Assume for a moment that Bob was convicted of a crime and sentenced to thirty years' imprisonment in 1990. At his trial, the prosecution used DNA tests to establish guilt. Since the trial, methods of DNA testing have improved dramatically. Hoping that the new technology will establish his innocence, Bob requests access to the biological evidence to retest it. If the state refuses to grant access, Bob has two potential federal avenues for relief. He could either file a civil suit under 42 USC § 1983 or apply for a writ of habeas corpus under 28 USC § 2254. Both statutes create federal remedies for the violation of federal rights, but they differ in scope. Section 1983, first codified in 1871, creates a civil cause of action against state officials who deny federal rights and provides a remedy in federal court when state courts prove inadequate or unwilling to protect federal rights. Section 2254, the federal habeas statute, authorizes state prisoners held in violation of federal law to apply for a writ of habeas corpus in federal court. Due to the writ's long history at common law and tendency to create friction between federal and state governments by allowing direct attack of state convictions in the federal courts, the writ has accumulated a complicated set of procedural requirements imposed by both Congress and the courts. Each statute has its unique advantages and disadvantages. A habeas suit, if successful, could compel release from prison; however, the complex procedural rules for habeas might bar the claim. Although section 1983 cannot secure release, the less stringent procedural rules may allow the suit to proceed when barred.

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2 Id at 91–98. Congress first extended the federal writ of habeas corpus to prisoners in state custody in 1867. Id at 91. Schwartz briefly reviews a series of Supreme Court cases, dating back to the 1960s, that expanded the reach of the federal courts via liberal interpretations of the habeas statute. Id at 93–98. Congress last substantially modified the habeas statute by limiting the number of habeas appeals as part of the Anti-terrorism and Effective Death Penalty Act of 1996, Pub L No 104-132, 110 Stat 1218, codified at 28 USC § 2254 (2000).
in habeas. Which statute the suit is brought under might determine whether it survives.

Bob's case illustrates the complicated convergence of technology and law. As DNA testing becomes more sophisticated, questions arise about the conclusiveness of earlier forms of DNA testing. The newer, more precise tests may yield results less favorable to the prosecution, but a prisoner seeking to use the new technology to challenge the conclusiveness of the evidence that contributed to his conviction must first gain access to the physical evidence. In the Fourth, Fifth, or Sixth Circuit, Bob can only file a habeas suit. In contrast, the Eleventh Circuit allows Bob to file a section 1983 action and take advantage of its less stringent procedural rules.

This Comment examines the reasons behind the conflicting appellate court decisions and argues that, under current Supreme Court precedent, prisoner suits seeking access to evidence to retest it using new DNA technology may be brought under section 1983 despite their habeas overtones. Part I discusses the changes in DNA testing that motivate prisoners to seek retesting, some of the policy considerations in allowing retesting, and the two principal avenues—section 1983 and habeas—for pressing access claims in federal court. Part II examines the Supreme Court opinions demarcating section 1983 and habeas claims. Part III explains the three categories of cases created by the Court's demarcation test. Finally, referencing cases from the Fourth and Eleventh Circuits, Part IV argues that suits asserting a right of access to evidence for post-conviction DNA testing may be brought under section 1983.

I. CHANGING TECHNOLOGY AND STATIC LAW

Due to the evolving nature of science and technology, improved DNA tests, which produce reliable results from less or different DNA material, have become available. Arguing that the new tests either will or might prove exculpatory, prisoners assert the new tests as a basis for claims alleging a post-conviction right of access to evidence for new DNA testing. The claims reach federal court because, once denied access to evidence by the state, prisoners typically seek relief either

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3 See Harvey v Horan, 278 F3d 370, 374 (4th Cir 2002) ("[W]e find Harvey's § 1983 action to be deficient."); Kutzner v McDougal, 303 F3d 339, 341 (5th Cir 2002) (per curiam) (holding that "Kutzner's § 1983 claims were cognizable only in habeas corpus"); Boyle v Mayer, 46 Fed Appx 340, 340-41 (6th Cir 2002) (holding that the district court properly dismissed Boyle's section 1983 suit, which challenged the state's refusal to grant him access to evidence to perform DNA testing, because the suit effectively challenged the validity of his conviction).

4 Bradley v Pryor, 305 F3d 1287, 1288 (11th Cir 2002) (holding that because a "request for the production of evidence neither directly, nor by necessary implication, attacks the validity of [the convict's] conviction and sentence," it may be "brought pursuant to § 1983").
through section 1983 or the habeas statute. Because each statute has different purposes and rules, the courts must decide under which statute the suit properly belongs. Since an understanding of the genesis of DNA testing is valuable for understanding the jurisdictional issue generally, Part A provides a brief background of DNA testing. Part B then discusses the origins and purposes of the two principal avenues for federal relief, section 1983 and habeas.

A. The Genesis of DNA Testing

There are five basic forms of DNA testing, each developed sequentially and each more sophisticated and accurate than the last. DNA testing, regardless of the form, yields one of three results: exclusion, meaning that the individual is not the source of the material tested; non-exclusion, meaning that the individual cannot be excluded as the source; or no result, meaning that the analysis cannot be completed. Exclusion is a definitive finding, but non-exclusion moves the inquiry into a statistical analysis to determine the probability that the individual is the source of the material. The power—that is, the degree of reliability and accuracy—of the statistical calculation varies depending on the type of DNA test performed. The most recent test, the polymerase chain reaction (PCR), requires much smaller quantities of source material, can use a wider variety of material, and tends to be more successful in analyzing materials from rape cases. In criminal proceedings, the plaintiff hopes to use retesting to find and develop

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5 The five basic forms are: (1) "multi locus probe testing" (also known as "DNA fingerprinting"). (2) "single locus restriction fragment length polymorphism" (RFLP). (3) "polymerase chain reaction" (PCR) using "amplified length polymorphism" (PCR-AMPFLP), (4) PCR using "dot blot technology," and (5) "mitochondrial DNA sequencing." Charles M. Strom, Genetic Justice: A Lawyer's Guide to the Science of DNA Testing, 87 Ill Bar J 18, 19 (1999). The most recent development, mitochondrial DNA sequencing, is still in the process of being accepted by the courts. See Terrence F. Kiely, Forensic Evidence: Science and the Criminal Law 295–300 (CRC 2001).

6 Strom, 87 Ill Bar J at 19 (cited in note 5) (describing the "fundamentals of identity testing"). For a brief discussion on the mechanics of an exclusion result, see Charles I. Lugosi, Punishing the Factually Innocent: DNA, Habeas Corpus and Justice, 12 Geo Mason U Civ Rts L J 233, 247–49 (2002) (discussing the process, methods, and reliability of computer-automated testing).

7 Strom, 87 Ill Bar J at 19 (cited in note 5) ("The statistical power of nonexclusion can vary tremendously among cases based on variations in the type of test performed...the number of loci studied, and the frequency of the evidentiary genotype in the general population.").

8 Because PCR testing amplifies and duplicates DNA sequences, it can be done with as little as one cell, a minuscule amount of source material as compared to RFLP testing. See id at 23 ("Only a minute amount of DNA is required to perform testing."). DNA degradation caused by various factors such as bacteria renders DNA unsuitable for RFLP testing but does not affect PCR testing. Id (noting that PCR testing "may still be successful" in analyzing "decomposed tissues or in rape cases" where other tests, such as RFLP, will fail). See also Kiely, Forensic Evidence at 288–93 (cited in note 5) (discussing the benefits and uses of PCR testing).
exculpatory evidence, build a case for innocence, and, finally, secure release from custody."

B. Avenues for Federal Relief

State prisoners denied access to evidence for new DNA testing have two principal avenues for relief in federal court. They can file a civil suit under 42 USC § 1983 or petition for a writ of habeas corpus under 28 USC § 2254. Both statutes provide relief for violations of constitutional rights, but different purposes and qualifications inhere in the statutes. Although the two statutes differ in many important respects, they do have one common requirement.


A common requirement of both section 1983 and habeas corpus is that the suit must allege the violation of a constitutional right. A post-conviction right of access to evidence is difficult to categorize as a constitutional right because it fails to neatly fit into any preexisting categories of recognized procedural or substantive due process rights. Judges and scholars have suggested at least three due process grounds for a post-conviction right of access to DNA evidence for retesting.

   a) Claims of actual innocence. In Herrera v Collins, the Court reiterated its precedents that claims of actual innocence are not constitutional themselves, but are instead a "gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits." For that gateway to be effective,

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9 DNA testing and the resulting probability calculations are subject to two forms of error—interpretive error and laboratory error. Establishing a general error rate for DNA testing is, however, problematic. See Jonathan J. Koehler, Why DNA Likelihood Ratios Should Account for Error (Even When a National Research Council Report Says They Should Not), 37 Jurimetrics J 425, 430 (1997) (explaining the reasons why error rates are hard to establish). In 1996, the National Research Council recommended against using a calculation method that combined laboratory error rates with match probabilities. See National Research Council, The Evaluation of Forensic DNA Evidence 85-87 (National Academy 1996) (recommending that error rates be considered on a case-by-case basis). While scholars disagree on whether the NRC's recommendation is sound and exactly how to account for error, they do agree that error does occur in DNA testing and probability calculations. See, for example, Koehler, 37 Jurimetrics J at 428 (discussing the weaknesses of DNA testing). For a discussion of the NRC recommendation, see Margaret A. Berger, Laboratory Error Seen through the Lens of Science and Policy, 30 UC Davis L Rev 1081, 1081-92 (1997) (arguing in favor of the NRC recommendation); Koehler, 37 Jurimetrics J at 426 (arguing that failure to account for laboratory error will likely result in "overstat[ing] the probative value of [ ] reportedly matching DNA evidence").

10 See Harvey v Horan, 285 F3d 298, 310-11 (4th Cir 2002) (Luttig concurring) ("[A post-conviction right of access to evidence] is not one to material, exculpatory evidence necessary to ensure a fair trial. . . . It is not a right of 'factual innocence'. . . . Nor is it one of right to the preservation of potentially exculpatory evidence.").


12 Id at 404.
however, the prisoner must be able to make a colorable claim of actual innocence. Recognizing this fact, one could argue that a right of access to DNA evidence for retesting is an essential threshold to satisfy Herrera's gateway requirement. If the prisoner cannot get access to the evidence necessary to establish a colorable claim of innocence, he cannot litigate the constitutionality of his detention in habeas.

Judge Luttig made an analogous argument when he proposed that a right to post-conviction DNA testing "legitimately" derives from both substantive and procedural due process principles. Prisoners retain some substantive liberty interests protected by the Fourteenth Amendment. One of the interests protected is freedom from unlawful confinement, and "this substantive liberty interest is protected through a procedural due process right to have previously-produced forensic evidence either released to the convicted individual . . . or submitted by the government for [testing]." A state refusal to grant access to the evidence violates the procedural due process rights of the prisoner because the refusal impinges on a retained substantive liberty interest—freedom from unlawful confinement—protected by the Fourteenth Amendment. In Judge Luttig's view, the constitutional underpinning of the right to access is the right to prove one's innocence and thus gain release from unlawful confinement.

b) Brady v Maryland and access to exculpatory evidence. A post-conviction right of access to evidence for DNA testing might also be derived from a defendant's right of access to exculpatory evidence held by the prosecution, which was first recognized in Brady v Maryland. The fundamental principle animating Brady's holding is that the basic fairness necessary to a fair trial demands that the government produce all potentially exculpatory evidence. According to Judge

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13 In Cherrix v Braxton, 131 F Supp 2d 756 (ED Va 2001), the district court ordered the state to grant access to evidence to allow retesting with new DNA tests, holding that "discovery of the evidence is reasonably necessary to support[] the habeas petitioner's claims of actual innocence." Id at 760. The court noted that DNA was highly probative in rape cases such as the one at issue and could provide exculpatory evidence sufficient to support a claim of actual innocence. Id at 767.

14 Harvey, 285 F3d at 311 (Luttig concurring).

15 Id at 312-13.

16 Id at 315 (emphasis omitted). Luttig makes this artful argument in an opinion respecting the denial of rehearing en banc in a case that was denied rehearing as moot. He argues that the right of access is a matter of basic fairness and constitutionally required by the Due Process Clause. In a recent article, Seth Kreimer and David Rudovsky make much the same argument, stating that "a State's decision to deny access to DNA evidence that could demonstrate innocence must be judged against the substantive due process standards of fundamental fairness." Seth Kreimer and David Rudovsky, Double Helix, Double Bind: Factual Innocence and Postconviction DNA Testing, 151 U Pa L Rev 547, 588 (2002).


18 See Harvey, 285 F3d at 316 (Luttig concurring) ("For the better part of a half-century, if not longer, the government has been required, as a matter of procedural due process, or basic
Luttig, "the very same principle of elemental fairness that dictates pre-trial production of all potentially exculpatory evidence dictates post-trial production of this infinitely narrower category of evidence." This argument extends Brady's holding beyond both its facts and plain language, but the extension is not entirely unreasonable and has been accepted by at least one district court.

c) Access to courts and ineffective assistance of counsel. Some scholars argue that the right of access to DNA evidence for post-conviction testing may also be construed more in terms of a right of access to information. In this view, the right of access to evidence may be derived directly from the fundamental right of access to the courts. Because a prosecutor controls the evidence essential to mounting a successful challenge to the conviction, a prisoner is "effectively barred from access to the courts or other tribunals on the merits of the case." The prosecutor's refusal to grant access to evidence that might be necessary for the prisoner to present a viable case to the court becomes a de facto denial of access to the courts and thus infringes on a fundamental due process right of the prisoner.

At least one court has also recognized a right of access to retest DNA evidence as essential to establishing a claim of ineffective assistance of counsel. In Cherrix v Braxton, the Eastern District of Virginia noted that counsel did not request potentially exculpatory DNA retesting, but to establish that this failure met the requirements of an ineffective assistance of counsel claim—that a constitutional error probably resulted in conviction of one actually innocent—the litigant would have to retest the DNA. Access to the DNA evidence was thus
essential in order to prove deprivation of the Sixth Amendment right to effective assistance of counsel.\textsuperscript{27}

The common thread running through all of the preceding arguments is the threshold nature of a post-conviction right of access to DNA for retesting. Access to the DNA evidence for retesting is essential to protecting or effectuating some other important due process right. In many cases, the greater right—that is, the right to present claims of actual innocence, to obtain exculpatory evidence, or to access the courts—is frustrated if one does not recognize a derivative right: the post-conviction right of access to evidence.

2. Purpose and requirements of section 1983.

Section 1983 establishes a civil action for deprivation of constitutional rights. Under the statute, anyone who,

under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory . . . [deprives any United States citizen of] any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.\textsuperscript{28}

In \textit{Monroe v Pape},\textsuperscript{29} after an exhaustive review of the statute's legislative history, the Supreme Court concluded that the statute had three aims: Congress intended to "override certain kinds" of discriminatory state laws, to provide a "remedy where state law was inadequate," and to provide a federal remedy where state law was technically adequate but failed in practice.\textsuperscript{30}

Based on the legislative aims, the Court concluded that section 1983 created a remedy in federal court to address situations where "the claims of citizens to the enjoyment of rights, privileges, and immunities guaranteed by the Fourteenth Amendment might be denied by the state agencies."\textsuperscript{31} The Court further held that the "federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked."\textsuperscript{32} The fed-

\begin{itemize}
  \item \textsuperscript{27} Id at 770 ("Cherrix's request for DNA testing is reasonably necessary to support his claim that he was deprived of his Sixth Amendment right to the effective assistance of counsel, and that this deprivation resulted in the incarceration of an innocent man.").
  \item \textsuperscript{28} 42 USC § 1983.
  \item \textsuperscript{29} 365 US 167 (1961).
  \item \textsuperscript{30} Id at 173–74. The Court reversed one holding of \textit{Monroe}, that cities were immune from section 1983 suits, in \textit{Monell v New York City Department of Social Services}, 436 US 658. 663 (1978) ("We now overrule \textit{Monroe v. Pape}, insofar as it holds that local governments are wholly immune from suit under § 1983.").
  \item \textsuperscript{31} \textit{Monroe}, 365 US at 180.
  \item \textsuperscript{32} Id at 183 ("It is no answer that the State has a law which if enforced would give relief.").
\end{itemize}
eral remedy created is a "species of tort liability," and is subject to common law tort rules. Although exhaustion of state remedies is not required, the traditional doctrines of res judicata and collateral estoppel apply.

3. Purpose and requirements of habeas corpus.

Congress granted federal courts the power to issue writs of habeas corpus in 28 USC § 2254. The core purpose and "traditional function" of the writ of habeas corpus is to enable "an attack by a person in custody upon the legality of that custody, and . . . to secure release from illegal custody." Originally confined to persons in federal custody, the writ was extended to state prisoners during Reconstruction as a means of enforcing new federal rights.

To satisfy the requirements for habeas relief, a prisoner must file a petition in district court alleging "he is in custody in violation of the Constitution or laws . . . of the United States." Unlike section 1983, the habeas statute requires the litigant to pursue and exhaust all state remedies. Second or successive habeas petitions are allowed only in certain circumstances and then only with leave of the court.

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36 In Allen v McCurry, 449 US 90 (1980), the Court held that the traditional doctrines of res judicata and collateral estoppel apply to section 1983 regardless of the availability of habeas relief. Id at 96-97 (finding "no reason to believe that Congress intended to provide a person claiming a federal right an unrestricted opportunity to reigate an issue already decided in state court simply because the issue arose in a state proceeding in which he would rather not have been engaged at all"). The Court later held in Migra v Warren City, 465 US 75 (1984), that if a suit was voluntarily filed in state court, failure to raise federal claims in the state forum precludes raising them in a federal forum. Id at 84-85 (stating that "we must reject the view that § 1983 prevents the judgment in petitioner's state-court proceeding from creating a claim preclusion bar in this case"). If a plaintiff voluntarily files suit in state court, he must raise both federal and state claims. Id. For an example of an involuntary suit, see Fields v Sarasota Manatee Airport Authority, 953 F2d 1299, 1307-09 (11th Cir 1992) (holding that, in inverse condemnation suits, plaintiffs must reserve the federal issue while before state courts in order to preserve the issue for later litigation).


38 See Jordan Steiker. Restructuring Post-conviction Review of Federal Constitutional Claims Raised by State Prisoners: Confronting the New Face of Excessive Proceduralism, 1998 U Chi Legal F 315, 337 ("State prisoners were not uniformly afforded federal habeas remedies until Reconstruction, when Congress sought through a variety of jurisdictional devices . . . to ensure federal power to enforce newly recognized federal rights.").

39 28 USC § 2254(a).

40 The exhaustion requirement is in section 2254(b)(1)(A), which states that a writ of habeas corpus "shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State." Section 2254(c) states that a claim is not exhausted so long

Over the years, the traditional restrictions on writs of habeas corpus dissipated. As the constitutional protections afforded to state prisoners expanded, so too did the reach of federal habeas review. Responding in part to the expansion of federal habeas, many states began to offer more exhaustive post-conviction relief, thereby affording prisoners a state venue to litigate both federal and state constitutional claims. State post-conviction remedies combined with the exhaustion requirement for federal habeas review to delay access to federal habeas relief. As a result of the changes, prisoners began to view section 1983 as an alternative to habeas because it circumvented exhaustion requirements and allowed for immediate federal relief. In addition to allowing quicker access to federal court, section 1983, as a civil action, allows prisoners to request damages, injunctions, and even declaratory relief. Consequently, section 1983 enables a prisoner to go immediately to federal court and, if successful, win both damages and an injunction ordering his release. Given the significant procedural obstacles of habeas and the potential benefits of a successful section 1983 suit, the line between the two statutes became increasingly obscure as prisoners sought to use both. The Supreme Court finally addressed the confused distinction in Preiser v Rodriguez.

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41 As amended in 1996, section 2254(d) prevents litigation of the same claim in both state and federal courts. The provision states that writs “shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings.” The only two exceptions are for decisions “contrary to” or based on “an unreasonable application of clearly established Federal Law,” 28 USC § 2254(d)(1), and for decisions “based on an unreasonable determination of the facts in light of the evidence,” 28 USC § 2254(d)(2).

42 See Steiker, 1998 U Chi Legal F at 340 (cited in note 38) (“As the Court extended numerous constitutional protections to state prisoners during the 1960s, it substantially increased the number of non-record claims ... that state prisoners could pursue in federal court. These claims, too, were fully cognizable on federal habeas.”).

43 Id at 344 (noting that “[r]obust federal habeas in turn led to widespread adoption of extensive state post-conviction proceedings, primarily to limit intrusive federal court review”).

44 Id (stating that “the introduction of extensive state post-conviction proceedings substantially delayed federal review of federal claims and increased the costs of ultimately granting relief in federal court”).

45 The hope of prisoners was to use section 1983 and habeas interchangeably, filing suit under whichever provided the best opportunity for relief. See Preiser, 411 US 475, discussed in detail in Part II.A, is an example of a case where prisoners sought relief under section 1983, even though the type of relief in question traditionally belonged under habeas. See id at 482 (noting that the prisoners’ case, brought pursuant to section 1983, could also have been brought in habeas).

46 411 US 475, 477 (1973) (stating that the question before the Court was whether prisoners could “obtain equitable relief under [section 1983] even though the federal habeas statute ... clearly provides a specific federal remedy”).
II. THE SUPREME COURT'S DEMARCATION OF HABEAS AND SECTION 1983

In 1973, the Supreme Court heard the first in a series of cases that settled the boundary between section 1983 and habeas corpus claims. The Court fashioned a two-level inquiry to categorize cases that both allows latitude for the broad language of section 1983 and preserves the integrity of the specific habeas statute. It introduced the rudimentary framework for the test in *Preiser v Rodriguez*, discussed in Part A, and developed the framework further in *Heck v Humphrey*, discussed in Part B.

A. *Preiser v Rodriguez*

The issue before the Court in *Preiser* was whether state prisoners could seek injunctive relief under the broad language of section 1983 even though habeas corpus provided a specific remedy. The case consolidated three appeals from New York prisoners alleging that they were denied good-time credit without due process of law. All three prisoners filed both habeas actions and section 1983 suits that requested injunctions ordering the restoration of their good-time credits—relief that, if granted, would result in their immediate release. The Court held that prisoners could not bring section 1983 actions because the specific habeas statute displaced the broad language of section 1983.

The Court began its analysis with a review of the history of habeas and concluded both that the "essence" of habeas is an attack by a person in custody on the legality of his confinement and that the traditional purpose of the writ was to effectuate release. The Court further concluded that habeas relief is not limited to immediate release, but is also appropriate to attack future incarceration and secure early release. Based on this narrow, historic purpose of habeas, the Court reasoned that even though a complaint might fall into the broad language of section 1983, it must be brought under habeas if it challenges the fact or duration of custody on federal grounds. In other words,

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48 *Preiser*, 411 US at 477.
49 Id at 477–82 (describing the procedural history of each case).
50 Id. Immediate release would be required because the prisoners were all incarcerated beyond the date by which they would have been released had their good-time credits not been denied.
51 Id at 490 ("Congress has determined that habeas corpus is the appropriate remedy for state prisoners attacking the validity of the fact or length of their confinement, and that specific determination must override the general terms of § 1983.").
52 Id at 484.
53 Id at 487.
54 Id at 489 ("Such a challenge is just as close to the core of habeas corpus as an attack on
the specific purpose of habeas overrides the general purpose of section 1983.\textsuperscript{55}

Applying the principles articulated in the habeas discussion, the Court concluded that habeas petitions were the plaintiffs' only option because they were challenging the "fact or duration of [their] physical imprisonment" and requesting relief that "entitled [them] to immediate release or a speedier release."\textsuperscript{56} Allowing alternative causes of action subverted the exhaustion requirements of habeas and denied the state the opportunity to hear and correct its own constitutional errors.\textsuperscript{57}

For the Supreme Court, the policy concerns underlying habeas exhaustion requirements were important to its decision. The Court noted that the exhaustion requirements prevent "the unnecessary friction between the federal and state court systems that would result if a lower federal court upset a state court conviction without first giving the state court system an opportunity to correct its own constitutional errors,"\textsuperscript{58} At its base, "[t]he rule of exhaustion . . . is rooted in considerations of federal-state comity."\textsuperscript{59} The states have a natural and understandably strong interest in the administration of criminal justice. Were prisoners allowed to invoke federal power to override state convictions without first affording the state the opportunity to hear the claim, the concurrent federal jurisdiction could wholly displace the jurisdiction and authority of the state.\textsuperscript{60} This is precisely the result the exhaustion requirements were designed to prevent. Section 1983, on the other hand, was not intended as a tool to overturn criminal convictions. The purpose of section 1983 was to provide relief in the face of inadequate or unavailable state remedies. Given this purpose, an exhaustion requirement is illogical because it would require a prisoner to exhaust an unavailable or ineffective remedy.\textsuperscript{61}

Although it left many questions unanswered,\textsuperscript{62} the Court's \textit{Preiser} decision formulated the basic framework of the proper boundary of

\textsuperscript{55} Id at 490.
\textsuperscript{56} Id at 500.
\textsuperscript{57} Id at 490 (stating that the purpose of habeas exhaustion requirements is to afford the states the opportunity to correct constitutional errors).
\textsuperscript{58} Id.
\textsuperscript{59} Id at 491.
\textsuperscript{60} See id at 490–92 (discussing the importance of federal-state comity and noting the high degree of state interest in the administration of criminal justice).
\textsuperscript{61} See Part 1.2 (discussing the purpose and requirements of section 1983).
\textsuperscript{62} See Schwartz, 37 DePaul L Rev at 123 (cited in note 1). Schwartz identified three important unanswered questions in \textit{Preiser}: whether the nature of the claim or the remedy determines
habeas and section 1983. The decision set up a two-level inquiry to discern where a suit properly belongs. The first-level inquiry, a state-interest inquiry, is informed by the broad, systemic concerns of federal-state comity articulated by the Court in its discussion of the origin, purpose, and restrictions on the federal writ of habeas corpus. The state-interest inquiry asks whether a section 1983 suit exhibits an attempt to circumvent habeas requirements by challenging a valid outstanding criminal conviction. The second-level inquiry, the case-specific inquiry, is implied by the Court's emphasis on the fact that the requested relief would result in release from confinement and asks whether the relief, if granted, will yield habeas-like results.\(^6\)

B.  **Heck v Humphrey**

The Court did not substantially revisit the difference between section 1983 and habeas until *Heck v Humphrey*, where it held that any suit that, if successful, would "necessarily imply" the invalidity of a conviction or sentence was barred from being brought under section 1983 until the conviction or sentence was otherwise impugned.\(^6\) *Heck* expanded the two-level inquiry to reach cases where the habeas-like results were not simply immediate, but would necessarily—even if not immediately—follow.

In *Heck*, the Court faced a section 1983 action for monetary damages alleging that prosecutors and police violated due process rights by engaging in an unlawful and unreasonable investigation, destroying exculpatory evidence, and using illegal evidence at trial.\(^6\) The Court first noted that because the case involved damages rather than an injunction granting "immediate or speedier release," it was outside the holding of *Preiser*.\(^6\) Nevertheless, the Court found that the underlying question—whether the claim was cognizable at all under section

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\(^6\) One year later, the Court explicitly used the implied second-level test in *Wolff v McDonnell*, 418 US 539, 554-55 (1974). Faced with a request for both damages and injunctive relief, the Court allowed the damages action to proceed because granting damages based on flawed procedure would not yield habeas-like results. *Id*. The injunctive relief was barred by *Preiser* because it would result in immediate or early release, a habeas-like result. *Id*.

\(^6\) 512 US at 487 ("[T]he district court must consider whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence; if it would, the complaint must be dismissed unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated.").

\(^6\) *Id* at 478-79.

\(^6\) *Id* at 481-82 ("[T]he dicta of *Preiser* [are] an unreliable, if not an unintelligible guide: that opinion had no cause to address, and did not carefully consider, the damages question before us today.").
1983—was the same in both cases. After consideration of the history and purposes of section 1983 and habeas, Preiser concluded that certain claims must be brought in habeas to preserve the integrity of habeas exhaustion requirements. Heck, in contrast, focused on the civil nature of section 1983 actions for damages. Noting that section 1983 created tort liability, the Court stated that the "hoary principle" that outstanding criminal judgments may not be challenged in civil actions applied to section 1983 damages suits because they are civil actions. Applying that principle, the Court held that section 1983 may not be used to recover damages for "harm caused by actions whose unlawfulness would render a conviction or sentence invalid" unless the underlying conviction was already somehow impugned. To discern whether the section 1983 suit for damages or injunction challenged an outstanding criminal judgment, the district court "must consider whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence" and, unless the prisoner can show the conviction or sentence is already impugned, dismiss the suit if it would do so. Dismissal is required regardless of the availability of state or other federal remedies. If a successful plaintiff's action would not demonstrate the invalidity of the sentence or conviction, it should be allowed to proceed.

In a concurring opinion, four Justices agreed with the Court's basic premise and reasoning, but declined to adopt the categorical rule. Expressing concern that the decision might be read to foreclose sec-

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67 Id at 483.
68 Id. See also Part 1.3 (discussing the purposes of habeas).
70 Heck, 512 US at 483, 486.
71 Id at 486-87. The Court gave the example of a section 1983 suit seeking damages for violation of Fourth Amendment rights by a prisoner convicted of resisting arrest as one that, if successful, renders the conviction or sentence invalid. Id at 486 n 6. Because the prisoner must prove that the arrest was unlawful, a successful suit negates an element necessary to his conviction and therefore is not cognizable under section 1983. Id.
72 The Court's examples of how the conviction might be impugned include reversal on direct appeal, expungement by executive order, declaration of invalidity by a duly authorized state tribunal, or issuance of a writ of habeas corpus. Id at 486-87.
73 Id at 487.
74 Id at 489 ("Even a prisoner who has fully exhausted available state remedies has no cause of action under § 1983 unless and until the conviction or sentence is reversed, expunged, invalidated or impugned by the grant of a writ of habeas corpus.").
75 Id at 487. As an example, the Court wrote that a damages suit for unreasonable search and seizure need not demonstrate the invalidity of the conviction because of doctrines such as inevitable discovery and harmless error. Id at 487 n 7.
1983 actions in cases outside of the intersection of habeas and section 1983," the concurring Justices wrote that the "proper resolution of this case . . . is to construe § 1983 in light of the habeas statute and its explicit policy of exhaustion." This reading of the opinion accords with Preiser's statement that prisoners must "follow the federal habeas route with claims that fall within the plain language of § 1983 when that is necessary to prevent a requirement of the habeas statute from being undermined." Although only four Justices joined the concurring opinion, it was later adopted by a fifth Justice and now holds a majority on the Court. Both the majority and concurring opinions in Heck agreed that the primary goal of the inquiry is to preserve the integrity of the habeas statute and its attendant exhaustion requirements, thus protecting federal and state comity.

III. CATEGORIZING SUITS UNDER PREISER AND HECK

The test developed by the Court categorizes section 1983 suits in a manner that serves the purpose of section 1983 while preserving habeas. It creates three broad categories of cases: (1) cases touching the core of habeas corpus—that is, cases that both satisfy habeas requirements and seek relief that yields habeas-like results; (2) cases outside

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76 Id at 500 (Souter concurring) (noting that individuals punished by the imposition of fines or who have already served their sentences still have valid, outstanding convictions but are clearly outside the scope of the habeas statute because they are not in custody).
77 Id at 503.
78 Id at 501.
79 Justice Ginsburg, who joined Justice Scalia's majority opinion in Heck, changed her position, writing "I have come to agree with Justice Souter's reasoning [in Heck]." Spencer v Kemna, 523 US 1, 21 (1998) (Ginsburg concurring). Several circuits have noted Justice Ginsburg's new position, but declined to follow the new majority as current law. See, for example, Randall v Johnson, 227 F3d 300, 301 (5th Cir 2000) ("[W]e decline to announce for the Supreme Court that it has overruled one of its decisions."); Huey v Stine, 230 F3d 226, 230 (6th Cir 2000) ("Although Spencer may cast doubt upon the universality of the 'favorable termination' requirement, we will continue to follow the Supreme Court's directly applicable precedent."); Figueroa v Rivera, 147 F3d 77, 81 n 3 (1st Cir 1998) (stating that even though "[w]e are mindful that dicta from concurring and dissenting opinions ... may cast doubt upon the universality of Heck's 'favorable termination' requirement," the Supreme Court "has admonished the lower federal courts to follow its directly applicable precedent, even if that precedent appears weakened by pronouncements in its subsequent decisions . . . We obey this admonition"); Cabrera v City of Huntington Park, 159 F3d 374, 380 n 6 (9th Cir 1998) ("While it is questionable whether Heck's holding would command a majority of the Supreme Court today ... Heck remains good law."). Two circuits have recognized the change and applied Souter's concurring opinion as controlling law. See Jenkins v Haubert, 179 F3d 19, 27 (2d Cir 1999) ("[W]e find that to apply the Heck rule in such circumstances would contravene the pronouncement of five justices that some federal remedy—either habeas or § 1983—must be available."); Carr v O'Leary, 167 F3d 1124, 1127 (7th Cir 1999) ("A majority of the Justices of the Supreme Court have said that a prisoner who cannot challenge the validity of his conviction ... by either appeal or postconviction procedure can do so by bringing a civil rights suit for damages under 42 U.S.C. § 1983."). See also Bruce Ellis Fein, Heck v. Humphrey after Spencer v. Kemna, 28 New Eng J on Crim & Civ Confinement 1, 6–8 (2002) (discussing Ginsburg's switch and its effect on lower courts).
of the core of habeas because they do not meet habeas requirements and thus may be brought under section 1983 regardless of whether they seek habeas-like results; and finally, (3) cases proximate to the core of habeas—that is, cases that satisfy habeas jurisdictional requirements but do not seek relief that yields habeas-like results. The test categorizing the cases has two interrelated inquiries that measure both state interests and the particular facts of each case. The first inquiry, the state-interest inquiry, protects state interests because it requires courts to consider the case in light of the federal-state comity policy of the habeas statute. The second inquiry, the case-specific inquiry, protects the rights of the particular litigant by requiring the court to carefully consider the results of granting the requested relief. After a brief discussion of the Court's categorization test, this Part outlines the parameters of the three categories of cases created by the test and gives examples of each.

A. What the Categorization Test Measures

1. The state-interest inquiry.

The state-interest inquiry protects state interests and furthers the policy of federal-state comity by asking whether a suit circumvents the habeas statute in an attempt to challenge the validity of an outstanding criminal conviction. Although this inquiry will immediately identify a class of cases that may not be brought under section 1983—those where a person in custody facially challenges the validity of his conviction—it is not sufficient in itself to distinguish habeas and section 1983 due to overinclusiveness. Any suit challenging the validity of an outstanding criminal conviction could plausibly be swept up by this principle, regardless of whether it met habeas jurisdictional requirements and could not actually be brought as a habeas petition. The inquiry also fails to address whether the relief requested does, in fact, challenge the validity of an outstanding conviction. The case-specific inquiry is essential because it considers the actual results of a successful suit.

2. The case-specific inquiry.

By asking whether the requested relief would yield habeas-like results, the case-specific inquiry views each case on its facts. The inquiry separates two types of cases. First are those at the core of habeas
and which impermissibly circumvent habeas. These are separated from the narrow set of cases that either are outside the core of habeas because they do not satisfy habeas jurisdictional rules or are merely proximate to the core of habeas because, although they satisfy the jurisdictional requirements and appear to challenge the validity of an outstanding criminal conviction, the requested relief, if granted, does not yield habeas-like results. The latter two categories are cases where habeas exhaustion requirements either might be properly circumvented or, despite appearances otherwise, are not implicated. The court determines whether the relief yields habeas-like results by asking whether the relief, if granted, would “necessarily imply” the invalidity of the prisoner’s conviction. The key to applying the second-level inquiry is to understand what the Heck Court meant by suits that “necessarily imply” the invalidity of a conviction.

In Preiser, the requested injunctive relief, if granted, would have directly and unavoidably resulted in the plaintiffs’ immediate release from prison. Thus, the necessary result was habeas-like because it secured release from custody. Similarly, the injunctive relief requested in Wolff v McDonnell, another seminal Supreme Court case, would have inevitably shortened the duration of the imprisoned plaintiff’s confinement, a habeas-like result, and was therefore unavailable under section 1983. In contrast, the only unavoidable and direct result of relief in the form of damages was the payment of monies to the plaintiff, a result that did not implicate habeas-like relief. That a plaintiff receives money for damages stemming from a violation of his due process rights does not inevitably invalidate the result of the proceedings using the inadequate process. Heck, the source of the “necessarily imply” standard, involved money damages, but in order to receive the damages, the plaintiff had to prove constitutional violations of such magnitude that they, if true, inevitably required the reversal of his criminal conviction. The common thread running through all these cases is the inevitability of habeas-like results. Where habeas-like results are a natural and inevitable consequence of granting the

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81 Preiser, 411 US at 479–81.
83 Id at 554–55 (concluding that the requested injunctive relief would result in earlier release). See also note 63.
84 Id (allowing a section 1983 damages claim but dismissing a claim on the same facts that requested an injunction ordering restoration of good-time credits).
85 See Heck, 512 US at 482–83 (distinguishing between procedure and result and noting that Wolff allowed a section 1983 damages action for the use of wrong procedures, not for the wrong result).
86 Id at 479, 490 (detailing the allegations of the plaintiff and holding that the allegations challenged the legality of the conviction). See also Edwards v Bulisok, 520 US 641, 645–46 (1997) (noting that Heck envisioned the possibility “that the nature of the challenge . . . could be such as necessarily to imply the invalidity of the judgment”).
relief, relief cannot be granted under section 1983 because it falls into the core of the habeas statute. There is no element of discretion and, once the relief is granted, the inevitable outcome is the invalidity of the conviction.

The Court's phrase, "necessarily imply the invalidity" of a sentence or conviction, should be read to mean that invalidity of a conviction is the only rational, final outcome. With this understanding of the purpose and meaning of the two avenues of relief and the two-level inquiry in mind, the boundaries of the three categories can be established.

B. Boundaries of the Three Categories of Cases

1. Category I: cases at the core of habeas.

Cases at the core of habeas answer yes to both the state-interest and case-specific inquiries because they both meet habeas jurisdictional requirements and seek habeas-like relief. The plaintiffs in the core cases are both in custody and challenging the validity of a criminal conviction either facially or by requesting relief that necessarily implies the invalidity of the conviction. Preiser and Heck are two examples of cases at the core of habeas.

The more recent case of Edwards v Balisok is also an example of such a case. Inmate Balisok, claiming that the state had concealed exculpatory evidence and denied him the right to present a defense, alleged due process violations in the deprivation of good-time credits. The Court held that Balisok's allegations, if established as true, would dictate a finding of an unconstitutional deprivation of good-time credits and were thus not cognizable under section 1983 because the state would be required to restore his good-time credits and thereby shorten his length of confinement, a clear example of a habeas-like result. The case both circumvented state remedies and yielded habeas-like results, a clear example of a suit at the core of habeas.

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87 Compare Anyanwutaku v Moore, 151 F3d 1053, 1055 (DC Cir 1998) ("Although Anyanwutaku would have been eligible for parole at an earlier date had he prevailed on his claims in the district court, because D.C. parole decisions are entirely discretionary... there is no guarantee that he would have been released any earlier."); Neal v Shimoda, 131 F3d 818, 824 (9th Cir 1997) (holding that a section 1983 suit seeking to reinstate parole eligibility could proceed because mere parole eligibility would not necessarily lead to release).

88 Preiser, 411 US at 487, 500 (holding the plaintiffs' claims for injunctive relief cognizable only in habeas because the injunctions, if granted, would result in release from illegal custody); Heck, 512 US at 490 (affirming dismissal of a damages claim because it "challenged the legality of the conviction").


90 Id at 643-44.

91 Id at 643-48 (arguing that "[t]he principal procedural defect complained of by respondent would, if established, necessarily imply the invalidity of the deprivation of his good-time credits" and noting that "the sole remedy in federal court for a prisoner seeking restoration of
2. Category II: cases outside the core of habeas.

Cases outside the core of habeas answer no to the state-interest inquiry because they typically do not meet habeas jurisdictional requirements, and habeas relief is thus unavailable. A case may, however, answer yes to the case-specific inquiry if it seeks relief that yields habeas-like results. The plaintiff might not be in custody, but might still be challenging the validity of his conviction. The recognition of this class of cases was the explicit purpose of the concurring opinion in *Heck*.

A recent example of such a case is *Nonnette v Small*. *Nonnette* brought a section 1983 action alleging various due process violations in revocation of good-time credits. Noting that *Nonnette* was no longer in custody and was therefore barred from federal habeas relief, the court allowed his action for damages to go forward notwithstanding the fact that it might impugn the denial of the good-time credits. The habeas-like results did not indicate a deliberate attempt to circumvent habeas because habeas was unavailable.

3. Category III: cases proximate to the core of habeas.

Cases proximate to the core of habeas typically answer yes to the state-interest inquiry because the plaintiffs meet habeas jurisdictional requirements. The cases involve persons who are in custody and thus eligible for habeas relief, so it is possible that their suits might circumvent habeas requirements. The crucial difference, however, is in the application of the case-specific inquiry. The cases must answer no to the case-specific inquiry—the plaintiffs cannot be seeking relief that yields habeas-like results. Because the requested relief will not necessarily imply the invalidity of convictions, the cases may be brought...
under section 1983 without undermining the policy and purposes of the habeas statute.

The Supreme Court noted the existence of this class of cases in *Heck*. As an example, the Court pointed to a section 1983 action alleging unreasonable search and seizure: because the evidence might have been admissible under some other theory, like independent source and inevitable discovery, the section 1983 suit did not necessarily undermine the conviction. Several circuits picked up on the Court’s example and held that suits alleging illegal search and seizure do not necessarily imply the invalidity of outstanding convictions. Suits alleging excessive use of force are also cognizable under section 1983 for the same reason. Similarly, by analyzing the inevitable results of claims, several courts have held that section 1983 actions that, if successful, would merely establish eligibility for parole were not barred by *Heck* because mere eligibility would not dictate early release. The common theme in cases proximate to the core of habeas is that the

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96 See *Heck*, 512 US at 487 n 7 (noting that “[i]n order to recover compensatory damages ... [the] plaintiff must prove not only that the search was unlawful, but that it caused him actual, compensable injury ... [which] does not encompass the ‘injury’ of being convicted and imprisoned (until his conviction has been overturned”). For a discussion of *Heck’s* footnote seven and the circuit responses, see Paul D. Vink, Note, *The Emergence of Divergence: The Federal Court’s Struggle to Apply Heck v. Humphrey to § 1983 Claims for Illegal Searches*, 35 Ind L Rev 1085, 1086 (2002).

97 See, for example, *Moore v Sims*, 200 F3d 1170, 1172 (8th Cir 2000) (holding that an arrest without probable cause “does not necessarily imply the invalidity of [a] drug-possession conviction”); *Copus v City of Edgerton*, 151 F3d 646, 649 (7th Cir 1998) (stating that “it is possible for an individual to be properly convicted although he is unlawfully arrested, or his home unlawfully searched” and “we cannot say with certainty that success on Copus’ § 1983 claim ‘necessarily’ would impugn the validity of his conviction”).

98 *Smithart v Toney*, 79 F3d 951, 952 (9th Cir 1996) (“Because a successful section 1983 action for excessive force would not necessarily imply the invalidity of Smithart’s arrest or conviction, *Heck* does not preclude Smithart’s excessive force claim.”). See also *Martinez v City of Albuquerque*, 184 F3d 1123, 1126 (10th Cir 1999) (“A finding that police officers utilized excessive force to arrest Martinez would in no manner demonstrate the invalidity of Martinez’s state court conviction for resisting arrest under these circumstances.”); *Jackson v Suffolk County*, 135 F3d 254, 257 (2d Cir 1998) (“We also conclude that Jackson’s Fifth Amendment claim should not have been dismissed pursuant to *Heck v. Humphrey*, because a claim for use of excessive force lacks the requisite relationship to the conviction.”); *Nelson v Jashurek*, 109 F3d 142, 145 (3d Cir 1997) (“Yet a finding that [the defendant] used excessive ‘substantial force’ would not imply that the arrest was unlawful and thus the Supreme Court’s example of how *Heck v. Humphrey* can bar a civil action is not applicable here.”).

99 See, for example, *Dotson v Wilkinson*, 329 F3d 463, 471 (6th Cir 2003) (en banc) (“Because the ultimate impact of these new hearings on the validity of Dotson or Johnson’s continued confinement is unclear, we cannot say that a successful section 1983 action that simply results in a new discretionary parole hearing ‘necessarily implies’ the invalidity of either plaintiff’s conviction or sentence.”), cert granted, 158 L Ed 2d 354 (2004); *Anyanwu v Seattle*, 151 F3d at 1056 (“Had [the plaintiff] succeeded in the district court, he would have earned nothing more than a ‘ticket to get in the door of the parole board.’ He thus properly brought his claim under section 1983.”); *Neal*, 131 F3d at 824 (“[T]he only benefit that a victory in this case would provide Neal and Martinez, besides the possibility of monetary damages, is a ticket to get in the door of the parole board, thus only making them eligible for parole consideration.”).
natural and inevitable results of a successful case are not habeas-like, and thus the case does not necessarily constitute an attempt to secure habeas benefits without habeas restrictions.

IV. ANALYZING POST-CONVICTSION SUITS FOR ACCESS TO DNA EVIDENCE

Although the Supreme Court developed its two-level inquiry distinguishing section 1983 from habeas in factual contexts different from the typical suit claiming a post-conviction right of access to DNA evidence, the test can and should be applied to sort out such suits. As noted above, several circuits have already addressed the issue and have issued conflicting rulings. Using representative cases from the Fourth and Eleventh Circuits, this Part examines the approach taken by the circuit courts and suggests that a straightforward application of the Supreme Court's two-level inquiry supports the conclusion that the suits may be brought under section 1983. Part A provides a brief history of Harvey v Horan and Bradley v Pryor, the representative cases, along with a summary of the courts' reasoning and holdings. Part B applies the Supreme Court's two-level inquiry and concludes that the cases may be properly brought under section 1983.

A. Representative Cases: Harvey v Horan and Bradley v Pryor

James Harvey and Danny Joe Bradley were both state prisoners who brought section 1983 suits against the states, alleging due process violations based on the states' refusal to grant them access to biological evidence used in their trials for the purpose of performing new DNA testing. Harvey's suit was dismissed, but Bradley's was allowed to proceed.

In its holding that Harvey's claim was not cognizable under section 1983 because it was habeas-like, the Fourth Circuit employed two intertwined lines of reasoning. The first line, drawn from Heck, reasoned that because Harvey claimed innocence and asserted that new

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100 See notes 3–4.
101 278 F3d 370 (4th Cir 2002).
102 305 F3d 1287 (11th Cir 2002).
103 Harvey was convicted of rape and forcible sodomy by a Virginia jury in 1990. DNA tests performed at the time of the trial could not exclude him. Harvey, 278 F3d at 373. An Alabama jury convicted Bradley of murder in 1983. Bradley, 305 F3d at 1288. Although DNA testing was not used at his trial, the trial court concluded that biological evidence taken from the victim matched Bradley's blood-type profile. Bradley v State, 494 S2d 750, 754 (Ala Crim App 1985) ("The Court further finds, from the evidence and testimony, that the Defendant, Danny Joe Bradley, was a blood type 'O' non-secretener and that the semen found in and on the body of the victim was consistent with that which would be deposited by the Defendant.").
104 Harvey, 278 F3d at 373; Bradley, 305 F3d at 1288.
105 Harvey, 278 F3d at 375; Bradley, 305 F3d at 1290.
DNA testing would exonerate him, he sought access to the evidence in order to “challenge the fact or duration of his confinement.” The court reasoned that because Harvey’s sole purpose in the suit was to undermine his conviction, Heck barred the claim from being cognizable under section 1983. The court concluded that if the suit delivered Harvey’s desired result, exculpatory evidence, the suit would necessarily imply the invalidity of his conviction.

The court used a second line of reasoning informed by Preiser to conclude that the suit could be brought only as a habeas action. The court noted that Preiser evidenced a special concern that section 1983 not be used to circumvent habeas requirements. Although Harvey asserted that his section 1983 suit did not presently challenge the fact or duration of his conviction, circuit precedent held that when a section 1983 claim seeks to establish “every predicate” for a later release and “has all the earmarks of a deliberate attempt to subvert the [exhaustion] requirements of § 2254(b),” the plaintiff must file a habeas petition. Applying Preiser and circuit precedent to Harvey’s claim, the court concluded that his claim intended to “set the stage for future attack on his confinement” and must therefore be brought under habeas.

In contrast, the Bradley court began its analysis by pointing out that the Supreme Court’s Preiser holding, that challenges to the fact or duration of confinement must be brought in habeas, was “sharpen[ed]” in Heck to require an additional analysis of whether the result of the action would “necessarily imply” the invalidity of the conviction. Applying Heck to the facts of Bradley’s case, the court concluded that it did not bar the suit from being brought under section 1983.

To reach its result, the court examined the consequences of granting Bradley’s petition. The court noted that Bradley “prevails in this lawsuit once he has access to that evidence or an accounting for its ab-

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106 Harvey, 278 F3d at 375 (“He seeks access to biological evidence to challenge the fact or duration of his confinement. Harvey claims that he is innocent and that further DNA testing will lead to his exoneration.”).
107 Id (“While Heck dealt with a § 1983 claim for damages, the Court did not limit its holding to such claims. And we see no reason why its rationale would not apply in a situation where a criminal defendant seeks injunctive relief that necessarily implies the invalidity of his conviction.”).
108 Id at 377.
109 Id at 378 (brackets in original), quoting Hamlin v Warren, 664 F2d 29, 30, 32 (4th Cir 1981).
110 Harvey, 278 F3d at 378.
111 Bradley, 305 F3d at 1289-90, quoting Heck, 512 US at 487.
112 Bradley, 305 F3d at 1290 (allowing Bradley’s section 1983 suit to proceed because doing so “will not demonstrate the invalidity of his conviction”).
sence." The court declined to follow the Fourth Circuit's and district court's argument that, because Bradley's ultimate purpose was to challenge his conviction, his action must be brought in habeas. Instead, the court held that success in this particular claim did not "necessarily imply" anything about the underlying conviction. The results of new DNA testing could be either exculpatory or inculpatory, but even if the evidence proved exculpatory, the court noted that he must initiate a new suit alleging a different constitutional violation to challenge his conviction.

Bradley and Harvey are typical plaintiffs in post-conviction section 1983 litigation. Prisoners bring the suits; they therefore cannot fall into the category of cases outside the core of habeas because habeas relief is theoretically available. The cases either are at the core of habeas and must be brought as habeas petitions, the Fourth Circuit's position, or are proximate to the core of habeas and thus may be brought under section 1983, the Eleventh Circuit's position. The circuit split results from different applications of the Supreme Court's test demarcating section 1983 and habeas, with the Fourth Circuit finding the state-interest inquiry conclusive without proceeding to the case-specific inquiry and the Eleventh Circuit, while recognizing that an inmate's section 1983 claim may circumvent habeas, finding the case-specific inquiry dispositive because it measures whether a section 1983 action will actually circumvent habeas.

B. Applying the Two-Level Inquiry

1. Applying the state-interest inquiry.

Determining whether a section 1983 claim exhibits an attempt to circumvent the habeas statute requires the court to look at the facts of the case and view it in light of the purposes and history of both habeas and section 1983. The answer to the state-interest inquiry is clear in

113 Id.
114 Id (noting that a habeas proceeding is not required because "a plaintiff's successful effort to obtain evidence for DNA testing does not necessarily imply that his conviction and sentence are invalid").
115 Id at 1290–91, quoting Harvey, 278 F3d at 382–83 (King concurring) (stating that "future exculpation is not a necessary implication of Harvey's claim in this case"), and quoting Harvey v Horan, 285 F3d 298, 308 (4th Cir 2002) (Luttig concurring) (stating that the suit "necessarily implies nothing at all about the plaintiff's conviction" and observing that even if the suit resulted in discovery of exculpatory evidence, the plaintiff would have to argue for release in a separate action on the basis of a separate constitutional violation).
116 Bradley, 305 F3d at 1291, quoting Harvey, 285 F3d at 308 (Luttig concurring):

In order to overturn a conviction based on exculpatory evidence that might appear from any DNA testing, the petitioner would have to initiate an entirely separate action at some future date, in which he would have to argue for his release upon the basis of a separate constitutional violation altogether.
cases where the plaintiff is in custody, is directly challenging the legality of custody, and might still file either a direct appeal of the conviction in state court or petition for a state or federal writ of habeas corpus. The answer, however, can be ambiguous in cases where the plaintiffs have already exhausted their direct and habeas appeals. As illustrated by Harvey and Bradley, the question is a close one in cases asserting a post-conviction right of access to evidence, but the cases typically are an attempt to circumvent habeas requirements.

Harvey had exhausted both his state and federal habeas appeals. The section 1983 suit dismissed by the Fourth Circuit was his second suit asserting violation of due process rights for denial of access to the evidence; the first had been refiled as a habeas claim and dismissed as procedurally defaulted. Because the claim was available when Harvey litigated his first state habeas claim, Virginia law barred him from asserting it in a second habeas claim in state court. Because he was statutorily barred from filing a second habeas petition in Virginia and his previous federal habeas petition was dismissed, Harvey had exhausted both his state and federal habeas remedies.

Bradley’s case is factually similar to Harvey’s in that, prior to filing his section 1983 claim, he exhausted his appeals, both direct and habeas, at both the state and federal levels. Unlike Harvey, Bradley did not appear to have raised an identical claim in any of the prior proceedings. The claim was available, however, when Bradley litigated his federal habeas claims and a second habeas petition asserting the claim would have been barred as second or successive.

The exhaustion of both state and federal habeas lends itself to two interpretations. One could argue that because the plaintiff has ex-

117 Harvey, 278 F3d at 373 (noting that Harvey did not file a direct appeal of his conviction and that his state habeas appeal was rejected by the Virginia Supreme Court).

118 Id (stating that Harvey’s first claim, filed as a section 1983 action, was dismissed in a federal district court, the court ordered Harvey to refile his claim as a habeas petition, and the same court subsequently dismissed the petition). See also Harvey v Horan, 119 F Supp 2d 581, 584 (ED Va 2000) (holding that Harvey’s second suit could proceed under section 1983 and was not a habeas petition). Although judgments in habeas suits have preclusive effect if identical claims are later raised under section 1983, Harvey’s second section 1983 claim might survive because the district court did not reach the merits of the due process claim. Dismissal for procedural default is a judgment on the merits for the purposes of section 2254(b) of the habeas statute but is probably not a judgment on the merits that has preclusive effect for section 1983 suits.


120 Bradley’s direct appeal was denied. Bradley, 494 S2d at 772 (concluding that “Danny Joe Bradley received a fair trial and that his conviction of a capital offense and sentence to death are proper and due to be affirmed”). Both his state and federal habeas petitions for post-conviction relief were denied as well. Bradley v Nagle, 212 F3d 559, 571 (11th Cir 2000) (“[T]he opinion of the district court denying Bradley’s petition for habeas corpus is affirmed.”); Bradley v State, 557 S2d 1339, 1340, 1348 (Ala Crim App 1989).

121 Bradley’s federal habeas petition was denied in 2000. Bradley, 212 F3d at 571. By this time, both RFLP and PCR DNA testing were in wide use.
hausted habeas relief, the section 1983 claim is an obvious attempt to circumvent the habeas exhaustion requirements because he has simply run into the wall created by them. He could not litigate the claim in habeas at either the state or federal level, so he has asserted the precluded claim under section 1983 in federal court. This is the position taken by the courts that categorize suits for post-conviction access to DNA evidence as cases at the core of habeas and thus not cognizable in section 1983. Alternatively, one could argue that the overarching purpose of section 1983 is to provide an alternative for a prisoner in this precise position. He cannot litigate the claim in habeas because state law and habeas procedural rules jointly bar him from doing so. The state is unable or unwilling to provide him a forum to vindicate his right of access to the evidence, exactly the kind of situation section 1983 was designed to remedy.

The approach taken by the Harvey court illustrates a solution to the impasse by avoiding the debate entirely and demonstrating that, by looking at the purpose of the plaintiffs, these cases can typically be classified as attempts to circumvent habeas requirements. The court noted that because Harvey claimed innocence and asserted that new DNA testing would exonerate him, he sought access to the evidence in order to “challenge the fact or duration of his confinement.”

The court concluded that because a section 1983 claim that seeks to establish “every predicate” for a later release and “has all the earmarks of a deliberate attempt to subvert the [exhaustion] requirements of § 2254(b)” must be filed in habeas, Harvey’s section 1983 suit attempting to “set the stage for future attack on his confinement” would circumvent habeas.

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122 The exhaustion of habeas does not bring a suit into the category of cases outside the core of habeas. That category consists of section 1983 suits that might impugn a conviction but are allowed to proceed because the plaintiff cannot meet the in-custody requirement for habeas relief. Heck, 512 US at 499–502 (Souter concurring) (discussing the types of situations in which plaintiffs could only bring section 1983 suits to challenge their convictions).

123 See Monroe, 365 US at 171–80 (discussing the history and purposes of section 1983).

124 Harvey, 278 F3d at 375 (holding that Harvey’s claim, in essence, “seeks injunctive relief that necessarily implies the invalidity of his conviction”).

125 Id at 378. The court said:

   In Hamlin, we held that a prisoner’s § 1983 claim had to proceed under the habeas framework because he was seeking to establish “every predicate” for a subsequent request for release. . . . We concluded that when a complaint calls into question the validity of a state court conviction and “has all the earmarks of a deliberate attempt to subvert the [exhaustion] requirement of § 2254(b),” the petitioner must observe the habeas requirements, “notwithstanding the absence of any request for release.”

   Id, quoting Hamlin, 664 F2d at 32.

126 Harvey, 278 F3d at 378 (stating that Harvey was “attempting to . . . use his claim for access to evidence to set the stage for a future attack on his confinement”).
The Harvey court's approach essentially takes the plaintiff's case at face value. If the obvious purpose of the suit is to secure immediate or earlier release from confinement, the case clearly has habeas overtones. Although one might argue that the plaintiff might choose to seek clemency rather than release or might defy reason and choose to stay in prison, those arguments are specious at best. The only plausible reason for a prisoner to go through the trouble and expense of new DNA testing is to develop exculpatory evidence that might lead to release. The suit has habeas-like goals and presents at least the appearance of an attempt to circumvent habeas exhaustion requirements and inject the federal courts into the state criminal justice system. The answer to the state-interest inquiry is yes. Section 1983 suits seeking post-conviction access to evidence for new DNA testing are an attempt to circumvent habeas. However, the suits cannot be properly categorized until the case-specific inquiry is completed.


The case-specific inquiry to determine if the requested relief in a specific section 1983 suit yields habeas-like results asks whether the inevitable results of the relief "necessarily imply" the invalidity of an underlying conviction. Recollecting that the Supreme Court's "necessarily imply" standard should be read to mean that invalidity of the conviction is the only rational, final outcome, the answer to the case-specific inquiry in both Bradley and Harvey is no. Section 1983 suits asserting a post-conviction right of access to evidence do not necessarily imply the invalidity of any convictions because if the plaintiff succeeds, only two results inevitably follow: the plaintiff (1) receives access to the evidence and thus (2) has a possibility of developing exculpatory evidence.

a) The result of access. The result of access follows because the right being asserted is a due process right that dictates, at a bare minimum, that the state allow the plaintiff access to the evidence for the purposes of DNA testing. In other words, if the court concludes that access was unconstitutionally denied and orders the state to produce the evidence, the only immediate result is that the plaintiff gets

127 Id at 372 (noting that the district court held that Harvey had a due process right of post-conviction access to DNA evidence); Bradley, 305 F3d at 1289. Bradley does not explicitly state that the plaintiff asserted a due process right of access, but the lower court's certificate of appealability referred to a "due process claim" as one possible constitutional basis for a later suit. Id. It is important to note, however, that neither court held that there is, in fact, a constitutional right of post-conviction access to evidence. See Harvey, 278 F3d at 372 (overturning the district court's holding that Harvey had a due process right of access to evidence); Bradley, 305 F3d at 1289 n 2 (noting that "this case does not address the question of whether Bradley's claim states a cause of action").
access to the evidence. The plaintiff “prevails in [the] lawsuit once he has access to [the] evidence or an accounting for its absence.”\textsuperscript{129} As it relates to mere access, the claim is analogous to a Freedom of Information Act (FOIA) claim, which is not barred by \textit{Heck} because, although the information delivered might be helpful, a judicial finding that it must be delivered does not in itself establish the validity or invalidity of any claims.\textsuperscript{129}

\textit{b) The result of possible exculpatory evidence.} Once the plaintiff gains access to the evidence, he acquires only the possibility of developing exculpatory evidence. If new DNA testing is done, it could have any of three results: exclusion, exonerating the plaintiff; non-exclusion, establishing the plaintiff’s guilt;\textsuperscript{130} or an inconclusive result.\textsuperscript{131} The ultimate outcome of the DNA testing resulting from the access is unknown.\textsuperscript{130} Even assuming that the new DNA test excluded the plaintiff as the source of the tested material, his conviction could be sustained in the face of other overwhelming evidence of guilt, or he could choose not to challenge the conviction in court and instead seek clemency.\textsuperscript{133} That the plaintiff’s goal is to find evidence that will “yield results establishing or tending to establish his innocence”\textsuperscript{134} does not mean that he will reach it as an immediate or inevitable result of success in his suit. The suit requesting access to evidence alone cannot “demonstrate the invalidity of his conviction” and thus does not yield

\textsuperscript{129} \textit{Bradley}, 305 F3d at 1290.

\textsuperscript{129} See \textit{Razzoli v Federal Bureau of Prisons}, 230 F3d 371, 376 (DC Cir 2000) (dismissing the claim on other grounds, but holding that \textit{Heck} did not bar a FOIA claim that sought disclosure of a supposedly exonerating FBI report because, although the report might be helpful to the plaintiff, “a judicial finding that some agency must deliver this report to Razzoli would not itself establish some necessary element of those claims”). A successful FOIA claim enforces a right of access under a federal law; thus, the plaintiff succeeds once access is granted regardless of whether the plaintiff succeeds in his ultimate goal. Id (“A FOIA claim wins, generally speaking, if the plaintiff has properly requested the document from the agency and no exemption applies.”).

\textsuperscript{130} New DNA testing, which is more accurate, could reduce the probability that the prisoner is the source of the tested sample, but this result falls far short of exonerating and would not inevitably lead to the reversal of his conviction. A prosecutor could argue that a reduction in probability that the defendant is the source of the sample is not sufficient grounds to overturn the conviction because other compelling evidence also points to his guilt. For a discussion of the mechanics of a non-exclusion result, see Part I.A. See also \textit{Harvey}, 285 F3d at 308 (Luttig concurring) (noting that the results of DNA testing will not necessarily lead to exculpation).

\textsuperscript{131} See \textit{Harvey}, 278 F3d at 382–83 (King concurring) (reporting that the “capable counsel acknowledged at oral argument that state-of-the-art DNA testing often inculpates rather than exculpates, and at other times is simply inconclusive”). See also \textit{Harvey}, 285 F3d at 308 (Luttig concurring) (noting that the DNA results could be “inconclusive,” “insufficiently exculpatory,” or “inculpatory”).

\textsuperscript{132} See \textit{Bradley}, 305 F3d at 1290 (noting that “it is possible that the evidence will not exculpate him”).


\textsuperscript{134} \textit{Bradley}, 305 F3d at 1288.
habeas-like results. Mere access to the evidence would not inevitably prove his conviction was invalid. Bradley and Harvey differ from Heck in the essential respect that the Heck plaintiff, to succeed in his suit, needed to prove Fourth Amendment violations of such magnitude that, if true, required the reversal of the conviction. As illustrated in analogous cases, mere access to evidence neither requires nor even implies the consequences that concerned the Court in Heck.

The creation of a possibility to develop exculpatory evidence is analogous to cases where prisoners use section 1983 to challenge the revocation of parole eligibility. Because parole decisions are largely discretionary, whether the prisoner will actually get parole depends on factors outside the scope of the requested relief. Granting relief that reinstates parole eligibility does not yield habeas-like results because the parole commission might deny parole. Nothing in the suit necessarily implies the invalidity of the underlying conviction and, although it establishes a necessary condition precedent to getting parole, it does not in itself guarantee that the prisoner will ultimately get parole. In much the same way, obtaining post-conviction access to evidence to perform DNA testing merely establishes a necessary condition precedent to developing exculpatory evidence, but it does not guarantee that exculpatory evidence is the inevitable result.

135 Id at 1290.
136 Id at 1290–91 (arguing that future exculpation was not a necessary implication of Bradley’s claim). The Bradley court also noted that Bradley would need to initiate a new suit alleging a “different constitutional violation” to overturn his conviction in the event the evidence was exculpatory. Id at 1290. As illustrated by Heck, this is not a relevant consideration. Even if he had been successful in his section 1983 suit, Heck would have been required to file a habeas suit to reverse his conviction. He alleged that the prosecutor and police engaged in an unlawful, arbitrary, and unreasonable investigation, destroyed exculpatory evidence, and used illegal evidence at trial. Heck, 512 US at 479. To collect monetary damages, he needed to prove the allegations true. If he proved them true, the result of any subsequent habeas challenge to his conviction was a foregone conclusion. Id at 486–87 (holding that in order to recover for an unconstitutional conviction under section 1983, a plaintiff would necessarily have to prove his conviction invalid). Inasmuch as the possibility existed, Heck was simultaneously litigating a future habeas claim with his section 1983 suit. The subsequent habeas suit, although procedurally necessary, was a mere formality. See also Edwards, 520 US at 645–46 (dismissing the plaintiff’s section 1983 claim because “the principal procedural defect complained of by respondent would, if established, necessarily imply the invalidity of the deprivation of his good-time credits”).

137 Heck, 512 US at 479, 489–90 (identifying the alleged Fourth Amendment violations and holding that the violations, if proven true, necessarily implied the invalidity of the plaintiff’s conviction).

138 See Dotson, 329 F3d at 471 (“A successful challenge will only ‘necessarily imply’ the invalidity of a prisoner’s conviction or sentence if it will inevitably or automatically result in earlier release.”); Anyanwuakwuku v Moore, 151 F3d 1053, 1055–56 (DC Cir 1998) (holding that section 1983 challenges to parole eligibility are not barred by Heck because they do not necessarily imply the invalidity of convictions and do not automatically result in a speedier release from prison); Neal v Shimoda, 131 F3d 818, 824 (9th Cir 1997) (holding that, because the inmates’ suit to establish parole eligibility “in this case does not necessarily imply the invalidity of their convictions or continuing confinement, it is properly brought under § 1983”).
Thus, courts applying the case-specific inquiry, asking whether the section 1983 claim for post-conviction access to DNA evidence will yield habeas-like results, should determine that it will not do so. Bradley's and Harvey's section 1983 suits, if successful, will not yield any habeas-like results that necessarily imply the invalidity of the underlying convictions. The cases fall into the category of cases proximate to the core of habeas because despite the apparent attempt to circumvent the habeas statute, the actual result of a section 1983 case seeking post-conviction access to DNA evidence does not undermine the habeas statute because its inevitable result, access to evidence, does not necessarily imply the invalidity of the underlying conviction.

**CONCLUSION**

A close reading and application of the two-level inquiry established by the Court in Preiser and Heck places cases asserting a post-conviction right of access to DNA evidence for retesting into the third category. All that the litigants get if successful is bare access to the DNA evidence. That access may in turn lead to newly discovered evidence—such as new DNA testing results—that is exculpatory, but access itself does not inevitably impugn or undermine the outstanding state criminal conviction. The litigants are not using a civil tort to attack a criminal conviction; rather, they are using it to establish an essential predicate that may create viable habeas claims.

Both Bradley and Harvey ultimately received the access they sought. The outcome for Harvey, however, stemmed from a change in state law. As argued by the Harvey court, this issue might be best handled by the legislatures of the several states and the federal government. However, because uniform legislation is lacking and several states have no legislation at all, suits seeking access to evidence

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139 See Harvey, 285 F3d at 302 (noting that a recent change in Virginia law allowed Harvey access to the evidence). See also Va Code Ann § 19.2-327.1 (Supp 2003) (allowing for post-conviction testing, subject to certain terms and conditions, where the evidence "was not previously subjected to testing because the testing procedure was not available . . . at the time the conviction became final").

140 Harvey, 285 F3d at 301-03 (stating that "both the Congress of the United States and the various state legislatures are presently wrestling with exactly these sorts of questions"); Harvey, 278 F3d at 376-77 (describing the new Virginia statute and pending federal legislation and noting that allowing the convict's claim "to proceed under § 1983 would judicially preempt legislative initiatives in this area").

141 There is substantial commentary on the various legislative initiatives to deal with the issue of prisoners' access to evidence for post-conviction DNA testing. Some of the more recent articles include Holly Schaeffer, Note, Postconviction DNA Evidence: A 500 Pound Gorilla in State Courts, 50 Drake L Rev 695, 731-38 (2002) (advocating for state statutory reform that would allow prisoners access to post-conviction DNA testing); Diana L. Kanon, Note, Will the Truth Set Them Free? No, but the Lab Might: Statutory Responses to Advancements in DNA Technology, 44 Ariz L Rev 467, 471-91 (2002) (evaluating Illinois, New York, and Arizona stat-
in post-conviction proceedings will continue to come before the federal courts, and the categorization of those suits will continue to be devil judges. The Supreme Court precedents provide a workable template for categorization.
