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NOTE

PRISONER LITIGATION AND THE MISTAKE OF *JENKINS V. HAUBERT*

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The interplay between the two most common sources of federal court prisoner litigation, 42 U.S.C. § 1983 and the federal habeas corpus statute, 28 U.S.C. § 2254, has long been the source of vigorous judicial and academic discourse. This Note uses a recent Second Circuit decision, Jenkins v. Haubert, *to illustrate the lower federal courts' confusion over the proper application of an important limit on prisoner litigation, the favorable-termination rule. The author asserts that the* Jenkins *court erroneously sidestepped Supreme Court precedent, specifically,* Heck v. Humphrey *and its progeny.* Heck*'s favorable-termination rule requires a prisoner to show that her conviction was reversed, expunged, invalidated, or called into question by a federal court's issuance of a writ of habeas corpus before she may bring a damages claim under § 1983 alleging unconstitutional conviction or im-*

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prisonment. This Note argues that the Jenkins *court read* Heck *and its progeny too narrowly. Specifically, it criticizes the* Jenkins *court for refusing to apply the favorable-termination rule to former prisoners and to challenges to disciplinary segregation that have no effect on the overall length of confinement.*

This Note concludes that until the Supreme Court provides a more clearly defined rule, the lower courts should read Heck *and its progeny as standing for the general proposition that in order to recover under a § 1983 claim alleging unconstitutional conviction, sentence, or intraprison confinement, a plaintiff must satisfy the requirements of the favorable-termination rule.*

INTRODUCTION

In 1997, prisoners filed just under 65,000 petitions in the United States district courts, a twenty-two and one-half percent increase over the number filed just four years earlier.[1] Those 65,000 prisoner petitions accounted for almost twenty-five percent of the entire civil caseload in federal district courts.[2] The two most "fertile sources"[3] of these petitions are 42 U.S.C. § 1983[4] and the federal habeas corpus statute, 28 U.S.C. § 2254,[5] both of which provide remedies for ag-

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1 *See* ADMIN. OFFICE OF THE U.S. COURTS, FEDERAL JUDICIAL CASELOAD: A FIVE-YEAR RETROSPECTIVE 14 (1997), *available at* http://www.uscourts.gov/publications.htm.

2 *See id.*

3 Heck v. Humphrey, 512 U.S. 477, 480 (1994).

4 Section 1983 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.

42 U.S.C. § 1983 (1994). Professor Martin Schwartz and Judge George Pratt have noted that "[s]ection 1983 is a vital part of American law." Martin A. Schwartz & Hon. George C. Pratt, *Section 1983 Litigation*, 14 TOURO L. REV. 299, 299 (1998).

5 Section 2254 provides in pertinent part:

> (a) [A] district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.
>
> (b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.
>
> (c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

28 U.S.C. § 2254 (1994).

grieved prisoners. At the intersection of these two statutes, confusion abounds.

In *Heck v. Humphrey*,[6] the Supreme Court held that a prisoner may not bring a damages action under § 1983 alleging unconstitutional conviction or imprisonment unless the conviction has been reversed, expunged, invalidated, or called into question by a federal court's issuance of a writ of habeas corpus.[7] This rule prevents prisoners from evading the habeas statute's strict exhaustion requirements by labeling the action one arising under § 1983.[8] At the time, the "*Heck* rule" seemed a "relatively simple way to avoid collisions at the intersection of habeas and § 1983."[9] However, the rule has proven to be anything but simple.

Three years later, *Edwards v. Balisok*[10] extended the *Heck* rationale to suits attacking intraprison disciplinary sanctions that affect the overall length of confinement.[11] Unfortunately, *Edwards* raised as many questions as it answered and caused an abundance of confusion in the lower courts.[12] Does the *Heck-Edwards* rule apply to sanctions that do not affect the overall length of confinement? Does it apply to *former* prisoners, for whom habeas corpus relief is not available?[13]

In June of 1999, the Second Circuit handed down *Jenkins v. Haubert*,[14] holding that *Heck* and its progeny do not bar such suits.[15] The *Jenkins* court resolved a split amongst its own district courts, but a split amongst the circuit courts continues.[16] This Note uses the *Jenkins* opinion as an illustration of the lower courts' confusion as to how to resolve this important issue. Moreover, this Note argues that the Second Circuit now joins those sister circuits that have erroneously side-

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6 512 U.S. 477 (1994).

7 *See id.* at 486-87.

8 *See infra* Part I.B.

9 *Heck*, 512 U.S. at 498 (Souter, J., concurring).

10 520 U.S. 641 (1997).

11 *See infra* Part I.C.

12 *See infra* Part II; *see also* Bradley v. Evans, No. 98-5861, 2000 WL 1277229, at *5 (6th Cir. Aug. 23, 2000) (table opinion, full text available on Westlaw) ("This area of the law . . . remains in a state of flux." (citation omitted)).

13 According to Professor Schwartz and Judge Pratt, these questions are "certainly among the most important issues regarding Section 1983." Schwartz & Pratt, *supra* note 4, at 299.

14 179 F.3d 19 (2d Cir. 1999).

15 *See infra* Part III.B.

16 *See* Melissa L. Koehn, *The New American Caste System: The Supreme Court and Discrimination Among Civil Rights Plaintiffs*, 32 U. MICH. J.L. REFORM 49, 91 (1998) ("As is readily obvious, *Heck* did not clarify [§ 1983 litigation]."); Martin A. Schwartz, *Supreme Court Section 1983 Developments*, 15 TOURO L. REV. 1483, 1488 (1999) (noting that "*Heck* has generated all kinds of problems"); Eric J. Savoy, Comment, Heck v. Humphrey: *What Should State Prisoners Use When Seeking Damages from State Officials . . . Section 1983 or Federal Habeas Corpus?*, 22 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 109, 110 (1996) (claiming that the *Heck* decision "makes an already difficult area of [the] law even more complex").

stepped the requirements of *Heck* and its progeny. While the result is superficially appealing, *Jenkins* is an inaccurate reading of Supreme Court precedent.

Part I chronicles the development of applicable Supreme Court precedent, beginning with *Heck* and proceeding to *Edwards v. Balisok*[17] and *Spencer v. Kemna*.[18] Part II describes the lower courts' confusion regarding the application of this precedent and reveals the sharp divide over the reach of *Heck* and its progeny. Part III discusses the *Jenkins* decision itself, and Part IV argues that the *Jenkins* court erroneously held *Heck*'s favorable-termination rule inapplicable to a former prisoner who had challenged the procedures afforded to him in a disciplinary hearing that resulted in a period of solitary confinement. Part IV also argues that the court failed to adequately tackle Jenkins's two analytically distinct due process claims and suggests a better approach.

I
THE DEVELOPMENT OF THE FAVORABLE-TERMINATION REQUIREMENT

A. Section 1983 and the Habeas Statute: A Brief History

In order to properly examine the difficulties surrounding *Heck* and its progeny, it is first necessary to briefly discuss two important federal statutes: 42 U.S.C. § 1983 and 28 U.S.C. § 2254.[19]

The Civil Rights Act of 1871, a Reconstruction Era statute commonly referred to as the Ku Klux Klan Act, was a "crucial ingredient[ ] in the basic alteration of our federal system."[20] Section 1983 derives from section 1 of the 1871 Act[21] and provides a remedy for individuals harmed by unconstitutional action taken under color of state law.[22] The purpose of § 1983 was to "interpose the federal courts between the States and the people, as guardians of the people's federal rights,"[23] especially when state courts were unable or unwilling to en-

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17 520 U.S. 641 (1997).

18 523 U.S. 1 (1998).

19 For additional discussion of the interplay between § 1983 and the habeas statute, see RICHARD H. FALLON ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1513-15 (4th ed. 1996); PETER W. LOW & JOHN C. JEFFRIES, JR., FEDERAL COURTS AND THE LAW OF FEDERAL-STATE RELATIONS 1134-67 (4th ed. 1998); Martin A. Schwartz, *The* Preiser *Puzzle: Continued Frustrating Conflict Between the Civil Rights and Habeas Corpus Remedies for State Prisoners*, 37 DEPAUL L. REV. 85, 88-111 (1988).

20 Patsy v. Fla. Bd. of Regents, 457 U.S. 496, 503 (1982).

21 *See* CHARLES ALAN WRIGHT, LAW OF FEDERAL COURTS 133-34 (5th ed. 1994).

22 *See* Mitchum v. Foster, 407 U.S. 225, 242 (1972).

23 *Id.* (citations omitted); *see also* WRIGHT, *supra* note 21, at 137 ("The basic purpose of . . . § 1983 is to compensate persons for injuries caused by the deprivation of constitutional rights.").

force those rights.[24] Congress intended to "'throw open the doors of the United States courts to individuals who . . . suffered . . . the deprivation of constitutional rights."[25]

While Congress clearly intended the Civil Rights Act to provide a federal forum for redressing constitutional violations, Congress did not fashion the federal remedy to displace the availability of state courts to hear similar claims.[26] Nevertheless, the Supreme Court has consistently held that, in order to bring an action under § 1983, it is unnecessary for an individual to exhaust state remedies.[27]

However, exhaustion of state remedies is a necessary prerequisite to seeking relief under the relevant federal habeas corpus statute, § 2254.[28] The "essence of habeas corpus is an attack by a person in custody upon the legality of that custody, and . . . the traditional function of the writ is to secure release from illegal custody."[29] Habeas corpus is "of immemorial antiquity"[30] and is often referred to as the "Great Writ."[31]

Since both § 1983 and the habeas statute address constitutional violations, the two often overlap. However, as Professor Schwartz notes, "[t]his hardly means that they are fungible."[32] Indeed, because habeas requires exhaustion, while § 1983 does not, the intersection of the two statutes has yielded a great deal of litigation.[33] As noted by Justice Souter, the "general" civil rights statute and the "specific" habeas corpus statute not only have the potential to overlap and intersect, but they are on a direct "collision course."[34]

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24 *See* Schwartz, *supra* note 19, at 89 ("The Congress that adopted the 1871 Act decided that a federal remedy for constitutional deprivations was necessary because state authorities were either unwilling or unable to control the widespread violence of the Ku Klux Klan against blacks and their supporters.").

25 *Patsy*, 457 U.S. at 504 (quoting remarks of Rep. Lowe).

26 *See Patsy*, 457 U.S. at 506 (noting that "many legislators interpreted [section 1 of the 1871 Act] to provide dual or concurrent forums in the state and federal system, enabling the plaintiff to choose the forum in which to seek relief"); Monroe v. Pape, 365 U.S. 167, 183 (1961), *overruled by* Monell v. Dep't of Soc. Servs., 436 U.S. 658 (1978) ("The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked.").

27 *See, e.g., Patsy*, 457 U.S. at 506; Preiser v. Rodriguez, 411 U.S. 475, 494-96 (1973).

28 *See supra* note 5. The statute provides that a writ of habeas corpus "shall not be granted" unless the "applicant has exhausted the remedies available in the courts of the State." 28 U.S.C. § 2254(b).

29 *Preiser*, 411 U.S. at 484.

30 WRIGHT, *supra* note 21, at 350.

31 *Id.* at 351.

32 Schwartz, *supra* note 19, at 98.

33 *See supra* note 19.

34 Heck v. Humphrey, 512 U.S. 477, 492 (1994) (Souter, J., concurring in judgment).

B. *Heck v. Humphrey*

The issue presented in *Heck v. Humphrey* was "whether a state prisoner may challenge the constitutionality of his conviction in a suit for damages under 42 U.S.C. § 1983"[35] without first obtaining a writ of habeas corpus.

An Indiana state court convicted the petitioner, Roy Heck, of voluntary manslaughter and sentenced him to fifteen years in state prison.[36] While still incarcerated, Heck filed a § 1983 suit in the United States District Court for the Southern District of Indiana, claiming that county prosecutors and investigators had, among other things, "engaged in an 'unlawful, unreasonable, and arbitrary investigation' leading to [Heck's] arrest; 'knowingly destroyed' evidence 'which was exculpatory in nature and could have proved [Heck's] innocence'; and caused 'an illegal and unlawful voice identification procedure' to be used at [his] trial."[37] He sought compensatory and punitive damages.[38]

Justice Scalia first noted that the case "lies at the intersection of the two most fertile sources of federal-court prisoner litigation—the Civil Rights Act of 1871 . . . and the federal habeas corpus statute."[39] He then began the majority's analysis by discussing *Preiser v. Rodriguez*,[40] in which state prisoners lost good-time credits as the result of disciplinary hearings.[41] The *Preiser* plaintiffs sought an injunction restoring their good-time credits, relief that would have ended their sentences immediately.[42]

The *Preiser* Court held that "habeas corpus is the exclusive remedy for a state prisoner who challenges the fact or duration of his confinement and seeks immediate or speedier release, even though such a claim may come within the literal terms of § 1983."[43] In dicta, the *Preiser* Court also suggested that a prisoner seeking only damages and not immediate release, and thereby not attacking the fact or length of confinement, may properly bring a § 1983 suit.[44] However, other dicta noted the possibility of situations in which § 1983 damage suits essentially attack the conviction's validity, and thus habeas consti-

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35 *Heck*, 512 U.S. at 478. Professor Schwartz and Judge Pratt view the case as "an exceedingly important decision." Schwartz & Pratt, *supra* note 4, at 323.

36 *See Heck*, 512 U.S. at 478.

37 *Id.* at 479.

38 *See id.*

39 *Id.* at 480.

40 411 U.S. 475 (1973).

41 *See id.* at 476. Good-time credit is "awarded for good conduct and reduces [the] period of sentence which [a] prisoner must spend in prison." BLACK'S LAW DICTIONARY 694 (6th ed. 1990).

42 *See Preiser*, 411 U.S. at 476-77.

43 *Heck*, 512 U.S. at 481.

44 *See Preiser*, 411 U.S. at 489.

tutes the appropriate vehicle for relief, overriding the "general terms of § 1983."[45]

The *Heck* majority found it unnecessary to apply the muddled reasoning[46] of the *Preiser* dicta[47] and interpreted *Preiser*'s narrow holding as applying only to prisoners seeking release from custody.[48] Since Heck asked only for monetary damages, the Court analogized his § 1983 suit to a suit alleging malicious prosecution. Noting that § 1983 "creates a species of tort liability,"[49] Justice Scalia explored the common law tort principle that a civil suit is an improper vehicle to mount a collateral attack on an outstanding criminal conviction.[50]

In order to bring a successful suit for malicious prosecution, the accused must first obtain a favorable judgment in the criminal prosecution.[51] The Court explained that this requirement "'avoids parallel litigation over the issues of probable cause and guilt.'"[52] Without this rule, a claimant would be able to succeed in a tort action while the underlying criminal conviction still stands. The possibility of that situation contravenes "'strong judicial policy against the creation of two conflicting resolutions arising out of the same or identical transaction.'"[53] Permitting parallel litigation would effectively allow a convicted criminal to bring a collateral attack in the form of a civil suit.[54]

Extending the analogy of malicious prosecution, the Court concluded that "the hoary principle that civil tort actions are not appropriate vehicles for challenging the validity of outstanding criminal judgments applies to § 1983 damages actions that necessarily require the plaintiff to prove the unlawfulness of his conviction or confinement."[55] The Court then announced its governing rule:

> We hold that, in order to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by ac-

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45 *Id.* at 490.

46 Justice Scalia characterized the dicta of *Preiser* as "unreliable, if not . . . unintelligible." *Heck*, 512 U.S. at 482.

47 Professor Schwartz notes that the ambiguous *Preiser* decision resulted in frustrating attempts of lower courts to solve "*Preiser* Puzzles." Schwartz, *supra* note 19, at 87-88.

48 *See Heck*, 512 U.S. at 483 ("Thus, the question posed by § 1983 damages claims that do call into question the lawfulness of conviction or confinement remains open.").

49 *Heck*, 512 U.S. at 483 (quoting Memphis Cmty. Sch. Dist. v. Stachura, 477 U.S. 299, 305 (1986)). According to Professor Beermann, the Court's characterization of § 1983 as creating a "'species of tort liability'" is a "familiar adage." Jack M. Beermann, *Common Law Elements of the Section 1983 Action*, 72 CHI.-KENT L. REV. 695, 712 (1997) (quoting *Heck*, 512 U.S. at 483 (quoting, respectively, *Stachura*, 477 U.S. at 305)).

50 *See Heck*, 512 U.S. at 483-87.

51 *See* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 119, at 874 (5th ed. 1984).

52 *Heck*, 512 U.S. at 484 (quoting 8 S. SPEISER ET AL., AMERICAN LAW OF TORTS § 28:5, at 24 (1991)).

53 *Id.*

54 *See id.*

55 *Id.* at 486.

> tions 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 determination, or called into question by a federal court's issuance of a writ of habeas corpus, 28 U.S.C. § 2254.[56]

Thus, the Court concluded that a district court judge hearing a prisoner's § 1983 suit must determine whether a successful claim would necessarily imply the invalidity of the underlying conviction or sentence.[57]

Justice Souter concurred in the judgment but questioned Justice Scalia's malicious prosecution analogy.[58] Specifically, Justice Souter asserted that relying on the majority's malicious prosecution analogy would lead to the conclusion that a person convicted of a crime is unable to bring a § 1983 damages claim, a position inconsistent with "statutory interpretation."[59] Rather than relying on the Court's reasoning, Justice Souter (with whom Justices Blackmun, Stevens, and O'Connor joined) relied upon *Preiser* dicta, concluding that allowing Heck to pursue his claim in federal court "'would wholly frustrate explicit congressional intent.'"[60] In Justice Souter's view, the *Heck* holding is limited to the proposition that a state prisoner may bring a § 1983 damages claim for unconstitutional confinement, but only if he is able to show that a federal court has previously established the invalidity of that confinement.[61] However, the concurring Justices refused to read the majority's opinion so broadly as to bar individuals for whom habeas is not available (those individuals not "in custody"[62]) from bringing suit under § 1983 for unconstitutional conviction or imprisonment; to do so would "deny any federal forum for claiming a deprivation of federal rights,"[63] an assertedly "untoward result."[64]

In response to Justice Souter's concern for former prisoners who are unable to bring postconviction challenges,[65] the majority maintained that "the principle barring collateral attacks—a longstanding and deeply rooted feature of both the common law and our own juris-

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56 *Id.* at 486-87.

57 *See id.* at 487.

58 *See id.* at 496 (Souter, J., concurring in judgment).

59 *Id.* (Souter, J., concurring in judgment).

60 *Id.* at 498 (Souter, J., concurring in judgment) (quoting Preiser v. Rodriguez, 411 U.S. 475, 489 (1973)).

61 *See id.* (Souter, J., concurring in judgment).

62 28 U.S.C. § 2254(a); *see also Heck*, 512 U.S. at 497 (Souter, J., concurring in judgment) (discussing *Preiser* and 28 U.S.C. § 2254).

63 *Heck*, 512 U.S. at 500 (Souter, J., concurring in judgment).

64 *Id.* (Souter, J., concurring in judgment).

65 Regarding such individuals, Justice Scalia quipped: "of which no real-life example comes to mind." *Id.* at 490 n.10.

prudence—is not rendered inapplicable by the fortuity that a convicted criminal is no longer incarcerated."[66] It is not the federal courts' province, Justice Scalia argued, to "provide a remedy for all conceivable invasions of federal rights,"[67] a result which would alter the "entire landscape of our § 1983 jurisprudence."[68]

C. *Edwards v. Balisok*

Three years later, in *Edwards v. Balisok*,[69] the Court once again visited prisoner suits, extending the reach of *Heck* to intraprison administrative sanctions. The question before the Court was whether a state prisoner's damages claim, challenging the validity of intraprison disciplinary procedures that resulted in a revocation of his good-time credits, was cognizable under § 1983.[70]

The plaintiff in *Edwards*, Jerry Balisok, alleged that the procedures used in his prison disciplinary hearings were inadequate. The district court ruled that a judgment in Balisok's favor would "'necessarily imply the invalidity of the disciplinary hearing and the resulting sanctions,'"[71] and thus his § 1983 suit was not cognizable under *Heck*.[72] The Ninth Circuit reversed, holding that Balisok's suit did not fall within the purview of *Heck*, because Balisok challenged only the procedures used in the disciplinary hearing, not the good-time credit deprivation itself.[73]

The unanimous Supreme Court, per Justice Scalia, recognized that the Ninth Circuit was correct in distinguishing between a request for damages for deprivation of good-time credits as a procedural matter and a request for damages for deprivation of those credits as a substantive matter.[74] The Court disagreed, however, that this distinction was dispositive and noted that the Ninth Circuit's position ignored the distinct possibility that the nature of the procedural challenge could necessarily imply the invalidity of the disciplinary judgment.[75] Indeed, if Balisok established the deceit and bias of the prison officials, he would be entitled to have his disciplinary convic-

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66 *Id.*

67 *Id.*

68 *Id.*

69 520 U.S. 641 (1997). Professor Schwartz and Judge Pratt have suggested that *Edwards* was "the Section 1983 sleeper of the year." Schwartz & Pratt, *supra* note 4, at 324.

70 *See Edwards*, 520 U.S. at 643.

71 *Id.* at 644.

72 *See id.*

73 *See id.*

74 *See id.* at 645 (noting that "[t]he distinction between these two sorts of claims is clearly established in our case law, as is the plaintiff's entitlement to recover at least nominal damages under § 1983 if he proves the former one without also proving the latter one") (citing Cary v. Piphus, 435 U.S. 247, 266-67 (1978)).

75 *See id.*

tion set aside.[76] Thus, the Court concluded that Balisok's claim for damages, based on procedural defects in the prison disciplinary hearing, necessarily implied the invalidity of the punishment imposed and was therefore not cognizable under § 1983.[77]

The majority also reemphasized that neither *Heck* nor *Edwards* imposed an exhaustion requirement upon § 1983 and pointed out that the plaintiff would not necessarily be able to proceed under § 1983 even if he had exhausted all of the available state remedies.[78] Either the intraprison disciplinary conviction has been overturned and the claim may proceed under § 1983, or it has not been overturned, in which case the claim "is not cognizable and should be dismissed."[79]

Justice Ginsburg wrote a separate concurrence, in which Justices Souter and Breyer joined. While Justice Ginsburg agreed that Balisok's allegations of decision-maker bias and deceit were not cognizable under § 1983, she opined that his other procedural claims would not necessarily imply the invalidity of his good-time credit deprivation and were immediately cognizable under § 1983.[80]

D. *Spencer v. Kemna*

Spencer v. Kemna[81] exacerbated the confusion in the courts of appeals over proper application of *Heck* and *Edwards*. The plaintiff in *Spencer* filed a habeas corpus challenge to a hearing that resulted in revocation of his parole. Spencer completed his prison term before the case was finally disposed of, and the Court confronted the issue of whether his petition was moot.[82]

Spencer contended that, even though he was no longer in custody, his habeas corpus petition could not be moot, since *Heck* and *Edwards* required him to demonstrate the invalidity of his parole revocation before proceeding under § 1983.[83] In other words, Spencer argued that since he was not allowed to bring his § 1983 suit until a federal court issued a writ of habeas corpus, thereby overturning the hearing, his habeas corpus petition could not be moot. Justice Scalia, writing the plurality opinion, rebuffed Spencer's contention as a "great non sequitur, unless one believes (as we do not) that a § 1983 action for damages must always and everywhere be available."[84] However, the plurality noted that if Spencer were to seek damages for in-

76 *See id.* at 647.
77 *See id.* at 648.
78 *See id.* at 649.
79 *Id.*
80 *See id.* at 649-50 (Ginsburg, J., concurring).
81 523 U.S. 1 (1998).
82 *See id.* at 3.
83 *See id.* at 17.
84 *Id.*

adequate hearing procedures and not for reaching the wrong result, then so long as the alleged defects did not necessarily imply the invalidity of the punishment, *Heck*'s favorable-termination requirement would not apply.[85]

Justice Souter wrote another concurring opinion, in which Justices O'Connor, Ginsburg, and Breyer joined. Disagreeing with the plurality's reading of *Heck*, Justice Souter reiterated that the reach of § 1983 should not be limited at the expense of persons no longer in custody.[86] According to the concurring Justices, the "better view"[87] is that a former prisoner "may 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."[88] Thus, Justice Souter concluded, Spencer was free to bring a § 1983 action, regardless of the fact that his habeas petition was moot. Justice Souter again expressed disagreement with the *Heck* majority's conclusion that favorable-termination is a *necessary* element of a § 1983 cause of action, insisting instead that favorable-termination is a "'simple way to avoid collisions at the intersection of habeas and § 1983.'"[89]

Justice Ginsburg, in a separate concurrence, noted her agreement with Justice Souter,[90] as did Justice Stevens in his dissenting opinion.[91] Thus, after *Spencer*, five Justices of the current Court have voiced support for Justice Souter's reading of *Heck* and its progeny.[92]

II
THE LOWER COURTS

A. The Courts of Appeals

The first court of appeals to directly address the question of whether the *Heck* rule applies to a § 1983 challenge to disciplinary segregation that does not affect the overall length of confinement was the Court of Appeals for the District of Columbia Circuit. The plaintiff in *Brown v. Plaut*,[93] Ernest Brown, filed a § 1983 suit alleging a

85 *See id.*

86 *See id.* at 20-21 (Souter, J., concurring).

87 *Id.* at 21 (Souter, J., concurring).

88 *Id.* (Souter, J., concurring).

89 *Id.* at 20 (Souter, J., concurring).

90 *See id.* at 21 (Ginsburg, J., concurring) (noting that she has "come to agree with Justice Souter's reasoning").

91 *Id.* at 25 n.8 (Stevens, J., dissenting) ("Given the Court's holding that [Spencer] does not have a remedy under the habeas statute, it is perfectly clear, as Justice Souter explains, that [Spencer] may bring an action under [ ] § 1983.").

92 *See* Schwartz, *supra* note 16, at 1488 ("The interesting issue here is whether this is going to be regarded as dicta or as a holding by the lower courts.").

93 131 F.3d 163 (D.C. Cir. 1997), *cert. denied*, 524 U.S. 939 (1998).

denial of due process that led to ten months of administrative segregation.[94] Judge Wald, writing for the panel, rejected the trial court's argument that *Preiser* and its progeny barred Brown's suit.[95]

Brown's complaint alleged violations arising only out of his placement in administrative segregation, and he did not allege loss of good-time credits; thus, the panel held that *Heck* was inapplicable.[96] Judge Wald noted that the complaint "may not properly be analogized to a suit for malicious prosecution,"[97] because "the decision he is challenging bears little resemblance to a judicial proceeding."[98]

The *Brown* court nimbly evaded *Edwards* by narrowly reading the Supreme Court's opinion as "careful to respect"[99] the distinction between administrative sanctions that changed the overall length of confinement and those that changed only the "conditions of confinement."[100] Crucial to the panel's conclusion was *Sandin v. Conner*,[101] in which the Supreme Court failed to question the plaintiff's invocation of § 1983 but held that, in order to constitute a protected liberty interest, an inmate's disciplinary confinement must constitute an "atypical and significant hardship . . . in relation to the ordinary incidents of prison life."[102]

Nonetheless, in *Gambina v. Sawyer*,[103] the D.C. Circuit later recognized that, despite dicta in *Brown* suggesting otherwise, if the "procedural defects alleged would, if established, necessarily imply the invalidity of the punishment imposed,"[104] then the § 1983 claim arising out of disciplinary sanctions is not cognizable under *Edwards*.[105]

In *Figueroa v. Rivera*,[106] the First Circuit confronted a case in which the plaintiff died before he was able to have his conviction overturned.[107] The court noted that allowing the § 1983 suit to proceed "would fly in the teeth of *Heck*."[108] In *Figueroa*, the court rejected the appellants' argument that refusing to allow the suit to proceed was fundamentally unfair:

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94 *See id.* at 165.
95 *See id.* at 167-68.
96 *See id.* at 168.
97 *Id.*
98 *Id.*
99 *Id.*
100 *Id.*
101 515 U.S. 472 (1995).
102 *Id.* at 484.
103 No. 99-5128, 1999 WL 728353 (D.C. Cir. Aug. 17, 1999) (per curiam).
104 *Id.* at *1.
105 *See id.*
106 147 F.3d 77 (1st Cir. 1998).
107 *See id.* at 79.
108 *Id.* at 81.

> [A]nnulment of the underlying conviction is an element of a section 1983 'unconstitutional conviction' claim. Creating an equitable exception to this tenet not only would fly in the teeth of *Heck*, but also would contravene the settled rule that a section 1983 claimant bears the burden of proving all the essential elements of her cause of action.[109]

The *Figueroa* panel observed that dicta from *Spencer* may "cast doubt" on *Heck*'s favorable-termination requirement but concluded that "[t]he Court . . . has admonished the lower federal courts to follow its directly applicable precedent, even if that precedent appears weakened by pronouncements in [later] decisions, and to leave to the Court 'the prerogative of overruling its own decisions.' We obey this admonition."[110]

Whereas the *Brown* panel would allow a § 1983 suit to proceed so long as the action taken did not alter the length of confinement, the Sixth Circuit observed in *Schilling v. White*[111] that unless the action has been reversed, "no § 1983 suit may exist."[112] The *Schilling* court argued that the *Heck* opinion does not rest entirely on a desire to preserve habeas corpus as the sole federal remedy for prisoners, but that the principle applies with equal force to defendants who are no longer incarcerated.[113] The Sixth Circuit refused to accept the contention that Schilling was being denied a federal forum, stating instead that Schilling "lacks a legitimate legal claim requiring adjudication."[114]

In a later, unpublished opinion, *Bibbs v. Zummer*,[115] the Sixth Circuit briefly noted that, for the purposes of *Heck* and its progeny, the "'conviction' in the prison disciplinary sense is the finding of guilt on the disciplinary charge,"[116] and if a successful § 1983 suit would imply the invalidity of that finding, then *Heck* bars the action.[117]

However, the Sixth Circuit clarified its position later in 1999 when it noted that a majority of the current Supreme Court Justices appear to exclude from *Heck*'s favorable-termination requirement those individuals for whom habeas corpus is unavailable.[118] Despite

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109 *Id.* (citations omitted).

110 *Id.* at 81 n.3 (quoting Agostini v. Felton, 521 U.S. 203, 237 (1997)).

111 58 F.3d 1081 (6th Cir. 1995).

112 *Id.* at 1086.

113 *See id.* ("In fact, *Heck* applies as much to prisoners in custody (a habeas prerequisite) as to persons no longer incarcerated.").

114 *Id.* at 1087.

115 No. 97-2112, 1999 WL 68573 (6th Cir. Jan. 21, 1999) (per curiam) (table opinion, full text available on Westlaw).

116 *Bibbs*, 1999 WL 68573, at *3 n.6.

117 *See id.*

118 *See* Shamaeizadeh v. Cunigan, 182 F.3d 391, 396 n.3 (6th Cir.), *cert. denied*, 120 S. Ct. 531 (1999) ("The majority of the Court in *Spencer*, however, now clearly excludes from *Heck*'s favorable termination requirement former prisoners no longer in custody.").

this acknowledgment, the Circuit maintains that it will "continue to follow *Edwards* and the reasoning of the unpublished Sixth Circuit cases"[119] until the Supreme Court decides to adopt a contrary position.

The Seventh Circuit has given these issues heavier treatment than most. In *Anderson v. County of Montgomery*,[120] the plaintiff was no longer incarcerated, a fact that the court determined "has no bearing on the applicability of *Heck*."[121] The court explicitly agreed with the Sixth Circuit's *Schilling* holding—that *Heck* applies as much to prisoners no longer in custody as to those who remain incarcerated—and observed that the difficulty or impossibility of reversing or expunging a conviction does not constitute a valid reason for bypassing *Heck*.[122] In so holding, the panel refused to rely on Justice Souter's *Heck* concurrence, noting that "a concurrence is not the law."[123]

When confronted with a plaintiff alleging due process violations stemming from disciplinary segregation that did not involve the loss of good-time credits, the Seventh Circuit again held *Heck* applicable. The panel in *Stone-Bey v. Barnes*[124] held that *Heck* applies to intraprison disciplinary sanctions as well as to original criminal convictions.[125] The fact that Stone-Bey was only subjected to segregation without the loss of good-time credits made no difference to the panel.[126] Loss of good-time credits or not, Stone-Bey was still attacking the judgment of the hearing officer, a suit impermissible under *Heck*.[127]

However, after the Supreme Court's *Spencer v. Kemna*[128] decision, the Seventh Circuit began backing away from the strong language of *Stone-Bey* and *Anderson*. In the recent case of *Carr v. O'Leary*,[129] Chief Judge Posner noted that the "dictum in *Spencer v. Kemna* casts sufficient doubt on the applicability of *Heck*"[130] to plaintiffs who are una-

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119 Riley v. Kurtz, No. 98-1077, 1999 WL 801560, at *6 (6th Cir. Sept. 28, 1999) (table opinion, full text available on Westlaw).

120 111 F.3d 494 (7th Cir. 1997), *overruled by* DeWalt v. Carter, No. 98-2415, 2000 WL 1137385 (7th Cir. Aug. 11, 2000).

121 *Id.* at 499.

122 *See id.*

123 *Id.*

124 120 F.3d 718 (7th Cir. 1997), *overruled by* DeWalt v. Carter, No. 98-2415, 2000 WL 1137385 (7th Cir. Aug. 11, 2000).

125 *See id.* at 721 ("*Heck* applies to 'judgments' rendered in the prison disciplinary setting.").

126 *See id.*

127 The court noted that, even if Stone-Bey were able to show a violation of his due process rights, he "would only be entitled to nominal damages for that violation because any harm resulting from his placement in disciplinary segregation would not be compensable until his conviction on the disciplinary charge was invalidated by a state tribunal or by a federal writ of habeas corpus." *Id.* at 722 n.3.

128 523 U.S. 1 (1998).

129 167 F.3d 1124 (7th Cir. 1999).

130 *Id.* at 1127.

ble to challenge the validity of their conviction.[131] Judge Ripple, in a separate concurrence, expressed frustration at the court's reluctance to follow Justice Souter's "pragmatic limitation on the rule of *Balisok*."[132] Judge Ripple maintained that Justice Souter's view would provide a "common-sense ground"[133] for decision and would allow the court to decide the case in a "straightforward manner."[134]

In August of 2000, the Seventh Circuit overruled *Stone-Bey* and *Anderson* in *DeWalt v. Carter*.[135] In that case, the court squarely confronted the issue of whether the *Heck-Edwards* rule precludes a § 1983 action when habeas is unavailable.[136] Explicitly adopting the Second Circuit's *Jenkins* rationale,[137] the *DeWalt* panel refused to "rule in such a way as would contravene the pronouncement of five sitting Justices."[138] Thus, the court held that "the unavailability of federal habeas relief does not preclude a prisoner from bringing a § 1983 action to challenge a condition of his confinement that results from a prison disciplinary action."[139]

Less hesitant than the Seventh Circuit, the Eighth Circuit has recognized an exception to *Heck*'s favorable-termination rule. In *Sheldon v. Hundley*,[140] the court noted that "prisoners who challenge disciplinary rulings that do not lengthen their sentence are probably outside the habeas statute and able to seek damages under § 1983 without showing favorable termination in an authorized state tribunal or a federal habeas court."[141] The case before the court, however, involved a loss of good-time credits. As of yet, the court has had no occasion to apply the reasoning of the *Sheldon* dicta.

The Ninth Circuit has also expressed doubt as to the continuing validity of *Heck*'s favorable-termination requirement, but it has declined to follow the D.C. Circuit's lead. Rather, the court in *Cabrera v. City of Huntington Park*[142] simply noted that, despite the concurrences in *Heck*, *Edwards*, and *Spencer*, "*Heck* remains good law."[143]

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131 *See id.*
132 *Id.* at 1129 (Ripple, J., concurring in judgment).
133 *Id.* at 1128 (Ripple, J., concurring in judgment).
134 *Id.* (Ripple, J., concurring in judgment).
135 No. 98-2415, 2000 WL 1137385 (7th Cir. Aug. 11, 2000).
136 *See id.* at *5.
137 *See id.*
138 *Id.* at *8.
139 *Id.* at *9.
140 83 F.3d 231 (8th Cir. 1996).
141 *Id.* at 234.
142 159 F.3d 374 (9th Cir. 1998).
143 *Id.* at 380 n.6.

B. The District Courts

The district courts are no less divided. Many courts have chosen to accept Justice Souter's "pragmatic limitation" on the applicability of *Heck* and its progeny. One court, in fact, has characterized this position as the "new majority."[144] The reasoning in these district court opinions is fairly consistent: a tally of Supreme Court concurrences and dissents reveals that, "in the eyes of a majority of the justices, where federal habeas corpus is not available to address constitutional wrongs, § 1983 must be."[145] The math is simple: Justices Stevens, O'Connor, and Blackmun joined Justice Souter's *Heck* concurrence; Justice Blackmun retired, but Justices Breyer and Ginsburg joined Justice Souter's *Spencer* concurrence; finally, Justice Stevens expressed support for Justice Souter's view in his *Spencer* dissent, bringing the final total to five Justices (leaving behind Chief Justice Rehnquist and Justices Scalia, Kennedy, and Thomas).

The list of district courts accepting this position is long. The Northern District of Indiana indicated that there is "a lack of any clear authority to the contrary,"[146] and the Western District of Louisiana opined that "[t]his result better accounts for the concern with fundamental fairness embodied in § 1983."[147] The Central District of California[148] and at least two judges in the Southern District of New York[149] agree.[150]

Equally as long, however, is the list of district courts refusing to accept such a position. Chief Judge Larimer of the Western District of New York read the Supreme Court cases as "sending a loud message:

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144 Dolney v. Lahammer, 70 F. Supp. 2d 1038, 1042 n.1 (D.S.D. 1999).

145 *Id.* at 1041.

146 Weller v. Grant County Sheriff, 75 F. Supp. 2d 927, 932 (N.D. Ind. 1999).

147 White v. Phillips, 34 F. Supp. 2d 1038, 1042 (W.D. La. 1998).

148 *See* Haddad v. California, 64 F. Supp. 2d 930, 938 (C.D. Cal. 1999) (noting that the court "will adhere to the reasoning of Justice Souter's *Spencer* concurrence that a section 1983 claim is not barred under the rule of *Heck* unless the section 1983 plaintiff is in custody").

149 *See* Green v. New York City Dep't of Correction, No. 98 CIV.825, 1999 WL 219911, at *7 (S.D.N.Y. Apr. 15, 1999) (denying defendants' motion to dismiss on grounds that claim did not involve the "fact or duration" of the plaintiff's confinement); Silva v. Sanford, No. 91 CIV.1776, 1998 WL 205326, at *13 (S.D.N.Y. Apr. 24, 1998) (noting that "if *Edwards* were applicable to disciplinary confinement without good time loss cases, the Supreme Court would have said so in *Sandin*"). *But see* Roucchio v. Coughlin, 29 F. Supp. 2d 72, 79 (E.D.N.Y. 1998) (asserting that decisions like *Silva* "seem to conflict with the Supreme Court's expansion of the applicability of common law principles announced in *Heck*"). Note, too, that *Edwards* was decided two years after *Sandin*.

150 *See* Schwartz, *supra* note 16, at 1488-89 ("There is a district court opinion, however, which says that [the language in *Spencer*] might be dicta, but five is more than four, and since I agree with it anyway, I am going to follow it."); *see also* York v. Huerta-Garcia, 36 F. Supp. 2d 1231, 1237 (S.D. Cal. 1999) (arguing that extension of the favorable-termination rule to disciplinary sanctions which do not involve the loss of good-time credits "misses the mark and paint's *Heck*'s holding with far too broad a brush").

an inmate cannot seek money damages for alleged deprivations arising out of a prison disciplinary hearing by commencing an action under § 1983 unless the results of that hearing already have been invalidated."[151] The court remarked that "[t]he rationale for the Supreme Court's message is clear: it would make little sense for an inmate to recover damages for something that occurred during a hearing, the validity of which remains untested or unchallenged"[152] by appeal, administrative review, collateral attack, *or* habeas corpus.[153]

Chief Judge Larimer is not alone. In the Southern District of New York, Judge Mukasey, in *Jenkins v. Haubert* (later vacated by the Second Circuit), refused to read the holding of *Edwards* as limited to loss of good-time credits.[154] Judges Chin,[155] Baer,[156] Sotomayor,[157] Preska,[158] and Haight[159] agreed.

III
JENKINS V. HAUBERT[160]

A. Facts

Plaintiff-appellant Eric Jenkins, while incarcerated at Green Haven Correctional Facility, was subject to the first of two disciplinary hearings on July 26, 1994.[161] Defendant-appellee, Lieutenant Michael Haubert of the New York State Department of Corrections, who presided over the hearing, refused Jenkins's request to call four witnesses.[162] Following the proceedings, Haubert found Jenkins guilty of

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151 Burnell v. Coughlin, 975 F. Supp. 473, 477 (W.D.N.Y. 1997).

152 *Id.*

153 *See id.*

154 *See* Jenkins v. Haubert, No. 95 CIV. 5453, 1998 WL 148332, at *3 (S.D.N.Y. Mar. 30, 1998) (noting that the Court was "not saying that a plaintiff must exhaust state remedies before filing a § 1983 claim, but that 'while the state challenges are being pursued, . . . the § 1983 claim has not yet arisen'" (quoting Heck v. Humphrey, 515 U.S. 477, 489 (1994))), *vacated*, 179 F.3d 19 (2d Cir. 1999).

155 *See* Odom v. Coombe, No. 95 CIV. 6378, 1998 WL 120361 (S.D.N.Y. Mar. 18, 1998), *abrogated by* Jenkins v. Haubert, 179 F.3d 19 (2d Cir. 1999).

156 *See* Scott v. Scully, No. 93 CIV. 8777, 1997 WL 539951 (S.D.N.Y. Aug. 28, 1997), *abrogated by* Jenkins v. Haubert, 179 F.3d 19 (2d Cir. 1999).

157 *See* Higgins v. Coombe, No. 95 CIV. 8696, 1997 WL 328623 (S.D.N.Y. June 16, 1997), *abrogated by* Jenkins v. Haubert, 179 F.3d 19 (2d Cir. 1999).

158 *See* Sims v. Artuz, No. 96 CIV. 0216, 1997 WL 527882 (S.D.N.Y. Aug. 25, 1997), *abrogated by* Jenkins v. Haubert, 179 F.3d 19 (2d Cir. 1999).

159 *See* Gomez v. Kaplan, No. 94 CIV. 3292, 1998 WL 355427 (S.D.N.Y. June 30, 1998), *abrogated by* Jenkins v. Haubert, 179 F.3d 19 (2d Cir. 1999).

160 179 F.3d 19 (2d Cir. 1999).

161 *See* Jenkins v. Haubert, No. 95 CIV. 5453, 1998 WL 148332, at *1 (S.D.N.Y. Mar. 30, 1998), *vacated*, 179 F.3d 19 (2d Cir. 1999).

162 *See id.*

violating prison rules and sentenced him to thirty days in keeplock.[163] Jenkins properly but unsuccessfully filed an administrative appeal with the Green Haven Correctional Facility superintendent.[164]

On August 14, 1994, Jenkins filed a C.P.L.R. Article 78[165] claim in New York Supreme Court, alleging that Haubert's refusal to hear from witnesses violated due process.[166] While the Article 78 claim was pending, Jenkins was the subject of another disciplinary hearing.[167] Jenkins requested a substitute for Haubert in order to avoid possible prejudice against him stemming from the Article 78 proceeding, in which Jenkins named Haubert as a defendant.[168] Haubert denied the request, found Jenkins guilty of the charges, and sentenced him to another thirty days in keeplock.[169] Once again, Jenkins unsuccessfully appealed to the superintendent.[170]

After the New York Supreme Court dismissed his Article 78 claim, Jenkins filed suit under § 1983 in the Southern District of New York, alleging that Haubert had violated his Fourteenth Amendment right to procedural due process when he refused to allow the four witnesses' testimony during the first hearing.[171] Jenkins also alleged that Haubert had denied him due process at the second hearing, because the "defendant was biased against him, and retaliated against him for having initiated the Article 78 proceeding."[172]

The district court dismissed Jenkins's claims in two separate opinions.[173] In the first opinion, Judge Mukasey ruled that Jenkins was collaterally estopped from relitigating the claims raised in the Article 78 proceeding.[174] In the second opinion, the court held that Jenkins's § 1983 suit arising out of the second hearing was not cognizable under the rule of *Heck* and *Edwards*.[175] Jenkins appealed the second opinion.

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163 *See Jenkins*, 179 F.3d at 20-21 (noting that "keeplock" is "a form of segregation in which the inmate is confined to his cell, deprived of participation in normal prison routine, and denied contact with other inmates." (internal quotation marks omitted)).

164 *See Jenkins*, 179 F.3d at 21.

165 Article 78 provides: "Relief previously obtained by writs of certiorari to review, mandamus or prohibition shall be obtained in a proceeding under this article . . . ." N.Y. C.P.L.R. § 7801 (McKinney 1994).

166 *See Jenkins*, 179 F.3d. at 21.

167 *See id.*

168 *See id.*

169 *See id.*

170 *See id.*

171 *See id.*

172 Jenkins v. Haubert, No. 95 CIV. 5453, 1998 WL 148332 at *1 (S.D.N.Y. Mar. 30, 1998), *vacated*, 179 F.3d 19 (2d Cir. 1999).

173 *See Jenkins*, 179 F.3d at 21.

174 *See id.*

175 *See id.*

B. The Second Circuit

Writing for the panel, Judge Walker characterized the issue in *Jenkins* as "whether *Heck* and *Edwards* bar a § 1983 claim . . . where a prisoner (or former prisoner) alleges a constitutional violation arising out of the imposition of intra-prison disciplinary sanctions that have no effect on the duration of the prisoner's overall confinement[,] . . . an open question in our circuit."[176]

After exploring § 1983 and the habeas corpus statute, the court turned to Supreme Court precedent. The court noted that, until recently, the favorable-termination requirement of *Heck* "generated confusion in the lower courts, especially with respect to the question of whether an intra-prison disciplinary sanction that does not affect the length of a prisoner's overall confinement constitutes a 'conviction or sentence' within the meaning of the *Heck* rule."[177] The court observed that much of the confusion stemmed from *Edwards*, in which a ruling in the prisoner's favor would necessarily invalidate the revocation of his good-time credits.[178]

After discussing *Spencer v. Kemna*,[179] the court opined that Supreme Court precedent does not require application of the *Heck* rule to a § 1983 suit challenging a disciplinary segregation term that does not include good-time credit loss.[180] A contrary position would "contravene the pronouncement of five justices that some federal remedy—either federal habeas corpus or § 1983—must be available."[181] Accordingly, the court adopted the D.C. Circuit's reasoning in *Brown v. Plaut*,[182] expressed doubt at the continuing validity of *Stone-Bey v. Barnes*,[183] and read its own holding in *Black v. Coughlin*[184] as encompassing only challenges to the fact or length of a prisoner's confinement when federal habeas corpus is available.[185]

While the *Jenkins* court held that *Heck* and its progeny did not bar Jenkins's § 1983 claim, the court remanded the case for consideration

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176 *Id.*

177 *Id.* at 25.

178 *See id.*

179 523 U.S. 1 (1998).

180 *Jenkins*, 179 F.3d at 27.

181 *Id.*

182 131 F.3d 163 (D.C. Cir. 1997), *cert. denied*, 524 U.S. 939 (1998); *see supra* notes 93-102 and accompanying text.

183 120 F.3d 718 (7th Cir. 1997), *overruled by* DeWalt v. Carter, No. 98-2415, 2000 WL 1137385 (7th Cir. Aug. 11, 2000); *see supra* notes 124-27 and accompanying text.

184 76 F.3d 72 (2d Cir. 1996). There, the Second Circuit saw "no reason why *Heck*, which dealt with constitutional challenges to a criminal conviction, is not also controlling with respect to due process challenges to prison disciplinary hearings." *Id.* at 75; *see infra* notes 222-25 and accompanying text.

185 *See Jenkins*, 179 F.3d at 28.

of whether, under the requirements of *Sandin v. Conner*,[186] Jenkins had stated a legally cognizable claim of deprivation of due process.[187]

IV

ANALYSIS OF *JENKINS* AND THE *HECK* RULE

The Second Circuit's analysis in *Jenkins* leads to two conclusions. The first conclusion is that, in light of dicta in *Spencer v. Kemna*,[188] § 1983 must be available to those prisoners who are outside the reach of habeas corpus (whether because they were fined or because their term of imprisonment is complete). The second conclusion is that, since Jenkins attacked only his placement in disciplinary segregation (which had no effect on the overall length of confinement), *Heck* and its progeny do not bar a § 1983 suit.

In remanding the case for *Sandin* consideration, the court collapsed analytically distinct due process claims, reflecting the continuing uncertainty in the lower courts as to how to properly resolve this "confusing thicket."[189]

A. The *Heck* Rule's Applicability to Prisoners No Longer in Custody

A significant portion of *Jenkins* focuses on *Spencer v. Kemna*,[190] culminating in the conclusion that since five Justices have expressed doubt as to *Heck*'s applicability to prisoners no longer in custody, "some federal remedy . . . must be available."[191] While *Jenkins* did not treat it as such, the issue is a threshold one, in that if the *Heck* line of cases does not apply to former prisoners, then the analysis is over. Any discussion of length and condition of confinement are superfluous if Justice Souter's position prevails, at least insofar as *Heck* and *Edwards* are concerned.

Following the "new majority position," the *Jenkins* court does the math, comes up with a majority of the Court, and adopts it as law. However, the court is quick to note that its holding does not rest solely "on our tally of votes on the Court for Justice Souter's view of *Heck*."[192] The remainder of the opinion suggests quite the opposite.

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186 515 U.S. 472 (1995).

187 *See Jenkins*, 179 F.3d at 29.

188 523 U.S. 1 (1998).

189 Koehn, *supra* note 16, at 92; *see* Bradley v. Evans, No. 98-5861, 2000 WL 1277229, at *5 (6th Cir. Aug. 23, 2000) (table opinion, full text available on Westlaw) ("A guiding hand from the Supreme Court, however, seems very much in order to prevent future courts from losing their way in this forest of uncertainty.").

190 523 U.S. 1 (1998).

191 *Jenkins*, 179 F.3d at 27.

192 *Id.*

Once one poses the threshold question, there are but two possible answers: either *Heck* and its progeny apply to plaintiffs no longer in custody or they do not. If the answer is the former, then the analysis shifts to whether *Heck* applies to disciplinary segregation unrelated to the length of confinement. If the answer is the latter, then the *Heck* analysis ends and *Sandin* analysis begins.

Jenkins defies this logic by erroneously answering the threshold question in the negative and proceeding with the disciplinary segregation query. Thus, even though the court refused to accept the proposition that "the principle barring collateral attacks . . . is not rendered inapplicable by the fortuity that a criminal is no longer incarcerated,"[193] its analysis proceeds as though it had.[194]

At oral argument, the *Jenkins* panel requested that the parties submit letter briefs addressing the impact of *Spencer* on the issues presented on appeal. Jenkins's attorney contended: "Mr. Jenkins, like the claimant in *Spencer,* is an individual without recourse to habeas to whom the favorable-termination requirement should not apply."[195] The court agreed with that contention, despite the fact that the *Spencer* plurality opinion rebuffed a similar argument as "a great non sequitur, unless one believes (as we do not) that a § 1983 action for damages must always and everywhere be available."[196] According to *Jenkins,* application of the favorable-termination bar to Jenkins would result in an "untoward result,"[197] namely the denial of a federal forum for claiming a deprivation of federal rights.[198]

This "new majority" position represents a misreading of not only *Heck* and *Edwards,* but also of the *Spencer* plurality opinion.[199] In fact, the *Spencer* plurality noted that "[i]t is not certain . . . that a § 1983 damages claim would be foreclosed"[200] if a former prisoner were to challenge only the procedures used without necessarily implying the result's invalidity.[201] Thus, *Spencer* reinforces *Heck*'s admonition that "the principle barring collateral attacks . . . is not rendered inapplicable by the fortuity that a convicted criminal is no longer incarcer-

193 Heck v. Humphrey, 512 U.S. 477, 490 n.10 (1994).

194 *See Jenkins,* 179 F.3d at 27-28.

195 Letter Brief for Plaintiff-Appellant at 3, Jenkins v. Haubert, 179 F.3d 19 (2d Cir. 1999) (No. 98-2408).

196 Spencer v. Kemna, 523 U.S. 1, 17 (1998).

197 *Heck,* 512 U.S. at 500 (Souter, J., concurring in judgment).

198 *See id.* (Souter, J., concurring in judgment).

199 *Cf.* RICHARD H. FALLON ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 194 (4th ed. Supp. 1999) ("Justice Souter's position in *Heck* now appears to command a majority.").

200 *Spencer,* 523 U.S. at 17.

201 *See id.*

ated,"[202] while clarifying that former prisoners may bring suits that do not imply the invalidity of the punishment imposed.[203]

Justice Souter's position seems to rest on the general principle that litigants alleging constitutional violations must be afforded a federal remedy. The authority for the "principle that every person asserting a federal right is entitled to one unencumbered opportunity to litigate that right in a federal district court . . . is difficult to discern. It cannot lie in the Constitution, . . . [a]nd no such authority is to be found in § 1983 itself."[204] In *Withrow v. Williams*,[205] Justice Scalia noted that "[i]t would be a strange constitution that regards state courts as second-rate instruments for the vindication of federal rights and yet makes no mandatory provision for lower federal courts."[206]

Thankfully, resolution of this difficult question is not at issue, because whether or not a plaintiff is currently in custody has no effect on the applicability of *Heck* and its progeny.[207] While the lack of habeas availability "strikes a responsive cord,"[208] the "core holding"[209] of *Heck* is still applicable.[210] Prisoners challenging the validity of the punishment imposed must obtain a judgment invalidating it before a "§ 1983 suit may exist."[211] This favorable-termination requirement does not, as Justice Souter contends, deny a federal remedy to prisoners for whom habeas is no longer available. Rather, it mandates that, for a legitimate legal claim to exist under § 1983, the plaintiff has two options: (1) she must bring a § 1983 suit challenging only the procedures used and not the result reached, or (2) she must first have the punishment invalidated by a nonfederal tribunal.

While the second option seems to compel an unfair result, the alternative would result in perverse incentives. The State argued in its *Jenkins* letter brief that a narrow reading of *Edwards* "would permit an inmate to revive expired claims upon release from prison and reward inmates for failing to pursue diligently state-based remedies, as re-

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

203 *See id.*

204 Allen v. McCurry, 449 U.S. 90, 103 (1980).

205 507 U.S. 680 (1993).

206 *Id.* at 723 (Scalia, J., concurring).

207 *See* Anderson v. County of Montgomery, 111 F.3d 494, 499 (7th Cir. 1997) (noting that plaintiff's no longer being incarcerated "has no bearing on the applicability of *Heck*"), *overruled by* DeWalt v. Carter, No. 98-2415, 2000 WL 1137385 (7th Cir. Aug. 11, 2000). *But see supra* notes 135-39 and accompanying text.

208 Figueroa v. Rivera, 147 F.3d 77, 81 (1st Cir. 1998).

209 *Id.*

210 *Cf.* Beermann, *supra* note 49, at 720 (arguing that "one clear exception that should be made from *Heck*'s rule is that a convict who cannot seek habeas corpus should be allowed to bring a damages action challenging his conviction").

211 Schilling v. White, 58 F.3d 1081, 1086 (6th Cir. 1995).

quired by *Heck* and *Edwards*."[212] Thus, a prisoner would be able to sidestep the favorable-termination requirement simply by waiting out her sentence.

The Second Circuit's reliance on counting up the votes of concurrences is misplaced. Aside from succumbing to the dubious practice of relying on the dicta from concurring and dissenting opinions,[213] *Jenkins* failed to recognize that *Heck*, *Edwards*, and *Spencer* apply regardless of whether or not the plaintiff is incarcerated. Because § 1983 provides for suits alleging "deprivation of any rights . . . secured by the Constitution,"[214] "there has been no injury of constitutional proportions,"[215] unless the plaintiff, whether in custody or not, can show that the punishment has been reversed.[216]

B. The *Heck* Rule's Applicability to Disciplinary Segregation

Even though the *Jenkins* court refused to accept the proposition that *Heck*'s favorable-termination rule applies to individuals for whom habeas is not available, it nonetheless proceeded to discuss the rule's applicability to suits challenging disciplinary segregation that do not affect the overall length of confinement. In refusing to apply the *Heck* rule to suits attacking disciplinary segregation, the Second Circuit joins those of its sister circuits who have erroneously circumvented the favorable-termination requirement.

In his brief to the court, Jenkins argued that "*Edwards* is not meant to reach § 1983 actions like the present, which challenge only the conditions of the prisoner's confinement rather than its fact or duration."[217] Lieutenant Haubert claimed that such an argument "reflects an untenably narrow reading of that case."[218] The court agreed with Jenkins and characterized his suit as "a challenge to the conditions of his confinement, rather than as a challenge to the fact or duration of his confinement."[219] Accordingly, the court found that *Heck*'s favorable-termination requirement did not apply.[220]

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212 Letter Brief for Defendant-Appellee at 3, Jenkins v. Haubert, 179 F.3d 19 (2d Cir. 1999) (No. 98-2408).

213 *See* Agostini v. Felton, 521 U.S. 203, 217 (1997) (cautioning that "statements made by five Justices . . . do not, in themselves, furnish a basis for concluding that our . . . jurisprudence has changed"); Randell v. Johnson, No. 99-11092, 2000 WL 1280459, at *1 (5th Cir. Sept. 26, 2000) ("[W]e decline to announce for the Supreme Court that it has overruled one of its decisions.").

214 42 U.S.C. § 1983 (1994).

215 *Schilling*, 58 F.3d at 1086.

216 *See id.*

217 Brief for Plaintiff-Appellant at 4, Jenkins v. Haubert, 179 F.3d 19 (2d Cir. 1999) (No. 98-2408).

218 Brief for Defendant-Appellee at 6, Jenkins v. Haubert, 179 F.3d 19 (2d Cir. 1999) (No. 98-2408).

219 *Jenkins*, 179 F.3d at 27.

220 *See id.*

The State had argued that the Second Circuit recently "applied the *Heck* rule to a conditions of confinement case where federal habeas corpus was unavailable"[221] in *Black v. Coughlin*.[222] The argument is compelling. The plaintiff in *Black* alleged that procedural defects at a disciplinary hearing resulted in a sentence of 180 days in confinement.[223] A good-time credit loss was not involved, and the confinement therefore had no effect on the overall length of his prison term.[224] The *Black* court saw "no reason why *Heck*, which dealt with constitutional challenges to a criminal conviction, is not also controlling with respect to due process challenges to prison disciplinary hearings."[225] The *Jenkins* court, however, "decline[d] to read *Black* that way."[226]

The Second Circuit's interpretation is consistent with the D.C. Circuit's conclusion that the Supreme Court, in *Sandin v. Conner*,[227] did not question the plaintiff's invocation of § 1983 in an administrative segregation suit.[228] While this is true, it is certainly not dispositive. One should note that the *Edwards* decision came two years after *Sandin* and that the *Edwards* Court concluded that a suit implying the "invalidity of the *punishment* imposed . . . is not cognizable under § 1983."[229] The "punishment imposed" on a plaintiff such as Jenkins is the keeplock confinement itself, regardless of its effect on the overall prison sentence.

Scholars have recently noted that the tendency of some lower courts to read *Heck* and *Edwards* as "mandat[ing] dismissal even of § 1983 challenges to prison conditions or proceedings that are unrelated to possible early release"[230] is a "dubious application" of those cases.[231] These scholars, like the *Jenkins* court, point to the *Stone-Bey*[232] case as an example, especially given the recent pronouncements of Justice Souter in *Heck*[233] and *Spencer*.[234]

However, a closer reading of those lower court opinions reveals that the application of *Heck* and *Edwards* to these situations is perhaps

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221 *Id.* at 28.

222 76 F.3d 72 (2d Cir. 1996).

223 *See id.* at 73.

224 *See id.*

225 *Id.* at 75.

226 *Jenkins*, 179 F.3d at 28.

227 515 U.S. 472 (1995).

228 *See* Brown v. Plaut, 131 F.3d 163 (D.C. Cir. 1997), *cert. denied*, 524 U.S. 939 (1998).

229 Edwards v. Balisok, 520 U.S. 641, 648 (1997) (emphasis added).

230 FALLON ET AL., *supra* note 199, at 195.

231 *Id.*

232 Stone-Bey v. Barnes, 120 F.3d 718 (7th Cir. 1997), *overruled by* DeWalt v. Carter, No. 98-2415, 2000 WL 1137385 (7th Cir. Aug. 11, 2000).

233 Heck v. Humphrey, 512 U.S. 477, 491-503 (1994) (Souter, J., concurring).

234 Spencer v. Kemna, 523 U.S. 1, 18-21 (1998) (Souter, J., concurring).

not so dubious after all;[235] the logic in those opinions is, in fact, persuasive. Roy Heck sought damages in federal court for a state court conviction that no tribunal had overturned.[236] Similarly, Jerry Balisok sought damages for an intraprison disciplinary hearing that resulted in the loss of good-time credit.[237] In both instances, the Supreme Court emphasized that allowing the § 1983 suits to continue before invalidation of the conviction "'would permit a collateral attack on the conviction through the vehicle of a civil suit.'"[238]

The Court's reasoning applies with equal force to disciplinary segregation, in which case the "conviction" is "the finding of guilt on the disciplinary charge."[239] As the Seventh Circuit noted in *Stone-Bey*, whether the sentence imposed is coupled with loss of good time credits or whether it simply consists of disciplinary segregation makes no difference in applying *Heck* and its progeny.[240] The Court's concern in *Heck* and *Edwards* was the "hoary principle" that civil actions are inappropriate vehicles for launching collateral attacks on criminal proceedings that would necessarily imply the invalidity of the punishment imposed.[241] This concern is as real for disciplinary segregation that results in good-time credit loss as for segregation that does not.

C. A Better Approach

Having concluded that the favorable-termination requirement applies neither to former prisoners nor to challenges to disciplinary segregation that have no effect on the duration of the prisoner's overall confinement, the *Jenkins* court remanded the case for determination of whether Jenkins stated a claim cognizable under *Sandin*.[242] In doing so, the court failed to recognize two analytically distinct due process claims, the first of which implies the invalidity of the confinement and is therefore barred by *Heck* and its progeny. The second challenges only the procedures used without necessarily implying the confinement's invalidity, thereby providing a proper basis for a § 1983 claim.

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235 *See* Schwartz & Pratt, *supra* note 4, at 325 (noting Judge Pratt's response to Professor Schwartz's opinion that *Edwards* imposed an exhaustion requirement: "[i]f you have not got the disciplinary sanction vacated, nothing wrong has been done to you that the federal court or Section 1983 is interested in correcting").

236 *See Heck*, 512 U.S. at 478-79.

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

238 *See Heck*, 512 U.S. at 484 (quoting 8 S. SPEISER ET AL., AMERICAN LAW OF TORTS § 28:5, at 24 (1991)).

239 Bibbs v. Zummer, No. 97-2112, 1999 WL 68573, at *3 (6th Cir. Jan. 21, 1999) (per curiam) (table opinion, full text available on Westlaw).

240 *See* Stone-Bey v. Barnes, 120 F.3d 718, 721 (7th Cir. 1997), *overruled by* DeWalt v. Carter, No. 98-2415, 2000 WL 1137385 (7th Cir. Aug. 11, 2000).

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

242 *See supra* notes 186-87 and accompanying text.

In order to recover compensatory damages under § 1983, a plaintiff must prove "actual injury caused by the denial of his constitutional rights."[243] Constitutional rights, however, "do not exist in a vacuum."[244] Insofar as Jenkins alleged that Lieutenant Haubert's bias resulted in a violation of his constitutional rights, his claim alleged actual injury—wrongful finding of guilt on the charges—and "necessarily impl[ied] the invalidity" of the punishment imposed. In *Heck*, *Edwards*, and *Spencer*, the Court noted that § 1983 claims will not be foreclosed when the suits challenge only the procedures used.[245] However, these suits are valid causes of action only when the procedural challenge does not imply the punishment's invalidity. The *Edwards* Court unanimously held that procedural defects "based on allegations of deceit and bias on the part of the decisionmaker,"[246] similar to those that Jenkins alleged, are not cognizable under § 1983 until the plaintiff obtains favorable termination.[247]

Prisoners may properly seek damages under § 1983 without first obtaining favorable-termination only if the alleged injury "does *not* encompass the 'injury' of being convicted and imprisoned (until his conviction has been overturned)."[248] The prisoner may seek "nominal damages for . . . a violation of his right to procedural due process."[249] When a § 1983 suit does not allege that the procedures used in a disciplinary hearing caused the actual injury of wrongful conviction and confinement, nominal damages are available. Nominal damages "are the appropriate means of 'vindicating' rights whose deprivation has not caused actual, provable injury."[250]

One may certainly argue that denying Jenkins's right to call certain witnesses violated his right to due process. Insofar as the complaint alleged a violation of that right without implying the invalidity of the officer's final determination, Jenkins was entitled to go forward with his § 1983 suit.

CONCLUSION

The Court's decision in *Heck* is less than six years old, and its use of the favorable-termination requirement in *Edwards* and *Spencer* took place within the last three. Within this relatively short period of time,

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243 Memphis Cmty. Sch. Dist. v. Stachura, 477 U.S. 299, 307 (1986).

244 *Id.* at 307-08 (quoting Carey v. Piphus, 435 U.S. 247, 254 (1978)).

245 *See Spencer*, 523 U.S. at 17 (1998); Edwards v. Balisok, 520 U.S. 641, 645 (1997); *Heck*, 512 U.S. at 482-83.

246 *Edwards*, 520 U.S. at 648.

247 *See id.*

248 *Heck*, 512 U.S. at 487 n.7.

249 *Id.* at 499 n.4 (Souter, J., concurring in judgment) (citing Carey v. Piphus, 435 U.S. 247, 266 (1978)).

250 Memphis Cmty. Sch. Dist. v. Stachura, 477 U.S. 299, 308 n.11 (1986).

the lower courts have become deeply divided as to proper application of the *Heck* rule. The Second Circuit's 1999 decision in *Jenkins* reflects this division. Nevertheless, the *Jenkins* opinion is most interesting not for the position it eventually takes or for the circuits with which it sides, but for the manner in which it arrives at its conclusion. The reasoning of *Jenkins* is noteworthy not so much as an illustration of the division of the lower courts, but as an illustration of the confusion over how this complicated line of cases fits together.

The Supreme Court's rationale in *Heck* was relatively straightforward: it would be improper for a prisoner to use a civil damages action to circumvent the habeas statute's strict requirements. The real difficulty began after the Court made the jump in *Edwards*, extending the favorable-termination rule to disciplinary sanctions that revoked good-time credits. While *Edwards* was a unanimous opinion, the holding's breadth remains unclear. The four separate opinions in *Spencer v. Kemna* certainly did not help clean up the mess.

Until the Supreme Court provides a more clearly defined rule, the lower courts should read the *Heck-Edwards-Spencer* line of cases as standing for the following general proposition: In order to recover damages for an allegedly unconstitutional conviction, imprisonment, *or intraprison confinement*, § 1983 plaintiffs—including those persons no longer in custody—must first prove that the conviction, sentence, *or punishment* has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus. A contrary rule, such as the one that the Second Circuit adopted in *Jenkins*, reflects an overly narrow reading of this line of cases and should be rejected.