
DEFINING THE REACH OF *HECK V. HUMPHREY*:
SHOULD THE FAVORABLE TERMINATION RULE
APPLY TO INDIVIDUALS WHO LACK ACCESS TO
HABEAS CORPUS?

Convicted criminals seeking to challenge unconstitutional conduct that occurred in the course of their prosecution or confinement can pursue relief through two avenues. One option is relief under the habeas corpus statute, which permits a federal court to order the release of a state prisoner whose confinement violates the Constitution or federal law.¹ The other option is available through 42 U.S.C. § 1983, which permits any person who has been unconstitutionally wronged by an individual acting under color of state law to seek damages or injunctive relief in federal court.² Both statutes provide remedies for constitutional violations, so their applicability overlaps when a criminal convicted in state court challenges the constitutionality of his conviction or sentence. As a result, the Supreme Court has had to confront the question of whether the two causes of action are interchangeable when a state prisoner challenges his conviction or confinement. The Court answered that question in the negative in *Heck v. Humphrey*³ and established a rule that has become paramount in the realm of prisoner litigation: a prisoner seeking damages for unconstitutional conviction or imprisonment must have the conviction or sentence reversed on appeal or otherwise declared invalid before his § 1983 claim can proceed.⁴ Federal judges hearing § 1983 claims must determine “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.”⁵

Courts have used *Heck*'s rule to dismiss a substantial number of § 1983 cases brought by imprisoned criminals;⁶ such claims can be

¹ 28 U.S.C. § 2254(a) (2000).

² The statute provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress

³ 42 U.S.C. § 1983 (2000).

⁴ 512 U.S. 477 (1994).

⁵ *Id.* at 486–87.

⁶ *Id.* at 487.

⁶ According to a Westlaw search performed on November 27, 2007, *Heck v. Humphrey* has been cited with approval in over 4500 district court opinions in the past thirteen years.

brought only through habeas. Further, *Heck*'s bar has forced lower courts to confront another question: how does *Heck* operate in cases involving convicted criminals who are ineligible for habeas corpus? This issue has been rendered salient by the post-*Heck* passage of the Antiterrorism and Effective Death Penalty Act of 1996⁷ (AEDPA), which introduced new restrictions on the availability of habeas relief. The combination of AEDPA's habeas restrictions and *Heck*'s bar on certain § 1983 claims may leave many prisoners with valid but unremedied constitutional claims. The Supreme Court has been silent on the issue, and lower courts have divided: most have ruled that a prisoner who is still in custody but is otherwise ineligible for habeas relief must comply with *Heck*, but a sizable minority permits all prisoners ineligible for habeas to petition for damages under § 1983.

This Note seeks to demonstrate why § 1983 should remain available to state court prisoners who are barred from seeking habeas relief and argues that favorable termination should be required only when a § 1983 claim could be resolved through habeas corpus. Existing Supreme Court precedent does not *require* barring § 1983 damages claims when plaintiffs cannot pursue habeas relief; in fact, the case law's underlying rationale counsels against such a conclusion. Furthermore, the policy-based rationales in favor of the *Heck* rule are less salient when applied to petitioners who lack an alternative cause of action; when habeas is unavailable, insufficient interests exist to justify dispensing with § 1983's remedial structure.

Part I examines *Heck* itself, as well as *Preiser v. Rodriguez*⁸ and *Spencer v. Kemna*,⁹ two other cases involving the overlap between § 1983 and habeas. Part II discusses the restrictions on habeas that may operate in tandem with *Heck* to bar relief, and discusses the difficulties lower courts have faced in determining *Heck*'s breadth. Part III argues that *Heck*'s favorable termination rule overreaches in cases where AEDPA bars habeas relief; when the dangers associated with the overlap between habeas and § 1983 do not apply, *Heck*'s doctrinal foundations become much less salient. Part III also discusses the pragmatic interests at stake and concludes that they, too, support the availability of § 1983 relief. Part IV concludes.

I. THE DOCTRINAL BACKGROUND

Heck v. Humphrey is one in a line of several cases in which the Court has confronted the intersection between habeas corpus and

⁷ Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of the U.S.C.).

⁸ 411 U.S. 475 (1973).

⁹ 523 U.S. 1 (1998).

§ 1983. In order to determine whether it is sensible to interpret *Heck* to bar claims brought by prisoners who have no alternative source of relief, it is important to understand the decision in the context of the Court's related jurisprudence.

A. Preiser v. Rodriguez

The Court in *Preiser v. Rodriguez* confronted the most basic type of overlap between § 1983 and habeas: the possibility that a prisoner could bring a § 1983 suit seeking an injunction ordering his release — the same remedy available through habeas. Underlying the Court's approach in *Preiser* was the fear that a prisoner could circumvent any restrictions on habeas relief by instead bringing a § 1983 action.¹⁰ The Court found especially worrisome the chance that a plaintiff could evade § 2254(b)'s¹¹ requirement that a plaintiff exhaust state remedies before bringing a habeas claim.¹² Section 1983 is also less restrictive than habeas in other respects. For instance, habeas corpus courts are required to give substantial deference to state court findings of fact;¹³ § 1983 courts, by contrast, are not required to do so.¹⁴ Permitting § 1983 claims seeking release from prison might render collateral habeas corpus review obsolete.

In *Preiser*, the Court held that prisoners who seek immediate or speedier release based on constitutional violations — claims that the Court acknowledged fall within the literal terms of § 1983 — must bring their claims in habeas.¹⁵ The general terms of § 1983 must be read in tandem with the more specific habeas corpus statute, such that the latter is the only cause of action available when the two statutes

¹⁰ See *Preiser*, 411 U.S. at 489–90 (“Congress clearly require[s] exhaustion of adequate state remedies as a condition precedent to the invocation of federal judicial relief under [the habeas corpus laws]. It would wholly frustrate explicit congressional intent to hold that the respondents in the present case could evade this requirement by the simple expedient of putting a different label on their pleadings.”).

¹¹ 28 U.S.C. § 2254(b) (2000).

¹² See *Preiser*, 411 U.S. at 477. The Supreme Court has adhered to its conclusion that exhaustion of state remedies is not required in order to bring a § 1983 claim, see, e.g., *Monroe v. Pape*, 365 U.S. 167, 183 (1961), although Congress does require exhaustion of administrative remedies in actions challenging conditions of confinement, see 42 U.S.C. § 1997e(a) (2000). A habeas petition may not be brought until petitioner has “sought and been denied relief in the state courts, if a state remedy is available and adequate.” *Preiser*, 411 U.S. at 477 (citing 28 U.S.C. § 2254(b)).

¹³ 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, 103 & n.105 (1988).

¹⁴ A number of other distinctions between habeas corpus and § 1983 make the latter a more desirable vehicle for prisoners' suits: attorneys' fees, jury trial, and discovery are all available in § 1983 suits and prohibited in habeas proceedings. See *id.* at 108–110.

¹⁵ See *Preiser*, 411 U.S. at 489–90.

overlap;¹⁶ holding otherwise would “wholly frustrate explicit congressional intent” embodied in the procedural requirements of § 2254(b).¹⁷ Following *Preiser*, the standard regulating the overlap between § 1983 and habeas was that the latter was the exclusive remedy for a state prisoner challenging the fact or duration of confinement and seeking injunctive relief.¹⁸ The Court in *Preiser* disclaimed the applicability of this restriction to suits seeking relief “other than immediate or more speedy release,” and stated that prisoners could still bring damages actions under § 1983.¹⁹

Preiser’s limits were tested the following year in *Wolff v. McDonnell*,²⁰ a § 1983 action brought by state prisoners challenging the constitutionality of prison disciplinary proceedings. The plaintiffs sought both damages and the restoration of good-time credits — relief that, if granted, would have resulted in speedier release from prison. The Court permitted the § 1983 action to proceed but held that relief was limited to damages.²¹ Since *Wolff* was a case challenging prison conditions, it left unanswered the question of whether a prisoner could bring a § 1983 damages action attacking the constitutionality of his conviction, and lower courts struggled with the issue. Many courts refused to interpret *Preiser* and *Wolff* so broadly as to permit § 1983 claims that challenged the validity of a prisoner’s conviction;²² others believed that only the type of relief requested, and not the basis for the claim, was relevant.²³ The Court would grapple with this question in *Heck*.

B. Heck v. Humphrey

Roy Heck was convicted of voluntary manslaughter in an Indiana state court for killing his wife. Before exhausting his state remedies, Heck filed a § 1983 suit alleging that state police officers and prosecutors had violated his constitutional rights;²⁴ although these accusations

¹⁶ *Id.* at 490 (“Congress has determined that habeas corpus is the appropriate remedy . . . and that specific determination must override the general terms of § 1983.”).

¹⁷ *Id.* at 489.

¹⁸ *Heck v. Humphrey*, 512 U.S. 477, 481 (1994).

¹⁹ *Preiser*, 411 U.S. at 494.

²⁰ 418 U.S. 539 (1974).

²¹ *Id.* at 554–55.

²² See Schwartz, *supra* note 13, at 123 & n.237.

²³ See, e.g., *Harper v. Jeffries*, 808 F.2d 281, 283 (3d Cir. 1986) (holding that a § 1983 claim may lie if a prisoner seeks damages but not immediate or speedier release from prison); *Wahl v. McIver*, 773 F.2d 1169, 1171 n.1 (11th Cir. 1985) (permitting a prisoner attacking “the manner in which his conviction was obtained” to seek damages under § 1983); *Lumbert v. Finley*, 735 F.2d 239, 242 (7th Cir. 1984) (concluding that a prisoner’s damages claim may proceed because “[t]he *Preiser* Court limited its holding to the case in which *only* the equitable relief of immediate or speedier release is sought”).

²⁴ *Heck v. Humphrey*, 512 U.S. 477, 478–79 (1994). Heck argued that the government had engaged in an “unlawful, unreasonable, and arbitrary investigation,” destroyed exculpatory evi-

might have been sufficient to support a habeas claim for release, Heck sought only damages. The district court dismissed the claim because it implicated the legality of Heck's confinement, and the Seventh Circuit affirmed on appeal: "If, regardless of the relief sought, the plaintiff [in a federal civil rights action] is challenging the legality of his conviction, so that if he won his case the state would be obliged to release him . . . the suit is classified as an application for habeas corpus . . ." ²⁵

The Supreme Court affirmed. The Court framed the issue before it as "whether money damages premised on an unlawful conviction could be pursued under § 1983."²⁶ Writing for the majority, Justice Scalia characterized the question as one of first impression, despite the *Preiser* Court's assertion that a state prisoner could seek damages provided he was "attacking something other than the fact or length of . . . confinement, and [was] seeking something other than immediate or more speedy release."²⁷ Justice Scalia concluded that *Preiser* turned not on the type of relief sought but instead on the nature of the claim: when a successful constitutional claim demonstrates the invalidity of the conviction, the prisoner *is* challenging the fact or length of confinement.²⁸ By reframing the holding of *Preiser* in this manner, the Court was able to avoid any appearance of conflict with its prior rulings.²⁹

Because § 1983 creates a species of tort liability, Justice Scalia looked to the common law of torts — specifically, the tort of malicious prosecution — to determine whether a § 1983 action could properly proceed. The Court noted the requirement that malicious prosecution claimants show favorable termination of the relevant prosecution before a tort claim can proceed; the favorable termination requirement "avoids parallel litigation [and] precludes the possibility of the claimant succeeding in the tort action . . . in contravention of a strong judicial policy against the creation of two conflicting resolutions arising out of the same or identical transaction."³⁰ Justice Scalia also referenced "the

dence, and used "an illegal and unlawful voice identification procedure" at his trial. *Id.* at 479 (internal quotation marks omitted).

²⁵ *Id.* at 479–80 (alteration in original) (internal quotation mark omitted).

²⁶ *Id.* at 480 n.2.

²⁷ *Id.* at 481 (ellipsis in original) (quoting *Preiser v. Rodriguez*, 411 U.S. 475, 494 (1973)). Justice Scalia's opinion was joined by Chief Justice Rehnquist and Justices Kennedy, Thomas, and Ginsburg.

²⁸ *See id.* at 481–82.

²⁹ The Court claimed that "a careful reading of *Wolff*" indicated that its language did not support the petitioner's claim for relief. *Id.* at 482. Justice Scalia characterized the claim in *Wolff* as one for "damages for the deprivation of civil rights," which was distinct from a claim for "damages for the deprivation of good-time credits." *Id.* at 482–83.

³⁰ *Id.* at 484 (quoting 8 S. SPEISER, C. KRAUSE & A. GANS, *AMERICAN LAW OF TORTS* § 28:5, at 24 (1991)).

hoary principle that civil tort actions are not appropriate vehicles for challenging the validity of outstanding criminal judgments.”³¹ Based on this principle, the majority adopted the favorable termination requirement and held that a district court must consider whether a § 1983 judgment “would necessarily imply the invalidity of [the claimant’s] conviction or sentence.”³² If so, the § 1983 claim would not be cognizable unless the conviction or sentence had previously been found invalid.³³

Justice Souter, in concurrence, argued for a narrower approach.³⁴ He disclaimed the majority’s framework by arguing that common law analogies could not displace statutory analysis if the statute’s history and purpose counseled against such an approach.³⁵ Instead, Justice Souter claimed fidelity to the methodology employed in *Preiser*, under which § 1983 and the habeas statute are read together with common law analysis used exclusively to resolve any overlaps between the two.³⁶ Justice Souter concluded that § 1983 and the habeas statute intersect only with respect to individuals who *can* invoke habeas jurisdiction; he expressed his concern about “needlessly plac[ing] at risk the rights of those outside the intersection” of the two statutes, such as individuals who are no longer in custody.³⁷ If these claimants were required to demonstrate prior invalidation of their convictions — a feat now rendered virtually impossible by the unavailability of habeas corpus — they would be denied access to the federal forum.³⁸

C. *Spencer v. Kemna*

Heck left a number of questions unresolved. Did the majority intend to bar only claims like Roy Heck’s that remain properly cognizable in a habeas suit?³⁹ Or does *Heck* bar convicted criminals who are no longer incarcerated, or for whom habeas remedies are otherwise no longer available, from seeking relief under § 1983? In 1998, the Court

³¹ *Id.* at 486.

³² *Id.* at 487.

³³ *Id.*

³⁴ *See id.* at 500–01 (Souter, J., concurring in the judgment). Justice Souter’s concurrence was joined by Justices Blackmun, Stevens, and O’Connor.

³⁵ *Id.* at 492.

³⁶ *See id.* at 497–98.

³⁷ *Id.* at 500.

³⁸ *Id.*

³⁹ Justice Souter believed that the majority opinion might be applied more narrowly because the intersection between § 1983 and habeas is problematic only when both are available. *See id.* But footnote 10 of the majority opinion took a broader view: Justice Scalia pointed out that § 1983 is not a comprehensive remedy for victims of constitutional violations, because doctrines like qualified immunity often bar relief even in the face of a violation. *See id.* at 490 n.10; *see also* RICHARD H. FALLON, JR., DANIEL J. MELTZER & DAVID L. SHAPIRO, HART AND WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1451 (5th ed. 2003).

addressed some of these questions in *Spencer v. Kemna*. The district court had dismissed Spencer's habeas suit as moot because Spencer was released from prison before the case was heard; the Eighth Circuit affirmed.⁴⁰ Spencer argued on appeal that his habeas petition could not be rendered moot because *Heck* would foreclose him from pursuing § 1983 relief, and he would thus be left without a remedy.⁴¹ Justice Scalia, writing for the majority, rejected the idea "that a § 1983 action for damages must always and everywhere be available."⁴²

Justice Souter concurred to express his disagreement with Spencer's assumption that he could not seek relief for constitutional injury under § 1983. Justice Souter reiterated his claim that *Heck* should be read not as creating a new element of a § 1983 claim, but instead as a "simple way to avoid collisions at the intersection of habeas and § 1983."⁴³ He argued that courts are "bound to recognize the apparent scope of § 1983 when no limitation [is] required for the sake of honoring some other statute or weighty policy, as in the instance of habeas."⁴⁴

A degree of *Spencer's* importance lies in the fact that a majority of the *Spencer* Court appeared to endorse Justice Souter's view that *Heck* does not bar an individual not "in custody," and therefore ineligible for habeas relief, from seeking damages under § 1983.⁴⁵ Indeed, Justice Ginsburg, who had joined Justice Scalia's opinion in *Heck*, concurred separately to reject the view she had adopted in *Heck*.⁴⁶ Citing Justice Frankfurter's statement that "wisdom too often never comes, and so one ought not to reject it merely because it comes late," Justice Ginsburg endorsed Justice Souter's approach.⁴⁷ But because *Spencer* did not require the Court directly to confront the applicability of *Heck* to prisoners no longer in custody or otherwise ineligible for habeas relief, the issue remains unsettled.⁴⁸

⁴⁰ *Spencer v. Kemna*, 523 U.S. 1, 6 (1998).

⁴¹ *Id.* at 17.

⁴² *Id.*

⁴³ *Id.* at 20 (Souter, J., concurring) (quoting *Heck*, 512 U.S. at 498 (Souter, J., concurring in the judgment)).

⁴⁴ *Id.*

⁴⁵ See FALLON, MELTZER & SHAPIRO, *supra* note 39, at 1451.

⁴⁶ *Spencer*, 523 U.S. at 21 (Ginsburg, J., concurring).

⁴⁷ *Id.* at 21–22 (quoting *Henslee v. Union Planters Nat'l Bank & Trust Co.*, 335 U.S. 595, 600 (1949)).

⁴⁸ In the immediate wake of *Spencer*, it seemed that five of the members of the Court would adopt Justice Souter's view if confronted directly with the question of whether an individual without access to habeas could bring a § 1983 claim challenging his conviction. See FALLON, MELTZER & SHAPIRO, *supra* note 39, at 1451. But since Justice O'Connor (who joined Justice Souter's concurrence) and Justice Rehnquist (who joined Justice Scalia's majority opinion) are no longer on the Court, the question of which view the Court might take is now more difficult.

II. HECK'S AFTERMATH

Many questions remained after *Heck*;⁴⁹ one that has developed more recently is how the *Heck* bar interacts with the habeas statute's restrictions on relief.⁵⁰ Habeas access has been limited substantially over the past decade, and so the issue of whether *Heck* operates when habeas is unavailable has become increasingly important. Although *Spencer* may provide a basis for finding that an individual who is ineligible for habeas may bring a § 1983 damages claim, the majority of courts to confront the issue have ruled that, since *Heck* has not been overruled, the favorable termination requirement applies whenever a claim attacks the validity of an underlying conviction.⁵¹ But a second, smaller camp has permitted a prisoner without access to habeas to pursue relief within § 1983's broad scope.⁵²

A. Lower Courts' Approaches

The larger group of courts has adopted the view espoused in *Figueroa v. Rivera*,⁵³ one of the first post-*Spencer* opinions to address the applicability of the favorable termination requirement to prisoners who are unable to seek a habeas remedy. Habeas relief was unavailable to the petitioners in *Figueroa* because the original claimant was deceased; his family sought relief under § 1983 for his allegedly unconstitutional conviction and sentence.⁵⁴ The First Circuit — although acknowledging the “fundamental unfairness” created by its conclusion — held that such a claim fell under *Heck*'s bar.⁵⁵ The court interpreted *Heck* as forbidding even claims that lie outside of the core in-

⁴⁹ One question that has created a substantial number of intercircuit conflicts is how to determine when a § 1983 judgment would necessarily impugn an underlying conviction. For instance, the circuits have disagreed as to whether a § 1983 claim seeking post-conviction access to DNA evidence is barred by *Heck*'s favorable termination rule. Compare *Osborne v. Dist. Attorney's Office*, 423 F.3d 1050, 1051 (9th Cir. 2005) (permitting such a claim to proceed), with *Harvey v. Horan*, 278 F.3d 370, 374 (4th Cir. 2002) (holding that habeas corpus is the exclusive remedy); see also Benjamin Vetter, Comment, *Habeas, Section 1983, and Post-conviction Access to DNA Evidence*, 71 U. CHI. L. REV. 587, 588 nn.3–4 (2004). Courts have also struggled with determining when a challenge to an arrest, a search, or the use of allegedly excessive force can proceed as a § 1983 claim. See Leon Friedman, *Challenging Unjust Convictions Under Section 1983*, 23 TOURO L. REV. 27, 38 (2007). Such questions are complicated by the Court's decision in *Stone v. Powell*, 428 U.S. 465 (1976), which held that a state prisoner who had been provided an opportunity for a full and fair hearing of his Fourth Amendment claim could not seek habeas relief on the ground that evidence obtained through an unconstitutional search had been introduced at trial, *id.* at 494–95, creating the question of when such claims necessarily impugn a conviction when brought under § 1983.

⁵⁰ See *Dible v. Scholl*, 410 F. Supp. 2d 807, 820 (N.D. Iowa 2006).

⁵¹ *Id.* at 820–22.

⁵² See *id.* at 822–23.

⁵³ 147 F.3d 77 (1st Cir. 1998).

⁵⁴ *Id.* at 79–80.

⁵⁵ *Id.* at 80–81.

tersection of habeas and § 1983; in its view, *Heck* applies whenever a § 1983 claim would necessarily imply the invalidity of the plaintiff's underlying conviction, regardless of whether an alternative means for challenging the conviction remained.⁵⁶ Many other circuits have followed suit and have adopted the view that *Heck* "definitively decided, in the negative, the question of whether a prisoner who is precluded from pursuing habeas relief can file a § 1983 action"⁵⁷ absent favorable termination.⁵⁸ These decisions reflect the belief that to follow *Spencer* would be to overrule *Heck* — a determination that lies solely within the Supreme Court's province.⁵⁹

In contrast, a number of courts have followed Justice Souter's *Spencer* concurrence and have concluded that a person who is legally precluded from seeking habeas relief — because of release from custody or some other exclusion from the habeas forum — may bring a § 1983 action based on a conviction that has not terminated in the plaintiff's favor.⁶⁰ These courts have declined to read *Heck* as creating a rule that can leave prisoners "with no conceivable remedy."⁶¹ These courts believe themselves free to adopt Justice Souter's position in *Spencer* because the circumstances of *Figueroa* have not yet come before the Supreme Court and *Heck* "merely hints at an answer in dicta and is not controlling in cases where a person is foreclosed from pursuing habeas relief."⁶²

This division among the lower courts highlights the need for clarity regarding whether *Heck* should be applied to prevent individuals who are ineligible for habeas from bringing § 1983 claims absent a showing of favorable termination. Furthermore, access to the habeas forum has become increasingly difficult to obtain since AEDPA's passage; strict time limits and restrictions exist on the types of claims courts can consider. As more inmates are barred from habeas, the question of how *Heck* applies to claims brought by individuals ineligible for habeas will become more salient.

⁵⁶ See *id.*

⁵⁷ *Dible*, 410 F. Supp. 2d at 822.

⁵⁸ See, e.g., *Gilles v. Davis*, 427 F.3d 197, 208–10 (3d Cir. 2005); *Huey v. Stine*, 230 F.3d 226, 229–30 (6th Cir. 2000); *Randell v. Johnson*, 227 F.3d 300, 301–02 (5th Cir. 2000). But see *Shamaeizadeh v. Cunigan*, 182 F.3d 391, 396 n.3 (6th Cir. 1999) (noting that under *Spencer* the Supreme Court indicated *Heck*'s favorable termination requirement would not apply when a claimant is no longer in custody).

⁵⁹ See *Dible*, 410 F. Supp. 2d at 822.

⁶⁰ See *id.* (citing, inter alia, *Huang v. Johnson*, 251 F.3d 65, 75 (2d Cir. 2001); *DeWalt v. Carter*, 224 F.3d 607, 616–17 (7th Cir. 2000); and *Haddad v. California*, 64 F. Supp. 2d 930, 938 (C.D. Cal. 1999)).

⁶¹ *Nonnette v. Small*, 316 F.3d 872, 877 & n.6 (9th Cir. 2002).

⁶² See *Dible*, 410 F. Supp. 2d at 823.

B. Limitations on Claims

A brief overview of AEDPA will make clear the potency of its requirements. AEDPA was passed in 1996 in response to growing congressional concerns about federal interference with state court criminal judgments, especially death penalty sentences.⁶³ Although AEDPA's passage was informed primarily by concerns about the reversal of death penalty convictions, AEDPA's provisions reach broadly enough to impact virtually all habeas petitions. Five changes are particularly important⁶⁴: First, a habeas petition must be filed within one year of the conclusion of direct review or the expiration of the time available for seeking state court review.⁶⁵ Second, judges may deny on the merits any unexhausted claim, meaning any claim not presented for state court resolution prior to the filing of a habeas petition.⁶⁶ Third, courts may hold evidentiary hearings only if the facts supporting the claim would establish the petitioner's innocence and the claim rests on either a new rule that must apply retroactively or new factual information that the petitioner could not have discovered earlier.⁶⁷ Fourth, courts may consider successive habeas petitions only in very limited circumstances.⁶⁸ Fifth, courts cannot grant relief for any claim adjudicated on the merits in state court unless the judgment was contrary to, or involved an unreasonable application of, clearly established federal law, or was based on an unreasonable determination of the facts in light of the evidence presented.⁶⁹

Although one can assume that the combination of AEDPA's restrictions and *Heck*'s bar precludes a number of convicted criminals from obtaining federal relief, it is difficult to determine empirically how many individuals are affected by the interaction. A few statistics may help to make an educated guess: Since the enactment of AEDPA, an average of 18,758 state non-capital habeas petitions have been filed per year.⁷⁰ Of those thousands of cases, many are dismissed before obtain-

⁶³ See Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996) (codified as amended in scattered sections of the U.S.C.); see also H.R. REP. NO. 104-383 (1995); Ad Hoc Committee on Federal Habeas Corpus in Capital Cases, *Report on Habeas Corpus in Capital Cases*, 45 CRIM. L. RPTR. 3239, 3240-41 (1989) (proposing the use of statutory time limits).

⁶⁴ See NANCY J. KING ET AL., FINAL TECHNICAL REPORT: HABEAS LITIGATION IN U.S. DISTRICT COURTS 8-9 (2007), available at <http://www.ncjrs.gov/pdffiles1/nij/grants/219559.pdf>.

⁶⁵ 28 U.S.C. § 2244(d)(1)(A) (2000).

⁶⁶ *Id.* § 2254(b)(2).

⁶⁷ *Id.* § 2254(e).

⁶⁸ *Id.* § 2244(b).

⁶⁹ *Id.* § 2254(d).

⁷⁰ LISA M. SEGHELLI & NATHAN JAMES, FEDERAL HABEAS CORPUS RELIEF: BACKGROUND, LEGISLATION, AND ISSUES 7 (2006) (discussing statistics from 1997-2004); see also KING ET AL., *supra* note 64, at 9-10 ("Each year, more than 18,000 cases, or one out of every

ing any form of substantive review. Estimates indicate that fewer than 1% of habeas petitions result in relief granted on the merits; 22% are dismissed as time-barred; almost 25% more are dismissed for failure to exhaust or for other procedural default.⁷¹ Since 2001 the success rate has steadily decreased: the number of petitions filed has increased while the number of successful cases has declined.⁷² These statistics indicate that “AEDPA has made habeas relief even more difficult for state prisoners to obtain” in federal courts.⁷³ Assessing the full reach of AEDPA’s procedural restrictions is difficult because courts do not always specify, when denying claims, whether the denials are merit-based or for procedural default.⁷⁴ But it is safe to assume that, among the plaintiffs in the nearly 9000 cases annually that are explicitly dismissed for failure to comply with AEDPA’s procedural requirements, at least some might wish to pursue § 1983 claims.⁷⁵

It is difficult to establish how many of those barred habeas petitioners, if they chose to instead file § 1983 suits for damages, would be affected by the *Heck* rule. This is in part because exactly which types of claims fall within *Heck*’s bar is unsettled: different circuits still disagree about when a successful § 1983 claim would necessarily imply the invalidity of the petitioner’s underlying conviction. But one conclusion is certain: *Heck*’s bar is still vigorously applied. *Heck* was cited with approval in over 4500 published district court opinions in the past thirteen years.⁷⁶ It seems reasonable to speculate that the large number of habeas claims barred by AEDPA combined with the vitality of the *Heck* rule creates the possibility that individuals with no access to a habeas forum will be denied access to § 1983 relief.

AEDPA’s one-year statute of limitations operates as one of the habeas statute’s most substantial restrictions; the statistics demonstrate that thousands of habeas petitions are barred each year because of the failure to file a timely petition. These numbers might give rise to an objection to the extension of § 1983 relief to claims in which the petitioner is barred by § 2244(d)’s statute of limitations.⁷⁷ According to

14 civil cases filed in federal district courts, are filed by state prisoners seeking habeas corpus relief . . .”).

⁷¹ KING ET AL., *supra* note 64, at 49–56.

⁷² See John H. Blume, *AEDPA: The “Hype” and the “Bite,”* 91 CORNELL L. REV. 259, 284 (2006).

⁷³ *Id.*

⁷⁴ See KING ET AL., *supra* note 64, at 49 & n.83.

⁷⁵ This total does not include the number that were likely dismissed for failure to comply with AEDPA’s substantive restrictions, like the requirement that the state judgment have violated clearly established law.

⁷⁶ See *supra* note 6.

⁷⁷ Indeed, federal courts seem more hostile toward extending § 1983 relief to petitioners who are ineligible for habeas because of their failure to comply with AEDPA’s limitations to prisoners who are no longer incarcerated. Such cases seem to operate under the assumption that individu-

the Supreme Court, the limitations period promotes finality by “expedit[ing] collateral attacks by placing stringent time restrictions on [them].”⁷⁸ If Congress has attempted to promote finality by incorporating stringent time limits on habeas actions, why should convicted criminals be granted a second opportunity to challenge their convictions despite their failure to comply with AEDPA’s statute of limitations?

But there is a reasonable argument that failure to comply with the statute of limitations is often not the petitioner’s fault. Two considerations might inform a decision to permit individuals to pursue § 1983 relief when the availability of habeas has lapsed.⁷⁹ First, the statute itself is ambiguously drafted: the Supreme Court has been called upon several times to resolve questions about when the statute of limitations begins to run, when it tolls, when cases are considered pending, and so forth; the Court decided four AEDPA statute of limitations questions in the 2004 term alone.⁸⁰ The ambiguity of the statute mitigates the blameworthiness of plaintiffs who do not file within the deadlines as interpreted by the Court. A second and related consideration is that prisoners generally file habeas claims without the advice of counsel, since the right to counsel terminates with the conclusion of direct review. Commentators have pointed out the potential injustice of AEDPA’s complex statute of limitations given most prisoners’ lack of access to counsel and the inadequacy of most prison law libraries.⁸¹ These factors may require reconsideration of the intuition against permitting inmates who have failed to comply with one statute of limitations to recast their claims in a § 1983 case.

als who have not complied with AEDPA’s restrictions have voluntarily forgone an attempt at habeas relief, so giving those plaintiffs a second opportunity for relief is unnecessary. *Compare* Nonnette v. Small, 316 F.3d 872 (9th Cir. 2002) (permitting § 1983 action to proceed when plaintiff had been released from custody), *and* Huang v. Johnson, 251 F.3d 65 (2d Cir. 2001) (same), *with* Dufrene v. Brazoria County, 146 F. App’x 715, 716 (5th Cir. 2005) (“AEDPA’s time-bar and successive-petition provisions do not preclude Dufrene from achieving a favorable termination, as required by *Heck*.”), *Wofford v. Montes*, No. 07-CV-3008, 2007 WL 605004 (C.D. Ill. Feb. 22, 2007) (barring prisoner’s § 1983 claim while acknowledging that a remedy may not be available through a habeas corpus action because of the petitioner’s possible failure to comply with AEDPA’s requirements), *United States v. Bohn*, No. 92-61-02, 1999 WL 1067866, at *4-5 (E.D. Pa. Nov. 9, 1999) (holding that inmate’s forfeiture of his habeas claim for failure to comply with AEDPA’s requirements did not lift *Heck*’s bar), *and* *Narducci v. Timoney*, No. 99-CV-3933, 1999 WL 961221 (E.D. Pa. Oct. 15, 1999) (same).

⁷⁸ See Blume, *supra* note 72, at 289 (second alteration in original) (quoting *Mayle v. Felix*, 545 U.S. 644, 657 (2005)) (internal quotation mark omitted).

⁷⁹ See *id.* at 290-91.

⁸⁰ See *id.* at 290 & n.144 (citing, *inter alia*, *Carey v. Saffold*, 536 U.S. 214 (2002) (determining that a case is “pending” under 28 U.S.C. § 2244 during the time between a lower state court’s decision and the filing of a notice of appeal)).

⁸¹ *Id.* at 290.

III. *HECK* SHOULD NOT BAR § 1983 CLAIMS BY PERSONS INELIGIBLE FOR HABEAS RELIEF

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. Thus, this Part argues that *Heck* does not operate to definitively bar § 1983 claims by individuals who cannot seek relief through habeas, either because they have been released from prison or because AEDPA's restrictions have rendered habeas claims unavailable. Rather, the favorable termination requirement should be applied only to individuals who still possess a valid cause of action under habeas.⁸² But the conclusion that *Heck*'s bar is not directly applicable to § 1983 claims brought by prisoners ineligible for habeas does not definitively answer the question of whether such claims *should* be permitted to proceed; it establishes only that lower courts are not prohibited from following Justice Souter's *Spencer* concurrence.⁸³ This Part also considers the arguments in favor of restricting § 1983 relief so as to bar petitions from prisoners whose claims attack the basis of their convictions, and concludes that such claims should nevertheless remain encompassed by § 1983.

A. *Heck's Rule Does Not Reach § 1983 Claims When Habeas Is Unavailable*

Careful review of *Heck* itself reveals that Justice Scalia's admonition against permitting § 1983 claims by inmates challenging the constitutionality of conviction or confinement does not, from a doctrinal perspective, extend to claims brought by individuals who are ineligible for habeas. The favorable termination principle should be understood as limited in this fashion because *Heck* and *Preiser* — the only Supreme Court cases to confront the direct overlap that occurs when both habeas and § 1983 are available — did not require the Court to decide the question of whether an individual with no other means of challenging his conviction should be required to show favorable termi-

⁸² In the wake of *Spencer*, some courts and commentators considered whether Justice Souter's *Spencer* concurrence might supersede *Heck* because a majority of the Court at that point appeared to endorse Justice Souter's view. See *Zupan v. Brown*, 5 F. Supp. 2d 792, 797–98 (N.D. Cal. 1998) (“It is . . . evident from Justice Ginsburg’s concurrence and Justice Stevens’ dissent that a majority of the Supreme Court . . . finds Justice Souter’s reading of *Heck* persuasive.”); FALLON ET AL., *supra* note 39, at 1451.

⁸³ Cf. *Figueroa v. Rivera*, 147 F.3d 77, 81 n.3 (1st Cir. 1998) (recognizing that dicta from *Spencer* might “cast doubt upon the universality of *Heck*’s ‘favorable termination’ requirement” but holding that the court was bound to follow directly applicable precedent even if it appears “weakened by pronouncements in its subsequent decisions” (citing *Agostini v. Felton*, 521 U.S. 203, 237 (1997))).

nation before a § 1983 action can proceed.⁸⁴ Although there is little question that Justice Scalia's favorable termination approach is binding on courts confronted with situations identical or similar to *Heck* or *Preiser*, 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. No Supreme Court precedent directly answers this question.⁸⁵ Indeed, Justice Scalia's admonition in footnote 10 of *Heck* — in which he grappled with Justice Souter's objections and argued that “no real-life example comes to mind” — seems unjustified given our current awareness of how often the habeas forum may be unavailable to potential § 1983 petitioners.⁸⁶ Justice Scalia's conclusion that challenges to the fact or duration of confinement are properly brought in a habeas corpus action rather than through a § 1983 complaint is the holding of *Heck* and binds lower courts; the same is not true of the claim that favorable termination should be required even of individuals who can no longer pursue habeas relief. Rather, footnote 10 is more properly characterized as dicta: “a statement not addressed to the question before the court or necessary for its decision.”⁸⁷ Given that *Heck* did not require the Court to decide the question of whether an inmate ineligible for habeas should be able to pursue a § 1983 claim, it is difficult to conclude that Justice Scalia's argument for the extension of the favor-

⁸⁴ See Bruce Ellis Fein, *Heck v. Humphrey After Spencer v. Kemna*, 28 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 1, 12–13 (2002) (concluding that *Heck*'s footnote 10 is not part of the holding).

⁸⁵ See *Jenkins v. Haubert*, 179 F.3d 19, 27 (2d Cir. 1999) (“[N]othing in Supreme Court precedent requires that the *Heck* rule be applied to a challenge by a prisoner to a term of disciplinary segregation [T]o apply the *Heck* rule in such circumstances would contravene the pronouncement of five justices that some federal remedy — either habeas corpus or § 1983 — must be available.”).

⁸⁶ *Heck*'s footnote 10 states in relevant part:

Justice Souter also adopts the common-law principle that one cannot use the device of a civil tort action to challenge the validity of an outstanding criminal conviction, but thinks it necessary to abandon that principle in those cases (of which no real-life example comes to mind) involving former state prisoners who, because they are no longer in custody, cannot bring postconviction challenges. We think the principle barring collateral attacks — a longstanding and deeply rooted feature of both the common law and our own jurisprudence — is not rendered inapplicable by the fortuity that a convicted criminal is no longer incarcerated.

Heck v. Humphrey, 512 U.S. 477, 490 n.10 (1994) (internal citation omitted).

⁸⁷ Fein, *supra* note 84, at 14 (quoting *United States v. Crawley*, 837 F.2d 291, 292 (7th Cir. 1988)) (internal quotation marks omitted); see *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 399–400 (1821) (“It is a maxim not to be disregarded, that general expressions . . . are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision.”).

able termination requirement to such claims “received the full and careful consideration of the [C]ourt.”⁸⁸

Aside from the fact that the Court has not yet considered a § 1983 claim by a habeas-ineligible inmate challenging the lawfulness of his conviction — meaning that any language to the contrary is only dicta — three other justifications exist for casting doubt on *Heck*'s applicability to claims that fall outside of the direct intersection between habeas and § 1983. Most importantly, the interests that the Court felt were at stake in *Heck* and *Preiser* are not compromised in cases in which habeas relief is unavailable. The interests are twofold, each directed toward resolving the complexities created by the overlap between § 1983 and habeas. First, the Court wanted to prevent individuals who sought injunctive relief from making an end-run around § 2254's exhaustion requirement. Thus *Preiser* sought to channel into habeas all claims in which an individual's cause of action (a challenge to the constitutionality of conviction or confinement) and the remedy sought (injunctive relief) overlapped.⁸⁹ Second, the Court feared that the constitutional violation that serves as the basis for a § 1983 suit might also be used as a basis for a claim for release in a state postconviction proceeding. This seemed, in part, to motivate the decision in *Heck*: even though Roy Heck was not seeking injunctive relief and so his § 1983 case overlapped only with a hypothetical habeas petition, the possibility existed that Heck could use a favorable § 1983 decision to bolster a habeas claim for release. But when habeas is unavailable, there is no possibility that a § 1983 judgment can be given persuasive effect in a later federal court proceeding. In any event, the res judicata effects of federal court judgments are matters of federal common law,⁹⁰ so courts could easily craft an exhaustion requirement or other restrictions to mitigate concerns about the effects of § 1983 judgments on future proceedings. In sum, the two interests that seemed to be at stake in *Heck* and *Preiser* — preventing an end-run around the exhaustion requirement and ensuring that § 1983 does not serve as even an indirect basis for undoing state criminal convictions — are either less salient or nonexistent when habeas relief is unavailable.

Further investigation into *Heck*'s doctrinal underpinnings reveals a third consideration: *Heck*'s favorable termination requirement was developed by analogizing relevant § 1983 claims to the tort of malicious

⁸⁸ See Fein, *supra* note 84, at 13 (quoting *Crawley*, 837 F.2d at 921) (discussing the definition of dicta).

⁸⁹ The *Preiser* Court pointed out that state courts remained available as a means of providing favorable termination. *Preiser v. Rodriguez*, 411 U.S. 475, 493 (1973). The Court also seemed to limit its opinion to the question of “the extent to which § 1983 is a permissible *alternative* to the traditional remedy of habeas corpus.” *Id.* at 500 (emphasis added).

⁹⁰ *Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 508 (2001).

prosecution.⁹¹ Although this analogy might make sense as applied to cases like Roy Heck's, it has less force where the claimant is unable to challenge his conviction or confinement in another cause of action. In order to prevent the danger of parallel litigation, the tort of malicious prosecution requires proof of legal termination of the prosecution in favor of the accused.⁹² *Carpenter v. Nutter*,⁹³ one of the cases cited by the majority in *Heck*, explains the basis for the rule: "If the rule were otherwise, the judgments of courts would have no efficacy, as they would be subject to impeachment wherever an attempt was made to enforce them, and would leave disputes between parties forever unsettled."⁹⁴ The *Carpenter* court's explanation of the necessity of favorable termination seems to be grounded less in the "hoary principle" that collateral attacks should always be disfavored⁹⁵ and more in a concern that a decision in the plaintiff's favor in a civil proceeding could be used as evidence or even proof as a matter of law in the original criminal or civil proceeding itself — perhaps an especially thorny issue if the two cases proceeded concurrently and judgment was first reached in the tort proceedings — or in a subsequent appeal. As discussed above, if § 1983 remains the only recourse available to an individual wishing to challenge his conviction or confinement, the concerns about parallel litigation and unsettledness are far less salient; there remains virtually no risk that a decision in the § 1983 plaintiff's favor can be used as a sword in a subsequent case.

The analogy of malicious prosecution to § 1983 cases brought by individuals who lack potential habeas recourse also seems misplaced in another respect: the tort's elements — only one of which is the favorable termination requirement — are stringent based partly on the characterization of malicious prosecution as a "disfavored cause of action" that has "the potential to impose an undue 'chilling effect' on the ordinary citizen's willingness to report criminal conduct."⁹⁶ Malicious prosecution is by its nature a broader tort than is the species of tort liability created in § 1983; claims can be directed not just at state actors

⁹¹ The Court has ruled that § 1983 creates a species of tort liability that justifies the importation of rules from the common law of torts to implement § 1983. See *Carey v. Phipps*, 435 U.S. 247, 257–58 (1978). Many commentators have taken issue with the Court's reliance on principles borrowed from the common law of torts, see, e.g., Eric A. Harrington, Note, *Judicial Misuse of History and § 1983: Toward a Purpose-Based Approach*, 85 TEX. L. REV. 999, 1012–17 (2007), and have argued that imposing a common law tort structure over § 1983 litigation is inconsistent with the statute's history and purpose, see, e.g., Jacques L. Schillaci, Note, *Unexamined Premises: Toward Doctrinal Purity in § 1983 Malicious Prosecution Doctrine*, 97 NW. U. L. REV. 439, 461–71 (2002).

⁹² *Heck v. Humphrey*, 512 U.S. 477, 484 (1994).

⁹³ 59 P. 301 (Cal. 1899).

⁹⁴ *Id.* at 302.

⁹⁵ See *Heck*, 512 U.S. at 486.

⁹⁶ *Sheldon Appel Co. v. Albert & Oliker*, 765 P.2d 498, 501–02 (Cal. 1989) (en banc).

like prosecutors but also at witnesses or individuals who report crimes.⁹⁷ The existence of strict filing requirements for malicious prosecution claims thus seems necessary to prevent the chilling of desirable conduct. But § 1983 claims can be directed only against state actors, and various immunities exist in order to protect state actors from liabilities that would hinder zealous performance of their duties.⁹⁸

The analogy of malicious prosecution to § 1983 claims continues to unravel in light of the channeling purposes served by making a claim difficult to pursue. A rule that would channel claims out of § 1983 and into habeas — just as the stringent elements of a malicious prosecution cause of action channel claims away from civil lawsuits and into the criminal appellate arena — seems justified as applied to claims where habeas remains available to the petitioner. But where an individual lacks any recourse other than a § 1983 action, this channeling effect seems misplaced. An individual with a valid constitutional claim has no incentive to delay bringing a habeas claim, so there is less of a need to develop requirements that will prevent him from seeking to evade one course of action in favor of another.

Justice Scalia's approach in *Heck* seems less sensible when applied to bar § 1983 claims brought by inmates who are ineligible for habeas than it does when used to protect the interests compromised by the direct overlap between § 1983 and habeas. Having established that good reasons exist to doubt the applicability of the favorable termination rule to claims brought by individuals who are ineligible for habeas and seek only damages, this Note next examines the question whether a legitimate policy justification exists for denying such individuals a cause of action under § 1983.

B. Are There Justifications for Requiring Individuals Who Are Ineligible for Habeas To Show Favorable Termination?

As described above, AEDPA's habeas restrictions have curtailed the scope of habeas review substantially.⁹⁹ The question nonetheless remains whether, regardless of the *Heck* rule, justifications exist for denying individuals who are ineligible for habeas access to the federal forum that the literal terms of § 1983 seem to permit.¹⁰⁰ Should the Court permit these individuals to seek redress in a § 1983 damages claim for constitutional violations? Or do significant state interests or other practical imperatives outweigh the remedial impulse? There are

⁹⁷ See Schillaci, *supra* note 91, at 467.

⁹⁸ See *id.* at 469.

⁹⁹ See *supra* section II.B, pp. 877–79.

¹⁰⁰ As Justice Souter recognized in his *Heck* concurrence, § 1983 is the only statutory mechanism other than habeas corpus by which individuals can sue state officials in federal court for violating constitutional rights. *Heck*, 512 U.S. at 500 (Souter, J., concurring).

legitimate reasons to impose substantial restrictions — such as those made necessary by the overlap between § 1983 and the writ of habeas corpus — on the availability of remedies for constitutional violations.¹⁰¹ Section 1983 itself establishes a strong presumption in favor of providing “individually effective redress” for constitutional violations;¹⁰² the statute was passed based partly on the concern that states were not providing relief to victims of unconstitutional state processes.¹⁰³ However, this presumption can yield when outweighed by significant interests on the other side;¹⁰⁴ so, the availability of § 1983 relief may be constricted when necessary. Assuming that § 1983 functions in this manner — as a baseline presumption in favor of the provision of relief for constitutional torts — do significant state interests exist to justify requiring habeas-ineligible individuals challenging the constitutionality of their convictions to show favorable termination before their claims may proceed?

It does not appear that state interests are so vulnerable as to require the extension of a judge-made rule that would, in tandem with AEDPA’s restrictions, operate to preclude a substantial number of constitutional claims from § 1983’s purview. A brief comparison to other restrictions on § 1983 relief is instructive: *Preiser*’s requirement that individuals seeking release from prison pursue such relief in habeas actions is a response to the countervailing concern that prisoners could make an end-run around the habeas statute’s exhaustion requirement; *Heck*’s favorable termination rule seems a sensible resolution to the overlap between the applicability of both habeas corpus and § 1983 to individuals who remain in custody and are otherwise eligible for habeas relief. The Prison Litigation Reform Act of 1995¹⁰⁵ — a statutory restriction on the availability of § 1983 relief to inmates challenging prison conditions — was drafted to curb the number of prisoner lawsuits brought in federal courts and to minimize federal court intervention in the running of state prisons.¹⁰⁶ Even the most established restrictions on the text of § 1983 can be viewed as pragmatic responses

¹⁰¹ See Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1778–79 (1991); see also Daniel J. Meltzer, *Congress, Courts, and Constitutional Remedies*, 86 GEO. L.J. 2537, 2559 (1998).

¹⁰² See Meltzer, *supra* note 101, at 2559.

¹⁰³ *Monroe v. Pape*, 365 U.S. 167, 180 (1961) (“It is abundantly clear that one reason the legislation was passed was to afford a federal right in federal courts because, by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced and the claims of citizens . . . might be denied by the state agencies.”).

¹⁰⁴ See *id.*

¹⁰⁵ Pub. L. No. 104-134, tit. VIII, 110 Stat. 1321-66 (codified as amended in sections 11, 18, 28, and 42 of the U.S.C.).

¹⁰⁶ See generally Mark Tushnet & Larry Yackle, *Symbolic Statutes and Real Laws: The Pathologies of the Antiterrorism and Effective Death Penalty Act and the Prison Litigation Reform Act*, 47 DUKE L.J. 1 (1997).

to countervailing concerns: for instance, the importation of statutes of limitations by reference to state tort law can be viewed as a necessary judicial response to § 1983's lack of an explicit limitations period.

These examples help to demonstrate that pragmatic concerns can justify restrictions on § 1983 relief. But are there significant state interests or other practical concerns that justify permitting the favorable termination bar to effectively preclude the access to the federal forum that § 1983 is supposed to protect? Even viewing § 1983 claims that attack the foundation of a conviction or sentence as a form of collateral attack, a comparison with the judge-made restrictions on habeas corpus relief that have been imposed in response to pragmatic concerns indicates that the § 1983 remedy need not be withheld from individuals who cannot pursue habeas claims.

In recent years, the Supreme Court has been increasingly restrictive in its view of when it is appropriate for state court prisoners to collaterally attack their convictions. The Court has developed restrictions based on a careful balance of the interest in providing inmates with a federal forum for constitutional review against the states' interest in finality and respect for their judicial processes. The Court's decision in *Teague v. Lane*¹⁰⁷ reflects such a balancing: the Court determined that claims based on "new law" could not be brought in a habeas corpus action because of the costs of retroactivity.¹⁰⁸ Permitting state prisoners to seek relief for violations of newly created constitutional rights, like that established in *Miranda v. Arizona*,¹⁰⁹ would not only wreak havoc on the federal system but would severely compromise state interests. Finality, comity, and respect for state court judgments are all interests that are also protected by AEDPA's restrictions.¹¹⁰ If we worry that the interests in finality, comity, and federalism will be compromised by § 1983 to the same extent that they are compromised by habeas petitions, we might conclude that sufficient state interests exist to outweigh the remedial impulse expressed in the text of § 1983.

Despite this argument's apparent merit, it is not clear that § 1983 damages relief compromises state interests in the same ways that habeas relief does. Although § 1983 claims do compromise finality in the sense that litigation surrounding an underlying claim can continue long past the point of the state court criminal judgment, claims for damages do not reduce the certitude that the convicted criminal will serve the sentence that the state has imposed upon him. Continued litigation therefore might compromise finality to a certain point, but

¹⁰⁷ 489 U.S. 288 (1989).

¹⁰⁸ *See id.* at 310.

¹⁰⁹ 384 U.S. 436 (1966).

¹¹⁰ *See* *Caldwell v. Dretke*, 429 F.3d 521, 528 (5th Cir. 2005) (citing *Duncan v. Walker*, 533 U.S. 167, 178 (2001); *Williams v. Taylor*, 529 U.S. 420, 436 (2000)).

this does not create as significant a state interest in denying relief as it does in the habeas context. Similarly, concerns about a lack of respect for state court judgments are less substantial because a § 1983 judgment, unlike the issuance of a writ of habeas corpus, does not result in the *undoing* of a criminal conviction.¹¹¹ One of the biggest concerns fueling the passage of AEDPA was that federal courts were disrupting the proper federal-state balance of authority by undoing state death penalty convictions that had been fully adjudicated on the merits.¹¹² Although allowing for § 1983 relief might be seen as showing a lack of respect for state court judgments in the sense that permitting damages relief necessarily casts blame on state actors, maintaining the state court *judgment* shows a certain amount of respect for state court proceedings.

In practice it is unlikely that § 1983 judgments will compromise federal-state comity to a significant extent. Perhaps the biggest objection to extending § 1983 relief in the cases at hand is that permitting such claims demonstrates a lack of comity or respect for state court processes (as distinct from state court judgments). Comity stands partly for the notion that the federal government should not interfere in state processes unless significant reasons exist for doing so. AEDPA attempted to promote federal-state comity by forbidding federal courts from issuing writs of habeas corpus unless the state court had committed the most egregious of violations: issuing a decision in violation of clearly established federal law or in clear contravention of the facts. One of the intuitions behind comity is that the federal government should not needlessly interfere in the operations of state judicial systems. Permitting convicted criminals to seek § 1983 damages relief from state actors might seem to operate in clear contravention of this intuition, as § 1983 claims might be used to force state criminal justice systems unnecessarily to comply with federal rules. If states fear that they will be subjected to damages actions, comity might be compromised nearly to the same extent as it is in the habeas context. However, whereas it was once commonly accepted that § 1983 damages ac-

¹¹¹ This point stands despite Justice Scalia's assertions in *Heck* that § 1983 relief operates as a form of collateral attack, or a vehicle whereby a convicted criminal can establish his innocence. *Heck v. Humphrey*, 512 U.S. 477, 484–86 (1994) (analogizing to the collateral attack inherent in malicious prosecution). Unlike other forms of collateral attack — such as federal habeas corpus or state postconviction proceedings — § 1983 relief does not operate as a direct undoing of a criminal conviction, since the criminal judgment stands.

¹¹² See generally SEGHETTI & JAMES, *supra* note 70, at 1–5 (discussing the importance of legislation that would rectify the delays and repetition caused by state capital prisoners' unfettered access to habeas corpus). AEDPA's primary impact has been that habeas courts show more deference to state judgments. See KING ET AL., *supra* note 64, at 61 (discussing the fact that habeas corpus is now granted to only approximately 12.4% of capital habeas petitioners, as compared with the approximately 40% grant rate reported for capital cases as of 1995).

tions helped serve the function of keeping state governments within certain constitutional bounds by forcing them to comply with federally developed constitutional standards,¹¹³ it has since been questioned whether damages operate to deter state actors in the way we might ordinarily expect.¹¹⁴ Governments arguably do not internalize costs in the same way that private actors do, so state governments are unlikely to react as strongly to financial incentives — the dollars extracted by federal court judgments — as they are to more politically salient ones, such as the release of convicted criminals from incarceration.¹¹⁵ If the concern is that state governments might be unfairly deterred from operating their criminal justice systems as they wish, that deterrence is likely to be much more salient in the habeas corpus context than in the § 1983 context, since state governments will not internalize the costs of § 1983 judgments. Although sovereign immunity generally forbids the filing of damages claims directly against state governments and although claims can run only against state actors in their individual capacities, these facts do not change the remedial calculus, since state actors are virtually always indemnified such that damages are paid out of the state treasury. This understanding of how state governments internalize financial costs, as opposed to more politically salient costs, provides a strong argument in favor of extending § 1983 relief: individuals who have had their constitutional rights violated are able to obtain some form of relief, while the nature of that relief (damages) is specified so as to ensure minimal intrusion on state processes. Although state interests in the habeas context might favor the restriction and even outright denial of the availability of the writ, the state interests in denying remedies under § 1983 are simply not so substantial as to deny access to the federal forum for inmates who are ineligible for habeas and who seek relief for constitutional deprivations.

A final remedies-based justification for holding *Heck* inapplicable to cases in which habeas is unavailable has to do with the remedial oddity created by *Heck*'s holding that favorable termination need be shown only when a successful § 1983 proceeding would *necessarily* imply a conviction's invalidity. The Court has, in past decisions, instructed that certain constitutional violations are not cognizable under habeas because they do not *necessarily* establish that the petitioner's

¹¹³ See Fallon & Meltzer, *supra* note 101, at 1788–89.

¹¹⁴ See generally Daryl J. Levinson, *Making Governments Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345 (2000).

¹¹⁵ See *id.* at 346–47 (arguing that remedies that are assumed to deter state governments from behaving in a particular way do not actually force governments to assume the costs of their decisionmaking processes).

conviction was unlawful.¹¹⁶ As a result, claims alleging such constitutional violations remain cognizable under § 1983, even absent favorable termination, because a successful claim will not necessarily establish the unlawfulness of the conviction. When both habeas and § 1983 are available, the asymmetry caused by such cases seems less problematic: individuals who wish to challenge more serious constitutional violations — those that, in *Heck*'s parlance, would necessarily prove the invalidity of an underlying conviction — are relegated to habeas corpus, whereas those who wish to seek damages for less serious infractions can seek damages under § 1983. But when *Heck* is invoked to bar claims by individuals who no longer have access to habeas corpus, a curious remedial oddity results: less serious constitutional claims remain cognizable in § 1983, while more serious constitutional claims — those that would necessarily imply the invalidity of petitioner's conviction — go unremedied entirely. The result seems to be at odds with our intuitions about when remedies are appropriate: individuals who have suffered more serious constitutional deprivations can receive no relief whatsoever, and those with claims, like Fourth Amendment violations, that the Court has subtly characterized as less serious are able to receive a damages remedy.

IV. CONCLUSION

As the habeas corpus statute becomes more restrictive in its substantive and procedural limitations on access to the federal forum, the import of *Heck*'s favorable termination requirement will correspondingly increase as more individuals barred from habeas courts may wish to seek relief under § 1983 for constitutional violations connected to their convictions or sentences. This Note argues that the favorable termination requirement should not apply to individuals who are ineligible for habeas but seek to challenge the constitutionality of their criminal conviction or sentence. Absent the identification of substantial state or other pragmatic interests that outweigh the presumption § 1983 establishes in favor of a federal forum and constitutional relief — an identification that is probably better suited for Congress than it is for the courts — individuals who seek damages for constitutional violations that might undermine or impugn a conviction or sentence should be permitted to bring a claim under § 1983 without first showing favorable termination.

¹¹⁶ See, e.g., *Stone v. Powell*, 428 U.S. 465, 494–95 (1976). Although the Court purported to base its decision on a weighing of the merits and the costs of using the exclusionary rule on collateral review, in reality the Court appeared to apply a variant of the harmless error test: even if a search or the introduction of evidence at trial was unlawful, that error was likely harmless in light of other factors. See *id.*