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The *Heck* Conundrum: Why Federal Courts Should Not Overextend the *Heck v. Humphrey* Preclusion Doctrine

I. INTRODUCTION

Sirens screamed as the officers turned into an alley after the stolen white Honda. The couple fleeing pursuit had nowhere to go. Suddenly, the two felons ditched the Honda and ran towards a maroon pick-up truck with officers quick on their heels. Law enforcement intercepted the couple before they were able to reach the truck, but after an intense brawl, the fleeing felons entered the truck, started its engine, and rammed the police-car barricade that blocked their escape. Quickly reversing, perhaps to attempt another run at the blockade, one of the felons backed the truck toward where one of the officers stood. In response, the officer raised his gun and fired on the driver, killing him. The other felon was secured, arrested, charged, and convicted of assault with a deadly weapon on a police officer.

This dramatization recounts the facts in the Ninth Circuit's recent case *Beets v. County of Los Angeles*.¹ In *Beets*, the deceased felon's parents brought a § 1983 action² against the shooting officer and the county claiming that excessive force was used in the attempt to arrest the deceased felon.³ The federal court of appeals affirmed the district court's holding that *Heck v. Humphrey* barred the grieving parents from seeking relief in a federal forum.⁴ *Heck* is a 1994 Supreme Court decision holding that a federal court cannot hear a state prisoner's § 1983 claim for damages based on a violation of federal rights if doing so would necessarily imply the invalidity of the prisoner's conviction or confinement, unless that prisoner can first show that the conviction was overturned.⁵ This important rule is known as the "*Heck* bar,"⁶ and it is intended to preserve comity

1. 669 F.3d 1038, 1040 (9th Cir. 2012).

2. For an explanation regarding § 1983 causes of action, see *infra* Part II.

3. *Beets*, 669 F.3d at 1040.

4. *Id.*

5. 512 U.S. 477, 486–87 (1994).

6. *See, e.g., Beets*, 669 F.3d at 1042.

between state and federal courts by preventing a federal cause of action that would jeopardize the basis of a state conviction.⁷

Consequently, the parents in *Beets* argued that *Heck* did not apply to their action because neither they nor their deceased son were convicted of any crime that the § 1983 claim might undermine.⁸ The court instead pointed to the deceased's coconspirator and stated that, because she had been convicted in relation to the same occurrence, any remedy the parents might secure via § 1983 would necessarily imply the invalidity of *her* conviction.⁹ Thus, no federal forum was available to hear the parents' federal claim.¹⁰

The *Beets* case highlights an important question left unanswered by *Heck* and its progeny—are individuals precluded from seeking § 1983 relief if success in that action would be inconsistent with a *co-felon's* conviction or confinement?¹¹ Currently, the circuits are split over the closely related issue of whether a federal court may entertain a § 1983 claim if the petitioner has no access to habeas relief because she is either released from custody or was not sentenced to incarceration.¹² And the limited available scholarship regarding the *Heck* bar seems to focus on this topic.¹³ Yet, there is cause for

7. See *infra* Part III.A.

8. *Beets*, 669 F.3d at 1042.

9. *Id.* at 1048.

10. *Id.*

11. Although the existing literature does address how *Heck* should or should not apply to persons who do not qualify for habeas relief, see *infra* note 13, there is significantly less discussion on how *Heck* implicates noncriminal plaintiffs, or, specifically, those petitioners who bring § 1983 claims on behalf of themselves and deceased persons when there has been no conviction in their regard.

12. See *infra* Part IV.

13. See Jack M. Beermann, *Common Law Elements of the Section 1983 Action*, 72 CHI.-KENT L. REV. 695, 714 (1997) (anticipating *Heck's* "potential to create significant new complications in § 1983 litigation and [to] impose substantial new obstacles on § 1983 plaintiffs"); 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, 880–84 (2008) [hereinafter Note] (arguing that *Heck* should not apply to petitioners who do not have access to habeas relief); Thomas Stephen Schneidau, Note, *Favorable Termination After Freedom: Why Heck's Rule Should Reign, Within Reason*, 70 LA. L. REV. 647, 669 (2010) (arguing that *Heck* should apply to non-habeas-eligible plaintiffs because of important state sovereignty issues). Other pieces discuss the implications of *Heck v. Humphrey* in various areas of the law. See John Stanfield Buford, Comment, *When the Heck Does this Claim Accrue? Heck v. Humphrey's Footnote Seven and § 1983 Damages Suits for Illegal Search and Seizure*, 58 WASH. & LEE L. REV. 1493, 1502–03 (2001) (discussing the impact of *Heck* on petitions arguing illegal search); Benjamin Vetter, Comment, *Habeas, Section 1983, and Post-Conviction*

concern in the fact that an even more peripheral plaintiff, one whose federal claim would *not* necessarily undermine another party's state conviction, may also be *Heck* barred from federal court.¹⁴ Accordingly, this Comment contributes to the current literature by highlighting this consequence of adopting an expansive view of *Heck*, which half the circuits have done, and offers an alternative method of preclusion where appropriate.

This Comment argues that a petitioner bringing a § 1983 claim for damages in federal court should generally not be prohibited from doing so even if another party's criminal conviction rests on the same set of facts that give rise to the civil action because the § 1983 claimant's success will not necessarily imply the invalidity of the other's criminal conviction. Of course, if a court determines that privity between the claimant and the co-felon satisfies collateral estoppel requirements,¹⁵ then that analysis may create a bar to the action.¹⁶ But absent collateral estoppel, the petitioner's action should not be precluded merely because success could result in inconsistent findings by juries or judges regarding the petitioner and a convicted person.

This approach is favorable because it limits the scope of the *Heck* bar to those instances when a petitioner would actually undermine her own conviction if she were successful in the § 1983 action, which

Access to DNA Evidence, 71 U. CHI. L. REV. 587 (2004) (arguing that *Heck* should not bar DNA requests from prisoners); Paul D. Vink, Note, *The Emergence of Divergence: The Federal Court's Struggle to Apply Heck v. Humphrey to § 1983 Claims for Illegal Searches*, 35 IND. L. REV. 1085 (2002) (evaluating the implications of *Heck* on Fourth Amendment searches). The most surprising observation about this area of literature is the lack of professional pieces. Nearly every piece published that analyzes *Heck v. Humphrey* comes from notes and comments. The research surrounding *Heck v. Humphrey* would benefit greatly from professional contributions.

14. See *infra* Part VI.

15. Collateral estoppel and res judicata are related but independent preclusion concepts. 47 AM. JUR. 2D *Judgments* § 464 (2006). Res judicata prohibits a party or its privies from relitigating a previously adjudicated cause of action. *Id.* § 473. Since a civil action cannot be brought in a criminal trial, a civil § 1983 cause of action will not have been previously adjudicated. Therefore, res judicata will never preclude a § 1983 claim that arises from the same facts on which a criminal conviction rests. Collateral estoppel, on the other hand, arises when an issue of ultimate fact has been determined in a valid and final prior proceeding. *Id.* § 487. Thus, collateral estoppel could preclude a § 1983 claim if the issue of that claim was fully adjudicated in a prior criminal trial and the party against whom it is applied was a party or in privity with a party to the trial.

16. While *Heck* is intended to protect state convictions from being collaterally attacked through the federal court system, it is a separate and distinct doctrine from collateral estoppel.

was the purpose of the bar's creation when the Court initially decided *Heck*.¹⁷ Broadening this scope is detrimental because it keeps potentially valid federal claims out of federal court in situations where a state forum may not be available or sufficient. Also, imposing the *Heck* bar on petitioners like the *Beets* plaintiffs complicates the *Heck* analysis for future courts because it adds elements that do not belong. Indeed, it confuses the differences between issue preclusion and *Heck* preclusion.

To support these arguments, Part II provides a brief explanation of § 1983 and habeas corpus relief. Part III explains how the Court has dealt with the relationship between these two statutes in the context of *Heck v. Humphrey* and subsequent cases. Part IV presents the current circuit split and its relationship to the question posed in this piece. Part V studies the *Beets* case in detail to provide context for the analysis that follows in Part VI. Part VI identifies the troubling results that come from extending the *Heck* bar in the manner adopted by the *Beets* court. This section also explains how cases may still be properly barred by collateral estoppel when appropriate. Part VII concludes.

II. A BRIEF EXPLANATION OF § 1983 AND HABEAS CORPUS RELIEF

The two major doctrinal players in this Comment, 42 U.S.C. § 1983 and the habeas corpus statute, 28 U.S.C. § 2241, are the basis for thousands of federal complaints each year. In 2011, over 16,000 habeas petitions were filed, which alone accounted for 6% of all private cases submitted to federal district courts.¹⁸ The number of § 1983 claims is also impressive.¹⁹ The volume of cases that federal

17. See *infra* Part III.A.

18. ADMIN. OFFICE OF THE U.S. COURTS, STATISTICAL TABLES 2011: TABLE C-3, at 35 (2011), available at <http://www.uscourts.gov/uscourts/Statistics/StatisticalTablesForTheFederalJudiciary/2011/Dec-11/C03Dec11.pdf> (showing that 16,195 habeas corpus petitions were filed out of 243,182 total private civil cases). About 6,000 habeas petitions are appealed to circuit courts, making up about 30% of all federal question appeals. ADMIN. OFFICE OF THE U.S. COURTS, STATISTICAL TABLES 2011: TABLE B-7, AT 19 (2011), available at <http://www.uscourts.gov/uscourts/Statistics/StatisticalTablesForTheFederalJudiciary/2011/Dec-11/B07Dec11.pdf>.

19. ADMIN. OFFICE OF THE U.S. COURTS, STATISTICAL TABLES 2011: TABLE C-3, at 35 (2011), available at <http://www.uscourts.gov/uscourts/Statistics/StatisticalTablesForTheFederalJudiciary/2011/Dec-11/C03Dec11.pdf>. The total number of civil rights cases brought by both prisoners and nonprisoners was over 59,000 or approximately 25% of all private cases heard in federal district court. Granted, not all civil rights cases rely on § 1983 for a private cause of action, but many do.

courts receive dealing with these two statutes, and the significance of the rights they protect, make it important to understand their relation to each other.

Both statutes originally were enacted in the Reconstruction Era to provide federal remedies for state violations of federal rights. During this time, Congress worked to align the justice system with the recently passed post-Civil War amendments, which resulted in substantial federal checks on state power.²⁰ The Habeas Corpus Act of 1867 was novel because it authorized federal courts to hear petitions from prisoners held in state custody.²¹ This statute was initially drafted in a way that encouraged state prisoners to call on the federal government to correct missteps by state actors.²² Congress later amended the statute to require a petitioner to first exhaust all potential state remedies before seeking habeas review in federal court.²³ Habeas affords a prisoner a release from custody if she successfully demonstrates that all state avenues for redress have failed and that her federal rights were violated.²⁴

Originally part of the Ku Klux Klan Act of 1871,²⁵ § 1983²⁶ was enacted due to the conditions in the South at the time of its

20. See LARRY W. YACKLE, *FEDERAL COURTS* 41–42 (3d ed. 2009) (explaining that post-Civil War constitutional amendments and various civil rights statutes extended the jurisdiction and the remedial authority of federal courts).

21. Habeas Corpus Act of 1867, ch. 27, 14 Stat. 385 (identifying defendants subject to suit or prosecution in state court as having access to federal court through a writ of habeas corpus).

22. *Id.* (calling it the federal court clerk’s “duty” to issue a writ of habeas corpus if a state prisoner meets the requirements and finding it the “duty” of the marshal to obey that writ and deliver the state prisoner to federal court).

23. Act of June 25, 1948, Pub. L. No. 80-773, 62 Stat. 967 (codified at 28 U.S.C. § 2254). See Martin A. Schwartz, *The Preiser Puzzle: Continued Frustrating Conflict Between the Civil Rights and Habeas Corpus Remedies for State Prisoners*, 37 DEPAUL L. REV. 85, 95–96 (1988). Professor Schwartz explains that the policy behind the exhaustion requirement was twofold. First, it was a nod to state comity—Congress gives state courts the first opportunity to correct any constitutional violation. Second, the requirement preserves the relationship between state and federal courts by avoiding any unnecessary disturbance, which in turn also balances federalism interests against the need for the writ of habeas corpus in situations where the State has violated federal law. *Id.* Beyond this, Congress demonstrated its respect for state remedies by obliging state prisoners to first turn there before seeking federal redress. *Id.* at 102.

24. See Schwartz, *supra* note 23, at 104–05 (explaining that a release from custody is the heart of habeas relief, particularly since it does not attempt to compensate for *past* suffering).

25. Ku Klux Klan Act of 1871, ch. 22, 17 Stat. 13 (1871) (“[A]ny person who, under color of any [state law], shall subject, or cause to be subjected, any person within the

passage.²⁷ The Act attempted to hold State officers, who were unable or unwilling to protect the newly freed slaves, accountable for evenhandedly enforcing state law.²⁸ Section 1983's lack of an exhaustion requirement is a major procedural difference between it and habeas.²⁹ In the landmark case of *Monroe v. Pape*, Justice Douglas found that the "general language" of § 1983 makes the federal remedy "supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked."³⁰ In all, the Court has construed § 1983 to have a very "broad reach."³¹

Habeas and § 1983 are substantively different as well.³² For example, while habeas can result in a prisoner's release from confinement,³³ § 1983 provides an action for declaratory, injunctive, and monetary relief.³⁴ Indeed, release from custody "lies at the heart

jurisdiction of the United States to the deprivation of any rights . . . shall . . . be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress.").

26. 42 U.S.C. § 1983 (2006). 28 U.S.C. § 1343(a)(3) gives federal district courts jurisdiction to hear cases arising under § 1983.

27. *Monroe v. Pape*, 365 U.S. 167, 183 (1961), *overruled on other grounds by* *Monell v. Dep't of Soc. Servs. of N.Y.C.*, 436 U.S. 658 (1978). *Monroe* held that a municipality was not a "person" as required by § 1983, meaning that a claim could not be raised directly against the city. *Monroe*, 365 U.S. at 191–92. *Monell* reversed this conclusion, holding that "local governments, like every other § 1983 'person' . . . may be sued for constitutional deprivations." *Monell*, 436 U.S. at 690–91.

28. *Monroe*, 365 U.S. at 175–76. Justice Douglas found "three main aims" of the Ku Klux Klan Act. *Id.* at 173. First, it was possible that in certain circumstances the Act would override state law. *Id.* Second, "it provided a remedy where state law was inadequate," to do so. *Id.* Third, the Act was "to provide a federal remedy where the state remedy, "though adequate in theory, was not available in practice." *Id.* at 174.

29. *See Patsy v. Bd. of Regents*, 457 U.S. 496, 501 (1982) (holding that "exhaustion is not a prerequisite to an action under § 1983"); Schwartz, *supra* note 23, at 98 (noting that the conflict between § 1983 and habeas arises because under habeas a prisoner must exhaust all state remedies before bringing suit, but under § 1983 she does not).

30. 365 U.S. at 183.

31. *Heck v. Humphrey*, 512 U.S. 477, 503 (1994) (Souter, J., concurring); *Preiser v. Rodriguez*, 411 U.S. 475, 489 (1973) (stating that the language of § 1983 is "broad" and that "[t]he statute is a general one"). Although § 1983 does not create substantive rights itself, it "provides remedies for deprivations of rights established elsewhere." *City of Okla. City v. Tuttle*, 471 U.S. 808, 816 (1985) (plurality opinion).

32. *See YACKLE, supra* note 20, at 682 (comparing § 1983 and habeas, saying that "[i]n both instances, litigants can initiate original proceedings in federal court, contending that state officials have violated their federal rights"); Schwartz, *supra* note 23, at 88–89 (explaining that the major purpose of § 1983 was to enforce the Fourteenth Amendment).

33. *See supra* note 24 and accompanying text.

34. Schwartz, *supra* note 23, at 89. Professor Yackle states that "[o]rdinarily, § 1983

of the habeas corpus remedy,” but it is not available in a civil rights action.³⁵ Also, damages are an important remedy under § 1983, but they are not available under habeas.³⁶

Despite the various differences between habeas and § 1983, state exhaustion is really the crux of the issue. Section 1983’s lack of a state exhaustion requirement lends itself to strategic litigation by prisoners because exhausting all state remedies under habeas is laborious, time consuming, and expensive. A state prisoner desiring to show that a state official violated her federal rights in a way that justifies the prisoner’s release generally has to jump through the various procedural hoops established by § 2254 of the habeas statute.³⁷ But, if that same prisoner were able to side-step the burdensome habeas standard by using the more general § 1983 statute, she could collaterally attack her conviction or confinement without exhausting state remedies. However, this side-step strategy conflicts with the purpose of habeas’s state exhaustion requirement—to preserve comity by defusing friction between state and federal courts. It would allow a prisoner to do what habeas expressly prohibits by merely changing the label on the complaint.³⁸

To avoid this, the Supreme Court has held that a state prisoner cannot attack the validity of her confinement or the duration thereof by means of a § 1983 civil action.³⁹ In *Preiser v. Rodriguez*, plaintiff-prisoners were denied “good-conduct-time credits” as a result of disciplinary proceedings.⁴⁰ They sought the restoration of these

actions offer nothing that habeas corpus does not also deliver, and usually a good deal less.” YACKLE, *supra* note 20, at 683.

35. Schwartz, *supra* note 23, at 104–05.

36. *Id.* See also YACKLE, *supra* note 20, at 684 (offering that “[a]ctions pursuant to § 1983 may offer plaintiffs a form of relief that is not available in habeas proceedings—namely, compensatory damages”).

37. A prisoner must show that he has exhausted state remedies or that there is not an adequate remedy available in the state courts, or that special circumstances exist that make the state process ineffective to protect the prisoner’s rights. See 28 U.S.C. § 2254(a)–(b) (2006).

38. MICHAEL L. WELLS ET AL., CASES AND MATERIALS ON FEDERAL COURTS 925 (2d ed. 2011) (identifying this possibility). See also YACKLE, *supra* note 20, at 683 (calling it “inconsistent” to allow § 1983 actions where “habeas corpus is the traditional device for contesting unlawful deprivations of liberty” and stating that the mechanisms included therein are meant to ensure that habeas claims are brought “in a proper way at the proper time”).

39. See, e.g., *Preiser v. Rodriguez*, 411 U.S. 475 (1973); *Wolff v. McDonnell*, 418 U.S. 539 (1974).

40. 411 U.S. at 476.

credits through § 1983.⁴¹ The Court held that the § 1983 claim could not be considered because success in the civil action would attack the legality of the prisoners' confinement and restoration of the credits would demand their immediate release from custody.⁴² Since this result would fall squarely within the "traditional scope" of habeas corpus relief, using § 1983 to seek speedier release from prison is prohibited.⁴³ However, where § 1983 claims do not trespass into traditional habeas territory, they usually are entertained. Indeed, the Court later allowed § 1983 claims to challenge rules and practices within state prisons so long as the validity or length of the plaintiff's confinement was not jeopardized.⁴⁴

III. *HECK* AND ITS PROGENY

After *Preiser* and subsequent cases, it was clear that a prisoner was prohibited from bringing a § 1983 claim that, if recognized, would also require shortening her term of confinement or her outright release. But, that same prisoner would still be allowed to bring a § 1983 injunctive action against the practices or procedures of a prison that violated her constitutional rights. The latter action may proceed because successfully proving the use of unconstitutional procedures within a prison would not necessarily require speedier release. Suppose, however, a prisoner did not seek release for an alleged unconstitutional confinement based on past violations, but instead sought only damages. Should the prisoner be able to bring a § 1983 claim if doing so would jeopardize the validity of her confinement? In *Heck v. Humphrey*, the Court said "no" and the *Heck* bar was born.

A. *Heck v. Humphrey*

Roy Heck was convicted and sentenced in Indiana after a state court found him guilty of killing his wife.⁴⁵ Heck appealed his sentence in the state court and also brought a pro se suit in federal

41. *Id.* at 477.

42. *Id.* at 498–99.

43. *Id.* at 487.

44. In *Wolff v. McDonnell*, the Court held that a § 1983 claim was permissible if a state prisoner merely desired to challenge the practices, rules, and regulations of the complex in which he was held, since it did not actually shorten his term. 418 U.S. at 543, 579.

45. *Heck v. Humphrey*, 512 U.S. 477, 478 (1994).

district court alleging that law enforcement officers violated his constitutional rights by knowingly destroying evidence.⁴⁶ Heck sought compensatory and punitive money damages, but he did not seek injunctive relief or release from prison.⁴⁷

Heck was unsuccessful in the district court, which dismissed his § 1983 claim without prejudice because it directly implicated the validity of his state conviction.⁴⁸ He appealed this decision to the Seventh Circuit and while that appeal was pending, the Indiana Supreme Court affirmed Heck's conviction.⁴⁹ Following the affirmation, Heck submitted a writ of habeas corpus in federal court that was denied.⁵⁰ Subsequently, the Seventh Circuit affirmed the dismissal of Heck's § 1983 petition because even though he did not directly challenge the validity of his sentence, success on the § 1983 claim would obligate the State to release him based on a violation related to his confinement.⁵¹

The Supreme Court affirmed the Seventh Circuit in an opinion without dissent. However, the Court split over how rigidly to apply its newly developed bar to § 1983 claims. While Justice Scalia wrote for the majority, his approach strictly requires the petitioner to prove that her state conviction was terminated in her favor before a federal court may entertain the civil claim that rests on the same set of facts.⁵² Concurring, Justice Souter championed a nuanced approach that emphasized simply avoiding collisions between habeas relief and § 1983.⁵³ Three other Justices joined Justice Souter,⁵⁴ essentially making the uncontested *Heck* result a 5–4 decision on the rationale.

1. Justice Scalia and the Court's opinion

Justice Scalia stated that the question before the Court involved

46. *Id.* at 479.

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.* Heck initially submitted a writ of habeas corpus prior to the affirmation of his state conviction that was denied because "it contained unexhausted claims." *Id.* Nevertheless, Heck's second federal habeas petition was also denied. *Id.*

51. *Id.* at 479–80.

52. *See infra* Part III.A.1.

53. *See infra* Part III.A.2.

54. Justice Souter was joined by Justices Blackmun, Stevens, and O'Connor. *Heck*, 512 U.S. at 491 (Souter, J., concurring).

“the intersection” of 42 U.S.C. § 1983 and 28 U.S.C. § 2254.⁵⁵ When previously considering the nature of this intersection, the Court discussed the “overlap” of § 1983 and § 2254.⁵⁶ The *Preiser* court had noted in dicta that a state prisoner could seek damages via § 1983 because habeas does not provide that remedy; thus, the action would not skirt too closely to habeas’s traditional scope.⁵⁷ Justice Scalia argued, however, that this “statement may not be true . . . when establishing the basis for the damages claim necessarily demonstrates the invalidity of the conviction.”⁵⁸ Narrowly defined, the issue for the Court in *Heck* was whether a federal court should or should not recognize a § 1983 claim for damages that questions the validity of a state prisoner’s conviction or confinement.⁵⁹ Finding that the Court treats § 1983 as a “species of tort liability,”⁶⁰ Justice Scalia analogized § 1983 to the common law tort action of malicious prosecution.⁶¹

Malicious prosecution is often brought when the plaintiff has been the subject of unjustified litigation that caused her some sort of harm.⁶² A malicious prosecution plaintiff must prove that the action against her led to a legal termination in her favor.⁶³ The Court incorporated the favorable termination requirement to ensure that a federal court would not entertain a § 1983 action without the

55. *Id.* at 480 (majority opinion).

56. *Preiser v. Rodriguez*, 411 U.S. 475, 503–04 (1973).

57. *Id.* at 494.

58. *Heck*, 512 U.S. at 481–82.

59. *Id.* at 483.

60. *See Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 305–06 (1986) (quoting *Carey v. Piphus*, 435 U.S. 247, 253 (1978)) (recognizing a line of cases stating that the Court has “repeatedly noted that . . . § 1983 creates ‘a species of tort liability’ in favor of persons who are deprived of ‘rights, privileges, or immunities secured’ to them by the Constitution”); *see also* *Smith v. Wade*, 461 U.S. 30, 34 (1983); *Imbler v. Pachtman*, 424 U.S. 409, 417 (1976). Professor Yackle explained that by referring to tort law in these situations, “the Court may only mean to recognize that a defendant’s behavior often constitutes both a violation of the plaintiff’s federal rights for purpose of § 1983 and a common law wrong, compensable under state law.” YACKLE, *supra* note 20, at 472. Basically, categorizing § 1983 as a species of tort law gives the Court a starting point for analysis since the statute itself is written quite broadly and without much direction for detailed application.

61. *Heck*, 512 U.S. at 483–84.

62. STUART M. SPIESER, CHARLES F. KRAUSE & ALFRED W. GANS, *THE AMERICAN LAW OF TORTS* § 28.1 (Monique C. M. Leahy ed., 2011). This point is emphasized: “[w]ith respect to malicious-prosecution claims arising from both prior criminal and civil proceedings, the key is misuse of legal procedure—unjustifiable litigation.” *Id.*

63. *Id.*

petitioner first proving that the conviction with which her claim coincided was reversed, thus avoiding a collision at the intersection of habeas relief and § 1983.

The Court reasoned that requiring the prisoner to show favorable termination of her conviction before initiating § 1983 proceedings avoids parallel litigation over issues that might undermine the criminal conviction and result in two conflicting outcomes. In essence, a favorable termination requirement prohibits a collateral attack on the prisoner's conviction via a § 1983 civil suit.⁶⁴ Based on this understanding, the Court directed:

[W]hen a state prisoner seeks damages in a § 1983 suit, the . . . court must consider whether a judgment in favor of the plaintiff would *necessarily* imply the invalidity of his conviction or sentence; if it would, the complaint must be dismissed unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated.⁶⁵

Conversely, if the success of the plaintiff's § 1983 action would not "demonstrate the invalidity of any outstanding criminal judgment against the plaintiff, the action should be allowed to proceed . . ." ⁶⁶ And while favorable termination may appear to be a habeas-type exhaustion requirement, the Court maintained the procedural difference between habeas and the *Heck* bar by viewing *Heck* as the *denial* of an action's existence.⁶⁷

In Mr. Heck's case, the Court concluded that it could not entertain his § 1983 claim because the action for damages would functionally challenge the legality of his conviction. That is, his successful civil claim would prove that his conviction violated his constitutional rights, undermining the state supreme court's affirmance of his conviction.⁶⁸

64. *Heck*, 512 U.S. at 484. The Court reasoned that "civil tort actions are not appropriate vehicles for challenging the validity of outstanding criminal judgments." *Id.* at 485. For that reason, "§ 1983 damages actions that necessarily require the plaintiff to prove the unlawfulness of his conviction or confinement" should be subject to the favorable termination requirement. *Id.* at 486.

65. *Id.* at 487 (emphasis added). In a footnote, the Court clarified that when a plaintiff does not seek damages directly attributable to conviction or confinement, but "whose successful prosecution would necessarily imply that the plaintiff's criminal conviction was wrongful," if the plaintiff would "have to negate an element of the offense of which he has been convicted," the § 1983 claim cannot be brought. *Id.* at 486 n.6.

66. *Id.* at 487.

67. *Id.* at 489.

68. *Id.* at 490.

2. *Justice Souter's concurrence*

Justice Souter, and the three Justices joining him, also believed that *Heck* involved the intersection of § 1983 and habeas relief.⁶⁹ He wrote separately because he agreed that the malicious prosecution analogy was a way to avoid collisions at the intersection, but he disagreed that the Court should create a bright-line rule.⁷⁰ First, if the malicious prosecution analogy should properly guide the analysis, then, according to Justice Souter, a plaintiff should logically also be required to prove its other two elements: the lack of probable cause and intentional malice.⁷¹ However, the majority did not include these requirements because it would lead to absurd results. For example, imagine if a § 1983 petitioner whose conviction was overturned because police beat her during interrogation was expected to show a lack of probable cause before a federal court would hear her claim. It would be ridiculous to preclude the action from federal court because the officers, despite their unlawful interrogation methods, likely had probable cause to believe the plaintiff was guilty.⁷²

Thus, Justice Souter's point is that the malicious prosecution analogy, from which derived the favorable termination requirement for § 1983 actions, should be the starting point only, rather than the final concrete rule. Since the majority did not adopt the other elements of malicious prosecution, rigid application of favorable termination seems inconsistent. Indeed, Justice Souter believed that the malicious prosecution analogy was a "simple way to avoid

69. *Id.* at 491 (Souter, J., concurring).

70. *Id.* at 492 (Souter, J., concurring); *see also* Beermann, *supra* note 13, at 725–26 (arguing that *Heck's* analysis is inconsistent with prior law for several reasons, one being its broad requirement of common law elements for a § 1983 claim, and another being that "Justice Scalia's opinion is quite extreme on the relationship between § 1983 and analogous common law").

71. *Heck*, 512 U.S. at 493–94 (Souter, J., concurring); *see* SPIESER, KRAUSE & GANS, *supra* note 62, § 28.4, at 524–35 (explaining the elements of malicious prosecution in both civil and criminal proceedings).

72. *Heck*, 512 U.S. at 494 (Souter, J., concurring); *see also* Beermann, *supra* note 13, at 726 (explaining that under malicious prosecution, once a conviction has occurred, the plaintiff's common law action is "forever barred, even if subsequently, the conviction was held invalid." Thus, a petitioner could have an action under color of law that deprived her of a constitutional right, as required by § 1983, but based on the *Heck* majority's reasoning, this petitioner would not have a § 1983 claim because under "the most analogous common law" claim—malicious prosecution—the plaintiff's action would not be available).

collisions at the intersection of habeas and § 1983,” but that it should not completely dictate the elements of a § 1983 cause of action.⁷³ He warned that reading favorable termination as the basis for a § 1983 analysis rather than just a starting point would “needlessly place at risk the rights of those outside the intersection of § 1983 and the habeas statute, [such as] individuals not ‘in custody’ for habeas purposes.”⁷⁴ If individuals not within this intersection were required to show favorable termination, “the result would be to deny any federal forum for claiming a deprivation of federal rights.”⁷⁵ These petitioners would not qualify under habeas since they are either not convicted or not currently confined. They would also be kept from § 1983 relief since they cannot show a favorable state ruling. Therefore, no procedural vehicle would exist for these types of plaintiffs to bring their claims to a federal court.

Inflexibly requiring favorable termination in all § 1983 cases in which there has been a prior conviction would leave viable federal claims unlitigated regardless of whether the intersection between habeas relief and § 1983 currently exists. Based solely on the reasoning in *Heck*, it is difficult to justify barring a petitioner not in custody from seeking § 1983 relief merely because she cannot demonstrate favorable termination, especially if she was never convicted in relation to the set of facts giving rise to the civil action in the first place.

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

74. *Id.* at 500. The concurrence articulately presents the policy behind the careful navigation between the habeas statute and § 1983. Citing *Preiser*, Justice Souter explains that § 1983 should be read in light of § 2254 “which applies only ‘to persons in custody’” because “state courts [should] be given the first opportunity to review constitutional claims bearing upon a state prisoner’s release from custody.” *Id.* at 497 (quoting *Preiser v. Rodriguez*, 411 U.S. 475, 489 (1973)). Summarily, if a § 1983 claim were brought before a plaintiff secured a favorable termination, then the habeas statute would lose some of its vigor since state courts could be avoided by bringing the federal civil action, assuming that success in that civil action would necessarily undermine the criminal conviction in state court. *Id.* at 498. Justice Souter expounds by stating that to “allow[] a state prisoner to proceed directly with a federal-court § 1983 attack on his conviction or sentence ‘would wholly frustrate explicit congressional intent’ as declared in the habeas exhaustion requirement.” *Id.* at 498 (quoting *Preiser*, 411 U.S. at 489). He further clarified that Congress decided that that “the appropriate remedy for state prisoners attacking the validity of the fact or length of their confinement” is through petitions of habeas corpus. *Id.* (quoting *Preiser*, 411 U.S. at 490).

75. *Id.* at 500.

B. What Followed

The *Heck* court established what it thought was a bright-line rule—a plaintiff seeking § 1983 relief must first show favorable termination of her conviction if success in the civil action would necessarily imply the invalidity of the conviction. If this rule applied only to current prisoners who are within the habeas relief and § 1983 intersection, then it would be an appropriate means for avoiding jurisdictional collisions. However, Justice Souter feared that *Heck* would be interpreted so that § 1983 petitioners not in custody would also be held to the favorable termination requirement. His concurrence argued against this presumption, and it gained momentum four years later in *Spencer v. Kemna* when the Court considered whether a plaintiff's habeas petition was moot since he was no longer in custody.⁷⁶

The *Spencer* plaintiff argued that if *Heck* barred him from bringing a § 1983 claim in relation to his first parole revocation unless he could show its invalidity, he would be kept out of federal court both by the mootness of his habeas petition and by *Heck*.⁷⁷ Essentially, if the Court found that *Heck* applied, the plaintiff would have no procedural mechanism to enter his claim in federal court. The Court concluded that the habeas petition was moot, but it is the Court's commentary on § 1983 actions that is important here. Justice Scalia, again speaking for the majority, stated that it is not required that a § 1983 action for damages always be available.⁷⁸ So, if it were true that *Heck* barred the plaintiff's federal civil action, then that alone would not warrant his habeas petition remaining ripe.⁷⁹ However, the Court did not answer whether a § 1983 action brought by a petitioner no longer in custody could be maintained in federal court.

Again concurring, Justice Souter argued that the “general” § 1983 statute should be read in light of the “specific” habeas statute, which applies only to persons “in custody.”⁸⁰ He believed it “important to read the Court's *Heck* opinion as subjecting only

76. 523 U.S. 1, 6–7 (1998).

77. *Id.* at 17.

78. *Id.* Justice Scalia does not offer any additional rationale for this conclusion besides simply calling the petitioner's *Heck*-mootness argument a “great non sequitur.” *Id.*

79. *Id.*

80. *Id.* at 20 (Souter, J., concurrence).

inmates seeking § 1983 damages for unconstitutional conviction or confinement” to the favorable termination requirement “lest the plain breadth of § 1983 be unjustifiably limited at the expense of persons not ‘in custody.’”⁸¹

Justice Souter reiterated his fear that if a plaintiff who did not fall under the habeas statute (not being in custody) were barred from bringing a § 1983 claim, it would create a “patent anomaly,”⁸² keeping out petitioners with viable § 1983 claims despite no remedy under habeas. Justice Ginsburg, who had joined Justice Scalia in *Heck*, wrote her own concurrence in *Spencer* to state that she agreed with Justice Souter’s reasoning that “individuals without recourse to the habeas statute because they are not ‘in custody’ . . . fit within § 1983’s ‘broad reach.’”⁸³ Thus, by the end of *Spencer*, Justice Souter’s approach to § 1983 petitioners not in custody was arguably adopted by five of the Supreme Court Justices.⁸⁴

IV. THE CIRCUIT COURTS’ APPLICATION OF *HECK* TO PLAINTIFFS NOT IN CUSTODY

Justice Souter’s persuasive arguments left unresolved the question whether *Heck* applies to plaintiffs not in custody, which eventually created a split between the circuits. The Second, Fourth, Seventh, Ninth, Tenth, and Eleventh Circuits have all held that when a petitioner is not incarcerated, *Heck* does not bar a § 1983 claim because the intersection of habeas relief and § 1983 is not present.⁸⁵ Conversely, the First, Third, Fifth, Sixth, and Eighth

81. *Id.* (emphasis added).

82. *Id.*

83. *Id.* at 21 (Ginsburg, J., concurrence). Justice Ginsburg, agreeing with Justice Souter’s reasoning, indicated that at the end of *Spencer*, a majority of the Court held the view that a petitioner not in custody bringing a § 1983 claim was not *Heck* barred from doing so. *Id.* Half the federal circuits have applied the *Spencer* concurrence in these types of situations. *See infra* Part IV.

84. Justice Ginsburg, Justice O’Connor, and Justice Breyer all joined Justice Souter’s concurrence by agreeing that a petitioner not in custody is not *Heck* barred from bringing a § 1983 claim. 523 U.S. at 18 (Souter, J., concurring). Justice Stevens’ dissent puts him at odds with Justice Scalia’s opinion and defaults him into Justice Souter’s camp. *Id.* at 22 (Stevens, J., dissenting) (arguing that damage to reputation is sufficient collateral injury to preserve habeas from mootness).

85. *See, e.g.*, *Cohen v. Longshore*, 621 F.3d 1311, 1316–17 (10th Cir. 2010) (agreeing with the *Spencer* concurrence approach that is more just and more in accordance with the purposes of § 1983 to not apply *Heck* to a petitioner who has no available habeas remedy); *Wilson v. Johnson*, 535 F.3d 262, 267–68 (4th Cir. 2008) (holding that a past prisoner does

Circuits have all concluded that the language in *Heck* makes it clear that where favorable termination cannot be shown, a petitioner is barred regardless of whether a habeas remedy is or ever was available.⁸⁶ The Supreme Court has even acknowledged that the circuits hold contrasting views regarding *Heck*'s application to § 1983 petitioners not in custody,⁸⁷ though it chose not to provide guidance.⁸⁸

The Second Circuit directly addressed this issue by holding that a plaintiff "escape[s] the jaws of *Heck*" when she is not in the custody

not "fall squarely" within *Heck* and choosing to employ the *Spencer* concurrences so plaintiff would not be left without access to federal court); *Harden v. Pataki*, 320 F.3d 1289, 1298 (11th Cir. 2003) (adopting the view from *Spencer* that when federal habeas corpus is not available to address constitutional wrongs, § 1983 must be available); *Nonnette v. Small*, 316 F.3d 872, 876 (9th Cir. 2002) (joining the circuits that find a § 1983 claim maintainable where petitioner has no habeas remedy); *Huang v. Johnson*, 251 F.3d 65, 74–75 (2d Cir. 2001) (holding that even though a mother's § 1983 action challenged the duration of confinement, it didn't challenge the validity thereof, and finding *Spencer* to hold that § 1983 must be available to address constitutional wrongs where habeas isn't available); *Carr v. O'Leary*, 167 F.3d 1124, 1127 (7th Cir. 1999) (indicating that *Spencer* dictum implies that *Heck* should not be a bar to prisoners who can no longer bring habeas petitions since released); *Leather v. Eyck*, 180 F.3d 420, 424 (2d Cir. 1999) (holding that the plaintiff had "escaped the jaws of *Heck*" because he was not ever in the custody of the state); *cf. Guerrero v. Gates*, 442 F.3d 697, 704–05 (9th Cir. 2006) (identifying an important limit on *Nonnette*, namely that the prisoner must "timely pursu[e]" the habeas claim while it is available for *Heck* not to apply after release).

86. *See, e.g., Entzi v. Redmann*, 485 F.3d 998, 1003 (8th Cir. 2007) (stating that absent a decision from the Supreme Court, a convicted criminal no longer incarcerated is barred by *Heck* despite the concurrences in *Spencer*); *Williams v. Consovoy*, 453 F.3d 173, 177–78 (3d Cir. 2006) (criticizing the Second Circuit's *Huang* opinion for adopting a rule not a part of a "cohesive majority opinion"); *Giles v. Davis*, 427 F.3d 197, 209–10 (3d Cir. 2005); *Randall v. Johnson*, 227 F.3d 300, 301 (5th Cir. 2000) (holding that a plaintiff that is no longer in custody and thus cannot file a habeas petition is still barred by *Heck*); *White v. Gittens*, 121 F.3d 803, 806 (1st Cir. 1997) (finding *Heck* to say that even those who are no longer incarcerated and therefore do not have access to habeas corpus are still barred from bringing suit); *Schilling v. White*, 58 F.3d 1081, 1086 (6th Cir. 1995) (stating that "*Heck* applies as much to prisoners in custody (a habeas prerequisite) as to persons no longer incarcerated"); *cf. Powers v. Hamilton*, 501 F.3d 592, 601 (6th Cir. 2007) (finding that Justice Souter's concurrences in *Heck* and *Spencer* did not intend to carve out a large exception for all former prisoners, but only for those who were precluded from bringing a habeas petition as a matter of law rather than simply failing to do so).

87. *Muhammad v. Close*, 540 U.S. 749, 752 n.2 (2004).

88. Possibly, the Court has not yet responded to the split because requiring favorable termination as a prerequisite to a § 1983 claim makes little sense if the petitioner does not find herself within the habeas/§ 1983 intersection, which might require a bit of backpedaling after *Heck* and *Spencer*. *See Note, supra* note 13, at 880 ("A careful analysis of the underpinnings of *Heck* reveals that the legal merits of the favorable termination requirement are considerably weaker when applied to individuals who lack a potential habeas cause of action.")

of the State, and since she has “no remedy in habeas corpus” she is allowed to pursue a § 1983 claim in federal court.⁸⁹ The Sixth Circuit was equally forceful in determining that “*Heck* applies as much to prisoners in custody (a habeas prerequisite) as to persons no longer incarcerated.”⁹⁰ This split implies that half of the circuits would allow a § 1983 action by a petitioner who is not in custody or has never been convicted in relation to the set of facts giving rise to the civil claim, even if another party’s conviction is based on those same facts. Since the petitioner herself is not standing in the intersection of habeas relief and § 1983, the *Spencer* concurrences indicate that her action may proceed.

The Ninth Circuit provides a useful case study regarding the application of *Heck* to § 1983 plaintiffs who have no access to relief via habeas. It holds that in circumstances where a habeas remedy is unavailable, “a § 1983 claim may be maintained.”⁹¹ The same year that the Ninth Circuit made this rule, it decided *Cunningham v. Gates*,⁹² where the court faced the question whether *Heck* precluded a nonconvicted petitioner from bringing a § 1983 claim on facts that provided the basis for another’s conviction. *Cunningham* represents the awkwardness of fitting a non-*Heck*-typical plaintiff into a *Heck* analysis.

There, co-felons Soly and Cunningham were surrounded by law enforcement officers after police received a tip and observed the two robbing a liquor store.⁹³ Before they could leave in the getaway car, the police encircled them by “jamming” their escape.⁹⁴ The officers fired into the car with shotguns and handguns, which culminated in Soly’s death and Cunningham’s permanent paralysis.⁹⁵

Cunningham was charged with Soly’s murder by provoking the officers to shoot at the getaway car, as well as robbery, burglary, and

89. *Leather*, 180 F.3d at 424. See also *Jenkins v. Haubert*, 179 F.3d 19 (2d Cir. 1999). The *Leather* court notes that collateral estoppel may still bar the plaintiff’s claim even though *Heck* does not. *Leather*, 180 F.3d at 424.

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

91. *Nonnette v. Small*, 316 F.3d 872, 876 (9th Cir. 2002). However, the Ninth Circuit also requires that the plaintiff have “timely pursu[ed]” her habeas petition while available if *Heck* is not to bar her civil action once she is no longer confined. *Guerrero v. Gates*, 442 F.3d 697, 704–05 (9th Cir. 2006).

92. 312 F.3d 1148 (9th Cir. 2002).

93. *Id.* at 1151–52.

94. *Id.* at 1152.

95. *Id.*

attempted murder of police officers.⁹⁶ The jury was instructed that “it must find that Cunningham knew or should have known that he was shooting at police officers engaged in the performance of their duties.”⁹⁷ He was convicted on all counts. Subsequently, Soly’s parents and Cunningham himself brought § 1983 claims against law enforcement for its brutal response to the robbery. The Ninth Circuit conclusively found that *Heck* barred Cunningham’s action because if he were successful, it would necessarily imply the invalidity of his conviction.⁹⁸

In regards to Soly’s parents, the court turned away from *Heck* and instead employed collateral estoppel principles.⁹⁹ It quickly determined that the first two prongs of collateral estoppel had been met.¹⁰⁰ First, the issues necessarily decided in Cunningham’s criminal trial were identical to the issues in the Solys’ § 1983 claim, and second, Cunningham’s trial resulted in a judgment on the merits. The third prong requires that the party raising the issue be in privity with the party against whom it has already been adjudicated. So, the court evaluated whether the Solys “had an identity or community of interest” with Cunningham and whether he was their “virtual representative.”¹⁰¹ Specifically identifying three important reasons privity was lacking, the court held that: (1) the Solys were not represented by counsel at the criminal trial, (2) they had no voice in the proceedings, and (3) the jury did not have the benefit of the evidence or argument from Soly’s view.¹⁰² The court also stated that

96. *Id.*

97. *Id.*

98. *Id.* at 1155.

99. The California common law elements of collateral estoppel that the *Cunningham* court applied are that (1) the issues in both actions are identical, (2) the issue was fully adjudicated in the prior action, and (3) the party against whom collateral estoppel is applied was a party to the previous action or in privity with a party to that action. *Id.* The court did not give any real explanation why *Heck* was inapplicable. However, since neither the Solys nor their son were convicted, it would have been impossible to find *them* within the intersection of habeas and § 1983.

100. Collateral estoppel generally requires that the issues be identical, that the issue was fully adjudicated in the first case, that the party against whom collateral estoppel applied was a party or in privity with a party to the first case, and that the party against whom collateral estoppel is applied had a full and fair opportunity to litigate the issue. *See infra* Part VI.B.

101. *Cunningham*, 312 F.3d at 1156 (quoting *State Farm Mut. Auto. Ins. Co. v. Davis*, 7 F.3d 180, 183 (9th Cir. 1993) and *United States v. Geophysical Corp.*, 732 F.2d 693, 697 (9th Cir. 1984)).

102. *Id.*

Cunningham's and Soly's interests probably would have "sharply diverged" at trial.¹⁰³ Additionally, the court reasoned that it would require "[l]ooking into a crystal ball" to divine exactly how Soly's own trial would have come out and that such "rank speculation" is insufficient to invoke collateral estoppel.¹⁰⁴ Thus, to reach its conclusion that Soly's parents' § 1983 action could proceed, the court looked outside the *Heck* framework and opted to use a collateral estoppel analysis instead. Unfortunately, the court did not expressly state that *Heck* did not apply.

Three years later, the Ninth Circuit decided *Smith v. City of Hemet*, in which the court held that a man convicted of resisting arrest was not barred by *Heck* from bringing a § 1983 claim for excessive force.¹⁰⁵ It reasoned that the civil action could proceed without undermining the conviction because excessive force might have been used subsequent to the conduct on which the conviction was based.¹⁰⁶ The court explained that a § 1983 action is not *Heck* barred unless its successful prosecution would *necessarily* imply the invalidity of plaintiff's earlier conviction.¹⁰⁷ This set the stage for *Beets*.

V. BEETS V. COUNTY OF LOS ANGELES

Currently, the majority of the circuits would not find *Heck* to bar a petitioner from bringing a § 1983 claim in relation to her conviction or confinement if she never was or no longer is in custody.¹⁰⁸ However, if the § 1983 petitioner's claim implies the invalidity of another party's conviction, should the *Heck* bar apply? One might deduce from *Nonnette v. Small*,¹⁰⁹ *Cunningham v. Gates*,¹¹⁰ and *Smith v. City of Hemet*¹¹¹ that the Ninth Circuit's *Heck*

103. *Id.* This is particularly true since Cunningham was convicted of causing Soly's death. *Id.*

104. *Id.*

105. 394 F.3d 689, 707 (9th Cir. 2005).

106. *Id.* at 698.

107. *Id.* at 699.

108. *See supra* note 85 and accompanying text.

109. 316 F.3d 872, 876 (9th Cir. 2002) (holding that where habeas is not available for relief, § 1983 must be).

110. 312 F.3d 1148, 1156 (9th Cir. 2002) (holding that a petitioner not convicted on the set of facts giving rise to the § 1983 action was not barred by *Heck* nor collateral estoppel since the parties were not in privity).

111. 394 F.3d 689, 699 (9th Cir. 2005) (holding that a § 1983 claim is not barred by

jurisprudence allows a nonconvicted, nonconfined § 1983 petitioner to bring an action for damages, despite another's conviction resting on the same set of facts. *Heck* appears not to apply because the petitioner herself does not have access to any sort of relief under habeas since she is not in custody. Further, if the *Cunningham* court's reasoning is adopted, collateral estoppel likely will also not preclude the action because the high privity standard would not be met. Nevertheless, in *Beets v. County of Los Angeles*,¹¹² the Ninth Circuit concluded that *Heck* prohibits this type of § 1983 action, thereby realizing the fear of five Justices from the *Spencer* court that *Heck* could be read to bar petitioners not in the habeas relief and § 1983 intersection.¹¹³

In May of 2008, Glenn Rose was shot and killed by police while he and Sarah Morales attempted to flee law enforcement in a stolen vehicle.¹¹⁴ Morales was charged and convicted based on an aiding and abetting theory for assaulting an officer with a deadly weapon while she knew or should have known the officer was engaged in the performance of his duties.¹¹⁵ Her conviction was affirmed by the state appellate court, and the state supreme court denied review.¹¹⁶

Meanwhile, Rose's parents filed a § 1983 claim in federal court in their own rights and as successors in interest to their son.¹¹⁷ The claim alleged that the officer used excessive deadly force against Rose, violating his and their constitutional rights.¹¹⁸ The court found that *Heck* barred the § 1983 claim by reasoning that the jury already found the officer's performance lawful in relation to Rose because of the aiding and abetting theory.¹¹⁹ Thus, if the plaintiffs were successful in the § 1983 claim, the result would necessarily imply the invalidity of Morales's conviction.¹²⁰

Heck unless it necessarily implies or demonstrates that the plaintiff's conviction is invalid).

112. 699 F.3d 1038 (9th Cir. 2012).

113. See *supra* notes 83–87 and accompanying text.

114. *Beets*, 699 F.3d at 1040. For a fuller recitation of the *Beets* facts, see Part I.

115. 669 F.3d at 1040.

116. *Id.* at 1040–41.

117. *Id.* at 1040.

118. *Id.*

119. *Id.*

120. *Id.*

Besides *Cunningham*,¹²¹ the various circuit courts have not confronted many cases in which a nonconvicted successor-in-interest plaintiff seeks § 1983 damages based on the same set of facts for which the deceased party's co-felon was convicted.¹²² Ultimately, such a situation requires the court to reference the co-felon's conviction and find one of two possibilities. The first is that success in the plaintiff's action *necessarily* implies the invalidity of the confined party's conviction. The alternative possibility is that the parties are in privity so that collateral estoppel bars the § 1983 action. The first possibility would be an application of the *Heck* bar, the second, plain collateral estoppel. However in *Beets*, the Ninth Circuit misconstrued *Heck* by fusing these two doctrines together.

The *Beets* court's analysis established that the jury found Morales to have acted willfully against a police officer who was not using excessive force to lawfully perform his duties.¹²³ The court reasoned that a jury's verdict determines the lawfulness of the officer's action "throughout the whole course of the defendant's conduct."¹²⁴ The court felt that if the *Beets* plaintiffs were successful in the § 1983 action, it would necessarily imply that the jury in Morales's trial got it wrong.¹²⁵

The court found that "if a criminal conviction arising out of the same facts stands and is fundamentally inconsistent with the unlawful behavior for which section 1983 damages are sought, the 1983

121. 312 F.3d 1148 (9th Cir. 2002).

122. In *Figueroa v. Rivera*, 147 F.3d 77 (1st Cir. 1998), the First Circuit heard a case in which the family of a prisoner who died while his habeas petition was being reviewed brought a § 1983 action against the State for malicious prosecution. The prisoner's alleged co-felon, who was in custody as well, also filed for habeas, but the reviewing judge denied both petitions. The court held that *Heck* barred the family from bringing the claim because the deceased prisoner did not show that his conviction had been overturned. The court was skeptical that a § 1983 plaintiff might satisfy *Heck* by referencing the surviving co-felon's potential conviction reversal. *Id.* at 81.

123. *Beets*, 669 F.3d at 1047.

124. *Id.*

125. The court points out that if Rose rather than Morales had been convicted, this civil action would have to be dismissed pursuant to *Heck*. Also, Morales's conviction bars her from bringing a § 1983 action based on the officer's actions. *Id.* The author of this Comment completely agrees that if Rose were alive and in state prison claiming a § 1983 violation, there is no doubt that *Heck* would preclude him. Similarly, if it were Morales bringing the § 1983 claim, she would most definitely run afoul of the *Heck* bar since she would be unable to meet the favorable termination requirement. As it is, neither of these scenarios is actually the case and the action should be allowed.

action must be dismissed.”¹²⁶ It quickly pointed out that this rule references a “criminal conviction” rather than the “plaintiff’s” conviction and that this choice of language suggests that *Heck* “may apply to civil actions brought by individuals other than the convicted criminal if such application does not otherwise violate any constitutional principles.”¹²⁷

In the name of *Heck*, the court forged ahead to apply the collateral estoppel analysis used by the *Cunningham* court, without making any distinction between the two doctrines. It found that the first two prongs of collateral estoppel were met during Morales’s criminal jury trial because the trial resulted in a judgment on the merits of whether the officer acted within the scope of his duty during the attempted arrest.¹²⁸ In reference to whether that judgment applied to the *Beets* plaintiffs, the court explained that the plaintiffs were not parties to Morales’s criminal prosecution, so *Heck* preclusion could apply only if the plaintiffs “had an identity or community of interest” with Morales.¹²⁹ The court concluded that the plaintiffs were in privity with Morales on the issue of excessive force and that they should have reasonably expected to be bound by the jury’s decision in Morales’s trial.¹³⁰

The court failed to explain how Rose could have argued for his own interests at Morales’s criminal trial since Rose could not join as an interested party like he might have in civil court, even if he were alive. Nevertheless, the court held:

[W]here more than one person engages in a concerted criminal act during the course of which one of the criminals is killed by the police, then when the propriety of the officer’s action is critical to the conviction of a surviving criminal, and the deceased’s interests in the issue are in no way inconsistent with the surviving criminal’s interest in the issue, the “community of interest” is such that the deceased and those asserting claims through the deceased may

126. *Id.* at 1046 (quoting *Smith v. City of Hemet*, 394 F.3d 689, 695 (9th Cir. 2005)). This rule actually comes from *Smithart v. Towery*, 79 F.3d 951, 952 (9th Cir. 1997), which was decided before *Spencer* and dealt with a petitioner who had pleaded to assault with a deadly weapon. This makes it quite distinguishable from *Beets*.

127. *Beets*, 669 F.3d at 1046.

128. *Id.*

129. *Id.* at 1047 (quoting *Cunningham v. Gates*, 312 F.3d 1148, 1156 (9th Cir. 2002)).

130. *Id.* at 1046–48.

reasonably be bound by the determination of the issue by a jury in the criminal proceeding.¹³¹

The court believed that this perspective preserved two important judicial policies that the Supreme Court cited when it established the *Heck* bar: first, the policy against conflicting resolutions arising out of the same transactions and, second, a concern for finality and consistency.¹³² Yet, allowing a § 1983 petitioner to proceed with her action despite another's conviction on the same set of facts would not violate finality or consistency. In fact, it would be harmonious with federal law and Court precedent regarding inconsistent convictions for co-felons.¹³³

VI. TROUBLING RESULTS

In both *Heck* and *Spencer*, Justice Souter explained that he viewed § 1983 as a broad statute and habeas as a specific statute.¹³⁴ If a diagram were used to depict this idea, one large circle encompassing all constitutional violations could be titled "Potential Constitutional Violations." Within that large circle, a smaller one would appear titled "Habeas Corpus Jurisdiction." All constitutional claims seeking or resulting in release from confinement would fall within the smaller circle. Anything outside the small circle could give rise to a § 1983 action, but any claim within that smaller circle would be off limits to a § 1983 claim. Thus, the broad § 1983 cause of action is curtailed only when an action falls within the scope of habeas relief. Where that is not the case, § 1983 should be allowed to function in its role as the vehicle for securing relief for constitutional violations.¹³⁵ The overlapping of the two circles is what the Justices call the habeas relief and § 1983 intersection, and claims not within the intersection should be allowed to proceed. Thus, the petitioner could be cruising down § 1983 Street without ever getting caught in the intersection with Habeas Street. That

131. *Id.* at 1048.

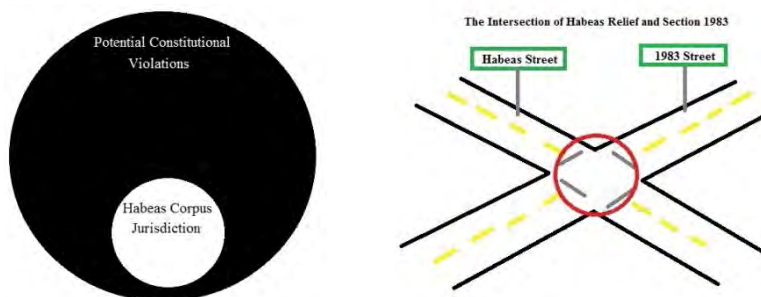
132. *Id.*

133. *See infra* Part VI.A.1.

134. *Heck v. Humphrey*, 512 U.S. 477, 497, 502 (1994) (Souter, J., concurring); *Spencer v. Kemna*, 523 U.S. 1, 20 (1998) (Souter, J., concurring).

135. However, there are limits to the recovery that § 1983 can offer even in justifiable situations due to obstacles such as "state sovereign immunity, municipal immunity from respondeat superior liability, and qualified immunity for law enforcement officers." Buford, *supra* note 13, at 1502–03.

crossing is where jurisdictional collisions occur and it must be avoided.



To reiterate, *Heck* held that a *prisoner* seeking damages under § 1983 would be prohibited from doing so if the action’s success would “necessarily imply the invalidity” of her conviction, unless she could first show that her conviction was favorably terminated.¹³⁶ Thus, the holding consists of two parts: (1) the necessary invalidity test and (2) the favorable termination test. A logical exercise will help highlight the problems with this requirement: A § 1983 petitioner who has not been convicted of a crime in relation to a set of facts cannot necessarily imply the invalidity of her own conviction because there is none. The nonexistent conviction makes the second part of the *Heck* test moot since one cannot show the favorable termination of a conviction that never existed in the first place. Therefore, if a court is to find that *Heck* bars a § 1983 petitioner who has not been convicted, it must do so exclusively by referring to a party who *has* been convicted based on the same set of facts from which the § 1983 action arises. The following section argues that this *Heck*-by-reference approach is inconsistent with the reasoning upon which the *Heck* opinion was based, and this approach convolutes the important preclusion purpose for which *Heck* stands—to avoid undermining state criminal convictions by using a federal civil cause of action.

136. *Heck*, 512 U.S. at 487.

A. Heck Should Not Bar a § 1983 Petitioner Who Is Not at the Habeas Intersection

“Finality and consistency” in judicial proceedings was a major policy factor in the Court’s *Heck* ruling,¹³⁷ but it was not the only policy consideration. Both Justices Scalia and Souter acknowledged that certiorari needed to be granted in *Heck* because it dealt with the important and often litigated “intersection” between § 1983 and § 2254.¹³⁸ Avoiding a collision between these two statutes was the driving force behind the Court’s holding and the implementation of the favorable termination requirement.¹³⁹ In his concurrence, Justice Souter explained that he agreed with the majority that the favorable termination standard is “a relatively simple way to avoid collisions at the intersection of habeas and § 1983.”¹⁴⁰ Thus, not only did the Court worry about finality and consistency, but it specifically sought to protect the traditional scope of habeas corpus relief by prohibiting any run-around attack resulting from a § 1983 action. In cases where a § 1983 petitioner does not find herself in this intersection, *Heck* should not apply.

As noted, this is the stance taken by more than half of the federal circuits,¹⁴¹ and until the Supreme Court specifically addresses the issue, confusion will persist. Further, Justice Souter suggests that the “sensible way” to read *Heck* is that only a *prisoner* bringing a § 1983

137. See Buford, *supra* note 13, at 1513 (stating that one must appreciate that *Heck* advanced the principles of “consistency, finality, and federalism”); Schneidau, *supra* note 13, at 652 (arguing that “[s]uccess in collaterally-attacking tort suits would allow two diametrically opposed judicial decisions concerning the same set of operative facts to stand,” jeopardizing the policies of finality and consistency).

138. *Heck*, 512 U.S. at 480; *id.* at 491 (Souter, J., concurring); see also *id.* at 490 (Thomas, J., concurring). This intersection has also been referred to as an “overlap.” See *supra* note 56 and accompanying text.

139. *Heck*, 512 U.S. at 486–87 (Souter, J., concurring) (reasoning that allowing a “civil tort action[.]” to “challenge[.] the validity of outstanding criminal judgments . . . that necessarily require the plaintiff to prove the unlawfulness of his conviction or confinement” is a “hoary principle” because it violates the traditional purpose of habeas). See also Note, *supra* note 13, at 881 (arguing that “there is less of a basis for extending the favorable termination requirement to cases in which the *direct conflict* between § 1983 and habeas corpus is impossible because habeas is unavailable”) (emphasis added). The Court wanted to prevent individuals seeking injunctive relief from bypassing the habeas exhaustion requirement, and the Court feared that the basis for the § 1983 suit might also be used as a basis for a claim for release from prison. *Heck*, 512 U.S. at 489 (majority opinion).

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

141. See *supra* note 85 and accompanying text.

claim must satisfy the favorable termination requirement; otherwise, *Heck* could be seen as “needlessly plac[ing] at risk the rights of those outside the intersection of § 1983 and the habeas statute, individuals not ‘in custody’ for habeas purposes.”¹⁴² Such an outcome is troubling because it might “deny any federal forum for claiming a deprivation of federal rights.”¹⁴³

This is precisely what happened in *Beets*. Since the plaintiff-parents were in no way connected with the crime, they were not convicted or imprisoned. Thus, the § 1983 action could not necessarily imply the invalidity of their conviction.¹⁴⁴ Rose was killed in the exchange resulting in Morales’s conviction, so his parents’ § 1983 action would not necessarily imply the invalidity of Rose’s conviction.¹⁴⁵ In order for the *Heck* bar to keep Rose’s parents out of federal court, the *Beets* court determined that Morales’s conviction threatened a collision at the habeas and § 1983 intersection because the jury concluded in her trial that the officer did not use excessive force.¹⁴⁶ If the *Beets* plaintiffs were successful in their § 1983 claim, the court thought it would necessarily imply the invalidity of Morales’s conviction.¹⁴⁷ However, this reasoning is problematic most prominently because it suggests that the prosecutorial outcome for co-felons is never inconsistent.

1. Codefendants may receive different verdicts

The potential that co-felons might receive inconsistent judgments is neither impossible nor taboo. The Federal Rules of Criminal Procedure state that when the joinder of defendants in a trial appears to prejudice a defendant, the court may sever the defendants’ trials such that they occur separately.¹⁴⁸ There are numerous reasons codefendants might be tried separately: a codefendant’s admitted confession incriminates the other, one codefendant seeks to call the other as a defense witness, the codefendants offer conflicting defenses or strategies, a codefendant

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

143. *Id.*

144. *See generally* *Beets v. Cnty. of L.A.*, 669 F.3d 1038, 1040–41 (9th Cir. 2012).

145. *See generally id.*

146. *Beets*, 669 F.3d at 1047–48.

147. *Id.*

148. FED. R. CRIM. P. 14(a).

fears being found guilty by association, or a codefendant desires to avoid evidence confusion at trial.¹⁴⁹ For example, in *United States v. Mayfield*,¹⁵⁰ the Ninth Circuit held that the district court abused its discretion when it failed to grant the defendants' motion for severance based on mutually exclusive defenses.¹⁵¹ Separate trials could result in conflicting verdicts, condemning one while exonerating the other.

Despite the possibility of inconsistent verdicts, Federal Rules of Criminal Procedure codify the severance rule to preserve a defendant's constitutional right to a fair trial. Similarly, § 1983 was passed so that a private right of action is available to individuals who can prove that state actors violated their constitutional rights.¹⁵² The underlying principle is the same—that is, finality and consistency, though important to the judicial system, should not trump civil rights guaranteed by the Constitution. Unilaterally denying a petitioner's potentially successful § 1983 claim because it might imply the invalidity of another's criminal conviction is not compatible with this principle. Indeed, it implies that a less serious § 1983 claim would remain cognizable, while more serious constitutional claims, ones that actually have the power to imply the invalidity of another's conviction, would not be remedied at all.¹⁵³

The possibility of codefendants receiving inconsistent verdicts supports the conclusion that a *Beets*-like scenario does not warrant a *Heck* bar. *Heck* applies when an attempted § 1983 claim would necessarily imply the invalidity of a conviction or confinement. Where co-felons are tried separately due to severance, inconsistent results do not necessarily imply the invalidity of one verdict or the other; it simply means that for whatever reason, the juries read the facts differently. Thus, a *Beets*-scenario petitioner should not be *Heck* barred because success in the § 1983 claim does not *necessarily* imply invalidity, just as severance leading to inconsistent verdicts for

149. WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE §§ 17.2(a)–17.2(f) (3d ed. 2011).

150. 189 F.3d 895 (9th Cir. 1999).

151. *Id.* at 899–900. However, in the defendant's individual trial, a jury again found him guilty, which was affirmed on appeal. *United States v. Mayfield*, 418 F.3d 1017 (9th Cir. 2005).

152. *See supra* Part II.

153. *See Note, supra* 13, at 889 (identifying this anomaly).

codefendants does not *necessarily* imply the invalidity of the conflicting verdicts.

Justice O'Connor explained the importance of the adverb "necessarily" when a court decides whether a § 1983 plaintiff's claim implies the invalidity of an outstanding conviction:

[W]e were careful in *Heck* to stress the importance of the term "necessarily." For instance, we acknowledged that an inmate could bring a challenge to the lawfulness of a search pursuant to § 1983 in the first instance, even if the search revealed evidence used to convict the inmate at trial, because success on the merits would not "*necessarily* imply that the plaintiff's conviction was unlawful." To hold otherwise would have cut off potentially valid damages actions as to which a plaintiff might never obtain favorable termination—suits that could otherwise have gone forward had the plaintiff not been convicted.¹⁵⁴

The Supreme Court's jurisprudence regarding inconsistent verdicts for a single defendant further supports the importance of "necessary" invalidity. Indeed, in federal courts, "it is not necessary that the verdict returned by a jury be logically consistent in all respects."¹⁵⁵ *Dunn v. United States* held that "[c]onsistency in the verdict is not necessary" since each count in an indictment is regarded separately.¹⁵⁶ Subsequently, in *United States v. Dotterweich*, the Court found that an inconsistent verdict in relation to codefendants was not a basis for reversal because juries may indulge in motives or vagaries such as "carelessness or compromise,"¹⁵⁷ which may result in one defendant going free while the other is left with full responsibility of the crime.

Thus, the possibility of inconsistency arising from a petitioner's successful § 1983 claim and another's conviction is not strong enough to keep the plaintiff out of federal court.¹⁵⁸ There will be no

154. *Nelson v. Campbell*, 541 U.S. 637, 647 (2004) (internal citations omitted).

155. LAFAVE, *supra* note 149, § 24.10(b).

156. 284 U.S. 390, 393 (1932). The Court further explained that inconsistency may be the result of compromise or mistake, but that verdicts should not be set aside by speculation or inquiry into such matters. *Id.* at 394.

157. 320 U.S. 277, 279 (1943).

158. *See* Note, *supra* note 13, at 886–88 (stating that continued litigation might compromise finality to a certain point, but it does not create the same state interest in denying relief as it does in the habeas context and that states' interest in denying remedies under § 1983 are "simply not so substantial as to deny access to [a] federal forum").

pressure on the State to release or reduce the convicted party's confinement on the basis that another party secured relief for a violation of constitutional rights arising from the same set of facts. The critical missing element is Justice O'Connor's "necessarily."¹⁵⁹ Not only are inconsistent verdicts against one defendant undisturbed, but inconsistent verdicts among codefendants are also presumed valid. Therefore, allowing a plaintiff to proceed with a § 1983 claim will not undermine another's conviction, even if they rest on the same set of facts.

2. An aiding and abetting conviction does not determine the principal's fate

The importance of "necessarily" is particularly dispositive in the *Beets* case because Morales's conviction relied on the theory that she aided and abetted Rose, which suggests that Rose himself was guilty of criminal activity. Aiding and abetting requires proof that one is present and means to assist the perpetrator of a crime.¹⁶⁰ However, an aiding and abetting conviction does not depend on whether or not the case's principal is convicted.¹⁶¹ *Standefer v. United States* holds that a jury could validly find Morales guilty, while Rose, as the principal, could be acquitted.¹⁶² This possibility further highlights the validity of inconsistent results between co-felons. Thus, reasoning that the plaintiffs' § 1983 claim should not proceed because success would necessarily imply the invalidity of Morales's conviction is neither accurate nor persuasive.

159. *Beets* has already caused at least one district court to forget the importance of "necessarily." In *Allen v. United States*, No. 03-01358-DAE-RJJ, 2012 WL 1424167, at *1 n.1 (D. Nev. Apr. 24, 2012), the District Court of Nevada noted that *Beets* held that plaintiffs convicted of a crime may be barred from bringing a § 1983 action if success would "tend to undermine the plaintiff's . . . conviction." *Tending to undermine* and *necessarily undermining* are different standards. A § 1983 action could tend to undermine an existing conviction without necessarily undermining it. However, in *Allen*, this was not dispositive to the court's conclusion, because the court found the plaintiff's arrest to be "separated temporally and spatially from [his] criminal activity" and so *Heck* did not apply anyway. *Id.*

160. 21 AM. JUR. 2D *Criminal Law* § 167 (2012).

161. *Standefer v. United States*, 447 U.S. 10, 13–14, 25 (1980).

162. *Id.* *Standefer* involved a defendant who was indicted for aiding and abetting a revenue official in accepting compensation in addition to that authorized by law. The Court upheld defendant's nine-count conviction despite the revenue official's acquittal in the same case. It stated that "[w]hile symmetry of results [in these situations] may be intellectually satisfying, it is not required." *Id.* at 25.

B. Collateral Estoppel May Still Bar Certain § 1983 Claims

Some may argue that the *Beets* court was justified in extending *Heck* because it broadens a tool useful in quickly disposing of § 1983 cases in which a criminal conviction remains. However, even if *Heck* does not apply to § 1983 claims in which the petitioner's action rests on the same set of facts that led to another's conviction, collateral estoppel may still effectively preclude the claim. Conceptually applying the *Heck* bar to a petitioner not located at the habeas and § 1983 intersection can be tricky, as the Ninth Circuit discovered in *Cunningham*.¹⁶³ There is, after all, no clear precedent on how to do it. Thus, in both *Cunningham* and *Beets*, the Ninth Circuit created a hybrid analysis by combining *Heck* with collateral estoppel. This approach is not necessary. Where *Heck* does not properly fit the facts, collateral estoppel should be applied instead.

The Ninth Circuit's *Heck* jurisprudence exemplifies why this is so. The *Cunningham* court held that the plaintiffs' § 1983 claim was not barred under *Heck* or collateral estoppel because the deceased's interests "sharply diverged" from those of his co-felon.¹⁶⁴ Conversely, in *Beets*, the nonconvicted plaintiffs *were* found in privity and thus *Heck* barred.¹⁶⁵ This type of *Heck* application is exactly what Justice Souter, and the majority of Justices by the end of *Spencer*,¹⁶⁶ feared would

163. *Cunningham v. Gates*, 312 F.3d 1148 (9th Cir. 2002) (using collateral estoppel principles rather than the *Heck* favorable termination test to analyze whether petitioners' § 1983 claim was barred). See *supra* notes 92–104 and accompanying text.

164. *Cunningham*, 312 F.3d at 1156. Although it could be argued that this wording leaves open the possibility that the court did not think that either *Heck* or privity applied *after* analyzing both, this would mean that the court did think that *Heck* could apply to the Solys, and it just did not find that *Heck* barred them from their claim in this specific instance. However, a more persuasive view of this wording is that the court did not think *Heck* applied and so it evaluated the claim under collateral estoppel; if the court initially thought that *Heck* did bar the Solys' claim, then some mention or analysis of favorable termination would be present for future readers to consider. In its absence, this Comment's author believes that the court did not intend to apply *Heck* to petitioners bringing a § 1983 action on behalf of a deceased party.

165. The *Beets* Court found the "necessary invalidity" test is required in any § 1983 situation since *City of Hemet* used the wording "a criminal conviction" rather than "the plaintiffs'" criminal conviction when referring to petitioners falling within *Heck*'s scope. *Beets v. Cnty. of L.A.*, 669 F.3d 1038, 1046 (9th Cir. 2012).

166. Justices Blackmun, Stevens, and O'Connor joined Justice Souter's concurrence in *Heck*, and in *Spencer*, his concurrence was joined by Justices O'Connor, Breyer, and Ginsburg. Justice Ginsburg had originally been with Justice Scalia in the *Heck* majority, so after *Spencer*, it appears that the majority of the court agrees with the concerns outlined by Justice Souter. See also Buford, *supra* note 13, at 1509 (stating that Justice Souter's refusal to apply the favorable

happen—a § 1983 plaintiff with no access to habeas relief was kept out of federal court because she was unable to show favorable termination of a conviction, not even her own.

While this *Heck* and collateral estoppel fusion reaches results unintended by at least four of the Justices who made up the *Heck* court,¹⁶⁷ collateral estoppel may preclude § 1983 claims by its own doctrinal elements. Collateral estoppel generally consists of four parts: (1) whether the issues in the first case are identical to the issues in the second, (2) whether the prior case resulted in a final judgment on the merits, (3) whether the party against whom collateral estoppel is raised was a party or in privity with a party to the prior adjudication, and (4) whether the party against whom collateral estoppel is asserted had a full and fair opportunity to litigate the issue in the prior proceeding.¹⁶⁸

If a § 1983 petitioner is to be barred in a non-*Heck* scenario, meaning the petitioner is not a currently incarcerated prisoner, collateral estoppel is favorable to the *Heck* bar. As in *Cunningham* and *Beets*, the first two prongs of collateral estoppel are probably met even in another's criminal trial. At least some of the issues are likely to be identical, such as whether a police officer acted within the scope of his duties,¹⁶⁹ and the judge or jury will likely give a final judgment on the merits of those issues. It is more difficult to conclude that a § 1983 plaintiff not involved in another's criminal trial whatsoever should reasonably expect to be bound by its conclusions.¹⁷⁰ A nonconvicted plaintiff was likely not a party to another's criminal trial nor could she have intervened.¹⁷¹ Indeed, in

termination requirement to plaintiffs not incarcerated at the time of the civil action now commands the majority of the Court).

167. See *supra* notes 54, 73–75 and accompanying text.

168. 47 AM. JUR. 2D *Judgments* § 489 (2012). The “full and fair opportunity to litigate” is sometimes inferred from the third element. Thus, it is not uncommon for some states to view collateral estoppel as a three-element analysis.

169. However, an argument can be made that even if the officer acted within the scope of her duties in relation to one party to a crime, she may have exceeded that scope by using excessive force in relation to another party.

170. “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.” *Allen v. McCurry*, 449 U.S. 90, 94 (1980) (citing *Montana v. United States*, 440 U.S. 147, 153 (1979)).

171. The criminal system does not allow intervention like the civil system does. *Cf.* FED. R. CIV. P. 24.

order for collateral estoppel to be applicable to a nonconvicted § 1983 petitioner, the court will have to find privity.

Privity exists when a nonparty to a suit adequately has interests represented by someone with the same interests who *is* a party to the suit.¹⁷² Thus, if she is to be kept out of court, a § 1983 petitioner not convicted on a set of facts must be in privity with one who was convicted on those same facts. It is possible that the § 1983 petitioner is situated so that her rights are conditioned by a judgment involving another person,¹⁷³ but a party also deserves a full and fair opportunity to litigate her § 1983 issue and another's criminal trial in which the petitioner cannot intervene may not be an effective or appropriate forum. Moreover, based on the discussion of severance and the validity of inconsistent verdicts,¹⁷⁴ privity in a criminal case is likely harder to find than in a civil case. Since co-felon defendants can employ differing theories of defense, it is difficult to precisely state that one's criminal defense adequately represents the interests of the other. However, while privity may be difficult to find, it is not impossible,¹⁷⁵ and engaging in a privity analysis in situations where a nonconvicted § 1983 plaintiff's claim coincides with another's conviction works to both protect the rights of § 1983 petitioner as well as preclude only those actions where the high privity standards are met.

Therefore, where privity is appropriate, collateral estoppel may properly preclude a petitioner's § 1983 action regardless of any reference to *Heck*. Although collateral estoppel and the *Heck* bar feel related, in cases where both are considered as bars to an action, courts evaluate them as separate and distinct doctrines.¹⁷⁶ Thus, in a

172. *Richards v. Jefferson Cnty., Ala.*, 517 U.S. 793, 798–99 (1996) (quoting *Martins v. Wilks*, 490 U.S. 755, 762 n.2 (1989)).

173. RESTATEMENT (SECOND) OF JUDGMENTS ch. 4 Introductory Note (1982).

174. *See supra* Part VI.A.1.

175. Indeed, the *Beets* court may likely have reached the same conclusion regarding Rose's parents by directly employing collateral estoppel and not referencing *Heck* as part of its analysis. For instance, Rose was the actual aggressor and instigator in *Beets* and any evidence presented at Morales's trial would likely have applied equally to Rose himself. Accordingly, by assuming all else equal, it is plausible that the court could have found Rose's interests adequately represented by Morales during her trial.

176. *See, e.g., Levine v. Kling*, 123 F.3d 580, 583 (7th Cir. 1999) (explaining that even if a plaintiff is able to get his conviction overturned and avoid *Heck*, collateral estoppel could still apply).

non-*Heck* scenario, courts would be wise to clearly indicate that collateral estoppel and not *Heck* is the applicable analysis.¹⁷⁷

VII. CONCLUSION

Finality and consistency are important to the integrity of the judicial system; § 1983 claims that would jeopardize those principles are properly barred under *Heck*. However, in situations where a petitioner's civil action does not *necessarily* imply the invalidity of another's conviction, *Heck* should not be used to preclude the claim because it stretches *Heck* far beyond what it was intended to avoid—collisions at the intersection of habeas corpus relief and § 1983.

If there are instances in which an individual's conviction would necessarily be implied invalid by another's § 1983 action, the § 1983 action could be prohibited by the common law principles of collateral estoppel. This was the Ninth Circuit's approach in *Cunningham* and its attempt in *Beets*. But, if this is to be the approach, then courts should be clear that they are analyzing the two doctrines separately, rather than conflating them. This way, courts will preserve the integral purpose of the *Heck* bar without giving it a broader reach by thrusting additional and independent analytical components into the already polarizing *Heck* analysis.¹⁷⁸

A court should be able to look at a case like *Beets* and see no direct intersection between habeas relief and § 1983 nor any danger of implying the invalidity of the petitioner's own conviction because she has not been convicted. Thus, it can proceed with a collateral estoppel and privity analysis without incorporating *Heck*. In that case, the court will need persuasive reasons to find privity between the would-be § 1983 petitioner and the convicted party. Absent privity, the petitioner should be allowed to litigate the potentially successful § 1983 claim in a federal forum. Otherwise, if there is no remedy at the

177. See Schneidau, *supra* note 13, at 672 (arguing that collateral estoppel, like the favorable termination requirement from *Heck*, serves the "important state interest" of preserving resources, preventing opposing judicial decisions, and encouraging reliance on the finality of those decisions).

178. Admittedly, the *Beets* analysis could be read as not confusing *Heck* and collateral estoppel, but as using them in a two-tiered approach. First, the court determines that *Heck* applies. Once it concludes that *Heck* applies, it uses collateral estoppel to justify prohibiting the claim since the habeas/§ 1983 intersection is not present. But this reading does not impact the analysis of this Comment.

state level, legitimate claims for violations of constitutional rights may go unrecognized and unresolved.

When close cases such as *Beets* arise, § 1983's "broad reach" suggests that the tie should go to the petitioner.¹⁷⁹ It is better policy to allow an action for a violation of federal rights to proceed than to default to a position of preclusion. Plaintiffs with viable constitutional claims may never have the opportunity to litigate them in federal court because of the rigidity with which some courts are interpreting *Heck*. It is this author's hope that the other circuits will learn from the mistakes of *Beets* and move away from the improper application of *Heck*.

Lyndon Bradshaw *

179. See *Heck v. Humphrey*, 512 U.S. 477, 503 (1994) (Souter, J., concurring) (stating that "congressional policy" indicates that "individual[s] not unaffected by the habeas statute" should be able to "take advantage of the broad reach of § 1983").

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