

VII. CONCLUSION

For those held behind bars during the COVID-19 pandemic, the jurisdictional limits of habeas law were not merely academic. Each time a court found that it lacked habeas jurisdiction, there were thousands of detainees who remained behind bars hoping they do not contract a severe form of the disease. With a series of highly effective vaccines on the market, courts may not return to the problem posed by prisoner COVID-19 habeas petitions for many years. However, as this article has shown, problems in interpreting the

[300] *Id*. at 294 n.4.

[301] *Id*. at 294; see also Banister v. Davis, 140 S. Ct. 1698, 1714 (2020) (Alito, J., dissenting) (quoting the "gross and inexact" language from Harris v. Nelson); Carmona v. U.S. Bureau of Prisons, 243 F.3d 629, 634 (2d Cir. 2001) ("A number of other circuits—relying primarily on the ground that habeas proceedings are not civil actions—have ruled the Litigation Reform Act inapplicable to habeas actions brought by federal prisoners under § 2241."); Walker v. O'Brien, 216 F.3d 626, 634 (7th Cir. 2000) ("We therefore hold that if a case is properly filed as an action under 28 U.S.C. §§ 2241, 2254, or 2255, it is not a 'civil action' to which the PLRA applies.").

[302] *Mays*, 456 F. Supp. 3d at 996–97.

[303] *Id*. at 995–98.

[304] Harris v. Nelson, 394 U.S. 286, 293–94 (1969).

[305] *See id*. at 294; *see also Banister*, 140 S. Ct. at 1714 (Alito, J., dissenting) (quoting the "gross and inexact" language from Harris); *Carmona*, 243 F.3d at 634 ("A number of other circuits—relying primarily on the ground that habeas proceedings are not civil actions—have ruled the Litigation Reform Act inapplicable to habeas actions brought by federal prisoners under § 2241."); *Walker,* 216 F.3d at 634 ("We therefore hold that if a case is properly filed as an action under 28 U.S.C. §§ 2241, 2254, or 2255, it is not a 'civil action' to which the PLRA applies.").

[306] *E.g.*, Xuyue Zhang v. Barr, No. 20-00331-AB, 2020 WL 1502607, at *1 (C.D. Cal. Mar. 27, 2020).

[307] *Harris*, 394 U.S. at 293–94.

scope of habeas jurisdiction are deeper than the issues immediately presented in these cases. Courts across the federal circuit should adopt the broad approach to execution of a sentence claims as described in Part IV of this article. Reading habeas in this way also positions § 2241 as a statute that detainees should look to for emergency relief. This respects a traditional approach to the writ that the federal circuit has practiced since the nineteenth century. This article sees *In re Bonner*'s approach to habeas as having evolved throughout the twentieth century to meet the demands of the modern carceral state. In advocating the circuit to adopt this broad approach, this article encourages a respect for past practices and historical uses.


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