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## A Prisoner's Dilemma: The Eighth Circuit's Application of Heck v. Humphrey to Released Prisoners

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**A PRISONER’S DILEMMA: THE EIGHTH CIRCUIT’S  
APPLICATION OF *HECK V. HUMPHREY* TO RELEASED  
PRISONERS**

Tyler Eubank<sup>†</sup>

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## I. INTRODUCTION

In 2003, Randy James Newcomb was arrested for first degree driving while impaired and for felony test refusal.<sup>1</sup> Newcomb was sentenced to four years imprisonment, but the sentence was stayed for seven years.<sup>2</sup> In 2007, Newcomb was arrested for violating his probation, was sent to jail, and was again released in 2009.<sup>3</sup> Under Minnesota law, if a person is arrested for a first degree DWI and that person's sentence is stayed, the sentencing court must place that person on five years of supervised release.<sup>4</sup> Evidently, the sentencing court failed to do this with Newcomb.<sup>5</sup> Once Newcomb was imprisoned, a correctional officer wrote to the sentencing court asking that the court add a term of conditional release.<sup>6</sup> The judge did not respond, but someone within the Minnesota Department of Corrections administratively added a conditional release to Newcomb's sentence.<sup>7</sup>

Thus, Newcomb's sentence without the conditional release was set to expire April 13, 2010.<sup>8</sup> If, on the other hand, the conditional

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1. State *ex rel.* Newcomb v. Roy, No. A10-2075, 2011 WL 2437489, at \*1 (Minn. Ct. App. June 20, 2011).

2. *Id.*

3. *Id.*

4. *Id.*; see also MINN. STAT. § 169A.276, subdiv. 1(d) (2015) (“[W]hen the court commits a person to the custody of the commissioner of corrections under this subdivision, it shall provide that after the person has been released from prison the commissioner shall place the person on conditional release for five years.”).

5. *Newcomb*, 2011 WL 2437489, at \*1.

6. *Id.*

7. *See id.*

8. *Id.*

release had been imposed in accordance with Minnesota law, Newcomb's conditional release would have expired on January 12, 2014.<sup>9</sup> On April 15, 2010, just two days after Newcomb's original sentence expired, Newcomb was arrested for violating a condition of his release.<sup>10</sup> Newcomb's conditional release was revoked, and he was sentenced for an additional 150 days.<sup>11</sup>

While Newcomb was able to successfully petition for habeas corpus, what options would have been available to Newcomb if he did not discover the violation of his rights until after he had already served his additional time? Under the current law, it would all depend on in which jurisdiction Newcomb had the fortune or misfortune to have been imprisoned.<sup>12</sup>

In *Heck v. Humphrey*, the U.S. Supreme Court declared that prisoners must seek a favorable termination in habeas proceedings before challenging the fact or duration of confinement in a 42 U.S.C. § 1983 action.<sup>13</sup> In *Spencer v. Kemna*, however, the Court walked back this holding, hinting at the possibility that it would not apply where the prisoner has been released from prison.<sup>14</sup> Some circuit courts have, after counting the votes, decided that the *Heck* "favorable termination rule" does not apply to released prisoners.<sup>15</sup> Other circuit courts have decided to apply the *Heck* rule according to dicta pointing to the proposition that the favorable termination rule would apply once the prisoner was released even though habeas proceedings would be foreclosed.<sup>16</sup> The Eighth Circuit follows the latter approach.<sup>17</sup>

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9. *Id.*

10. *Id.*

11. *Id.*

12. See *infra* Section II.D (discussing the circuit split in which some jurisdictions require released prisoners to have had a favorable termination of their matter while others do not impose such a requirement).

13. 512 U.S. 477, 478 (1994); see *infra* Section II.B (discussing the history and outcome of *Heck v. Humphrey*).

14. 523 U.S. 1 (1998); see *infra* Section II.C (discussing the plurality of justices that held that the favorable termination rule would not apply to released prisoners to bar a § 1983 claim).

15. See *infra* Section II.D (discussing the circuit split, with some circuits following the holding of *Heck v. Humphrey*).

16. See *infra* Section II.D (discussing the circuit split, with some circuits following the holding of *Spencer v. Kemna*).

17. See *infra* Part III (discussing the Eighth Circuit's application of the *Heck* rule in such cases as *Newmy v. Johnson* and *Entzi v. Redmann*).

This article examines *Heck*, the origins of the current conflict, and the current circuit split in Part II.<sup>18</sup> This article also examines the application of the rule by the Eighth Circuit in Part III.<sup>19</sup> In Part IV, the article looks at habeas corpus law as it pertains to the *Heck* favorable termination rule.<sup>20</sup> In Part V, this article argues that the Eighth Circuit is on the wrong side of the split and its decisions are due to be overruled by the U.S. Supreme Court.<sup>21</sup> The article concludes the argument in Part VI.<sup>22</sup>

## II. HISTORY, *HECK*, AND *HECK*'S AFTERMATH

### A. *A Brief History of § 1983*

This article will rely on the history of § 1983 described in *Monroe v. Pape*.<sup>23</sup> Section 1983 began as § 1 of the Ku Klux Klan Act of 1871.<sup>24</sup> The passage of the Act was spurred by the Union-general-turned-United-States-President, Ulysses S. Grant.<sup>25</sup> On March 23, 1871, President Grant sent a message to Congress reading:

A condition of affairs now exists in some States of the Union rendering life and property insecure and the carrying of the mails and the collection of the revenue dangerous. The proof that such a condition of affairs exists in some localities is now before the Senate. That the power to correct these evils is beyond the control of State authorities I do not doubt; that the power of the Executive of the United States, acting within the limits of

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18. See *infra* Part II.

19. See *infra* Part III.

20. See *infra* Part IV.

21. See *infra* Part V.

22. See *infra* Part VI.

23. 365 U.S. 167 (1961), *overruled by* *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658 (1978). *Monroe* was responsible for overruling, at least implicitly, *Blyew v. United States*, which had upheld a circuit court decision essentially impeding a black person from testifying against white defendants who had killed several of her family members. 80 U.S. 581, 583, 595 (1871). For an excellent recitation of the facts of the *Blyew* case, see Robert D. Goldstein, *Blyew: Variations on a Jurisdictional Theme*, 41 STAN. L. REV. 469, 469–74 (1989).

24. *Monroe*, 365 U.S. at 171. The Ku Klux Klan Act of 1871 is also commonly known as the third Enforcement Act. *Historical Events: Ku Klux Klan Bill Enacted—April 20, 1871*, MILLER CTR., [http://millercenter.org/president/about/historical-events#4\\_20](http://millercenter.org/president/about/historical-events#4_20) (last visited Feb. 28, 2016). This article refers to the Ku Klux Klan Act of 1871 as the “Act.”

25. *Monroe*, 365 U.S. at 172.

existing laws, is sufficient for present emergencies is not clear. Therefore, I urgently recommend such legislation as in the judgment of Congress shall effectually secure life, liberty, and property, and the enforcement of law in all parts of the United States.<sup>26</sup>

The record shows three main purposes of the Act.<sup>27</sup> First, the Act was meant to override certain state laws that allowed state agents to abuse their authority by depriving people of their constitutional rights.<sup>28</sup> Second, the Act was meant to “provide a remedy where state law was inadequate.”<sup>29</sup> Finally, the Act was meant to correct situations in which there was a state remedy in place which was “adequate in theory, [but] not available in practice.”<sup>30</sup> In this, it was the specter of the Klan and the

26. *Id.* at 172–73.

27. *Id.* at 173.

28. *Id.* However, according to one U.S. Senator, Senator Sloss of Alabama, “there were no such laws.” *Id.* Senator Sloss protested:

The first section of this bill prohibits any invidious legislation by States against the rights or privileges of citizens of the United States. The object of this section is not very clear, as it is not pretended by its advocates on this floor that any State has passed any laws endangering the rights or privileges of the colored people.

*Id.* Senator Sloss appears to have forgotten the Black Codes, which, beginning as early as 1865, required blacks “to make contracts, work sunup to sundown, and ask permission before leaving the premises . . .” LOU FALKNER WILLIAMS, *THE GREAT SOUTH CAROLINA KU KLUX KLAN TRIALS, 1871–1872*, at 3 (1996). Additionally, the Black Codes forbade any black person from working in any profession outside of agriculture. *Id.*

29. *Monroe*, 365 U.S. at 173. Senator Sherman of Ohio expressed the purpose thus:

[I]t is said the reason is that any offense may be committed upon a negro by a white man, and a negro cannot testify in any case against a white man, so that the only way by which any conviction can be had in Kentucky in those cases is in the United States courts, because the United States courts enforce the United States laws by which negroes may testify.

*Id.* at 173–74.

30. *Id.* at 174. As Mr. Lowe artfully described it:

While murder is stalking abroad in disguise, while whippings and lynchings and banishment have been visited upon unoffending American citizens, the local administrations have been found inadequate or unwilling to apply the proper corrective. Combinations, darker than the night that hides them, conspiracies, wicked as the worst of felons could devise, have gone unwhipped [sic] of justice. Immunity is given to crime, and the records of the public tribunals are

compliance of state officials that the Act was meant to remedy.<sup>31</sup> As Senator Osborn put it:

That the State courts in the several States have been unable to enforce the criminal laws of their respective States or to suppress the disorders existing, and in fact that the preservation of life and property in many sections of the country is beyond the power of the State government, is a sufficient reason why Congress should, so far as they have authority under the Constitution, enact the laws necessary for the protection of citizens of the United States.<sup>32</sup>

*B. Heck v. Humphrey*

Roy Heck was convicted of voluntary manslaughter in an Indiana state court.<sup>33</sup> While Heck's appeal was being considered, Heck filed a § 1983 claim against Indiana prosecutors and an

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searched in vain for any evidence of effective redress.

*Id.* at 175.

31. *See id.* at 175–76 (“While one main scourge of the evil—perhaps the leading one—was the Ku Klux Klan, the remedy created was not a remedy against it or its members but against those who representing a State in some capacity were unable or unwilling to enforce a state law.”).

32. *Id.* at 176.

33. *Heck v. Humphrey*, 512 U.S. 477, 478 (1994). Roy and Rickie Heck were husband and wife. *Heck v. Indiana*, 552 N.E.2d 446, 448 (Ind. 1990). Rickie, however, commenced dissolution proceedings. *Id.* On the evening of January 6, 1986, several witnesses in the vicinity of Rickie's trailer heard an argument between Rickie and a man. *Id.* While some witnesses did not see the person with whom Rickie was arguing, others identified the other party as a tall, young man. *Id.* at 448–49. Just one witness identified the other party as Roy. *Id.* at 449. The witness, however, only identified him by his voice. *Id.* Following the argument, Rickie disappeared sometime between January 5 and 6, 1986. *Id.* at 448. Nearly ten months later, Rickie's body was found on a farm owned by Roy. *Id.* The pathologist opined upon his second examination of the body, that a blow to the head caused Rickie's death. *Id.* Roy exhibited a great deal of suspicious behavior following the disappearance of Rickie. *See id.* at 449. First, Roy told acquaintances that Rickie had left for Florida. *Id.* However, one of Rickie's bags was found in Roy's home. *Id.* Second, Roy requested that a couple of his female companions call the police pretending to be Rickie. *Id.* Next, Roy requested that his daughter and girlfriend dispose of several bags that were owned by Rickie and spread pepper over the place where Rickie's body was eventually found. *Id.* The jury returned a verdict of guilty on the count of voluntary manslaughter. *Id.* at 448.

investigator.<sup>34</sup> The complaint alleged that the defendants had knowingly destroyed exculpatory evidence.<sup>35</sup>

The federal district court dismissed the claim without prejudice as the claim implicated the legality of Roy's confinement.<sup>36</sup> While this decision was on appeal in federal court, the Indiana Supreme Court upheld Roy's conviction and sentence on direct appeal.<sup>37</sup> When the Seventh Circuit finally decided the case, the court affirmed, holding that:

If, regardless of the relief sought, the plaintiff is challenging the legality of his conviction, so that if he won his case the state would be obliged to release him even if he hadn't sought that relief, the suit is classified as an application for habeas corpus and the plaintiff must exhaust his state remedies, on pain of dismissal if he fails to do so.<sup>38</sup>

The U.S. Supreme Court granted certiorari.<sup>39</sup> According to the Court, the action lay at the intersection of § 1983 and the federal habeas corpus statute.<sup>40</sup> While § 1983 does not necessarily require an exhaustion of state remedies, an action brought under the

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34. *Heck*, 512 U.S. at 478–79. Section 1983 provides:

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

42 U.S.C. § 1983 (2012).

35. *Heck*, 512 U.S. at 479.

36. *Id.*

37. *Id.*

38. *Heck v. Humphrey*, 997 F.2d 355, 357 (7th Cir. 1993).

39. *Heck v. Humphrey*, 510 U.S. 1068 (1994).

40. *Heck*, 512 U.S. at 479; 42 U.S.C. § 1983; 28 U.S.C. § 2254 (2012). Section 2254 provides:

An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court *shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State*, or [that] there is an absence of available State corrective process; or circumstances exist that render such process ineffective to protect the rights of the applicant.

28 U.S.C. § 2254(b) (emphasis added).

federal habeas corpus statute does require a plaintiff to exhaust all state remedies.<sup>41</sup>

The Court began by reviewing relevant case law.<sup>42</sup> First, *Preiser v. Rodriguez* held that an inmate challenging the fact or duration of confinement must do so through a habeas corpus proceeding.<sup>43</sup> The *Heck* Court noted that the *Preiser* Court, in dictum, opined that an action for damages may be brought through a § 1983 action, because an action for damages, rather than release, is not challenging the fact or duration of confinement.<sup>44</sup> The *Heck* Court rejected this notion, stating:

That statement may not be true, however, when establishing the basis for the damages claim necessarily demonstrates the invalidity of the conviction. In that situation, the claimant *can* be said to be “attacking . . . the fact or length of . . . confinement,” bringing the suit within the other dictum of *Preiser*: “Congress has determined that habeas corpus is the appropriate remedy for state prisoners attacking the validity of the fact or length of their confinement, and that specific determination must override the general terms of § 1983.” In the last analysis, we think the dicta of *Preiser* to be an unreliable, if not an unintelligible, guide: that opinion had no cause to address, and did not carefully consider, the damages question before us today.<sup>45</sup>

The Court then went on to reject the petitioner’s contention that the issue was decided in *Wolff v. McDonnell*.<sup>46</sup> In applying *Preiser*,

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41. *Heck*, 512 U.S. at 480–81 (citing *Patsy v. Board of Regents*, 457 U.S. 496, 501 (1982)). In *Patsy*, Patsy sued her employer, Florida International University, claiming that she was impermissibly denied opportunities based on race and sex. 457 U.S. at 498. While the Fifth Circuit Court of Appeals remanded to the district court for a determination regarding state remedies, the U.S. Supreme Court reversed, declaring, “this Court has stated categorically that exhaustion is not a prerequisite to an action under § 1983 . . . .” *Id.* at 500–01.

42. *Heck*, 512 U.S. at 481–83.

43. *Id.* at 481 (citing *Preiser v. Rodriguez*, 411 U.S. 475, 488–90 (1973)). *Preiser* involved a challenge by inmates who were denied good-time credit as a result of disciplinary proceedings. 411 U.S. at 476. The inmates demanded injunctive relief that, if granted, would result in the inmates’ release from custody. *Id.* at 476–77.

44. *Heck*, 512 U.S. at 481 (citing *Preiser*, 411 U.S. at 494).

45. *Id.* at 481–82 (citation omitted) (quoting *Preiser*, 411 U.S. at 490).

46. *Id.* at 482 (citing *Wolff v. McDonnell*, 418 U.S. 539 (1974)). In *Wolff*, Wolff brought a § 1983 action on behalf of himself and other inmates of the

the *Wolff* Court held that while Wolff's action for restoration of good time credits was barred, the suit for damages was not, even though it "required determination of the validity of the procedures employed for imposing sanctions, including loss of good time, for flagrant or serious misconduct."<sup>47</sup> The *Heck* Court concluded, however, that *Wolff* only allowed a § 1983 claim for using the wrong process rather than for denying good time credits.<sup>48</sup> Further, the use of the wrong procedure did not affect the denial of the good time credits, which would call into question the fact or duration of confinement.<sup>49</sup> Therefore, to complete the tautology, the allowance of the case to continue for monetary damages did not affect the fact or duration of confinement.<sup>50</sup>

As a § 1983 action is a sort of tort action, the Court determined that a study of common law tort actions would provide guidance.<sup>51</sup> The tort of malicious prosecution provided the best analogy because "it permits damages for confinement imposed pursuant to legal process."<sup>52</sup> Malicious prosecution requires that the

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Nebraska Penal and Correctional Complex, Lincoln, Nebraska. 418 U.S. at 542. Wolff alleged that the disciplinary process did not comply with Due Process requirements. *Id.* at 543. Wolff sued for restoration of good time credits and monetary damages. *Id.*

47. *Wolff*, 418 U.S. at 554.

48. *Heck*, 512 U.S. at 482–83 ("[T]he claim as one of 'damages for the deprivation of civil rights,' rather than damages for the deprivation of good-time credits, we think this passage recognized a § 1983 claim for using the wrong procedures, not for reaching the wrong result (i.e., denying good-time credits). Nor is there any indication in the opinion, or any reason to believe, that using the wrong procedures necessarily vitiated the denial of good-time credits. Thus, the claim at issue in *Wolff* did not call into question the lawfulness of the plaintiff's continuing confinement."). The distinction between an attack on a procedure and an attack on a result has since been walked back by *Edwards v. Balisok*. 520 U.S. 641, 645–46 (1997). In *Balisok*, an inmate filed a § 1983 claim alleging that the procedure used to deprive him of thirty days of good-time credit was deficient. *Id.* at 643. Balisok requested damages and injunctive relief. *Id.* His amended complaint did not request restoration of the credit. *Id.* at 644. The Ninth Circuit Court of Appeals determined that a claim only attacking the procedure is always cognizable. *Id.* In holding that Balisok's claim ran afoul of *Heck*, the Court reasoned that even attacking the procedure used to deprive Balisok of good-time credits could call into question the fact or length of confinement. *Id.* at 645–46.

49. *Heck*, 512 U.S. at 483.

50. *Id.*

51. *Id.*

52. *Id.* at 484 (noting also that a claim for false imprisonment is a less applicable candidate as an award for false imprisonment only covered the time of

previous criminal proceeding be terminated in favor of the accused.<sup>53</sup> According to the Court,

This requirement “avoids parallel litigation over the issues of probable cause and guilt . . . and it precludes the possibility of the claimant [sic] succeeding in the tort action after having been convicted in the underlying criminal prosecution, in contravention of a strong judicial policy against the creation of two conflicting resolutions arising out of the same or identical transaction.”<sup>54</sup>

The Court ultimately held that,

[T]o recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a § 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court’s issuance of a writ of habeas corpus.<sup>55</sup>

This holding<sup>56</sup> has since become known as the favorable termination rule.

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arrest up until arraignment, but did not include damages regarding confinement as malicious prosecution would).

53. *Id.*; see *Carey v. Sheets*, 67 Ind. 375, 379 (1879) (“As a rule, it must be averred and proved, in an action for a malicious prosecution, that the prosecution complained of is at an end, and that it has terminated favorably to the plaintiff.”). See generally *Kirkpatrick v. Kirkpatrick*, 39 Pa. 288, 292 (1861) (discussing the elements required for a successful claim for malicious prosecution).

54. *Heck*, 512 U.S. at 486 (quoting 8 STUART M. SPEISER, CHARLES F. KRAUSE, & ALFRED W. GANS, *AMERICAN LAW OF TORTS* § 28:5, at 24 (1991)).

55. *Id.* at 486–87. The *Heck* rule has since been described as being based upon, amongst other ideas, the concept of comity. See *Wilkinson v. Dotson*, 544 U.S. 74, 79 (2005) (“These considerations of linguistic specificity, history, and comity led the Court to find an implicit exception from § 1983’s otherwise broad scope for actions that lie ‘within the core of habeas corpus.’” (quoting *Preiser v. Rodriguez*, 411 U.S. 475, 487 (1973)); see also *Chatman v. Slagle*, 107 F.3d 380, 382 (7th Cir. 1997) (citations omitted) (“*Heck* extends the *Preiser* rule to include § 1983 suits which request monetary, rather than injunctive, relief, for reasons of finality, consistency, and comity.”).

56. See, e.g., *Wilson v. Johnson*, 535 F.3d 262, 264 (4th Cir. 2008).

C. *The Roots of the Conflict*

In his concurring opinion, Justice Souter noted that the analysis of the majority could lead to inequitable results by shutting potential litigants out of court.<sup>57</sup> Justice Souter posited the following hypothetical:

Consider the case of a former slave framed by Ku Klux Klan-controlled law-enforcement officers and convicted by a Klan-controlled state court of, for example, raping a white woman; and suppose that the unjustly convicted defendant did not (and could not) discover the proof of unconstitutionality until after his release from state custody. If it were correct to say that § 1983 independently requires a person not in custody to establish the prior invalidation of his conviction, it would have been equally right to tell the former slave that he could not seek federal relief even against the law-enforcement officers who framed him unless he first managed to convince the state courts that his conviction was unlawful. That would be a result hard indeed to reconcile either with the purpose of § 1983 or with the origins of what was “popularly known as the Ku Klux Act,” the statute having been enacted in part out of concern that many state courts were “in league with those who were bent upon abrogation of federally protected rights.” It would also be a result unjustified by the habeas statute or any other post-§ 1983 enactment.<sup>58</sup>

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57. *Heck*, 512 U.S. at 501 (Souter, J., concurring).

58. *Id.* at 501–02 (citations omitted) (quoting *Collins v. Hardyman*, 341 U.S. 651, 657 (1951); *Mitchem v. Foster*, 407 U.S. 225, 240 (1972)). The notion of a framed person seeking redress through § 1983 is not far-fetched. In fact, that is exactly what happened in *Hibma v. Odegaard*, 576 F.Supp. 1549 (W.D. Wis. 1984), *aff'd in part, rev'd in part*, 769 F.2d 1147 (7th Cir. 1985). In that case, three deputy sheriffs undertook to frame Hibma for burglaries that they themselves had committed. *Id.* at 1551. The deputies contrived a plan in which they would get Hibma to steal a pistol and then sell it to the deputies' confederate. *Id.* The plan went off as expected, and the deputies brought Hibma in for questioning on the burglary and theft of the pistol. *Id.* The deputies then ignored Hibma's requests for a lawyer and requests for medical treatment for his narcotics withdrawals, eventually obtaining a confession from Hibma. *Id.* Hibma also gave consent for the deputies to search his home. *Id.* The deputies then proceeded to Hibma's home where they planted evidence regarding their own burglaries. *Id.* at 1552. When the sheriff and other deputies arrived, they found the evidence. *Id.* Hibma eventually pled guilty to the burglary and theft of the handgun, in return for which the

Justice Scalia, writing for the majority, responded by stating that the application of the rule should not depend on whether the prisoner is in or out of custody.<sup>59</sup> The majority went on to explain that § 1983 was not intended to give redress to every possible harm.<sup>60</sup> For instance, the immunity doctrines bar recovery against judges.<sup>61</sup>

In *Spencer v. Kemna*, the Court was asked to decide whether a habeas corpus petition was moot after a prisoner's release.<sup>62</sup> As the

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prosecutor dismissed the other burglary charges. *Id.* Hibma spent over a year in jail for the offense before being released. *Id.* Hibma did not learn about the planted evidence until three years later. *Id.* This case was decided before the *Heck* decision; because Hibma did not know about the violation until after his release, it is likely that the case never would have survived the favorable termination rule. Challenging the planting of evidence, which led to Hibma's pleading guilty, likely would have also challenged the fact or length of Hibma's confinement.

59. *Heck*, 512 U.S. at 490 n.10 ("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.").

60. *Id.*

61. *Id.* (emphasis omitted) (citation omitted) ("But if, as Justice Souter appears to suggest, the goal of our interpretive enterprise under § 1983 were to provide a remedy for all conceivable invasions of federal rights that freedmen may have suffered at the hands of officials of the former States of the Confederacy, the entire landscape of our § 1983 jurisprudence would look very different. We would not, for example, have adopted the rule that judicial officers have absolute immunity from liability for damages under § 1983, a rule that would prevent recovery by a former slave who had been tried and convicted before a corrupt state judge in league with the Ku Klux Klan."). The doctrine of judicial immunity is, of course, explicit from the language of the statute. *See* 42 U.S.C. § 1983 (2012) ("[E]xcept that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable."). The statute, however, has been found to not abrogate other common law immunities. *Buckley v. Fitzsimmons*, 509 U.S. 259, 268 (1993). Some of these immunities include the *Feres* doctrine, which blocks suits arising out of actions incident to service. *See Bowen v. Oistead*, 125 F.3d 800, 803 (9th Cir. 1997) (sovereign immunity); *Quern v. Jordan*, 440 U.S. 332, 338 (1979) (Eleventh Amendment immunity); *DiBlasio v. Novello*, 344 F.3d 292, 296–97 (2d Cir. 2003) (prosecutorial immunity).

62. 523 U.S. 1, 7 (1998). The Court determined that a habeas petition was moot once the prisoner was no longer incarcerated. *Id.* at 18. Most state courts lying within the Eighth Circuit have reached the same conclusion when examining state habeas petitions. *See Anderson v. State*, 98 S.W.3d 403, 404 (Ark. 2003) (dismissing appeal of denial of habeas petition where the prisoner had been released from custody); *Case v. Wood*, 377 N.W.2d 924, 924 (Minn. 1985)

petitioner had already been released from prison, he was required to show collateral consequences of the conviction.<sup>63</sup> Spencer argued that he would suffer collateral consequences due to *Heck*'s favorable termination rule; if Spencer's habeas corpus petition were dismissed, his ability to level a § 1983 action would also be foreclosed.<sup>64</sup> The Court concluded that the argument was:

[A] great non sequitur, unless one believes (as we do not) that a § 1983 action for damages must always and everywhere be available. It is not certain, in any event, that a § 1983 damages claim would be foreclosed. If, for example, petitioner were to seek damages "for using the wrong procedures, not for reaching the wrong result," and if that procedural defect did not "necessarily imply the invalidity of" the revocation, then *Heck* would have no application all.<sup>65</sup>

Justice Souter, writing for the four concurring justices, argued that the holding in *Heck* would not foreclose Spencer's § 1983 claim as "*Heck* did not hold that a released prisoner in Spencer's circumstances is out of court on a § 1983 claim, and for reasons explained in [his] *Heck* concurrence, it would be unsound to read either *Heck* or the habeas statute as requiring any such result."<sup>66</sup> According to the concurrence, the broad and general § 1983 statute should be read in light of the specific habeas corpus statute, as such a reading would require § 1983 to yield to the habeas corpus statute only where they conflict.<sup>67</sup>

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(dismissing appeal of petition where prisoner was already released from custody); *State ex rel. D.W. v. Hensley*, 574 S.W.2d 389, 391 (Mo. 1978) (en banc) (declaring petition for release from involuntary hospitalization moot after hospitalization had terminated); *State ex rel. Magrum v. Nygaard*, 38 N.W.2d 370, 370 (N.D. 1949) (declaring habeas petition moot where petitioner was ordered released from custody by a different order of the court); *Moeller v. Solem*, 395 N.W.2d 165, 165–66 (S.D. 1986) (habeas petition was moot after the petitioner had been paroled and the conviction would not affect parole eligibility).

63. *Spencer*, 523 U.S. at 7–8.

64. *Id.* at 17.

65. *Id.* (citations omitted) (quoting *Heck*, 512 U.S. at 482–83, 487).

66. *Id.* at 19 (Souter, J., concurring). Justices O'Connor, Ginsburg, and Breyer joined the concurrence. *See id.* at 18–21.

67. *Id.* at 20 (quoting *Heck*, 512 U.S. at 500) ("I also thought we were bound to recognize the apparent scope of § 1983 when no limitation was required for the sake of honoring some other statute or weighty policy, as in the instance of habeas. Accordingly, I thought it important to read the Court's *Heck* opinion as subjecting only inmates seeking § 1983 damages for unconstitutional conviction or

Justice Stevens was the final vote.<sup>68</sup> In his dissent, he argued that the claim was not moot as the petitioner was challenging the facts underlying the conviction rather than simply asking to be released.<sup>69</sup> Because the conviction could have lasting effects on the petitioner, the petitioner had a “redressable [sic]” interest in vindicating his good name.<sup>70</sup>

In a final footnote, Justice Stevens addressed the contention between the majority and the concurrence, stating, “[g]iven the Court’s holding that petitioner does not have a remedy under the habeas statute, it is perfectly clear, as Justice Souter explains, that he may bring an action under 42 U.S.C. § 1983.”<sup>71</sup>

#### D. *The Split*

Following the *Spencer* decision, a circuit split formed. Some jurisdictions, upon counting the votes of the concurrence and the dissent, determined that the favorable termination rule did not apply to released prisoners.<sup>72</sup> The Tenth Circuit, for instance, held that the favorable termination rule should not apply to released prisoners because, according to the court:

We are also persuaded that the *Spencer* plurality approach is both more just and more in accordance with the purpose of § 1983 than the approach of those circuits that strictly apply *Heck* even to petitioners who have been released from custody. If a petitioner is unable to obtain

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confinement to ‘a requirement analogous to the malicious-prosecution tort’s favorable-termination requirement,’ lest the plain breadth of § 1983 be unjustifiably limited at the expense of persons not ‘in custody’ within the meaning of the habeas statute.”).

68. *See id.* at 22–25 (Stevens, J., dissenting).

69. *Id.* at 22.

70. *Id.* at 23.

71. *Id.* at 25 n.8 (emphasis omitted).

72. *Newmy v. Johnson*, 758 F.3d 1008, 1010–12 (8th Cir. 2014) (citing *Cohen v. Longshore*, 621 F.3d 1311, 1315–17 (10th Cir. 2010); *Wilson v. Johnson*, 535 F.3d 262, 267–68 (4th Cir. 2008); *Powers v. Hamilton Cty. Pub. Def. Comm’n*, 501 F.3d 592, 599–605 (6th Cir. 2007); *Nonnette v. Small*, 316 F.3d 872, 875–78 (9th Cir. 2002); *Huang v. Johnson*, 251 F.3d 65, 73–75 (2d Cir. 2001); *Carr v. O’Leary*, 167 F.3d 1124, 1125–28 (7th Cir. 1999)). In total, seven circuits have adopted the reasoning of the *Spencer* concurrence in holding that the *Heck* favorable termination rule does not apply to released prisoners. *Cohen*, 621 F.3d at 1316 (“We are instead persuaded by the reasoning of the Second, Fourth, Sixth, Seventh, Ninth, and Eleventh Circuits that we are free to follow the five-Justice plurality’s approach in *Spencer* on this unsettled question of law.”).

habeas relief—at least where this inability is not due to the petitioner's own lack of diligence—it would be unjust to place his claim for relief beyond the scope of § 1983 where “exactly the same claim could be redressed if brought by a former prisoner who had succeeded in cutting his custody short through habeas.”<sup>73</sup>

Other courts decided to hold out for clear direction from the U.S. Supreme Court.<sup>74</sup>

### III. EIGHTH CIRCUIT APPLICATION

The Eighth Circuit has decided to continue the application of the *Heck* rule to cases in which the prisoner has been released until there is more concrete direction from the Court.

In *Entzi v. Redmann*, Entzi was convicted in North Dakota of gross sexual imposition.<sup>75</sup> While in prison, he was required to undergo sex offender treatment.<sup>76</sup> As part of the treatment, the participants were required to “work to lose their denial,” which would necessitate admitting their crimes.<sup>77</sup> Entzi refused, protesting that as he had testified to his innocence at trial, a later admission would subject him to perjury charges.<sup>78</sup> Entzi's refusal led to prison officials revoking “performance-based sentence reductions,” an act that Entzi claimed lengthened his sentence by one year.<sup>79</sup> In spite of attempts to the contrary, Entzi was released from prison and filed suit against his probation officer and prison officials.<sup>80</sup>

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73. *Cohen*, 621 F.3d at 1316–17 (quoting *Spencer*, 523 U.S. at 21 (Souter, J., concurring)).

74. *Newmy*, 758 F.3d at 1010; see also *Entzi v. Redmann*, 485 F.3d 998, 1003 (8th Cir. 2007); *Gilles v. Davis*, 427 F.3d 197, 208–12 (3d Cir. 2005) (holding that, after refusing to adopt the *Spencer* concurrence, successful completion of a diversionary program was not a favorable termination); *Randell v. Johnson*, 227 F.3d 300, 301–02 (5th Cir. 2000) (per curiam) (refusing to adopt the *Spencer* concurrence); *Figueroa v. Rivera*, 147 F.3d 77, 80–82 (1st Cir. 1998) (“[F]ederal courts [must] follow [the Court's] directly applicable precedent, even if that precedent appears weakened by pronouncements in its subsequent decisions, and to leave to the Court ‘the prerogative of overruling its own decisions.’” (citing *Agostini v. Felton*, 521 U.S. 203, 237 (1997))).

75. *Entzi*, 485 F.3d at 1000.

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.* at 1000–01.

80. *Id.* at 1001 (“Several days before Entzi's scheduled release from prison, his probation officer, Patrick Bohn, filed a petition to revoke probation based on

The court held that Entzi's claims were barred by the *Heck* rule in spite of the fact that he had already been released from prison.<sup>81</sup> The court stated that it was bound to apply the *Heck* rule until the U.S. Supreme Court had made a definitive determination to the contrary.<sup>82</sup>

#### IV. A BRIEF INTRODUCTION TO HABEAS CORPUS LAW

28 U.S.C. § 2254 provides for habeas relief for state prisoners where custody contravenes the Constitution or a United States treaty.<sup>83</sup> Traditionally, the only remedy for a successful habeas petition was equitable relief.<sup>84</sup> This often meant the restoration of good time credits or release from custody.<sup>85</sup> More and more, however, the habeas petition has been used to fight conditions in prisons.<sup>86</sup>

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Entzi's failure to complete this sex offender treatment. On September 3, 2004, the state trial court dismissed Bohn's petition, because it thought the requirement that Entzi admit his guilt during treatment 'violates the 5th Amendment right to be free from self-incrimination' and also 'violates common sense.'").

81. *Id.* at 1003. For a more recent and thorough application of the *Heck* rule by the Eighth Circuit, see generally *Newmy v. Johnson*, 758 F.3d 1008 (8th Cir. 2014). In *Newmy*, Newmy sued his parole officer for falsely reporting that Newmy did not report as required. *Id.* at 1009. The alleged false report caused Newmy's parole to be revoked. *Id.* The Eighth Circuit Court of Appeals upheld the district court's determination that the claim was not cognizable because Newmy had not obtained a favorable termination. *Id.* at 1011–12. The court noted, "[w]e recognize that this rule could preclude a damages remedy for an inmate who is detained for only a short time with limited access to legal resources, but that is a consequence of the principle barring collateral attacks that was applied in *Heck*." *Id.* at 1012.

82. *Entzi*, 485 F.3d at 1003.

83. 28 U.S.C. § 2254(a) (2012).

84. See *Wilwording v. Swenson*, 439 F.2d 1331, 1334 (8th Cir. 1971) ("[H]abeas corpus has been utilized as a procedural method of airing prisoner's complaint and granting equitable relief where relief was indicated.").

85. *Id.*

86. *Id.* These petitions concern a wide variety of issues. See *Rozelle v. Rossi*, 307 F.App'x 640, 642 (3d Cir. 2008) (prescription acne medication); *Bembry v. St. Lawrence*, No. CV407-046, 2007 WL 4256984, at \*1 (S.D. Ga. Nov. 30, 2007) ("His complaint seeks redress for overcrowding, double-celling, long hours of lockdown, cold food, small food portions, dirty food utensils, poor sanitation and air circulation, dirty showers, deprivation of property, deprivation of medical care, increased stress, exposure to homosexual activities, lack of jobs, deprivation of intelligent conversation, limited access to the law library, lost mail, deprivation of family contact, deprivation of home furnishings, and the high cost of phone

The writ cannot be granted unless state court remedies have been exhausted.<sup>87</sup> The requirement that state court remedies be exhausted is generally known as the exhaustion doctrine.<sup>88</sup> This doctrine was created because:

Early federal intervention in state criminal proceedings would tend to remove federal questions from the state courts, isolate those courts from constitutional issues, and thereby remove their understanding of and hospitality to federally protected interests. Second, (the doctrine) preserves orderly administration of state judicial business, preventing the interruption of state adjudication by federal habeas proceedings.<sup>89</sup>

However, the principal “cannot be used as a blunderbuss to shatter the attempt at litigation of constitutional claims without regard to the purposes that underlie the doctrine and that called it into existence.”<sup>90</sup>

The exhaustion doctrine only applies to claims that are still remediable in state court proceedings.<sup>91</sup> Further, the exhaustion doctrine, being a rule of comity, is not inflexible.<sup>92</sup> The exhaustion doctrine does not apply at all if there is a complete absence of state

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service.”); *Richards v. Richie*, No. CIV. 13–3029, 2015 WL 1522237, at \*2–3 (D. Minn. Mar. 30, 2015) (gluten-free dental floss).

87. See *supra* text accompanying note 41.

88. See, e.g., *O’Sullivan v. Boerckel*, 526 U.S. 838, 842 (1999).

89. *Braden v. 30th Jud. Cir. Ct. of Kentucky*, 410 U.S. 484, 490 (1973) (quoting Note, *Developments in the Law—Federal Habeas Corpus*, 83 HARV. L. REV. 1038, 1094 (1970)). Or, put more daintily, “it would be unseemly in our dual system of government for a federal district court to upset a state court conviction without an opportunity to the state courts to correct a constitutional violation.” *Darr v. Burford*, 339 U.S. 200, 204 (1950).

90. *Braden*, 410 U.S. at 490; *Pate v. Holman*, 343 F.2d 546, 547 (5th Cir. 1965) (footnote omitted) (“The doctrine requiring a state prisoner to exhaust all state remedies as a prerequisite to federal habeas corpus relief is a judge-made doctrine founded on comity and a proper regard for the position of the states in American federalism. Section 2254 of Title 28 is a congressional limitation on federal habeas corpus. It is not an absolute limitation.”).

91. *Humphrey v. Cady*, 405 U.S. 504, 516 (1972) (holding that the petitioner had met the requirements of the exhaustion doctrine where direct appeal was no longer available).

92. *Rice v. Wolff*, 513 F.2d 1280, 1289–90 (8th Cir. 1975) (determining that the exhaustion doctrine was satisfied where the arguments were presented to the highest court in the state, and that court declined to rule on the issue).

remedies or if protections of prisoners' rights are otherwise ineffective.<sup>93</sup>

Where a prisoner has failed to present his or her constitutional claim to a state court, a federal court, upon receiving the habeas petition, must conduct a four-step analysis to determine whether it can hear the case.<sup>94</sup> The preliminary question is whether the prisoner presented the constitutional claims contained within the habeas petition to the state court.<sup>95</sup> If the claims were not presented, the court would next look at whether the exhaustion doctrine has been met because there are no state remedies available or the available state remedies are futile.<sup>96</sup> If the prisoner has not presented his or her claims and state remedies exist, the court must look at whether the prisoner has an excuse for not presenting the claims in state court.<sup>97</sup> If the prisoner can establish a

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93. 28 U.S.C. § 2254(b)(1)(B)(i)-(ii) (2012) (stating that a habeas petition cannot be granted unless "there is an absence of available State corrective process; or . . . circumstances exist that render such process ineffective to protect the rights of the applicant."); *Pate*, 343 F.2d at 547.

94. *Smittie v. Lockhart*, 843 F.2d 295, 296 (8th Cir. 1988).

95. *Id.*

96. *Id.* The Court has not entertained whether the foreclosure of habeas to a released prisoner constitutes a lack of available remedy, but the fact that the Court chose not to discuss the lack of state remedy in *Heck* may be telling. *See supra* note 61. On the other hand, earlier habeas cases may shed some light on what the Court might do. *See Young v. Ragen*, 337 U.S. 235, 238-39 (1949) ("Unless habeas corpus is available, therefore, we are led to believe that Illinois offers no post-trial remedy in cases of this kind. The doctrine of exhaustion of state remedies, to which this Court has required the scrupulous adherence of all federal courts, see *Ex parte Hawk*, 321 U.S. 114, 64 S.Ct. 448, 88 L.Ed. 572 and cases cited, presupposes that some adequate state remedy exists."); *Fay v. Noia*, 372 U.S. 391, 433-35 (1963) (holding that 28 U.S.C. § 2254 did not cut off habeas relief unless prisoner intended to thwart the state court's jurisdiction), *overruled by* *Wainwright v. Sykes*, 433 U.S. 72 (1977); *Cady*, 405 U.S. at 516 ("This Court has repeatedly made it plain that not every state procedural default bars federal habeas corpus relief. Title 28 U.S.C. § 2254(b), (c), which require a state prisoner to exhaust available state remedies, are limited in their application to those state remedies still open to the habeas applicant at the time he files his application in federal court.").

97. *Smittie*, 843 F.2d at 296. To satisfy this "cause" requirement, the plaintiff must show that there was "some objective factor external to the defense . . ." *Murray v. Carrier*, 477 U.S. 478, 479 (1986). Courts have found cause in the context of ineffective assistance of counsel, provided the prisoner can meet the burdens contained in *Strickland v. Washington*, 466 U.S. 668 (1984). *Murray*, 477 U.S. at 488. The *Strickland* standard requires that the defendant show that counsel's performance fell below an objective standard of reasonableness and that

valid excuse, the prisoner must also show that he or she will be prejudiced if the case is dismissed on procedural grounds.<sup>98</sup>

The cause and prejudice requirements may not be necessary in exceptional instances where a default would lead to a miscarriage of justice and the defendant is actually innocent.<sup>99</sup>

## V. ANALYSIS

### A. *Section 1983 Does Not Support the Application of the Favorable Termination Rule to Claims by Released Prisoners*

#### 1. *Section 1983 Was Not Based on Principals of Comity but Was Specifically Meant to Interfere in State Affairs*

The above history of § 1983 lends support to not applying *Heck* to out-of-custody prisoners.<sup>100</sup> While the majority in *Heck* correctly noted that the habeas corpus statute was meant to support comity, § 1983 clearly was not.<sup>101</sup> To the contrary, § 1983 was passed

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the defendant was in fact prejudiced by the deficiency. 466 U.S. at 687. The Court has also found cause where the constitutional issue is novel. *Reed v. Ross*, 468 U.S. 1, 15 (1984) (“Counsel’s failure to raise a claim for which there was no reasonable basis in existing law does not seriously implicate any of the concerns that might otherwise require deference to a State’s procedural bar. Just as it is reasonable to assume that a competent lawyer will fail to perceive the possibility of raising such a claim, it is also reasonable to assume that a court will similarly fail to appreciate the claim. It is in the nature of our legal system that legal concepts, including constitutional concepts, develop slowly, finding partial acceptance in some courts while meeting rejection in others.”). More often, however, courts have rejected prisoners’ arguments. *See Henderson v. Cohn*, 919 F.2d 1270, 1273 (7th Cir. 1990) (illiteracy); *Rodriguez v. Maynard*, 948 F.2d 684, 687–88 (10th Cir. 1991) (pro se, lacked legal training, unaware of issue); *Vasquez v. Lockhart*, 867 F.2d 1056, 1058 (8th Cir. 1988) (lack of English skills); *Cornman v. Armontrout*, 959 F.2d 727, 729–30 (8th Cir. 1992) (unaware of claims, below-average intelligence); *Harris v. Knipp*, No. C 12–05114 YGR (PR), 2013 WL 6234651, at \*3 (N.D. Cal. Dec. 2, 2013) (unaware of prosecutor’s unconstitutional actions).

98. *Smittie*, 843 F.2d at 296.

99. *Murray*, 477 U.S. at 495–96 (citation omitted) (“We remain confident that, for the most part, ‘victims of a fundamental miscarriage of justice will meet the cause-and-prejudice standard.’ But we do not pretend that this will always be true. Accordingly, we think that in an extraordinary case, where a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas court may grant the writ even in the absence of a showing of cause for the procedural default.”).

100. *See supra* Part II.

101. *Compare supra* text accompanying notes 28–30 (describing the purposes

specifically to interfere in state affairs.<sup>102</sup> As the § 1983 framers understood it, the Act was specifically designed to thwart laws passed by states that would infringe on the constitutional rights of state citizens.<sup>103</sup> These concerns arose from the Black Codes, which were passed shortly after the emancipation of the slaves in an effort to keep freed slaves in their place, both literally and figuratively.<sup>104</sup>

Further, the Act was meant to spur the enforcement of laws equally by allowing recovery of damages to the victims of abuse at the hands of officials.<sup>105</sup> This would certainly meddle in the affairs of states.

Arguably, the second purpose of the Act, i.e., to supplement state law, would not directly interfere with states' laws. However, monetary damages for lack of a sufficient remedy would interfere just as easily as monetary damages for inequitable application of a law. Additionally, the creation of a federal forum for wronged parties would certainly interfere in intrastate affairs.<sup>106</sup> This was particularly true in the case of *Blyew*, in which a young woman witnessed the murder of several family members, but was unable to

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of § 1983 as intending to impede state attempts to deprive black persons of civil rights) *with supra* text accompanying notes 89–90 (describing the tension between state and federal courts giving rise to the exhaustion doctrine).

102. See *Monroe v. Pape*, 365 U.S. 167, 173 (1961), *overruled by* *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658 (1978); see also *supra* text accompanying notes 28–32 (describing the purpose of the statute as meant to override certain state actions and place checks on state actors).

103. See *Monroe*, 365 U.S. at 173.

104. See *id.*

105. See *id.* at 173–74.

106. The impact of the federal forum for § 1983 claims is undeniable. Researchers have asserted that § 1983 actions make up approximately ten percent of federal district courts' civil caseload. Roger A. Hanson & Henry W.K. Daley, *Challenging the Conditions of Prisons and Jails: A Report on Section 1983 Litigation*, U.S. DEP'T OF JUST. i, iii (Bureau of Justice Statistics ed., 1994) [hereinafter *Conditions of Prisons and Jails*], <http://www.bjs.gov/content/pub/pdf/CCOPAJ.PDF>. The volume of § 1983 cases have increased over time. In 1966 there were just 218 § 1983 cases. *Id.* at 2. The 1961 *Monroe* case was largely responsible for opening the doors of the federal courts to § 1983 actions even though § 1983 had been in existence since the late 1800s. Karen M. Blum & Kathryn R. Urbonya, *Section 1983 Litigation*, FED. JUD. CTR. 1, 2 . (Fed. Judicial Ctr. ed., 1998), [http://www.fjc.gov/public/pdf.nsf/lookup/Sect1983.pdf/\\$file/Sect1983.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/Sect1983.pdf/$file/Sect1983.pdf). The *Monroe* decision, coupled with the decision in *Cooper v. Pate*, 278 U.S. 546 (1964), which held that prisoners have constitutional rights, caused the number of § 1983 cases to skyrocket. See *Conditions of Prisons and Jails, supra*, at 1–2. This led to a total of 26,824 § 1983 cases in 1992. *Id.* at 2.

testify against the white defendants under Kentucky law.<sup>107</sup> The chance of having to answer for crimes and other misdeeds in federal courts was—and continues to be—compelling.<sup>108</sup>

The Court has noted the importance of applying the specific statute of habeas corpus over the general statute of § 1983.<sup>109</sup> However, § 1983 was much more specific in its aims: to override states in matters of constitutional violations.<sup>110</sup> Due to the specific design of § 1983, it should not cede to the general principle of comity found within the habeas corpus statute.<sup>111</sup> The *Heck* rule should not be applied to out-of-custody cases, particularly in light of the fact that the framers of the Act did not intend to defer to the states as the Court has.<sup>112</sup>

2. *Where a Prisoner Has Been Kept in Violation of Constitutional Rights, State Law Requires Supplementation*

The second lesson we can gather from history is that applying *Heck* to cases in which the prisoner is out of custody runs afoul of the second purpose of § 1983—supplementing state law.<sup>113</sup> Senator Sherman used the example of a black person who had a case against a white person, but was unable to testify at trial due to local rules.<sup>114</sup> In that example, the federal court would be able to provide a venue where a black person could testify against a white person.<sup>115</sup>

The case of a released prisoner is similar. In the case of a prisoner released from state custody, the habeas claims would likely be mooted.<sup>116</sup> In these situations, § 1983 should act as it was

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107. See *supra* note 23 and accompanying text (discussing the facts of the *Blyew* case).

108. See *supra* note 58 and accompanying text (discussing the *Hibma* case in which a man was framed by local law enforcement officers for burglaries that they themselves had committed).

109. *Spencer v. Kemna*, 523 U.S. 1, 20 (1998) (Souter, J., concurring).

110. See *Monroe*, 365 U.S. at 172–74 (discussing the three purposes of the statute).

111. See *supra* text accompanying note 67.

112. See *Monroe*, 365 U.S. at 172–74.

113. See *id.* at 173; *supra* text accompanying note 29 (citing state laws that would not allow a black person to testify against a white person as one reason for the statute).

114. See *supra* note 29 and accompanying text.

115. See *supra* note 29 and accompanying text.

116. See *supra* note 62 and accompanying text (providing cases for every state in the Eighth Circuit in which a habeas corpus petition was dismissed for mootness).

intended—to supplement state law where state law does not supply redress for harms committed under color of state authority.<sup>117</sup> If a prisoner is wrongfully imprisoned, they should be released and compensated for the violation of their constitutional rights.

One could argue that the danger of a § 1983 petition being mooted is fairly slim. Habeas corpus cases can take years to make it through the court system. The median processing time for a habeas petition is about six months.<sup>118</sup> Ten percent of cases take upwards of seven hundred days.<sup>119</sup> Most habeas petitions come from violent offenders.<sup>120</sup> However, 39 percent of habeas petitions come from other offenders.<sup>121</sup> The Bureau of Justice Statistics has found that the average sentence actually served by violent offenders was forty-five months.<sup>122</sup> We might be tempted to conclude that the possibility of a habeas petition being mooted is low, given that most prisoners who petition are serving roughly four years in prison.<sup>123</sup> However, the fact that only persons with long sentences are petitioning may be a symptom of the problem. Prisoners with valid complaints are not petitioning because the petition will be moot by the time it goes through the process.<sup>124</sup> Under *Heck*, the favorable termination rule would work to have the same depressing effect on § 1983 claims.<sup>125</sup>

3. *The U.S. Supreme Court Is Likely to Settle the Case in Favor of Allowing the Claims*

The next time the Court is required to address the issue, it is likely to find that the favorable termination rule does not apply to

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after the petitioner was released from confinement).

117. See *Monroe*, 365 U.S. at 173.

118. Roger A. Hanson & Henry W.K. Daley, *U.S. Dep't of Justice, Federal Habeas Corpus Review: Challenging State Court Criminal Convictions*, DEP'T. OF JUST. 1, 17, 19 (Tom Hester ed., 1995), <http://www.bjs.gov/content/pub/pdf/FHCRSCC.PDF>.

119. *Id.* at 19.

120. *Id.* at 11.

121. *Id.* Twenty-seven percent are from burglary, theft, drug trafficking, or weapons charges. *Id.* Another 12 percent come from other offenders. *Id.*

122. Paula M. Ditton & Doris James Wilson, *U.S. Dep't of Justice, Truth in Sentencing in State Prisons*, DEP'T. OF JUST. 1 (Tom Hester & Tina Dorsey eds., 1999), <http://bjs.gov/content/pub/pdf/tssp.pdf>.

123. See *id.*

124. See *supra* note 81 and accompanying text (describing the probability that prisoners with shorter sentences will be precluded from filing § 1983 claims).

125. See *Heck v. Humphrey*, 512 U.S. 477, 486–87 (1994).

released prisoners. Both Justices Thomas and Kennedy were in the *Heck* and *Spencer* majorities, although Thomas also filed a separate concurrence.<sup>126</sup> Both Justices Ginsburg and Breyer were in the *Spencer* concurrence.<sup>127</sup> The views of Chief Justice Roberts and Justices Sotomayor, Kagan, and Alito remain hidden. Following the death of Justice Scalia, there will likely be a new liberal justice appointed to the Court.<sup>128</sup> If all of the liberal justices, including Justices Sotomayor and Kagan, follow the previous positions of Justices Ginsburg and Breyer, there will be a five-vote majority against the application of the *Heck* rule to released prisoners.<sup>129</sup> Application of the favorable termination rule to released prisoners has a slight advantage according to current voting records.<sup>130</sup>

However, the application of the courts of appeals may push the needle in the other direction. Currently, the Second, Fourth, Sixth, Ninth, Tenth, and Eleventh Circuits have held that § 1983 is not foreclosed to released prisoners.<sup>131</sup> On the other side, only four circuits have applied the favorable termination rule to released prisoners.<sup>132</sup> The fact that a majority of jurisdictions have refused to apply the favorable termination rule because justice so requires should be compelling where other courts have continued to apply the standard simply because they have decided to wait and see.<sup>133</sup>

Finally, a majority of the Court has already implied that the favorable termination rule did not apply to released prisoners in *Spencer*, where Justice Stevens joined the four concurring justices in holding that § 1983 was not foreclosed to the released prisoner.<sup>134</sup>

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126. *Id.* at 478, 490–91; *Spencer v. Kemna*, 523 U.S. 1, 1 (1998).

127. *Spencer*, 523 U.S. at 1.

128. Josh Gerstein, *Obama's Supreme Court Short List*, POLITICO (Feb. 14, 2016, 6:58 AM), <http://www.politico.com/story/2016/02/antonin-scalia-replacement-219271>.

129. *See Spencer*, 523 U.S. at 1; *Heck*, 512 U.S. at 478.

130. *See Spencer*, 523 U.S. at 1; *Heck*, 512 U.S. at 478.

131. *See supra* note 72 and accompanying text (citing cases in which the Second, Fourth, Sixth, Seventh, Ninth, Tenth and Eleventh Circuits accepted or applied the *Spencer* concurrence approach).

132. *See supra* note 74 and accompanying text (citing cases in which the First, Third, Fifth, and Eighth Circuits chose to apply the favorable termination rule in spite of the *Spencer* concurrence).

133. *Compare* *Cohen v. Longshore*, 621 F.3d 1311, 1316–17 (10th Cir. 2010) (describing the *Spencer* approach as just), *with* *Figueroa v. Rivera*, 147 F.3d 77, 80–82 (1st Cir. 1998) (choosing to apply what the court viewed as direct precedent regardless of the weakened holding).

134. *See Spencer*, 523 U.S. at 18–25 (reaching a five-justice majority between the

Stare decisis should guide the current justices in deciding that the rule does not apply to out-of-custody prisoners.

*B. The Federal Habeas Corpus Statute Does Not Support the Application of the Favorable Termination Rule to Claims by Released Prisoners*

*1. Policy Considerations of the Federal Habeas Corpus Statute Do Not Support Application of the Favorable Termination Rule to Claims by Released Prisoners*

The *Heck* Court relied on the exhaustion doctrine as a basis of the favorable termination rule.<sup>135</sup> However, a review of the exhaustion doctrine shows that it is more nuanced and forgiving than the Court acknowledged.

The purpose of the exhaustion doctrine is comity,<sup>136</sup> and due to its basis in comity, the doctrine cannot be used like a club.<sup>137</sup> However, because the aims of the doctrine are necessarily tempered by the needs of prisoners, courts and the legislature have adopted equitable safeguards.<sup>138</sup> For instance, the four-step analysis adopted by courts ensures that prisoners will be heard when they have a legitimate claim.<sup>139</sup> The last two steps in the analysis, known as the cause and prejudice standard, allow a prisoner to make his or her case that the default was excused.<sup>140</sup> The Court has even offered an additional protection where the cause and prejudice standard cannot be met, which requires a showing of actual innocence and a potential miscarriage of justice.<sup>141</sup>

Thus, where the *Heck* Court slammed the door on Heck, analysis under the exhaustion doctrine would have required the Court to dig deeper into the circumstances of Heck's default: Is there an excusable reason for not presenting the claims in state court? Will the prisoner be prejudiced by the default? Will the

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four-justice concurrence and Justice Stevens' dissent).

135. See *Heck*, 512 U.S. at 479.

136. See *supra* text accompanying notes 83–89 (discussing the tension between state and federal habeas actions and the statute's attempts to compromise the two interests).

137. See *Braden v. 30th Jud. Cir. Ct. of Kentucky*, 410 U.S. 484, 490 (1973); *Pate v. Holman*, 343 F.2d 546, 547 (5th Cir. 1965) (discussing the importance of using the exhaustion doctrine judiciously as it is based on comity).

138. See *Braden*, 410 U.S. at 490; *Pate*, 343 F.2d at 547.

139. See *Smittie v. Lockhart*, 843 F.2d 295, 296 (8th Cir. 1988).

140. See *id.*

141. See *id.*

default result in a miscarriage of justice? Is the prisoner actually innocent?

The purpose of the exhaustion doctrine is not served by throwing up a complete bar. The exhaustion doctrine is meant to keep prisoners from prematurely removing constitutional issues from state to federal courts and to maintain comity between federal and state court systems.<sup>142</sup> However, state courts are not disrespected where federal courts hear a prisoner petition that is completely mooted in the state court.<sup>143</sup> Nor is there a risk of prematurely removing constitutional claims from state to federal courts due to the fact that the prisoner does not have a cause of action in state court.

There is a concern that this analysis would open the hoary floodgates to the federal courts. One would expect that due to the large amount of procedural protections for the prisoner, very few claims would be rejected based on failure to exhaust state claims. However, in 1995, sixty-three percent of all habeas claims were dismissed on procedural grounds without ever reaching the merits.<sup>144</sup> Of the sixty-three percent dismissed on procedural grounds, over half of those were rejected based on the failure to exhaust state remedies.<sup>145</sup> This shows that allowing these safeguards will not require federal courts to slog through the merits of each and every petition, just the deserving cases.<sup>146</sup>

The Court was correct when it stated that § 1983 did not afford a remedy in all circumstances, but a complete analysis would show that a remedy is not necessarily barred in these circumstances either.

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142. *Wilwording v. Swenson*, 439 F.2d 1331, 1334 (8th Cir. 1971).

143. *Spencer v. Kemna*, 523 U.S. 1, 7 (1998); *see supra* note 62 and accompanying text.

144. *Hanson & Daley*, *supra* note 118, at 17. Only thirty-five percent of the claims go on to be denied on the merits. *Id.*

145. *Id.*

146. Just one percent of petitions were granted on the merits. *Id.* Another one percent of cases were remanded to state courts. *Id.*

2. *The Plain Language of the Statute Does Not Support the Application of the Favorable Termination Rule to Claims by Released Prisoners*

The first two steps from the four-step analysis come to us from the statute itself.<sup>147</sup> They require an examination of whether there is a state remedy and whether that state remedy is adequate.<sup>148</sup> If there is no state remedy or if it is inadequate, federal courts are instructed to hear the case.<sup>149</sup> These prongs of the analysis are written in the disjunctive, thus allowing a claim to be heard even if state claims are not exhausted.<sup>150</sup> Of course, this makes sense, as it would be difficult for a prisoner to exhaust remedies that never existed.

For the released prisoner, this is particularly important. The claims of the released prisoner would be moot under state and federal habeas corpus case law.<sup>151</sup> The favorable termination rule simply allows courts to ignore habeas corpus analysis, which requires a federal court to examine the adequacy and existence of state remedies.

3. *Habeas Corpus Case Law Does Not Support the Application of the Favorable Termination Rule to Claims by Released Prisoners*

Case law prior to *Heck* generally held that the exhaustion doctrine only applied to the claims that were alive for the purposes of state relief.<sup>152</sup>

If the claim was not extinguished on state procedural grounds, it was ripe for relief under a federal habeas petition.<sup>153</sup> The Court at one time went so far as to declare that the habeas statute only

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147. *Smittie v. Lockhart*, 843 F.2d 295, 296 (8th Cir. 1988).

148. *See supra* note 93 and accompanying text.

149. *Smittie*, 843 F.2d at 296.

150. *Id.*

151. *Spencer v. Kemna*, 523 U.S. 1, 7 (1998). The Court determined that a habeas petition was moot once the prisoner was no longer incarcerated. *Id.* at 18. Most state courts within the Eighth Circuit have reached the same conclusion when examining state habeas petitions.

152. *See, e.g., Rice v. Wolff*, 513 F.2d 1280, 1289–90 (8th Cir. 1975).

153. *Id.* (citing *Smith v. Wolff*, 506 F.2d 556 (8th Cir. 1974)) (“[T]he exhaustion standard is not an inflexible requirement: it is a rule of comity and not a rule limiting the power of the federal courts to give habeas relief.”).

barred claims where there was an attempt by the petitioner to circumvent state jurisdiction.<sup>154</sup>

C. *The Favorable Termination Approach*

Courts could, instead of relying on the lessons of § 1983 and § 2254, take another approach. A recent United States District Court for the District of Minnesota decision has already interpreted the requirement of favorable termination broadly to allow for the possible recovery of a released prisoner.<sup>155</sup> The *Steadman* case is strikingly similar to the facts as described in *Newcomb*. Steadman's judicially imposed sentence was meant to expire on December 9, 2012.<sup>156</sup> However, the Minnesota Department of Corrections added a five-year term of probation administratively, in spite of the *Newcomb* court's clear directive that the Minnesota Department of Corrections did not have the power to unilaterally take such action.<sup>157</sup> Steadman failed to meet the terms of his administratively-added probation, and he was arrested on August 21, 2013.<sup>158</sup> At some time before December 3, 2013, a Minnesota Department of Corrections employee began inquiring into Steadman's status.<sup>159</sup> The Minnesota Department of Corrections then released Steadman on January 16, 2014.<sup>160</sup> Upon release, Steadman received a letter from Eddie Miles, Jr., the warden of Minnesota Correctional Facility-Lino Lakes, which stated:

On November 5, 2007, Ramsey County District Court sentenced you to the commissioner of corrections. Under the interpretation of the law at that time, the Department added a 5-year term of Conditional Release pursuant to Minn. Stat. § 169A.276 subd. 1(d). The term of Conditional release [sic] has been removed from your

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154. *See id.* at 1290 (quoting *Darr v. Buford*, 339 U.S. 200, 204 (1950)) (“[I]t would be unseemly in our dual system of government for the federal district court to upset a state court conviction without an opportunity to the state courts to correct a constitutional violation.”).

155. *Steadman v. Roy*, No. 14-3442, 2015 WL 1954402, at \*15 (D. Minn. Mar. 23, 2015). *See Wilson v. Lawrence Cty., Mo.*, 154 F.3d 757, 761 (8th Cir. 1998) (“Wilson’s pardon is therefore an ‘executive order’ that ‘expunged,’ ‘obliterated,’ and ‘invalidated’ his conviction. Heck requires nothing more.”).

156. *Steadman*, 2015 WL 1954402, at \*2.

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.*

sentence and you are hereby discharged as of December 22, 2012 . . . .<sup>161</sup>

In applying *Heck*, the court focused on the language of *Heck* regarding what constitutes a favorable termination:

[I]n order to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a § 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus, 28 U.S.C. § 2254.<sup>162</sup>

The court reasoned that *Heck* expressly allowed for a favorable termination through “expunge[ment] by executive order.”<sup>163</sup> The court also observed that the Eighth Circuit had previously held that an executive pardon was a means to favorable termination under the expungement-by-executive-order umbrella.<sup>164</sup> The *Steadman* court went on to hold that the favorable termination requirement was met in Steadman's case because “an agency within the executive branch of the State of Minnesota—the DOC—via the letter from Eddie Miles Jr., not only discharged Steadman from custody, but it also retroactively removed the entire term of conditional release that it had imposed on Steadman.”<sup>165</sup>

The first observation is that the court's reading of the executive expungement option is incredibly broad and likely a product of the procedural posture of the case. The opinion was issued following a motion to dismiss.<sup>166</sup> The court managed to avoid ruling on whether there was an expungement by arguing that the facts before the court had not yet been developed adequately to rule on the issue.<sup>167</sup>

Expungement generally has one of two meanings.<sup>168</sup> The first is to erase a criminal conviction from a record.<sup>169</sup> A second definition

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161. *Id.* at \*3.

162. *Id.* at \*11 (quoting *Heck v. Humphrey*, 512 U.S. 477, 486–87 (1994)).

163. *Id.*

164. *Id.* at \*14 (citing *Wilson v. Lawrence Cty., Mo.*, 154 F.3d 757, 761 (8th Cir. 1998)).

165. *Id.*

166. *Id.* at \*1.

167. *Id.* at \*14.

168. *Wilson*, 154 F.3d at 760. The court at the time was working with a 1990

is “[t]o erase or destroy . . . [t]o declare (a vote or other action) null and outside the record, so that it is noted in the original record as expunged, and redacted from all future copies.”<sup>170</sup> The actual practices of the states lend themselves to the second definition.

In actual practice, each state within the Eighth Circuit has a special provision for expungement.<sup>171</sup> In all of these provisions, the courts carry out the act of expungement.<sup>172</sup> Parties are required to petition the courts for relief from conviction.<sup>173</sup> In these states, the executive branch has no role in criminal expungement.<sup>174</sup> Thus, the literal interpretation of the language of *Heck* would leave it completely inapplicable as there are no executive branch expungements in the Eighth Circuit. Many of these statutory procedures addressing expungement, however, require favorable termination of the underlying criminal charges.<sup>175</sup>

Nonetheless, overextending the definition may be problematic. For instance, finding that the letter is an executive expungement does not further the purpose for which the favorable termination rule was created. The rule was created so that a later

version of Black’s Law Dictionary. *See id.* The definition has since been amended.

169. *Expungement*, BLACK’S LAW DICTIONARY 662 (9th ed. 2009).

170. *Id.* The *Wilson* court noted that it preferred the definition “[t]o destroy; blot out; obliterate; erase; efface designedly; strike out wholly.” 154 F.3d at 760 (quoting BLACK’S LAW DICTIONARY 582 (6th ed. 1990)). According to the *Wilson* court, this is the more common definition. *Id.*

171. ARK. CODE ANN. § 16-90-1413 (West, Westlaw through 2015 Reg. Sess. and 2015 1st Ex. Sess. of the 90th Ark. Gen. Assemb.); MINN. STAT. § 609A.03 (2015); MO. ANN. STAT. § 610.140 (West, Westlaw through 2015 Veto Sess. of the 98th Gen. Assemb.) (effective on Aug. 28, 2012); NEB. REV. STAT. ANN. § 29-3523 (West, Westlaw through 1st Reg. Sess. of the 104th Leg.); N.D. CENT. CODE ANN. §§ 19-03.1-23, 31-13-07 (West, Westlaw through 2015 Reg. Sess. of 64th Leg. Assemb.); S.D. CODIFIED LAWS § 23A-3-27 (West, Westlaw through 2015 Reg. Sess.); IOWA CODE ANN. §§ 123.46(6), 123.47(8) (West, Westlaw through 2015 Reg. Sess.).

172. ARK. CODE ANN. § 16-90-1413; MINN. STAT. § 609A.03; MO. ANN. STAT. § 610.140; NEB. REV. STAT. ANN. § 29-3523; N.D. CENT. CODE ANN. §§ 19-03.1-23, 31-13-07; S.D. CODIFIED LAWS § 23A-3-27; IOWA CODE ANN. §§ 123.46(6), 123.47(8).

173. *See, e.g.*, MINN. STAT. § 609A.02 (2015) (describing the circumstances under which a person may petition a court for an expungement).

174. *See* ARK. CODE ANN. § 16-90-1413; MINN. STAT. § 609A.02; MO. ANN. STAT. § 610.140; NEB. REV. STAT. ANN. § 29-3523; N.D. CENT. CODE ANN. § 19-03.1-23; S.D. CODIFIED LAWS § 23A-3-27; IOWA CODE ANN. §§ 123.46(6), 123.47(8).

175. *See* MINN. STAT. § 609A.02 (allowing for expungement of certain records where there was either a favorable termination or the sentence was stayed); NEB. REV. STAT. ANN. § 29-3523.

verdict in a civil litigation could not call into question the original criminal convictions.<sup>176</sup> Allowing such a letter to satisfy the favorable termination rule would allow a collateral attack on the underlying conviction because the letter had no effect on it. The letter only stated that Steadman was being discharged (presumably from probation) and that the five-year term was being removed.<sup>177</sup> If a similar letter—one stating that the term of probation had been removed and upon release there would be no probationary period—was given to an inmate who was still serving the original sentence, this reading of the favorable termination rule would allow the inmate to prosecute a § 1983 claim from his or her jail cell.

While extending the reaches of executive expungement may be satisfying as a practical matter, there is a danger that overextension could lead to unintended results.

*D. The Fact or Length of Confinement Approach*

Steadman likewise argued that his § 1983 petition was not challenging the fact or length of his confinement, but rather only challenged the constitutionality of the administrative term of his probation.<sup>178</sup>

The U.S. Supreme Court once alluded to the fact that a former prisoner seeking money damages would not implicate the favorable termination rule.<sup>179</sup> The Court rooted this dictum in the purposes of the habeas statute.<sup>180</sup> The Court reasoned that the original purpose of the statute was for a prisoner to obtain release from unlawful imprisonment.<sup>181</sup>

Unfortunately, courts have generally held that a § 1983 claim could have preclusive effects on habeas proceedings regardless of the relief sought.<sup>182</sup> This would bring to life the fears of a myriad of § 1983 actions causing havoc with convictions everywhere.

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

177. *Steadman v. Roy*, No. 14-3442, 2015 WL 1954402, at \*3 (D. Minn. Mar. 23, 2015).

178. *Id.* at \*12.

179. *Preiser v. Rodriguez*, 411 U.S. 475, 494 (1973).

180. *Id.*

181. See *Wilwording v. Swenson*, 439 F.2d 1331, 1334 (8th Cir. 1971).

182. *Kruger v. Erickson*, 77 F.3d 1071, 1074 (8th Cir. 1996).

*E. A Better Rule*

The better rule, rather than following dicta in *Heck*, would be for the Eighth Circuit to recognize that the problem lies at the crossroads of two statutes, neither of which allow the door to be slammed in the face of a prisoner with a viable claim. Even though, as discussed above, § 1983 gives little deference to comity, comity can and should be served under the habeas corpus statute.<sup>183</sup>

In the case of prisoners suing for monetary damages under § 1983, this requires the Eighth Circuit to submit the claims to the complete analysis of the exhaustion doctrine. First, the court must look at whether the claims were in fact presented.<sup>184</sup> Second, the court must determine whether there are no state remedies or if the state remedy is futile.<sup>185</sup> Third, the prisoner must establish that there was cause that could excuse the prisoner's failure to present the claims to the state court.<sup>186</sup> Fourth, the prisoner must establish that the prisoner will be prejudiced if the claim cannot be heard.<sup>187</sup> Finally, the court must look at whether refusing to hear the case will result in a miscarriage of justice, and whether the prisoner was innocent-in-fact.<sup>188</sup>

In the case of a prisoner released from custody, two issues arise. The first is whether a state remedy exists when the prisoner is out of custody. The Court has thus far not been required to examine whether state remedies are foreclosed once a prisoner is released because the Court has defaulted to the federal mootness analysis.<sup>189</sup> The Eighth Circuit should conclude that release from prison does foreclose state remedies for the purpose of this analysis. First, both state and federal courts have generally held that

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183. See *supra* Section V.B.1 (discussing the importance of comity in the habeas corpus statute).

184. See *Humphrey v. Cady*, 405 U.S. 504, 516 (1972).

185. *Rice v. Wolff*, 513 F.2d 1280, 1289–90 (8th Cir. 1975).

186. 28 U.S.C. § 2254(b)(1)(B)(ii)–(iii) (2012); *Pate v. Holman*, 343 F.2d 546, 547 (5th Cir. 1965).

187. *Smittie v. Lockhart*, 843 F.2d 295, 296 (8th Cir. 1988).

188. *Id.* at 297.

189. *Spencer v. Kemna*, 523 U.S. 1, 7 (1998); see *Anderson v. State*, 98 S.W.3d 403, 404 (Ark. 2003); *Case v. Wood*, 377 N.W.2d 924, 924 (Minn. 1985); *State ex rel. D.W. v. Hensley*, 574 S.W.2d 389, 391 (Mo. 1978) (en banc); *State ex rel. Magrum v. Nygaard*, 38 N.W.2d 370, 370 (N.D. 1949); *Moeller v. Solem*, 395 N.W.2d 165, 165–66 (S.D. 1986).

release from prison moots habeas corpus claims.<sup>190</sup> The U.S. Supreme Court has held that the absence of a habeas remedy means that the state remedy is foreclosed.<sup>191</sup> The Eighth Circuit need only apply the same principal and case law to § 1983 cases.

A federal court may be required, however, to interpret state law regarding whether the petition is actually foreclosed. This is nothing new; the Court has required the same analysis in other cases by holding that the exhaustion doctrine only applies to issues that are alive.<sup>192</sup> Determining which claims are alive or dead necessarily would require a court to delve into state law.

The second issue is whether the fact that the prisoner has been released from prison is cause for not bringing the claims to a state tribunal. The Court has only allowed narrow factual circumstances to provide cause.<sup>193</sup> A released prisoner could potentially rely on the novelty of the constitutional issue.<sup>194</sup> In the case study discussed in the introduction, for instance, the prisoner, the Minnesota Commissioner of Corrections, and the courts did not know that the practices involved were unconstitutional until the case went up on appeal.<sup>195</sup> A released prisoner may be able to succeed where they can show ineffective assistance of counsel.<sup>196</sup> An ineffective assistance of counsel claim is further limited by the requirement that it meet the *Strickland* standard.<sup>197</sup> The prisoner must show that

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190. *Spencer*, 523 U.S. at 7; see *Anderson*, 98 S.W.3d at 404; *Case*, 377 N.W.2d at 924; *D.W.*, 574 S.W.2d at 391; *Magrum*, 38 N.W.2d at 370; *Moeller*, 395 N.W.2d at 165–66.

191. See *supra* note 96 and accompanying text.

192. See *supra* text accompanying note 93.

193. See *supra* note 97 and accompanying text (noting that the cause requirement may be met by a claim of ineffective assistance of counsel, but little else).

194. See *supra* note 97 and accompanying text (citing a number of different arguments that have been unsuccessful in the habeas context, including the novelty of the issue).

195. State *ex rel.* Newcomb v. Roy, No. A10-2075, 2011 WL 2437489, at \*1 (Minn. Ct. App. June 20, 2011); see *Steadman v. Roy*, No. 14-3442, 2015 WL 1954402, at \*12 (D. Minn. Mar. 23, 2015) (discussing the Minnesota Commissioner of Correction's duty to change the policies of the Minnesota Department of Corrections after it was determined in *Newcomb* that the administrative addition of conditional release was unconstitutional).

196. See *supra* note 97 and accompanying text.

197. See *supra* note 97 and accompanying text.

counsel fell below an objective standard and that the prisoner was prejudiced by the faulty representation.<sup>198</sup>

## VI. CONCLUSION

When a prisoner submits a claim under § 1983, the claim rests at the intersection of § 1983 and the habeas corpus statute.<sup>199</sup> However, neither of those statutes supports the application of *Heck's* favorable termination rule to cases in which released prisoners bring a claim under § 1983.<sup>200</sup> The favorable termination rule would bar the claim where state remedies were not first exhausted.<sup>201</sup> In the case of released prisoners, this would mean a complete bar to the claim, as the claims of prisoners are moot for the purposes of habeas corpus following prisoners' release from custody.<sup>202</sup>

The better rule is to apply the four-step analysis courts apply to the exhaustion doctrine.<sup>203</sup> This would allow a released prisoner to make his or her case that state remedies are no longer available due to mootness.<sup>204</sup> It would further allow the prisoner to show cause and prejudice.<sup>205</sup> This is a difficult standard to meet, which would likely mean that the proverbial floodgates would not be opened.<sup>206</sup> In fact, there are a very few and narrow situations in which a released prisoner could succeed.<sup>207</sup> One of these may be where the claim is so novel that the prisoner did not recognize it until after the prisoner was released.<sup>208</sup> Another situation may be where ineffective assistance of counsel led to a failure to make a petition or submit a faulty petition.<sup>209</sup> In relying on mere dicta in *Heck* and waiting for clearer guidance from the Court, the Eighth

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198. See *supra* note 97 and accompanying text.

199. *Heck v. Humphrey*, 512 U.S. 477, 479 (1994).

200. See *supra* Sections V.A–B.

201. See *Wilwording v. Swenson*, 439 F.2d 1331, 1334 (8th Cir. 1971).

202. See *supra* note 62 and accompanying text.

203. See *supra* Section V.E.

204. See *supra* Section V.E.

205. See *supra* Section V.E.

206. See *supra* Section V.E.

207. See *supra* note 97 and accompanying text.

208. See *supra* note 97 and accompanying text.

209. See *supra* note 97 and accompanying text.

Circuit has taken the path of least resistance.<sup>210</sup> The path of least resistance has made this particular river crooked.

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210. Heck v. Humphrey, 512 U.S. 477, 492–96 (1994).