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# Favorable Termination After Freedom: Why Heck's Rule Should Reign, Within Reason

Thomas Stephen Schneidau

# Favorable Termination After Freedom: Why *Heck*'s Rule Should Reign, Within Reason

## I. INTRODUCTION

An alleged violation of an individual's legal rights demands an opportunity for redress. There can be no more equitable proposition than this, for right and remedy go hand in hand. In a democratic society, however, the availability and scope of a remedy is always commensurate with the value society places on the right at stake. The significant value the American people place on protecting their federal rights is reflected in 42 U.S.C. § 1983.[1] The statute provides litigants an avenue by which they may pursue a civil remedy against actors who, under color of state law, violate their federal rights.[2] The United States Supreme Court has described the purpose of § 1983 as "interpos[ing] the federal courts between the States and the people, as guardians of the people's federal rights."[3] Section 1983 creates a "species of tort liability" to address this end.[4]

A peculiar and problematic situation may arise, however, when a § 1983 plaintiff has a criminal conviction that has never been

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1. 42 U.S.C. § 1983 (2006). The statute provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

*Id.*

2. *Id.* Section 1983 is the descendant of § 1 of the Civil Rights Act of 1871, Act of Apr. 20, 1871, ch. 22, 17 Stat. 13, also known as the "Ku Klux Klan Act." MARTIN A. SCHWARTZ & KATHRYN R. URBONYA, FED. JUDICIAL CTR., SECTION 1983 LITIGATION 1 (2d ed. 2008), *available at* http://www.fjc.gov/public/pdf.nsf/lookup/sec19832.pdf/$file/sec19832.pdf. This Act sought to stem the tide of lawlessness created by the Klan and other similar groups through the availability of federal remedies. STEVEN H. STEINGLASS, SECTION 1983 LITIGATION IN STATE COURTS 2-2 (1988).

3. Mitchum v. Foster, 407 U.S. 225, 242 (1972).

4. Memphis Cmty. Sch. Dist. v. Stachura, 477 U.S. 299, 305 (1986).

invalidated. Consider a scenario imagined by Justice Scalia: an individual is convicted of resisting arrest and sentenced to time in jail.[5] His conviction is not overturned on appeal or through habeas corpus.[6] He subsequently files a § 1983 action against the officer who arrested him, claiming his Fourth Amendment right to be free from unreasonable seizures was violated.[7] In the underlying criminal trial, the State carried its burden in demonstrating the individual "intentionally prevent[ed] a peace officer from effecting a *lawful* arrest."[8] If the plaintiff were to succeed on his § 1983 claim, he would have to demonstrate that his arrest was unlawful.[9] This showing would "necessarily imply the invalidity of his [underlying] conviction or sentence."[10] The possibility then arises that two judicial decisions could reach diametrically opposed results regarding the same set of operative facts if such a collaterally-attacking § 1983 claim was cognizable. If the true purpose of § 1983 is to "interpose the federal courts,"[11] however, the significance in finding collaterally-attacking § 1983 claims non-cognizable is magnified when the plaintiff is ineligible for federal habeas corpus relief and has no other access to the federal courts.

Unfortunately, the Supreme Court has not settled the issue of whether a collaterally-attacking § 1983 claim brought by a non-habeas-eligible plaintiff is cognizable.[12] As a result, the circuit courts of appeals are split as to the proper course of action, with some non-habeas-eligible plaintiffs having the chance to succeed on their claims,[13] while others are categorically denied that opportunity.[14] This Comment will argue that, if given a full and

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5. Heck v. Humphrey, 512 U.S. 477, 487 n.6 (1994).

6. This fact is assumed in Justice Scalia's scenario. *See id.*

7. *Id.*

8. *Id.* Justice Scalia notes that "[t]his is a common definition of that offense." *Id.*

9. *Id.*

10. *Id.* at 487.

11. Mitchum v. Foster, 407 U.S. 225, 242 (1972).

12. Muhammad v. Close, 540 U.S. 749, 752 n.2 (2004). The Court has ruled that a collaterally-attacking § 1983 claim by a habeas-eligible plaintiff is not cognizable, however, without a showing of favorable termination. *See infra* Part II.A.

13. *See, e.g.*, Fuchs v. Mercer County, 260 F. App'x 472 (3d Cir. 2008); Entzi v. Redmann, 485 F.3d 998 (8th Cir. 2007); Randell v. Johnson, 227 F.3d 300 (5th Cir. 2000); Figueroa v. Rivera, 147 F.3d 77 (1st Cir. 1998). *But see* Menoza v. Meisel, 270 F. App'x 105 (3d Cir. 2008).

14. *See, e.g.*, Wilson v. Johnson, 535 F.3d 262 (4th Cir. 2008); Powers v. Hamilton County Pub. Defender Comm'n, 501 F.3d 592 (6th Cir. 2007); Harden v. Pataki, 320 F.3d 1289 (11th Cir. 2003); Huang v. Johnson, 251 F.3d 65 (2d Cir. 2001); Carr v. O'Leary, 167 F.3d 1124 (7th Cir. 1999).

fair chance to litigate his claim in state court criminal proceedings,[15] a non-habeas-eligible plaintiff bringing a collaterally-attacking § 1983 suit should first be required to show a "favorable termination"[16] to his underlying criminal conviction. For equitable reasons, however, the favorable termination requirement should not apply when state actors withheld exculpatory evidence from the plaintiff material to his underlying conviction, and such is not discovered until after the exhaustion of available remedies in the state criminal appeals process. In this instance, a non-habeas-eligible plaintiff should be allowed to bring his collaterally-attacking § 1983 action in state or federal court to adjudicate his federal claims.

Part II of this Comment outlines the dictum opinions of the Supreme Court on this issue in *Heck v. Humphrey*[17] and *Spencer v. Kemna*[18] and examines the manner in which the federal circuit courts have interpreted and applied these cases. Part III discusses the rationales of the opposing views espoused by Justice Scalia, Justice Souter, and the federal circuits in light of the history and purpose of § 1983, state sovereignty interests, and lingering questions of federal habeas interaction. Part III also discusses the limitations of utilizing the favorable termination requirement in all cases of collaterally-attacking § 1983 actions brought by non-habeas-eligible plaintiffs. Part IV concludes by arguing for the adoption of a qualified favorable termination requirement to address the dilemma.

## II. FAVORABLE TERMINATION: AN OVERVIEW OF HISTORY AND REACH

Generally, for a plaintiff to succeed in a § 1983 action, he must demonstrate that the defendant, acting under color of state law,

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15. *See, e.g.*, Kremer v. Chem. Constr. Corp., 456 U.S. 461, 481 (1982) (describing a full and fair chance to litigate in state courts as being provided with minimal procedural due process protections). This is the sense in which this term will be used for the purposes of this Comment. "A federal court should assume that state procedures will afford an adequate remedy, in the absence of unambiguous authority to the contrary." Pennzoil Co. v. Texaco, Inc., 481 U.S. 1, 15 (1987).

16. A favorable termination in this scenario can be demonstrated through: (1) a reversal of the conviction on direct appeal; (2) an expunging of the conviction by executive order. *Cf.* Heck v. Humphrey, 512 U.S. 477, 486–87 (1994) (stating the favorable termination requirement a habeas-eligible plaintiff must meet in order to succeed on a § 1983 action).

17. *Id.* at 477.

18. 523 U.S. 1 (1998).

violated his federal constitutional or statutory rights.[19] A difficult issue arises, however, when the plaintiff is also a convicted criminal, and success in his § 1983 action would necessarily impugn the validity of his underlying criminal conviction. Members of the Supreme Court addressed such a possibility in *Heck*[20] and *Spencer*.[21]

*A.* Heck v. Humphrey

In *Heck*, the Justices grappled with the implications of a collaterally-attacking § 1983 claim.[22] An Indiana state court convicted Roy Heck of voluntary manslaughter for the death of his wife and sentenced him to fifteen years in state prison.[23] During the pendency of his criminal appeal and while still incarcerated, Heck filed a § 1983 action in federal district court, alleging that county prosecutors and an Indiana State Police investigator engaged in unlawful investigatory practices, knowingly destroyed exculpatory evidence, and utilized an illegal voice identification procedure at his trial.[24] Heck requested compensatory and punitive monetary damages based on these claims.[25] The § 1983 action was dismissed without prejudice by the district court because its success would have directly undermined the validity of his underlying criminal conviction.[26] While awaiting his § 1983 appeal, Heck's criminal conviction was upheld, his first petition for a writ of federal habeas corpus was dismissed for failure to exhaust state remedies, and his second petition for a writ of federal habeas corpus was denied.[27] Subsequently, the Seventh Circuit affirmed the decision of the district court on Heck's § 1983 suit, reasoning that success on the action would necessitate Heck's release from prison, even though no such relief was sought, and habeas corpus was the proper vehicle for such a remedy.[28]

Consequently, the Supreme Court was faced with the question of whether the reach of § 1983 was sufficient to overcome the

19. *See* 42 U.S.C. § 1983 (2006).
20. *Heck*, 512 U.S. 477.
21. *Spencer*, 523 U.S. 1.
22. *Heck*, 512 U.S. 477.
23. *Id.* at 478.
24. *Id.* at 479.
25. *Id.*
26. *Id.*
27. *Id.* The denial of Heck's second petition for a writ of federal habeas corpus was upheld by the Seventh Circuit. *Id.*
28. *Id.* at 480. This is because a state could not, as a practical matter, continue to keep someone in prison when a civil award makes it monetarily liable for doing so.

potential consequences of a collateral attack. In *Preiser v. Rodriguez*, the Court previously surmised that Congress intended state prisoners challenging the "validity of the fact or length of their confinement" to utilize federal habeas corpus review exclusively over a § 1983 action.[29] While Heck's § 1983 action challenged the validity of his conviction, he sought compensation, not release from jail.[30] In *Heck*, the Court framed the issue as "whether *money damages* premised on an unlawful conviction could be pursued under § 1983."[31] Since Heck was still incarcerated and thus eligible for federal habeas corpus relief,[32] the Court had to decide whether his collaterally-attacking § 1983 claim was barred by the availability of an alternate federal remedy. Writing for the majority,[33] Justice Scalia began his analysis by pointing out that, in general, a plaintiff need not exhaust alternate remedies to bring a § 1983 claim.[34] The majority ultimately decided, however, that a correct handling of Heck's claim for relief rested not upon the availability of alternate remedies, but rather on whether such a § 1983 action was even cognizable.[35] Because of strong policy interests disfavoring the expansion of collateral attacks, and concerns regarding finality and consistency in litigation,[36] the Court found the action was not cognizable.[37]

The Court's conclusion was grounded in its recognition of a § 1983 action as a "species of tort liability,"[38] being most akin to the common law tort of malicious prosecution.[39] The Court highlighted the "hoary principle" that tort actions, and thus § 1983 actions, are inappropriate mechanisms for challenging criminal convictions.[40] Direct appeal, habeas corpus review, and executive review are the normal avenues by which a criminal's conviction

29. 411 U.S. 475, 490 (1973).

30. *Heck*, 512 U.S. at 479. Success on his § 1983 claim would have necessitated his release from jail, however. *See supra* text accompanying note 28.

31. *Heck*, 512 U.S. at 480 n.2 (emphasis added).

32. A federal writ of habeas corpus can only be granted to "a person in custody." 28 U.S.C. § 2254(a) (2006).

33. The majority consisted of Justices Scalia, Kennedy, Thomas, and Ginsburg and Chief Justice Rehnquist.

34. *Heck*, 512 U.S. at 480 (citing Patsy v. Bd. of Regents of Fla., 457 U.S. 496, 501 (1982)).

35. *Id.* at 483.

36. *Id.* at 485.

37. *Id.* at 483.

38. *Id.* (quoting Memphis Cmty. Sch. Dist. v. Stachura, 477 U.S. 299, 305 (1986) (internal quotation marks omitted)).

39. *Id.* at 484. The common law cause of action for malicious prosecution required the plaintiff to show a "favorable termination" to his underlying criminal conviction to succeed. *Id.*

40. *Id.* at 486.

may be expunged.[41] Success in collaterally-attacking tort suits would allow two diametrically opposed judicial decisions concerning the same set of operative facts to stand.[42] Public policy interests in finality and consistency of judicial decisions require that criminal convictions be safeguarded from collateral attacks of this nature.[43]

In light of these concerns, and expanding upon the analogy between § 1983 and the common law cause of action for malicious prosecution,[44] the Court held:

> [I]n order to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by action whose unlawfulness would render a conviction or sentence invalid, a § 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such a determination, or called into question by a federal court's issuance of a writ of habeas corpus.[45]

Consequently, the dismissal of Heck's § 1983 claim was affirmed because it was collaterally-attacking in nature, and Heck was unable to demonstrate a favorable termination to his underlying conviction.[46]

While the Court made clear that this "favorable termination" showing was not applicable to § 1983 claims that did not *necessarily* impugn the plaintiff's underlying criminal conviction,[47] consensus within the Court splintered when the question of the favorable termination requirement's applicability to

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41. *See id.* at 486–87.
42. *See id.* at 484.
43. *Id.* at 484–85
44. *Id.* at 484. Justice Souter found Justice Scalia's analogy of § 1983 claims with the common law tort of malicious prosecution wanting because of the incongruity in form and requirements of the respective actions. For instance, Justice Souter noted that the tort of malicious prosecution required the plaintiff to show the "[a]bsence of probable cause for the proceeding as well as '[m]alice,' or a primary purpose other than that of bringing the offender to justice." *Id.* at 494 (Souter, J., concurring) (quoting W. PAGE KEETON ET AL., PROSSER AND KEETON ON LAW OF TORTS 871 (5th ed. 1984)). Justice Souter also claimed that "under Reconstruction-era common law," favorable termination could only be demonstrated if the plaintiff was never convicted at trial. *Id.* at 496.
45. *Id.* at 486–87 (majority opinion).
46. *Id.* at 486–87, 490.
47. *Id.* at 487.

non-habeas-eligible plaintiffs arose.[48] In a footnote to the opinion, Justice Scalia argued that the strong policy against collateral attacks would not be overcome "by the fortuity that a convicted criminal is no longer incarcerated."[49] Justice Souter, in a concurrence joined by three other Justices,[50] saw the issue differently. He reasoned that plaintiffs "outside the intersection of § 1983 and the habeas statute, individuals not 'in custody' for habeas purposes,"[51] are entitled to a federal forum in light of § 1983's history and purpose.[52] The Court previously described the purpose of § 1983 as "interpos[ing] the federal courts between the States and the people, as guardians of the people's federal rights."[53] In light of the role federal habeas corpus plays as the "appropriate remedy for state *prisoners* attacking the validity of the fact or length of their confinement,"[54] Justice Souter posited that a favorable termination rule should stand only in cases where a habeas-eligible plaintiff seeks recovery under § 1983.[55] Hence, while Justice Scalia and the four Justices who joined his majority opinion found that recovery of damages in collaterally-attacking § 1983 claims was barred because such claims were not cognizable,[56] Justice Souter and those joining his concurrence rejected recovery because of the availability of federal habeas corpus,[57] an alternate federal forum. Although Justice Scalia's position garnered a majority backing of the Court, the passage of years brought a change of allegiance within the Court and, ultimately, confusion within the federal circuits.

### *B.* Spencer v. Kemna

The change of allegiance became manifest in 1998 when the Supreme Court decided *Spencer*.[58] The action involved petitioner Randy Spencer's request for the issuance of a writ of federal habeas corpus to invalidate the revocation of his parole by the

48. Again, though, this was only in the context of a § 1983 claim that would necessarily impugn the validity of the plaintiff's underlying conviction.

49. *Heck*, 512 U.S. at 490 n.10.

50. The concurring Justices were Justices Blackmun, Stevens, and O'Connor.

51. *Heck*, 512 U.S. at 500 (Souter, J., concurring).

52. *Id.* at 501–02.

53. Mitchum v. Foster, 407 U.S. 225, 242 (1972).

54. *Heck*, 512 U.S. at 498 (Souter, J., concurring) (emphasis added) (quoting Preiser v. Rodriguez, 411 U.S. 475, 490 (1973)).

55. *Id.* at 500.

56. *Id.* at 483 (majority opinion).

57. *Id.* at 498 (Souter, J., concurring).

58. Spencer v. Kemma, 523 U.S. 1 (1998).

Missouri Board of Probation and Parole.[59] The Court faced the issue of whether Spencer's claim was moot because, although Spencer petitioned for the writ while incarcerated, he was free by the time the district court addressed his petition.[60] Spencer assumed that he could not seek relief through a claim for damages under § 1983 due to the rationale of the majority in *Heck*, as he had not shown a favorable termination to his underlying conviction.[61] Spencer utilized this assumption to argue that his habeas claim should not be considered moot, as he would not have been guaranteed access to a federal forum if both § 1983 and federal habeas were foreclosed.[62] The Court, however, found that Spencer could only defeat the claim of mootness through a showing of collateral consequences.[63] Because Spencer failed to carry this burden, the Court affirmed the court of appeals' judgment dismissing the petition.[64] Once again writing for the majority, Justice Scalia reiterated Spencer's *Heck* assumption by cautioning that a "§ 1983 action for damages must [not] always and everywhere be available."[65]

Because Spencer chose not to bring a § 1983 action, the Court was not directly faced with the issue of whether a non-habeas-eligible plaintiff could recover damages under such an action without showing a favorable termination to his underlying conviction. This did not prevent concurring Justices, however, from addressing the issue. Justice Ginsburg, who had joined Justice Scalia's position in *Heck*, found herself endorsing Justice Souter's view upon further reflection of § 1983's "broad reach."[66] Justice Souter, joined by three Justices in his concurrence,[67] again pointed out in dicta what he believed to be the deficiencies of

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59. *Id.* at 3. Spencer had been convicted "of felony stealing and burglary." *Id.*

60. *Id.* at 3, 6. A federal writ of habeas corpus can only be granted to "a person in custody." 28 U.S.C. § 2254(a) (2006).

61. *Spencer*, 523 U.S. at 17. Spencer's claim necessarily impugned the validity of his parole revocation. *Id.* at 5.

62. *Id.* at 17. *See Heck*, 512 U.S. at 500 (Souter, J., concurring).

63. *Spencer*, 523 U.S. at 10–11, 14. Since Spencer was no longer incarcerated, the Court required that he demonstrate some other tangible injury that would result from his parole revocation in order to satisfy Article III's injury-in-fact requirement for standing. *Id.*

64. *Id.* at 18.

65. *Id.* at 17.

66. *Id.* at 21 (Ginsburg, J., concurring) (quoting *Heck*, 512 U.S. at 503 (Souter, J., concurring)). Justice Ginsburg remarked that "[w]isdom too often never comes, and so one ought not to reject it merely because it comes late." *Id.* at 22 (quoting Henslee v. Union Planters Nat. Bank & Trust Co., 335 U.S. 595, 600 (1949) (Frankfurter, J., dissenting)).

67. Justices O'Connor, Ginsburg, and Breyer joined in Justice Souter's concurrence.

applying a favorable termination requirement to a § 1983 claim brought by a plaintiff not in custody.[68] According to Justice Souter, the enforcement of such a requirement:

> [W]ould produce a patent anomaly: a given claim for relief from unconstitutional injury would be placed beyond the scope of § 1983 if brought by a convict free of custody (as, in this case, following service of a full term of imprisonment), when exactly the same claim could be redressed if brought by a former prisoner who had succeeded in cutting his custody short through habeas.[69]

In *Spencer,* as in *Heck*, the resolution of whether a favorable termination requirement was applicable to a non-habeas-eligible plaintiff in a collaterally-attacking § 1983 action was not necessary to the holding of the Court. Justice Souter's four-Justice concurrence, however, coupled with Justice Stevens' dissent subscribing to Justice Souter's position on that particular issue,[70] shifted what had been a majority backing of Justice Scalia's endorsement of the favorable termination requirement in non-habeas scenarios to a five–four "majority" in opposition to such a requirement.[71] The changing allegiance on the Court as to the applicability of the favorable termination requirement soon began to fracture the decisions of the federal circuits.

### *C. The Circuit Split*

Currently, the circuit courts of appeals are split on the precedential value and effect of the "non-habeas" opinions espoused in *Heck* and *Spencer* and the rationales that underlie them.

#### *1. Circuits Endorsing the* Heck *Majority*

Several circuits chose to follow the position espoused by Justice Scalia in *Heck.* In *Figueroa v. Rivera*, the First Circuit held that *Heck*'s favorable termination requirement barred recovery on a § 1983 claim brought by family members of a convicted murderer

68. *Spencer*, 523 U.S. at 20–21 (Souter, J., concurring).
69. *Id.*
70. *Id.* at 25 n.8 (Stevens, J., dissenting). Justice Stevens believed Spencer suffered sufficient collateral consequences to overcome the claim of mootness in his federal habeas petition. *Id.* at 23.
71. *See, e.g.*, Huang v. Johnson, 251 F.3d 65, 75 (2d Cir. 2001).

who died in prison during the pendency of his habeas petition.[72] The court rejected the appellants' argument "that strict application of *Heck* works a fundamental unfairness in [the] case,"[73] viewing its decision as necessarily flowing from the holding in *Heck*.[74] The court was also quick to point out that not requiring a showing of favorable termination when a convict is no longer in jail would disregard the established principle that a § 1983 claimant must establish every element of his claim.[75] While the First Circuit was mindful of the position posited by Justice Souter and endorsed by a majority of the Court in the dicta of *Spencer*, it noted that the high Court directed the lower federal courts to "follow its directly applicable precedent, even if that precedent appears weakened by pronouncements in subsequent decisions . . . ."[76] Thus, the First Circuit viewed the favorable termination rule's applicability to non-habeas-eligible § 1983 plaintiffs as part of *Heck*'s "core holding."[77]

At least one circuit court, the Third Circuit, has found that *Heck*'s favorable termination requirement applies to collaterally-attacking § 1983 actions brought by criminals whose convictions never led to imprisonment.[78] As a matter of law, plaintiffs in this situation were never eligible for federal habeas corpus.[79] In *Fuchs v. Mercer County*, the plaintiff entered a guilty plea to charges of disorderly conduct and harassment and accepted a fine after an altercation with police.[80] Fuchs argued that the district attorney's office did not adequately investigate key players in his case, and he consequently felt constrained to plead guilty to the deal he was

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72. 147 F.3d 77, 79–80 (1st Cir. 1998). Family members alleged the deceased was "framed" for murder by the defendants, resulting in an "unconstitutional conviction and sentence." *Id.* at 80.

73. *Id.* at 80–81.

74. *Id.* at 81.

75. *Id.* This statement suggests a state court conviction would have a preclusive effect on a collaterally-attacking § 1983 action insofar as the conviction acted as a res judicata bar to relitigating claims in a subsequent collateral proceeding. The Court in *Heck* did not address this issue, noting that "[t]he res judicata effect of state-court decisions in § 1983 actions is a matter of state law." Heck v. Humphrey, 512 U.S. 477, 480 n.2 (1994). For further discussion of res judicata, see *infra* Part III.B.2.c.

76. *Figueroa*, 147 F.3d at 81 n.3 (citing Agostini v. Felton, 521 U.S. 203 (1997)).

77. *Id.* at 81.

78. *See* Fuchs v. Mercer County, 260 F. App'x 472, 474 (3d Cir. 2008). *But see* Menoza v. Meisel, 270 F. App'x 105 (3d Cir. 2008).

79. A federal writ of habeas corpus can only be granted to "a person in custody." 28 U.S.C. § 2254(a) (2006).

80. 260 F. App'x at 473.

offered.[81] The court was well aware of the "various opinions" regarding the applicability of *Heck* to non-habeas-eligible plaintiffs.[82] Still, relying on its own panel decision several years earlier,[83] the Third Circuit found that a "guilty plea did not constitute a [necessary] 'favorable termination' for purposes of bringing a subsequent § 1983 suit."[84]

The availability of favorable termination avenues other than federal habeas corpus supported the ruling of the Fifth Circuit in *Randell v. Johnson*.[85] Randell had been convicted of driving while intoxicated and sought to challenge the length of his confinement based on time already served.[86] He was not in prison at the commencement of his § 1983 claim and argued that the favorable termination requirement did not apply to him since he was not habeas-eligible.[87] The court found that *Heck*'s bar was unequivocal and extended even to claims by non-habeas-eligible plaintiffs.[88] Citing the conclusions from several sister circuits concerning *Heck*'s applicability when procedural vehicles for invalidating the underlying conviction were lacking,[89] the court noted that Randell never demonstrated he lacked avenues of redress in this regard.[90] His sentence could have been "reversed on direct appeal, expunged by executive order, [or] declared invalid by a state tribunal authorized to make such determination."[91]

The Eighth Circuit has also recognized the applicability of *Heck*'s bar in negating collaterally-attacking § 1983 claims by non-habeas-eligible plaintiffs. In *Entzi v. Redman*, the plaintiff sought damages for the loss of sentence-reduction credits for failure to

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81. *Id.*

82. *Id.* at 474.

83. *See* Gilles v. Davis, 427 F.3d 197 (3d Cir. 2005). The court in *Fuchs* noted that it could not overrule one of its prior panel decisions absent an en banc ruling or an intervening Supreme Court decision. *Fuchs*, 260 F. App'x at 475.

84. *Fuchs*, 260 F. App'x at 474.

85. 227 F.3d 300, 301 (5th Cir. 2000).

86. *Id.* at 300–01.

87. *Id.* at 301.

88. *Id.* Mindful of the deference it owed the land's highest tribunal, the Fifth Circuit noted, "[W]e decline to announce for the Supreme Court that it has overruled one of its decisions." *Id.*

89. *Id.* (citing Jenkins v. Haubert, 179 F.3d 19, 26 (2d Cir. 1999); Shamaeizadeh v. Cunigan, 182 F.3d 391, 396 n.3 (6th Cir. 1999); Carr v. O'Leary, 167 F.3d 1124, 1127 (7th Cir. 1999)) (in these cases, the circuits have found that *Heck*'s favorable termination requirement should not apply when there are no procedural processes available to challenge a conviction).

90. *Id.*

91. *See* Heck v. Humphrey, 512 U.S. 477, 486–87 (1994). Presumably, a "state court authorized to make such a determination" is, at a minimum, a state court authorized to hear a state habeas corpus claim.

participate in a prison-run rehabilitative program for convicted sex offenders.[92] The court understood the holding of *Heck* to mandate rejection of such a claim, despite the fact the plaintiff was no longer in custody, absent a showing of favorable termination.[93] Recalling the on-point statement in *Heck* that "the principle barring collateral attacks . . . is not rendered inapplicable by the fortuity that a convicted criminal is no longer incarcerated," the Eighth Circuit reasoned that an explicit overruling of *Heck* by the Supreme Court would be necessary to hold otherwise.[94] A majority of dictum opinions in *Spencer* would not suffice.[95]

*2. Circuits Endorsing the* Spencer *"Majority"*

Despite the belief among several circuits in the "binding" effect of Justice Scalia's position as outlined in *Heck*, Justice Souter's position garners an equally faithful following. In *Huang v. Johnson*, the Second Circuit found that a mother's § 1983 action on behalf of her son, seeking to recover damages based on the allegedly unconstitutional length of his confinement,[96] could proceed based on the son's ineligibility for habeas corpus, as he was no longer incarcerated.[97] The court noted it had previously found *Heck*'s favorable termination requirement was not applicable to a plaintiff bringing a collaterally-attacking § 1983 claim when his underlying conviction never resulted in incarceration.[98] As a matter of law, such a plaintiff was never eligible for federal habeas corpus and consequently would not be guaranteed access to a federal forum without § 1983.[99] The Second Circuit analogized that situation with Huang's inability to access federal habeas corpus because of his release and reasoned that, in light of *Spencer*'s "majority" view, the favorable termination requirement should not apply to his § 1983 claim.[100]

The Fourth Circuit took a more policy-minded approach when endorsing Justice Souter's contention in *Wilson v. Johnson*.[101] The

92. 485 F.3d 998, 1003 (8th Cir. 2007).
93. *Id.*
94. *Id.* (citing *Heck*, 512 U.S. at 490 n.10).
95. *Id.*
96. 251 F.3d 65, 66 (2d Cir. 2001) (the mother alleged that her son was not given credit for time served while incarcerated for another incident).
97. *Id.* at 75.
98. *Id.* at 74 (citing Leather v. Eyck, 180 F.3d 420 (2d Cir. 1999)).
99. *Id.* A federal writ of habeas corpus can only be granted to "a person in custody." 28 U.S.C. § 2254(a) (2006).
100. *Huang*, 251 F.3d at 75.
101. 535 F.3d 262 (4th Cir. 2008).

plaintiff, upon his release from prison, filed a § 1983 claim alleging false imprisonment in connection with what he construed to be an improper prison term resulting from his guilty plea as an accessory to grand larceny.[102] Wilson had filed a previous § 1983 claim while in prison, but that claim was rejected on *Heck*'s favorable termination grounds.[103] The court stated, "Quite simply, we do not believe that a habeas ineligible former prisoner seeking redress for denial of his most precious right—freedom—should be left without access to a federal court."[104] The Fourth Circuit emphasized its view that § 1983 should only be limited insofar as it conflicts with the purposes of federal habeas corpus,[105] as was the case in *Heck*.[106] Otherwise, the court reasoned, § 1983's "sweeping breadth" guarantees litigants access to a federal forum when they allege a deprivation of their federal rights by those acting under the color of state law.[107] Judge Hanson, in a strong dissent, adopted the position held by several of the circuit courts that Justice Scalia's footnote ten, as part of the majority opinion in *Heck*, "is part of the core holding of *Heck* by which we are bound."[108] Consequently, Judge Hanson argued, principles of judicial restraint and recognition of the position of the Fourth Circuit within the hierarchical ordering of the federal courts support adherence to *Heck*'s favorable termination requirement until the Supreme Court holds otherwise.[109]

The practical availability of federal habeas corpus during incarceration was at the forefront when the Sixth Circuit considered the issue of collaterally-attacking § 1983 claims in *Powers v. Hamilton County Public Defender Commission*.[110] The court held that a § 1983 plaintiff who sought damages for the lack of indigency procedures in connection with his incarceration could pursue his claim, despite being out of prison, because his time in prison was not long enough to seek habeas relief.[111] The court reasoned that "[i]t seems unlikely that Justice Souter intended to

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102. *Id.* at 264.
103. *Id.*
104. *Id.* at 268.
105. *Id.*
106. Heck v. Humphrey, 512 U.S. 477, 480 (1994) (describing the case as "[lying] at the intersection of . . . § 1983, and the federal habeas corpus statute . . . .").
107. *Wilson*, 535 F.3d at 268.
108. *Id.* at 269 (Hanson, J., dissenting). Footnote 10 noted that "the principle barring collateral attacks . . . is not rendered inapplicable by the fortuity that a convicted criminal is no longer incarcerated." *Heck*, 512 U.S. at 490 n.10.
109. *Wilson*, 535 F.3d at 270 (Hanson, J., dissenting).
110. 501 F.3d 592 (6th Cir. 2007).
111. *Id.* at 601.

carve out a broad *Heck* exception for all former prisoners."[112] The court viewed adherence to Justice Souter's position as "ordinary rule refinement" within the appellate system[113] and remarked that brushing aside the opinion espoused by a majority of the Justices in *Spencer* was "something we decline to do."[114] Ironically, however, the Sixth Circuit admitted it could dispense with the issue based on its finding that Powers' § 1983 claim did not necessarily impugn the validity of his underlying conviction.[115]

The weight of authority to be given *Spencer*'s "majority" view was addressed by the Seventh Circuit in *Carr v. O'Leary*.[116] The court grappled with the possibility that even if *Heck*'s favorable termination requirement applied to Carr's collaterally-attacking § 1983 action, the state defendants waived its enforcement by their failure to timely raise the issue.[117] Finding that the defendants waived their right to seek dismissal based on the plaintiff's inability to show a favorable termination, the court next inquired as to whether any overriding state sovereignty interest provided sufficient grounds for the district court judge to forgive the waiver.[118] Ultimately, the Seventh Circuit reasoned that the dicta in *Spencer* cast sufficient doubt on the applicability of *Heck*'s favorable termination requirement to negate any discretion the judge would have in forgiving the waiver.[119] A concurrence to the opinion argued that there was no need to resort to a weighing of the judge's discretion since the *Heck* requirement was not applicable based on the dicta of *Spencer*.[120]

Like the Sixth Circuit in *Powers*, the Eleventh Circuit heard a case in which it found more than one "justification" for allowing the plaintiff's § 1983 claim to proceed.[121] In *Harden v. Pataki*, the court found, first, that the plaintiff's civil rights claim did not necessarily impugn his underlying conviction and, second, even if it did, *Heck*'s favorable termination requirement would not be applicable since the plaintiff was no longer incarcerated.[122] The opinion drew from Justice Souter's concurrence in *Spencer*,

112. *Id.* This suggests that prisoners who had a reasonable opportunity to seek federal habeas relief and did not or who did and failed would be barred from bringing a collaterally-attacking § 1983 action upon release.
113. *Id.* at 602.
114. *Id.* at 603.
115. *Id.*
116. 167 F.3d 1124 (7th Cir. 1999).
117. *Id.* at 1125–26.
118. *Id.* at 1127.
119. *Id.*
120. *Id.* at 1129 (Ripple, J., concurring).
121. Harden v. Pataki, 320 F.3d 1289 (11th Cir. 2003).
122. *Id.* at 1298.

reasoning that "*Heck* should be read as permitting a prisoner to 'bring a § 1983 action establishing the unconstitutionality of a conviction or confinement without being bound to satisfy a favorable-termination requirement that it would be *impossible as a matter of law* for him to satisfy.'"[123]

Significant controversy remains among the circuit courts of appeals on the question of the favorable termination requirement's applicability to a non-habeas-eligible plaintiff bringing a collaterally-attacking § 1983 claim. An exposition of the issues at stake counsels for the adoption of such a requirement, except when state actors withheld exculpatory evidence from the plaintiff material to his underlying conviction, and such is not discovered until after the exhaustion of available remedies in the state criminal appeals process.

## III. THE AVAILABILITY OF § 1983 TO NON-HABEAS-ELIGIBLE CRIMINALS

The lack of unanimity within the circuit courts of appeals regarding the reach of *Heck*'s favorable termination requirement illuminates the need for clarity in discerning the scope of § 1983. Assertions by some circuit courts that imposition of the favorable termination requirement on non-habeas-eligible plaintiffs bringing collaterally-attacking § 1983 actions is part of the "holding" or "central holding" of *Heck*[124] are incorrect. In *Muhammad v. Close*,[125] a non-habeas-eligible plaintiff brought a § 1983 action that did not necessarily impugn the validity of a misconduct charge on his prison record. The Supreme Court noted that "[t]his case is no occasion to settle the issue" of favorable termination's relation to collaterally-attacking § 1983 claims by non-habeas-eligible plaintiffs.[126] Thus the Court admitted a favorable termination requirement for non-habeas-eligible plaintiffs was not a necessary consequence of *Heck*, and *Spencer*'s "majority" opinion did not demand allegiance either.[127]

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123. *Id.* (emphasis added) (quoting Spencer v. Kemna, 523 U.S. 1, 21 (1998) (Souter, J., concurring)).

124. *E.g.*, Randell v. Johnson, 227 F.3d 300 (5th Cir. 2000); Figueroa v. Rivera, 147 F.3d 77 (1st Cir. 1998).

125. 540 U.S. 749 (2004).

126. *Id.* at 752 n.2.

127. *See id.* Additionally, the make-up of the Court has changed since *Spencer*, with the death, on September 3, 2005, of Chief Justice Rehnquist, who agreed with Justice Scalia's position, the retirement, on January 31, 2006, of Justice O'Connor, who sided with Justice Souter, and the retirement of Justice

Because the question of whether a non-habeas-eligible plaintiff bringing a collaterally-attacking § 1983 claim must demonstrate a favorable termination to his underlying conviction remains unsettled, it is necessary to dissect the arguments on both sides of the debate so as to arrive at an equitable resolution to this troubling controversy. Ultimately, *Heck*'s favorable termination requirement should be applied to a non-habeas-eligible plaintiff bringing a collaterally-attacking § 1983 claim if such a plaintiff was given a full and fair chance to litigate his claim in state criminal court proceedings. The history and purpose of § 1983, important state sovereignty interests, and lingering questions of federal habeas corpus interaction all lend support to such a rule. An exception to the applicability of the favorable termination requirement to a non-habeas-eligible plaintiff bringing a collaterally-attacking § 1983 claim must be granted, however, when state actors withheld exculpatory evidence from the plaintiff material to his underlying conviction, and such is not discovered until after the exhaustion of available remedies in the state criminal appeals process.

### *A. The History and Purpose of § 1983 Do Not Counsel Against Favorable Termination*

Justice Souter cites the "history" and "purpose" of § 1983 as justification for allowing federal claims to be heard in federal court, even if they are brought by non-habeas-eligible plaintiffs collaterally-attacking their underlying convictions.[128] He believes a convicted criminal's federal claims against state actors *always* deserve an opportunity to be heard in a federal forum.[129] Justice Souter describes the absence of such an opportunity as an "untoward result."[130] The history and purpose of § 1983, however, despite some confusing commentary from the Supreme Court over the years, actually suggest Congress was concerned with providing a federal remedy to litigants rather than unfettered access to a federal forum.[131]

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Souter himself on June 29, 2009. Where the balance of thought is within the Court on the issue is now uncertain.

128. Heck v. Humphrey, 512 U.S. 477, 501 (1994) (Souter, J., concurring).

129. *See id.* at 500–01.

130. *Id.*

131. Justice Scalia has noted that the "entire landscape" of § 1983 would appear quite different if the statute's goal was to provide unfettered access to a federal forum for federal claims. In particular, official immunities would not be available. *Id.* at 490 n.10 (majority opinion). For further discussion on official immunities in § 1983 litigation, see *infra* Part III.A.2.

Before demonstrating why the favorable termination requirement must apply to almost all cases of collaterally-attacking § 1983 claims brought by non-habeas-eligible plaintiffs (an issue that concerns the cognizability of the federal remedy), it is first necessary to establish that the history and purpose of § 1983 recognize the competency of state courts to resolve the federal issues at stake. For if § 1983 demands the availability of a federal forum because state courts are *necessarily* inadequate venues for resolution of these federal issues, collaterally-attacking § 1983 claims brought by non-habeas-eligible plaintiffs must be cognizable.

*1. Concurrent Jurisdiction Over § 1983 Claims Illustrates State Court Adequacy*

The Court has described the purpose of § 1983 as "interpos[ing] the *federal* courts between the States and the people, as guardians of the people's federal rights."[132] It may be surprising, then, that although the lower federal courts have original jurisdiction over § 1983 claims, they do not have exclusive jurisdiction over them.[133] State courts enjoy concurrent jurisdiction over § 1983 claims.[134] If the law's true purpose is to ensure the federal courts alone protect the federal rights of citizens, and in this context, protect them from any supposed inadequacy of state judicial systems, Congress has never reserved the federal courts' exclusive right to do so. This suggests Congress has faith in the ability of state courts to fully and fairly adjudicate federal claims.[135] Section 1983 is a federal remedy, but it does not require a federal forum.

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132. Mitchum v. Foster, 407 U.S. 225, 242 (1972) (emphasis added).

133. Federal jurisdiction over 28 U.S.C. § 1983 claims arises from 28 U.S.C. § 1331 (2006): "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." It also arises under 28 U.S.C. § 1343(a)(3) (2006):

> The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person: To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States.

134. SCHWARTZ & URBONYA, *supra* note 2, at 19.

135. The fact that Congress has never abridged state court jurisdiction over § 1983 claims during the statute's long history outweighs any evidence that some Congressmen viewed the supposed inadequacy of the state courts as one of the main problems § 1 of the Civil Rights Act of 1871 (now § 1983) sought to

The existence of concurrent state court jurisdiction over § 1983 claims also suggests the constitutional abuses § 1 of the Civil Rights Act of 1871[136] sought to curb were not based in the handling of criminal cases against African Americans by state actors, but were rather rooted in the severe deprivations African Americans suffered outside the courtroom for which their perpetrators were never punished. This position is supported by the other sections of the Civil Rights Act[137] providing for (1) criminal liability for conspiracies against the government and certain private citizens;[138] (2) the authority of the President to use military force to curtail violence and insurrection within the states;[139] (3) the authority of the President to suspend the writ of habeas corpus under certain circumstances;[140] (4) the requirement that jurors take an oath that they were not engaged in any conspiracies;[141] and (5) civil liability for actors who are complicit with conspirators.[142] Thus, read *in pari materia* with the rest of the Civil Rights Act of 1871, § 1 was likely not aimed at impugning the competency and neutrality of state officials working in the court system.

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remedy. *See* Monroe v. Pape, 365 U.S. 167, 176–77 (1961) (relating the problems several Congressmen saw with the state courts in dispensing justice and recognizing the possibility of municipal liability in § 1983 claims), *overruled on other grounds by* Monell v. Dep't of Soc. Servs. of City of N.Y., 436 U.S. 658 (1978). Regardless, Justice Powell has noted that "[d]espite differences in institutional environment and the unsympathetic attitude to federal constitutional claims of *some* state judges in years past, we are unwilling to assume that there now exists a general lack of appropriate sensitivity to constitutional rights in the trial and appellate courts of the several States." Stone v. Powell, 428 U.S. 465, 494 n.35 (1976) (emphasis added). Additionally, Senator Edmunds, who managed the bill that later became the Civil Rights Act of 1871, on the floor of the Senate, remarked that "[i]t [the legislation] does not undertake to interpose itself out of the regular order of the administration of law. It does not attempt to deprive any State of the honor which is due to the punishment of crime." CONG. GLOBE, 42d Cong., 1st Sess. 697–98 (1871). Hence, the *full* history of § 1983 recognizes the adequacy of state courts in adjudicating federal claims.

136. Once again, the forerunner of 42 U.S.C. § 1983 (2006).

137. Civil Rights Act of 1871, ch. 22, 17 Stat. 13 (the Civil Rights Act of 1871 contained a total of six sections).

138. *Id.* § 2.

139. *Id.* § 3.

140. *Id.* § 4.

141. *Id.* § 5.

142. *Id.* § 6.

*2. Official Immunities in § 1983 Actions Illustrate State Court Adequacy*

The continued existence and applicability of common law doctrines of immunity in § 1983 cases[143] also suggest the statute's history and purpose do not impugn the adequacy of the state courts to adjudicate federal claims. Judicial officers are granted absolute immunity from suit in § 1983 claims.[144] State prosecutors enjoy absolute immunity in § 1983 claims when they have acted within the court system, even when acting with malice and without probable cause.[145] Additionally, law enforcement officials are cloaked with qualified immunity,[146] protecting them from liability under § 1983 claims, except in cases where their behavior violates "clearly established constitutional rights of which a reasonable person would have known."[147] Thus, even if a law enforcement officer's actions against a criminal defendant are illegal and the judge disregards them at the criminal trial, unless those actions are clearly unconstitutional to a reasonable person, the law enforcement officer cannot be liable in a subsequent § 1983 action.[148] This fact holds true regardless of whether a showing of favorable termination is required to bring a collaterally-attacking § 1983 claim. While these immunity doctrines[149] do not directly reach the issue of the cognizability of claims, they indicate Congress did not perceive the officials involved in state criminal trials to be the problem § 1983 sought to address.

143. *See* Briscoe v. LaHue, 460 U.S. 325, 334 (1983) (stating that immunities for judges and prosecutors that existed at Reconstruction-era common law apply to § 1983 actions).

144. *See* Pierson v. Ray, 386 U.S. 547, 554–55 (1967).

145. *See* Imbler v. Pachtman, 424 U.S. 409, 424–27 (1976).

146. *See Pierson*, 386 U.S. at 556. It appears uncertain, however, whether qualified immunity was always available to law enforcement officers at Reconstruction-era common law. *See* Anderson v. Creighton, 483 U.S. 635, 646 (1987) (describing the "vagaries" of American common law). Still, it is clear qualified immunity was available to law enforcement officers at common law to some extent during that era. *See* Malley v. Briggs, 475 U.S. 335, 342 (1986) (officers applying for arrest warrants were given qualified immunity at common law when the Civil Rights Act of 1871 was enacted).

147. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

148. *See id.*

149. Qualified immunity is an affirmative defense that must be pled by the defendant. Gomez v. Toledo, 446 U.S. 635, 640 (1980).

*3. The Aims of § 1983 Espoused by the Supreme Court*

While the jurisdictional and immunity analyses provide a clear indication that Congress did not, in enacting § 1983, seek to impugn the competency of the state courts in handling federal claims, the Court's discussion of the aims of § 1983 in *Monroe v. Pape*[150] appears at first to do just that. The Court described three main aims of the § 1983 action in *Monroe*:[151] (1) to "override certain kind of state laws"; (2) to "provide a remedy where state law was inadequate"; and (3) "to provide a federal remedy where the state remedy, though adequate in theory, was not available in practice."[152] The first aim was obviously directed at overturning unconstitutional laws. State courts have the power to declare a state law unconstitutional, either as applied or on its face.[153] Because state courts have concurrent jurisdiction over § 1983 claims, state criminal defendants who have a full and fair chance to raise the issue of the unconstitutionality of the law under which they have been accused or convicted should have no recourse to litigate the same claim again merely because a federal court is also competent to hear such a claim.

Finding that § 1983 "[provides] a remedy where state law [is] inadequate,"[154] the second aim of the legislation expounded by the Court does not imply, on another front, that state courts are inadequate venues to protect federal rights. Indeed, the Court in *Monroe* would go on to say that "it is no answer that the State has a law which if enforced would give relief,"[155] thereby suggesting that no state tort action could ever be adequate. The Court's reading of the second aim was directed then at the inability of state tort actions alone to address the gravity of constitutional violations, not at the adequacy of state criminal trials. Concededly, the adequacy of state laws providing for tort recovery is an entirely different question than the adequacy of state courts, the latter of

150. Monroe v. Pape, 365 U.S. 167, 173–74 (1961) (recognizing the possibility of municipal liability in § 1983 claims), *overruled on other grounds by* Monell v. Dep't of Soc. Servs. of City of N.Y., 436 U.S. 658 (1978).

151. *Id.* at 167. The Court held for the first time in *Monroe* that state officers could be liable under § 1983 even when their violations of another's federal rights were not sanctioned by state law but were merely perpetrated under the cloak of the state authority they possessed. *See id.* at 187.

152. *Id.* at 173–74.

153. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.").

154. *Monroe*, 365 U.S. at 173.

155. *Id.* at 183.

which are given a "passing grade" by the recognition of concurrent jurisdiction[156] and the availability of official immunities.[157]

The final aim of § 1983 espoused by the Court—"to provide a federal remedy where state remedy, though adequate in theory, was not available in practice"[158]—is perhaps more problematic because it almost necessarily impugns the adequacy of the state courts. Consider, however, a scenario set in the South during the heyday of the Ku Klux Klan: an African American alleges that some of his personal property has been seized by the police without due process of law in violation of his Fourteenth Amendment rights. State law provides for tort recovery, perhaps on a theory of trespass to chattels or conversion. The case, however, like many other cases of its kind, never really sees the light of day, hence not being available in practice. There could have been three primary reasons for this: (1) Klan violence and intimidation techniques had the effect of preventing potential plaintiffs from bringing such actions; (2) jurors in state court proceedings were too prejudiced to dispense justice; or (3) public officials involved in state court proceedings were too prejudiced to dispense justice. Certainly, a combination of all three could have been at play, but it would be helpful to address the reasons individually. Provisions of the Civil Rights Act of 1871, other than § 1, along with the availability of official immunities, seem to have been aimed at addressing them specifically.

First, if the reason an adequate tort remedy to constitutional violations was available in theory but not in practice was because of the violent tactics of Klan members, the Civil Rights Act of 1871 contained another provision to address such violence. Section 3 of the Act authorized the President to utilize military force to curtail violence and insurrection within the states caused by conspirators like the Klan.[159] Second, if the problem was rooted in the fact that some jurors were members, or sympathizers, of the Klan, the Civil Rights Act sought to address their influence through the requirement that jurors take an oath that they were not part of any conspiracy to inhibit justice through the courts.[160] Finally, if the problem of practical availability of a remedy was found in the corruption of state officials in the court system,

156. *See supra* Part III.A.1.
157. *See supra* Part III.A.2.
158. *Monroe*, 365 U.S. at 174.
159. Civil Rights Act of 1871, ch. 22, § 3, 17 Stat. 13.
160. *Id.* § 5. The author does not suggest this requirement was always adequate to curtail the influence of jurors sympathetic to the Klan but reminds the reader that jurors are not a part of the appellate process by which decisions may be reviewed and overturned.

Congress could have rejected the immunities provided to those parties under the common law and later jurisprudence.[161] This all suggests, again, that § 1983[162] was not aimed at addressing the adequacy of state court proceedings.[163]

This proposed analysis notwithstanding, the meaning behind the final aim espoused by the Court in *Monroe* is almost immediately contradicted by its assertion that even if the state remedy was adequate in theory and available in practice, the federal civil action under § 1983 would still stand.[164] Hence, tort recovery through both state and federal law is a perfectly permissible outcome. This suggests that a full and fair chance to litigate a constitutional violation, even if provided in the state court system, does not inhibit the right to litigate that same question again in a § 1983 action; the § 1983 claim is cognizable. In such a circumstance, however, both chances to litigate the claim are in a civil setting. When a defendant gets a full and fair chance to argue his federal claims at his state criminal trial, he does so against the backdrop of a burden of proof carried by the state to prove its case beyond a reasonable doubt.[165] The plaintiff in a § 1983 claim must only prove his claim by a preponderance of the evidence.[166] Equity is offended when a plaintiff can succeed on a lesser showing in a collaterally-attacking § 1983 action after the state has already succeeded on a greater showing in a criminal trial.

### *B. Strong State Sovereignty Interests Demand Respect for State Court Decisions*

While the history and purpose of § 1983 offer no express impediments to the application of the favorable termination requirement to non-habeas-eligible plaintiffs bringing collaterally-attacking § 1983 claims, strong state sovereignty interests present compelling reasons for its adoption. Inherent concepts of

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161. *See supra* Part III.A.2.

162. Formerly § 1 of the Civil Rights Act of 1871.

163. It has been argued that the second and third aims of § 1983 espoused by the Court in *Monroe* are illusory in light of the substance of the congressional debates on § 1 of the Civil Rights Act of 1871. *See* Eric H. Zagrans, *"Under Color Of" What Law: A Reconstructed Model of Section 1983 Liability*, 71 VA. L. REV. 499, 527, 559–60 (1984).

164. Monroe v. Pape, 365 U.S. 167, 183 (1961) (recognizing the possibility of municipal liability in § 1983 claims), *overruled on other grounds by* Monell v. Dep't of Soc. Servs. of City of N.Y., 436 U.S. 658 (1978).

165. *See In re* Winship, 397 U.S. 358, 364 (1970).

166. *See* Grogan v. Garner, 498 U.S. 279, 286 (1991) (in the absence of any overriding individual interests, preponderance of the evidence is the default standard in civil suits).

constitutional federalism, analogous rules and doctrines, and concern for finality and consistency in judicial decision-making all counsel against unfettered access to § 1983.

*1. Constitutional Federalism Acknowledges the Importance of State Sovereignty*

Inherent concepts of federalism[167] in the United States Constitution give a clear indication of the strong deference to be afforded to state court decisions by the federal courts.[168] In Article III, § I of the Constitution, the judicial power is "vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."[169] Justice Scalia has noted the oddity of a position that would afford second-class standing to the state courts in their protection of federal rights when the Constitution does not require the creation of lower federal courts to address such claims.[170] The lower federal courts' lack of appellate power over state court decisions[171] and the Supreme Court's highly discretionary review of such cases[172] arise in part from this underlying principle of federalism in the Constitution. Indeed, the Supreme Court has recognized that federal and state courts are "equally bound to guard and protect rights secured by the [C]onstitution."[173] Applying the favorable termination requirement to a collaterally-attacking § 1983 plaintiff ensures respect for the states' undertaking of this duty implicitly recognized by the Constitution.

*2. Rules and Doctrines Analogous to Favorable Termination Support Its Adoption*

The importance of federal court deference to state court decisions is also evident in a number of congressional statutes and judicial doctrines. These analogous rules support the application of

167. "Federalism" is a term describing "[t]he legal relationship and distribution of power between the national and regional governments within a federal system of government." BLACK'S LAW DICTIONARY 644 (8th ed. 2004).

168. *See* Withrow v. Williams, 507 U.S. 680, 723 (1992) (Scalia, J., concurring).

169. U.S. CONST. art. III, § 1.

170. *Withrow*, 507 U.S. at 723.

171. The federal district courts are vested with original jurisdiction over certain claims. *See, e.g.*, 28 U.S.C. § 1331 (2006) (federal question jurisdiction); 28 U.S.C. § 1332 (2006) (diversity jurisdiction).

172. *See* Supreme Court Case Selections Act, Pub. L. No. 100-352, § 2(a)–(b), 102 Stat. 662 (1988).

173. *Ex parte* Royall, 117 U.S. 241, 251 (1886).

*Heck*'s favorable termination requirement to non-habeas-eligible plaintiffs bringing collaterally-attacking § 1983 actions by recognizing the important state sovereignty interests at stake.

*a. Federal Deference to State Court Decisions on State Taxes*

Congress enacted 28 U.S.C. § 1341 in order to prevent the federal courts from hearing cases concerning state tax disputes when state courts provide "a plain, speedy and efficient remedy" to address those disputes.[174] This statute shares the same rationale as the favorable termination requirement, namely, the recognition that a full and fair chance to litigate a claim in a competent state court supersedes any federal interests in adjudication. While 28 U.S.C. § 1341 deals exclusively with matters of *state* tax law as opposed to the federal claims at issue in § 1983, the federal rights a non-habeas-eligible plaintiff would most likely raise in his collaterally-attacking § 1983 action would be those applied against the states through the Due Process Clause of the Fourteenth Amendment, thus themselves becoming matters of state law.[175] If states have such a strong interest in the protection of their judicial decisions on tax policies, they must have a greater interest in protecting the weight and authority of their criminal convictions. *A fortiori*, a non-habeas-eligible plaintiff bringing a collaterally-attacking § 1983 action should be required to demonstrate a favorable termination to his underlying conviction.

*b.* Younger v. Harris *Abstention Doctrine*

The Supreme Court recognizes a "fundamental policy against federal interference with state criminal prosecutions,"[176] lending additional analogous support to the adoption of the favorable termination requirement when a non-habeas-eligible plaintiff brings a collaterally-attacking § 1983 action. In *Younger v. Harris*, the plaintiff sought injunctive relief against his pending state

174. 28 U.S.C. § 1341 (2006). The statute provides: "The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State." *Id.*

175. *See, e.g.*, Benton v. Maryland, 395 U.S. 784 (1969) (applying the double jeopardy provision of the Fifth Amendment against the states); Terry v. Ohio, 392 U.S. 1 (1968) (applying the Fourth Amendment bar on unreasonable searches and seizures against the states); Duncan v. Louisiana, 391 U.S. 145 (1968) (applying the Sixth Amendment's right to a trial by jury in criminal cases against the states).

176. Younger v. Harris, 401 U.S. 37, 46 (1971).

criminal prosecution.[177] The Court held that federal intervention would not be appropriate unless there was a threat of "irreparable injury"[178] to the plaintiff that was "'both great and immediate.'"[179] Non-habeas-eligible plaintiffs bringing collaterally-attacking § 1983 actions are not threatened with irreparable injury if they have procedural outlets for review of their convictions.[180] The other avenues of favorable termination provide these outlets.[181] Additionally, since the collaterally-attacking plaintiff is no longer incarcerated, he is no longer subject to any injury that may be called great or immediate.[182] While the *Younger* abstention[183] concerns pending state court proceedings, a state's interest in protecting the final judgments of its criminal proceedings is more substantial in light of judicial goals of finality and consistency.[184] The opportunity for continued litigation with the possibility of monetary recovery weakens the deterrent effect of the criminal law.[185]

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177. *Id.* at 39.

178. *Id.* at 46.

179. *Id.* (quoting Fenner v. Boykin, 271 U.S. 240, 243 n.2 (1926)). The Court did not address the applicability of the standard set forth in 28 U.S.C. § 2283 (2006), which provides: "A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." The Court has extended the applicability of the *Younger* doctrine to include claims for declaratory relief. Samuels v. Mackell, 401 U.S. 66 (1971). The Court in *Heck* suggested abstention might have been appropriate had Heck brought his § 1983 claim during the pendency of his criminal trial. Heck v. Humphrey, 512 U.S. 477, 487 n.8 (1994).

180. *See* Randell v. Johnson, 227 F.3d 300, 301 (5th Cir. 2000) (reasoning habeas corpus is not the only procedural vehicle to challenge a conviction).

181. *See Heck*, 512 U.S. at 486–87.

182. Justice Scalia, writing for a majority of the Court in *Spencer*, dismissed injury to reputation in such a situation as non-concrete. Spencer v. Kemna, 523 U.S. 1, 16 n.8 (1998). *See also* Paul v. Davis, 424 U.S. 693, 711–13 (1976) (mere injury to reputation not a deprivation of a liberty or property interest).

183. In *County of Allegheny v. Frank Mashuda Co.*, the Court described abstention as:

> [A]n extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy properly before it. Abdication of the obligation to decide cases can be justified under this doctrine only in the exceptional circumstances where the order to the parties to repair to the state court would clearly serve an important countervailing interest.

360 U.S. 185, 188–89 (1959).

184. *See infra* Part III.B.3.

185. *See* Teague v. Lane, 489 U.S. 288, 309 (1989).

*c. Full Faith and Credit: Res Judicata and Collateral Estoppel*

The preclusion doctrines of res judicata[186] and collateral estoppel,[187] like the favorable termination requirement, serve the important state interests of properly expending judicial resources, preventing the possibility of diametrically opposed judicial decisions, and encouraging reliance on the finality of judicial decisions.[188] The full faith and credit statute[189] requires federal courts to give state court judgments the same preclusive effect those judgments would receive by the courts of the state in which they were rendered.[190] Consequently, as long as a party has a full and fair chance to litigate his claim in state court, federal preclusion becomes a matter of the applicability of res judicata or collateral estoppel under state law. These preclusions may apply even when a § 1983 claimant was a criminal defendant in the underlying state court proceedings.[191] Thus, many cases in which a

186. "Under res judicata, a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action." Allen v. McCurry, 449 U.S. 90, 94 (1980) (citing Cromwell v. County of Sac., 94 U.S. 351, 352 (1876)). Res judicata is commonly called claim preclusion. *See id.* at 94 n.5.

187. "Under collateral estoppel, once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case." *Id.* at 94 (citing Montana v. United States, 440 U.S. 147, 153 (1979)). Collateral estoppel is commonly called issue preclusion. *See id.* at 94 n.5.

188. *Id.* at 94. These doctrines also serve the interest of the parties in limiting expenses related to litigation. *Id.*

189. 28 U.S.C. § 1738 (2006) provides:

> The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.
>
> The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.
>
> Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

190. *Allen*, 449 U.S. at 94–95.

191. *Id.* at 103–04. The Court found nothing in § 1983's language or legislative history indicating Congress intended to give state criminal judgments less weight than state civil judgments. *Id.* at 104. Additionally, federal courts are not bound by the doctrine of mutuality, which prevents non-parties to underlying litigation from claiming preclusion in later litigation of which they are a part.

non-habeas-eligible plaintiff brings a collaterally-attacking § 1983 action may be precluded if state law provides an expansive definition of what constitutes a "claim" or "issue." A non-habeas-eligible plaintiff's full and fair chance to litigate his federal claims during his underlying trial and appeal makes relitigation of those same claims in a § 1983 action untenable absent a showing of favorable termination.

*d.* Rooker-Feldman *Bar on Federal District Court Review*

State sovereignty interests supporting the adoption of the favorable termination requirement in collaterally-attacking § 1983 actions brought by non-habeas-eligible plaintiffs are manifest in the landscape of appellate review as well. The Supreme Court is vested with the right of appellate review of federal issues decided by the high court of any state.[192] The *Rooker-Feldman* doctrine[193] recognizes that because federal district courts almost exclusively exercise original jurisdiction over claims,[194] they are inadequate venues for reviewing state court decisions.[195] While success on a collaterally-attacking § 1983 action in a federal district court[196] would not, in fact, overturn the plaintiff's underlying state court conviction such that the decision may be considered a true

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*See* Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979) (permitting offensive use of issue preclusion); Blonder-Tongue Lab, Inc. v. Univ. of Ill. Found., 402 U.S. 313 (1971) (permitting defensive use of issue preclusion).

192. 28 U.S.C. § 1257(a) (2006) provides:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

193. *See* D.C. Court of Appeals v. Feldman, 460 U.S. 462 (1983); Rooker v. Fid. Trust Co., 263 U.S. 413 (1923).

194. *See supra* note 171. Federal district courts are given appellate jurisdiction over final judgments of bankruptcy courts, however. 28 U.S.C. § 158 (2006). Regardless, bankruptcy courts are federal, not state courts.

195. *See Feldman*, 460 U.S. at 482; *Rooker*, 263 U.S. at 416.

196. While the analogous bar of *Rooker-Feldman* is only applicable to federal district courts, the author does not imply that a non-habeas-eligible plaintiff bringing a collaterally-attacking § 1983 action may bring his claim in a state court without showing a favorable termination to his underlying conviction.

appellate review,[197] the effect of the decision, in practice, would be to impugn the validity of that conviction. The § 1983 action would scrutinize the sufficiency of a state criminal conviction through the means of what may be deemed a quasi-appellate tort action. Application of the favorable termination requirement to collaterally-attacking § 1983 actions brought by non-habeas-eligible plaintiffs safeguards the integrity of the state court conviction by preventing the circumvention of appropriate means of appellate review.

*e. Federal Habeas Deference to a State Court's Fourth Amendment Decisions*

The Supreme Court's deferential ruling in *Stone v. Powell*[198] also analogously illustrates the propriety of the favorable termination requirement in light of substantial state sovereignty interests. In that case, the Court rejected any supposed right of a state prisoner who had a "full and fair" opportunity to litigate his Fourth Amendment claim in a state court to argue deprivation of the exclusionary rule as grounds for relief in federal habeas corpus.[199] In a footnote to his majority opinion, Justice Powell highlighted the majority's faith in the state courts and the respect to be shown their decisions under the Constitution:

> Despite differences in institutional environment and the unsympathetic attitude to federal constitutional claims of some state judges in years past, we are unwilling to assume that there now exists a general lack of appropriate sensitivity to constitutional rights in the trial and appellate courts of the several States. State courts, like federal courts, have a constitutional obligation to safeguard personal liberties and to uphold federal law.[200]

It has been argued that the state interests at stake when a prisoner–plaintiff utilizes a collaterally-attacking § 1983 claim are much greater than the interests at stake when the plaintiff is not habeas-eligible.[201] In the former scenario, the state could be liable for monetary damages and would likely be forced to release the

197. Section 1983 "creates a species of tort liability," not criminal appellate review. Memphis Cmty. Sch. Dist. v. Stachura, 477 U.S. 299, 305 (1986).

198. 428 U.S. 465 (1976).

199. *Id.* at 494.

200. *Id.* at 494 n.35.

201. Note, *Defining the Reach of* Heck v. Humphrey*: Should the Favorable Termination Rule Apply to Individuals Who Lack Access to Habeas Corpus?*, 121 HARV. L. REV. 868, 888 (2008).

plaintiff if he was successful.[202] In the latter scenario, the state could merely be liable for damages if it lost, as the underlying conviction would still stand, and the plaintiff will have already served his time or paid his fine. This argument misses the point, however. The full and fair chance to litigate the claims at issue, as proposed in *Stone* and inherent in the other rules and doctrines above, is the real interest at play. Application of the favorable termination requirement to non-habeas-eligible plaintiffs bringing collaterally-attacking § 1983 claims merely ensures there is no excessive right to litigate.

*3. The State's Interest in the Finality and Consistency of Its Judicial Decisions*

Favorable termination serves the important judicial goals of "finality and consistency."[203] These goals are rooted in a deep respect for the competency of underlying court decisions. The Supreme Court highlighted this point succinctly in an 1836 decision:

> There is no principle of law better settled, than that every act of a court of competent jurisdiction shall be presumed to have been rightly done, till the contrary appears: this rule applies as well to every judgment or decree, rendered in the various stages of their proceedings from the initiation to their completion, as to their adjudication that the plaintiff has a right of action. Every matter adjudicated, becomes a part of their record; which thenceforth proves itself, without referring to the evidence on which it has been adjudged.[204]

The avenues of favorable termination provide a party with sufficient options in contesting what he alleges to be a federal rights violation undergirding his criminal conviction. One can imagine the length of time a federal issue, which a party had an opportunity to fully and fairly adjudicate in a state criminal trial and appeal, would continue to be litigated if given the opportunity to enter a federal forum. To be sure, such an extended period of litigation would be justified if the plaintiff demonstrated a favorable termination to his underlying conviction, as state sovereignty interests could then no longer be collaterally

202. *See supra* text accompanying note 28.
203. Heck v. Humphrey, 512 U.S. 477, 485 (1994).
204. Voorhees v. Jackson, 35 U.S. (10 Pet.) 449, 472 (1836).

compromised. In the absence of such a showing, however, concerns for finality and consistency should reign supreme.

Collaterally-attacking § 1983 claims are not cognizable under the common law principle that "civil tort actions are not appropriate vehicles for challenging the validity of outstanding criminal judgments."[205] The allowance of such actions and their possibility of success would undermine the sanctity of the criminal trial process as the primary means of publicly establishing the guilt or affirming the innocence of individuals within the United States.[206] In *Heck*, Justice Souter argued that the "broad language" of § 1983 cannot be narrowed by the common law, and thus the opportunity for a collaterally-attacking § 1983 action by a non-habeas-eligible plaintiff cannot be constrained without express statutory intent.[207] The problem with this reasoning is that the Court recognizes the common law does narrow the "broad language" of § 1983 through the availability of judicial and prosecutorial immunities.[208] Additionally, the intentional statutory omission of exclusive federal jurisdiction over § 1983 claims demonstrates a congressional understanding and endorsement of the fact that these federal claims can be given a full and fair treatment by the state courts.[209] A favorable termination requirement, then, does no more than prevent litigation from overflowing beyond the bounds of reasonableness.

Justice Souter described the inability of a non-habeas-eligible plaintiff to succeed on a collaterally-attacking § 1983 action without showing a favorable termination to his underlying conviction as a "patent anomaly" when compared with the ability of a former prisoner to succeed under § 1983 after release through federal habeas corpus.[210] There is nothing anomalous to this scenario, though, since both parties are required to make the *exact* same showing: favorable termination. The favorable termination requirement outlined in *Heck* recognizes four possibilities in demonstrating that a conviction has been, for all intents and purposes, invalidated.[211] To look to the availability of federal

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205. *Heck*, 512 U.S. at 486.

206. *See* Neder v. United States, 527 U.S. 1, 18 (1999) (citing Delaware v. Van Arsdall, 475 U.S. 673, 681 (1986)).

207. *Heck*, 512 U.S. at 502 (Souter, J., concurring) (citing Dennis v. Higgins, 498 U.S. 439, 443, 445 (1991)).

208. *See supra* Part III.A.2.

209. *See supra* Part III.A.1.

210. Spencer v. Kemna, 523 U.S. 1, 20–21 (1998) (Souter, J., concurring).

211. The four possibilities are: (1) reversal on direct appeal; (2) expunging by executive order; (3) declaration of invalidity by a state tribunal authorized to

habeas corpus alone, isolated from the other three avenues of recourse, appears to disregard the real concerns the Court had in *Heck*. The Court sought to make sure there were sufficient avenues to show favorable termination in every circumstance, even though each avenue might not be available in every circumstance. It seems then that, "as a matter of law,"[212] it would never be *impossible* for a plaintiff to show a favorable termination to his conviction because of the availability of the appellate process and the possibility of an executive pardon. Consistency in the application of *Heck*'s favorable termination requirement, then, works to ensure finality and consistency in judicial decisions.

### *C. Lingering Questions of Federal Habeas Interaction Caution Against Cognizability*

If Justice Souter's position were adopted, however, there are many questions to consider.[213] First, should a convict who had the opportunity to petition for a writ of federal habeas corpus while in prison, did not do so, and whose habeas claim was barred at the time of his release by the statute of limitations, still be allowed to bring a § 1983 action when released? Second, should a convict who had the opportunity to petition for a writ of federal habeas corpus while in prison and did not do so, but whose habeas claim was not barred by the statute of limitations at the time of his release, still be allowed to bring a § 1983 action after his release? Third, should a convict who had a pending petition for a writ of federal habeas corpus at the time of his release, which was subsequently dismissed for mootness, still be allowed to bring a § 1983 action after his release?[214] Fourth, should a convict who had no opportunity to petition for a writ of federal habeas corpus while in prison, because, as a practical matter, he was not in prison long enough to exhaust state remedies, still be allowed to bring a § 1983 action after his release? Fifth, should a convict who was convicted and fined, but never imprisoned, still be allowed to bring a § 1983 action?

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make such a determination; and (4) a calling into question by a federal court's issuance of a writ of habeas corpus. *Heck*, 512 U.S. at 486–87.

212. *Spencer*, 523 U.S. at 21 (Souter, J., concurring).

213. All of these scenarios assume that the plaintiff has not procured a favorable termination to his underlying conviction and is seeking to bring a collaterally-attacking § 1983 action.

214. This is the exact scenario applicable to the plaintiff in *Spencer*, although he had not yet filed a § 1983 action.

Undoubtedly, Justice Souter would answer with a categorical "yes" to the questions presented by the third, fourth, and fifth scenarios.[215] The second scenario is more problematic, but it is likely that if the plaintiff's opportunity at a federal forum had not passed because of habeas' statute of limitations, but was merely cut off by release of the prisoner, Justice Souter would still allow the potential plaintiff the opportunity to bring a § 1983 action. This scenario seems especially difficult because it could never be determined whether the party actually intended to petition for federal habeas review in prison before the statute of limitations ran.

If a plaintiff had the opportunity to address his claims in a federal forum, yet waived that opportunity by allowing the statute of limitations to run, as is the case in the first scenario, it would be surprising if Justice Souter acknowledged the plaintiff's right to another bite at the federal apple. Yet at the time *Heck* was decided,[216] there was no statute of limitations on federal habeas corpus review.[217] The time restrictions on federal habeas corpus review did not appear until the enactment of the Antiterrorism and Effective Death Penalty Act of 1996.[218] Justice Souter must have been operating under one of two assumptions: either (1) that § 1983 was so far reaching that it would not matter if the plaintiff ignored his opportunity at a federal forum through federal habeas corpus while in prison or (2) the plaintiff waived his right to a federal forum once released from prison if he failed to take advantage of a reasonable opportunity while in prison to petition for a writ of federal habeas corpus. The second assumption begs the troubling question of what constitutes a "reasonable opportunity."

The above hypothetical scenarios illustrate the potential problems that arise when making one federal remedy for a class of persons solely dependent on the availability of another, instead of evaluating all remedies in context with one another. While a § 1983 action may have broad reach, that reach is not unlimited. A full and fair chance to litigate claims in a forum acceptable to the federal remedy should foreclose the possibility of further litigation of those claims absent a showing of favorable termination. The

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215. *See generally Spencer*, 523 U.S. at 19 (Souter, J., concurring) (arguing that there should be no favorable termination requirement to a person situated in scenario (3)); *Heck*, 512 U.S. at 491–503 (Souter, J., concurring) (arguing that there should be no favorable termination requirement to a person situated in either scenario (4) or (5)).

216. *Heck* was decided on June 24, 1994.

217. *See* Clay v. United States, 537 U.S. 522, 528 (2003).

218. Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of 21 & 28 U.S.C.).

*Heck* requirement recognizes this ideal by guarding against the "creation of two conflicting resolutions arising out of the same or identical transaction"[219] and safeguarding the practice of judicial economy by finding such exhausted claims to be non-cognizable.

### *D. Exceptions and Limitations to the Favorable Termination Requirement*

In light of the foregoing findings,[220] a non-habeas-eligible plaintiff bringing a collaterally-attacking § 1983 action must demonstrate a favorable termination to his underlying conviction insofar as he had a full and fair chance to litigate his federal claims as defenses in his underlying conviction. Justice Souter outlined a scenario in which a full and fair chance to litigate federal claims was not available to the plaintiff during state criminal proceedings, presenting a true "patent anomaly"[221] in the distribution of justice that demands the setting aside of the favorable termination requirement, however: a convicted party, after having served his prison term or paid a fine, learns that "state officials deliberately withheld exculpatory material"[222] at his trial.

In *Brady v. Maryland*,[223] the Supreme Court contemplated an even more expansive scenario when it held "that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, *irrespective of the good faith or bad faith* of the prosecution."[224] Later Court decisions have extended the rule to include evidence not requested by the defense[225] and that known only to the police.[226] Such a due process violation occurs only if disclosure would have resulted in a "reasonable probability" that a verdict favorable to the defendant would have been reached.[227]

To be sure, evidence of "actual innocence" as to a plaintiff's underlying conviction, absent a showing state actors withheld that evidence, would not be grounds to lay aside the favorable

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219. *Heck*, 512 U.S. at 484.
220. *See supra* Part III.A–C.
221. *See* Spencer v. Kemna, 523 U.S. 1, 20–21 (1998) (Souter, J., concurring).
222. *Heck*, 512 U.S. at 502 (Souter, J., concurring).
223. 373 U.S. 83 (1963).
224. *Id.* at 87 (emphasis added).
225. United States v. Agurs, 427 U.S. 97, 107 (1976).
226. Kyles v. Whitley, 514 U.S. 419, 438 (1995).
227. United States v. Bagley, 473 U.S. 667, 682 (1985).

termination requirement.[228] Section 1983 actions are only concerned with the violation of an individual's federally protected rights by actors operating under color of state law.[229] Consequently, an unawareness of innocence by the courts is not grounds for recovery and is certainly not indicative of the absence of a full and fair chance to litigate the issues known to the parties. Conclusive proof of actual innocence can be utilized, however, as a vehicle to possibly gain a favorable termination through an executive order expunging the conviction.[230] The issue of actual innocence presents a much more troublesome situation when the pleading party is still in jail, though, as the deprivation of his liberty despite actual innocence may not be a reviewable constitutional injury.[231]

If, however, under the due process issues espoused in *Brady* and its progeny, a party does not have a full and fair chance to litigate his federal claims because he was deprived by state actors of exculpatory evidence material to his underlying conviction, and this fact is not discovered until after the exhaustion of available remedies in the state criminal appeals process,[232] the favorable termination requirement has no place in barring recovery under § 1983. To find otherwise would leave such a party in a truly anomalous situation: the absence of a federal *or* state venue to address state actors' alleged deprivations of his federal rights. One cannot have a full and fair chance to litigate his claims when, by the negligence or deception of others, his pursuit of those claims is unlawfully thwarted. Unfortunately, Justice Scalia apparently failed to account for this real possibility in his framing of the issues at stake.

Allowing for an exception to the applicability of the favorable termination requirement in collaterally-attacking § 1983 actions in the above situation serves a number of important purposes. First, it allows the party alleging a federal rights violation a federal remedy by which he can adjudicate his claim. The § 1983 plaintiff could still bring his claim in federal *or* state court, however.[233] Second, a

228. *Cf.* Herrera v. Collins, 506 U.S. 390, 404 (1993) (reasoning that "actual innocence" is not a constitutional claim).

229. *See supra* note 1.

230. *See Herrera*, 506 U.S. at 417.

231. *See id.* at 400 (noting federal habeas courts do not review questions of fact, but claims of unconstitutional incarceration).

232. Kyles v. Whitley, 514 U.S. 419, 438 (1995); *Bagley*, 473 U.S. at 682; United States v. Agurs, 427 U.S. 97, 107 (1976); Brady v. Maryland, 373 U.S. 83, 87 (1963).

233. *See* discussion *supra* Part III.A.1 regarding state court concurrent jurisdiction over § 1983 claims.

favorable ruling for the plaintiff in such a § 1983 action bolsters his ability to receive a favorable termination to his underlying conviction if he has not already received one. The practical likelihood that the state executive or a state tribunal so authorized would expunge the plaintiff's underlying conviction is increased upon a showing that a federal tribunal has recognized the federal law deficiencies manifest in that conviction. Third, public perception of the implicit fairness of the judicial process is bolstered by recognition that the appearance of truth will have its day in court. Finally, the availability of a full and fair adjudication of alleged federal law violations under a § 1983 action helps ensure guilty parties ultimately feel the weight of their actions not only in their pocketbooks, but in the public notice of their fault as well. Moreover, the natural deterrent effect such an exception would have on the negligent and intentional mishandling of evidence in the future seems obvious.

Such a "middle ground" appears to address the inherent limitations of the two positions espoused by Justices Scalia and Souter, respectively. It is a workable remedy to the infighting of the Court and the confusion of the circuits. It recognizes that a full and fair chance to litigate one's federal claims in an adequate venue is all that § 1983 requires and ensures the opportunity of every party subject to a criminal conviction just that chance—nothing more,[234] nothing less.[235]

The application of *Heck*'s favorable termination requirement to non-habeas-eligible plaintiffs bringing collaterally-attacking § 1983 claims has one major drawback. Inevitably, there will be instances in which a convicted criminal's federal claims were not justly adjudicated through the state criminal judicial process. Given the safeguards of the appeals process, though, including the opportunity to apply for a writ of certiorari from the Supreme Court and the possibility of an executive check through the pardon process, it would be difficult to argue that such injustices are simply ignored or are the product of mere state indifference. At some point, the recognition that a full and fair chance to litigate has been provided turns the balance in favor of finality. Obviously, the availability of § 1983 without an obligation to show a favorable termination is not an assurance of success in that action. This reality highlights the undeniable value of a full and fair chance to litigate. If the aim of the judicial process is perfection in judgment, rather than the *opportunity* for perfection in judgment, the courts,

234. Justice Souter's position.
235. Justice Scalia's (apparent) position.

and the men and women party to them, will find themselves forever frustrated by the unattainable.

Exempting non-habeas-eligible § 1983 plaintiffs bringing collaterally-attacking actions from a showing of favorable termination to their underlying convictions when they have not had a full and fair chance to litigate their claims, as outlined above, provides an effective means of safeguarding the integrity of the judicial process. While this exception to the favorable termination requirement cannot ensure the correctness of the decisions made by the courts considering parties' federal claims, it does ensure a full and fair opportunity to have those claims heard.

## IV. CONCLUSION

The circuit courts of appeals are split over whether a collaterally-attacking § 1983 claim brought by a non-habeas-eligible plaintiff is cognizable. In light of the history and purpose of § 1983, important state sovereignty interests, and lingering questions of federal habeas interaction, a non-habeas-eligible § 1983 plaintiff should be required to show a "favorable termination" to his underlying criminal conviction when his civil suit would necessarily attack the validity of his criminal conviction or sentence. However, for equitable reasons, this rule should not apply when state actors withheld exculpatory evidence from the plaintiff material to his underlying conviction, and such is not discovered until after the exhaustion of available remedies in the state criminal appeals process. The favorable termination requirement recognizes the reality of § 1983 as a tort remedy that cannot override a full and fair chance to litigate identical claims in a state criminal proceeding, without barring claims of which a given plaintiff was unlawfully deprived of that full and fair chance by state actors. This "middle ground" compromise of the views espoused by Justices Scalia and Souter is fair in theory and workable in practice.

*Thomas Stephen Schneidau*[*]

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