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Has All Heck Broken Loose? Examining Heck's Favorable-Termination Requirement in the Second Circuit After *Poventud v. City of New York*

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**HAS ALL *HECK* BROKEN LOOSE?
EXAMINING *HECK*'S FAVORABLE-
TERMINATION REQUIREMENT IN THE
SECOND CIRCUIT AFTER *POVENTUD V.
CITY OF NEW YORK***

*John P. Collins**

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INTRODUCTION

Imagine yourself in the shoes of Marcos Poventud. You have spent the last nine years in prison because of a conviction tainted by the police department’s failure to turn over potentially exculpatory evidence.¹ During those nine years, you were abused, physically and

1. *Poventud v. City of New York*, 715 F.3d 57, 58–59 (2d Cir. 2013), *vacated en banc on other grounds*, 750 F.3d 121 (2d Cir. 2014) [hereinafter *Poventud II*].

mentally.² Now, although your conviction was vacated, the prosecution successfully argued that you should remain incarcerated pending your new trial.³ The prosecution is also appealing the vacatur, and who knows when or how the appeals process will end.⁴ Remaining in prison for the foreseeable future seems inevitable. But, you see a light at the end of the tunnel. The prosecution has offered you a plea.⁵ Agreeing to it will require that you admit to being involved in the armed robbery, a crime against which you asserted your innocence at trial, but it will also secure your immediate release.⁶ The choice before you seems simple, right?

Surely this is what Marcos Poventud was thinking when he accepted the prosecution's plea offer. What likely had not crossed his mind, however, was the impact of the plea on his ability to seek damages for a violation of his constitutional rights under *Brady v. Maryland*.⁷ At its core, the problem with Poventud's suit for damages arose from the oft-debated intersection of the two most common sources of federal prisoners' rights litigation, habeas corpus and 42 U.S.C. § 1983 (§ 1983).⁸ Supreme Court precedent prevents a party from asserting a § 1983 claim when success on that claim necessarily implies the invalidity of an outstanding conviction.⁹ That type of challenge is more properly considered a collateral attack traditionally reserved for a habeas corpus petition. In *Heck v. Humphrey*¹⁰ and *Spencer v. Kemna*,¹¹ the Supreme Court grappled with this overlap, but concurrences and dicta-parsing split the lower courts as to whether *Heck* always required the current or former prisoner to show a favorable-termination when seeking damages under § 1983, or whether courts could recognize exceptions to *Heck*'s rule in certain circumstances that were not explicitly considered by

2. *See id.* at 59.

3. *See id.*

4. *See id.*

5. *See id.*

6. *See id.*

7. 373 U.S. 83 (1963) (requiring that the prosecution disclose material exculpatory evidence to the defense).

8. 42 U.S.C. § 1983 (2012). During the period from March 2012 to March 2013, 19,235 habeas petitions and 17,057 prisoner civil rights actions were filed. *See Cases Commenced, by Basis of Jurisdiction and Nature of Suit*, U.S. COURTS, <http://www.uscourts.gov/Viewer.aspx?doc=/uscourts/Statistics/FederalJudicialCaseLoadStatistics/2013/tables/C02Mar13.pdf>.

9. *See generally* *Heck v. Humphrey*, 512 U.S. 477 (1994).

10. *Id.*

11. 523 U.S. 1 (1998).

the Court.¹² Poventud had secured a vacatur of one conviction, only to subsequently plead guilty to the same facts and circumstances, albeit to a lesser-charged offense. He was no longer in custody, so habeas relief was no longer available. Did his desire to achieve freedom from a corrupted conviction cost him his opportunity to receive damages for a constitutional violation?

This was the question before the United States Court of Appeals for the Second Circuit. The facts, circumstances, and questions of law are nothing short of rare and exceptional; indeed, they are reminiscent of those often found in first-year law school exams. But the real-world implications concern an issue of profound importance: the right to redress for a constitutional violation. Despite the obvious significance of this issue, the circuit courts are split on whether there are any exceptions to *Heck*'s seemingly absolute favorable-termination requirement. Initially, a sharply divided three-judge panel recognized the most expansive exception to *Heck* to date: an absolute right to file suit under § 1983 if a person is no longer in custody and therefore has no remedy in habeas.¹³ This decision launched a rehearing en banc, a procedure in the Second Circuit that is as rare and exceptional as the case itself.¹⁴ Ultimately, the en banc court decided the case on a narrower ground, finding that Marcos Poventud's § 1983 suit did not, in fact, imply the invalidity of his conviction by guilty plea, thus removing the case from *Heck*'s purview.¹⁵ But the court never reached the soundness of the original panel's analysis of Second Circuit case law.¹⁶ It remains unclear in the Second Circuit whether a plaintiff's custodial status affects his ability to seek damages for constitutional violations and, if so, to what extent.

12. See discussion *infra* Parts I.B, II.A–B.

13. *Poventud II*, 715 F.3d 57, 60 (2d Cir. 2013), *vacated en banc on other grounds*, 750 F.3d 121 (2d Cir. 2014).

14. It is the “longstanding tradition” of the United States Court of Appeals for the Second Circuit to defer generally to panel decisions, proceeding to a full rehearing en banc “only in rare and exceptional circumstances.” See *Ricci v. DeStefano*, 530 F.3d 88, 89–90 (2d Cir. 2008) (Katzmann, J., concurring in denial of rehearing en banc). This tradition is rooted in the belief that “[d]ifficult issues should be decided only when they must be decided,” and further consideration is best left to the auspices of the Supreme Court. *Id.* at 89 (Calabresi, J., concurring in denial of rehearing en banc); see also *id.* at 93 (Jacobs, C.J., dissenting from denial of rehearing en banc).

15. *Poventud v. City of New York*, 750 F.3d 121, 127 (2d Cir. 2014) [hereinafter *Poventud III*].

16. See *id.* at 125 n.1.

Part I of this Article reviews the historical scope and function of 42 U.S.C. § 1983 and 28 U.S.C. § 2254 in prisoners' civil rights litigation. Part I additionally describes the manner in which the Supreme Court in *Heck* and *Spencer* refined that relationship to alleviate issues of potentially overlapping jurisdiction. Part II explores the split between those circuits holding that *Heck's* bar applies if success on a § 1983 claim for civil damages would necessarily imply the invalidity of an outstanding conviction regardless of whether the claimant is still in custody, and those that have circumscribed *Heck's* holding in favor of Justice Souter's narrower view in *Spencer*.¹⁷ Part II further examines the *Heck* bar as applied in the Second Circuit prior to *Poventud*. Part III analyzes the Second Circuit's most recent application of *Heck* in both the original panel and subsequent en banc decisions in *Poventud*.¹⁸ Part IV considers the state of § 1983, *Heck*, and custody in the Second Circuit in the aftermath of *Poventud*. Bringing this analysis to bear on *Poventud II's* holding reveals that the decision was an incorrect application of already flawed circuit law. However, this Part proposes that post-*Heck* Second Circuit case law can be read to permit limited exceptions to the favorable-termination requirement without running afoul of *Heck's* core concerns.

I. BACKGROUND: THE STATUTORY FRAMEWORK AND SUPREME COURT JURISPRUDENCE

Before one can understand the Supreme Court's attempt to avoid collisions at "the intersection of the two most fertile sources of federal-court prisoner litigation,"¹⁹ it is critical to examine both statutes and the intended function and scope of each. Following a brief discussion of § 1983 and habeas, this Part discusses the Supreme Court's holdings in *Heck* and *Spencer*, paying particular attention to the interplay between the majority in *Heck* and Justice Souter's concurring opinion in *Spencer*.

17. The First, Third, Fifth, and Eighth Circuits have held that *Heck* imposes an absolute bar on § 1983 claims seeking civil damages where success on that claim would necessarily impugn a conviction for which the claimant has not already secured a favorable termination. *See infra* Part II.A. By contrast, the Fourth, Sixth, Seventh, Ninth, Tenth, and Eleventh Circuits have permitted such actions in limited circumstances when the claimant is no longer in custody and therefore has no recourse in habeas. *See infra* Part II.B. As discussed in Part II.C, *infra*, the Second Circuit's position is unclear.

18. *Poventud II*, 715 F.3d 57 (2d Cir. 2013), *vacated en banc on other grounds*; *Poventud III*, 750 F.3d 121 (2d Cir. 2014).

19. *Heck v. Humphrey*, 512 U.S. 477, 480 (1994) (referring to 42 U.S.C. § 1983 and 28 U.S.C. § 2254).

A. Section 1983 and Habeas

1. Section 1983

The Civil Rights Act of 1871, commonly referred to as the Ku Klux Klan Act, codified at 42 U.S.C. § 1983, created a cause of action against those who, acting under color of state law, deprived citizens of their rights, privileges, or immunities secured by the Constitution.²⁰ It reads in relevant part:

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 redress²¹

The Reconstruction-era statute's "historical catalyst" was the widespread "campaign of violence and deception in the South, fomented by the Ku Klux Klan, which was denying decent citizens their civil and political rights."²² To that end, § 1983's purpose was "to interpose the federal courts between the States and the people, as guardians of the people's federal rights."²³ To ensure those disenfranchised by the States could seek redress, Congress broadly "thr[ew] open the doors of the United States courts to individuals who . . . had suffered[] the deprivation of constitutional rights."²⁴

Although § 1983 evinces Congress's intent to provide broad access to federal courts to those seeking recompense for constitutional violations, such access is not exclusive; rather, it is entrusted concurrently with state courts.²⁵ That is, while a suit alleging constitutional violations may be brought in state court, exhaustion of state remedies is not a prerequisite to filing suit in federal court.²⁶

20. See 42 U.S.C. § 1983 (2012); see also *Mitchum v. Foster*, 407 U.S. 225, 242 (1972); *Bracey v. Bd. of Educ. of City of Bridgeport*, 368 F.3d 108, 115 (2d Cir. 2004).

21. 42 U.S.C. § 1983.

22. *Wilson v. Garcia*, 471 U.S. 261, 276 (1985).

23. *Haywood v. Drown*, 556 U.S. 729, 735 (2009) (quoting *Mitchum*, 407 U.S. at 242 (1972) (internal quotation marks omitted)).

24. *Patsy v. Bd. of Regents of St. of Fla.*, 457 U.S. 496, 504 (1982) (alteration in original) (quoting the remarks of Congressman Lowe).

25. *Haywood*, 556 U.S. at 735 ("[S]tate courts as well as federal courts are entrusted with providing a forum for the vindication of federal rights violated by state or local officials acting under color of state law.").

26. *Patsy*, 457 U.S. at 507.

2. Habeas

A writ of habeas corpus is a writ “employed to bring a person before a court, most frequently to ensure that the party’s imprisonment or detention is not illegal.”²⁷ Federal habeas relief may be sought by a state prisoner through 28 U.S.C. § 2254, where the petitioner claims that his or her imprisonment violates the Constitution or federal law.²⁸ Unlike under § 1983, under § 2254 state prisoners must exhaust state remedies before properly seeking federal habeas relief.²⁹ Moreover, the writ is generally available only to those “in custody.”³⁰ Habeas petitions filed while the petitioner was in custody are usually dismissed as moot once the prisoner is released, a result that potentially forecloses any means of collateral attack on the conviction.³¹

3. Collisions at the Intersection

Each statute permits a claimant to seek redress for a state actor’s violation of federally protected rights. This overlap has raised concerns that “the no-exhaustion rule of § 1983 might, in the absence of some limitation, devour the exhaustion rule of the habeas corpus statute.”³² Without a limitation, for example, a prisoner could file suit under § 1983, even though success in that suit would necessarily imply that the underlying conviction is invalid, which in turn would require that the claimant be released (a function primarily reserved for habeas). Moreover, that claimant would be free from the exhaustion requirements mandated under habeas. In *Preiser v. Rodriguez*, the Supreme Court held that, although certain claims may fit within the literal terms of § 1983’s broad language, Congress specifically determined that habeas corpus’s strong policy of avoiding unnecessary friction between the federal and state court systems mandates that habeas corpus be the exclusive remedy for state prisoners attacking the validity of the fact or length of their

27. BLACK’S LAW DICTIONARY 728 (8th ed. 2004).

28. 28 U.S.C. § 2254(a) (2012).

29. *Id.* § 2254(b)(1)(A).

30. 28 U.S.C. § 2241(c)(3) (2012); *see also infra* note 65 and accompanying cases.

31. *See infra* Part II.A.4.

32. *Preiser v. Rodriguez*, 411 U.S. 475, 503–04 (1973) (Brennan, J., dissenting) (“Indeed, every application by a state prisoner for federal habeas corpus relief against his jailers could, as a matter of logic and semantics, be viewed as an action under the Ku Klux Klan Act to obtain injunctive relief against ‘the deprivation,’ by one acting under color of state law, ‘of any rights, privileges, or immunities secured by the Constitution and laws’ of the United States.”).

confinement.³³ However, that decision left open the question of whether claims that ordinarily sound in habeas, because they challenge the validity of an outstanding conviction, may properly be brought under § 1983 if habeas is no longer available. As discussed below, the dueling dicta in *Heck* and *Spencer* left the answer unclear.

B. *Heck* and *Spencer*

1. *Heck v. Humphrey*

Roy Heck was convicted in an Indiana state court of voluntary manslaughter for killing his wife.³⁴ Sentenced to fifteen years in prison, Heck filed a § 1983 suit in the Southern District of Indiana alleging that state police officers and prosecutors had “engaged in an ‘unlawful, unreasonable, and arbitrary investigation’ leading to [Heck’s] arrest; ‘knowingly destroyed’ evidence ‘which was exculpatory in nature and could have proved [Heck’s] innocence’; and caused ‘an illegal and unlawful voice identification procedure’ to be used at [his] trial.”³⁵ Although these claims may properly have been brought in a habeas petition seeking release from custody, Heck sought only damages.³⁶ The district court dismissed the suit because success on the alleged claims would have challenged the legality of Heck’s outstanding conviction,³⁷ and the Seventh Circuit affirmed.³⁸ Writing for the panel, Judge Posner concluded that:

If regardless of the relief sought, a [§ 1983] plaintiff is challenging the legality of his conviction, so that if he won his case the state would be obligated 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 state remedies, on pain of dismissal if he fails to do so.³⁹

The Supreme Court thus was presented with the question of whether § 1983’s broad scope reached damages claims that, if successful, could affect a collateral attack on an outstanding criminal conviction. The Court answered in the negative and affirmed the

33. *See id.* at 489–90.

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

35. *Id.* at 479.

36. At the time Heck filed his § 1983 claim, a habeas petition would have been deemed unexhausted because his direct appeal of the conviction was still pending. *See Heck v. Humphrey*, 997 F.2d 355, 357 (7th Cir. 1993).

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

38. *Heck*, 997 F.2d at 359.

39. *Id.* at 357.

Seventh Circuit.⁴⁰ Although the Court in *Preiser v. Rodriguez*⁴¹ had suggested, in dicta, that a prisoner seeking only damages rather than challenging the fact or length of confinement may be able to seek relief under § 1983, Justice Scalia clarified that the Court's decision in *Preiser* was not rooted in the particular relief sought, but rather in the nature of the claim.⁴² Addressing the *Preiser* dicta directly, Justice Scalia explained, "[the] statement [that a suit for damages under § 1983 is proper] 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.'"⁴³ Thus, because the end result of a successful suit by Heck would result in the very relief prohibited by *Preiser*, it was barred under § 1983.

The Court analogized Heck's claims to the common law tort of malicious prosecution. To succeed on a claim of malicious prosecution, a plaintiff must show a favorable termination of the underlying conviction.⁴⁴ This requirement, explained Justice Scalia, is grounded in "the hoary principle that civil tort actions are not appropriate vehicles for challenging the validity of outstanding criminal judgments."⁴⁵ Accordingly, extending this principle to Heck's claim "avoids parallel litigation . . . and it precludes the possibility of the claimant succeeding in the tort action after having been convicted in the underlying criminal prosecution."⁴⁶ This result is consistent with the "strong judicial policy against the creation of two conflicting resolutions arising out of the same or identical transaction."⁴⁷ The Supreme Court set forth the governing standard as follows:

We hold that, in 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

40. *Heck*, 512 U.S. at 490.

41. 411 U.S. 475 (1973).

42. *See Heck*, 512 U.S. at 481–82.

43. *Id.* at 481–82 (alterations in original) (quoting *Preiser*, 411 U.S. at 490).

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

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

46. *Id.* at 484 (quoting 8 S. SPEISER ET AL., AMERICAN LAW OF TORTS § 28:5, at 24 (1991)).

47. *Id.*

determination, or called into question by a federal court's issuance of a writ of habeas corpus, 28 U.S.C. § 2254. A claim for damages bearing that relationship to a conviction or sentence that has *not* been so invalidated is not cognizable under § 1983.⁴⁸

As a threshold matter, therefore, district courts must determine whether a prisoner's § 1983 claim implies the invalidity of an outstanding conviction.⁴⁹ If so, the suit is not cognizable under § 1983, and the prisoner's remedy is properly sought in habeas.⁵⁰ Because Heck failed to secure a favorable termination of the conviction upon which his damages claims rested, his § 1983 claims could not lie.⁵¹

While it was clear that the plaintiff need not show a favorable termination when success on a § 1983 claim bears no relationship to the validity of an outstanding conviction,⁵² the Court divided on the applicability of the favorable-termination requirement when, by virtue of the prisoner's release from custody, habeas is not a viable option. That is, is a showing of favorable termination required when success on a § 1983 claim challenges the validity of an outstanding conviction but the claimant has no access to habeas? In a concurring opinion, Justice Souter, joined by Justices Blackmun, Stevens, and O'Connor, argued for a narrower holding, applying the favorable-termination requirement only to § 1983 claims brought by claimants who still had access to habeas relief.⁵³ Applying the rule beyond that, Justice Souter explained, "would needlessly place at risk the rights of those outside the intersection of § 1983 and the habeas statute, individuals not 'in custody' for habeas purposes."⁵⁴ The concurring Justices believed that transposing a favorable-termination requirement on § 1983 claims brought by prisoners (both current and former) contravened the purpose behind § 1983,⁵⁵ and that the majority's common law analysis was best limited to actions where § 1983 and habeas overlap.⁵⁶

48. *Id.* at 486–87 (footnote omitted) (emphasis in original).

49. *See id.* at 487.

50. *See id.* at 489 ("We do not engraft an exhaustion requirement upon § 1983, but rather deny the existence of a cause of action."); *see also* Martin A. Schwartz, *The Supreme Court's Unfortunate Narrowing of the Section 1983 Remedy for Brady Violations*, CHAMPION, May 2013, at 58, 59.

51. *See Heck*, 512 U.S. at 489.

52. *Id.*

53. *Id.* at 500 (Souter, J., concurring).

54. *Id.*

55. *Id.* at 501–02.

56. *See id.* at 497–98.

The majority rejected Justice Souter's concerns, responding that "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."⁵⁷ However, because the Court's holding in *Heck* did not turn on whether Heck was in custody (and therefore whether he had access to habeas), it remained unclear how far the *Heck* bar extended.⁵⁸

2. Spencer v. Kemna

In *Spencer v. Kemna*,⁵⁹ Randy Spencer filed a habeas petition challenging a decision by the Missouri Board of Probation and Parole to revoke his parole.⁶⁰ Before a decision on Spencer's petition was issued, his prison term expired and he was released.⁶¹ Because Spencer was no longer in custody, the district court dismissed his petition as moot.⁶² Spencer argued on appeal that if his habeas petition was deemed moot, he would have no federal remedy because under *Heck* he would likewise be barred from bringing an action under § 1983.⁶³ Again writing for the majority, Justice Scalia rejected Spencer's assertion as "a great non sequitur," because the Court, reemphasizing its holding in *Heck*, does not believe that "a § 1983 action for damages must always and everywhere be available."⁶⁴ In any event, because Spencer chose not to file his claims under § 1983, the Court did not find occasion to reach the question posited by Justice Souter's concurring opinion in *Heck*. Rather, because Spencer could not show collateral consequences flowing from his outstanding conviction,⁶⁵ his claim was not cognizable on federal habeas review and the rulings of the lower courts were affirmed.⁶⁶

57. *Id.* at 490 n.10 (majority opinion) (emphasis added).

58. See Jason A. Jones, Note, *Prisoner Litigation and the Mistake of Jenkins v. Haubert*, 86 CORNELL L. REV. 140, 145–48, 160–61 (2000); Thomas Stephen Schneidau, Note, *Favorable Termination After Freedom: Why Heck's Rule Should Reign, Within Reason*, 70 LA. L. REV. 647, 655–58 (2010).

59. 523 U.S. 1 (1998).

60. *Id.* at 3.

61. See *id.* at 6.

62. *Id.* (dismissing the petition "[b]ecause . . . the sentences at issue here have expired, petitioner is no longer in custody within the meaning of 28 U.S.C. § 2254(a), and his claim for habeas corpus relief is moot" (internal quotations omitted)).

63. See *id.* at 17. Spencer's conviction, after all, remained outstanding, but his release from custody precluded him from seeking relief through habeas. *Id.*

64. See *id.*

65. In January 2013, the Supreme Court clearly stated that "federal habeas petitioners, by definition, are incarcerated, not on probation." *Ryan v. Gonzales*, 133

Justice Souter concurred to correct Spencer's flawed assumption that if habeas relief were not available to him, a claim under § 1983 would likewise be barred under *Heck* for failure to prove a favorable termination:

[Spencer] assumes that *Heck* . . . held or entails that conclusion If Spencer were right on this point, his argument would provide a reason, whether or not dispositive, to recognize continuing standing to litigate his habeas claim. But he is wrong; *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 my *Heck* concurrence, it would be unsound to read either *Heck* or the habeas statute as requiring any such result.⁶⁷

Justice Souter suggested a "better view," where "a former prisoner, no longer 'in custody,' may bring a § 1983 action establishing the unconstitutionality of a conviction or confinement without being bound to satisfy a favorable-termination requirement that it would be impossible as a matter of law for him to satisfy."⁶⁸ Such a position is a "simple way to avoid collisions at the intersection of habeas and § 1983" and does require engrafting a new (and often difficult to prove) element into a method of relief intended to operate broadly.⁶⁹

Here, like in *Heck*, the Court did not hold expressly that those no longer in custody and without recourse through habeas must still satisfy a favorable-termination requirement to proceed under § 1983.⁷⁰ *Spencer's* significance, however, is derived from the fact that

S. Ct. 696, 707 (2013). Other courts have suggested, however, that there are certain circumstances under which an individual, even though released on probation, may be eligible for federal habeas relief because the conditions of parole are so restrictive as to amount to a restraint of liberty. *See, e.g.,* *Burd v. Sessler*, 702 F.3d 429, 435 (7th Cir. 2012); *Poodry v. Tonawanda Band of Seneca Indians*, 85 F.3d 874, 894 (2d Cir. 1996).

66. *See Spencer*, 523 U.S. at 18.

67. *Id.* at 19 (Souter, J., concurring) (internal citation omitted). Justice Souter conceded, however, that:

[T]he majority opinion in *Heck* can be read to suggest that this favorable-termination requirement is an element of any § 1983 action alleging unconstitutional conviction, whether or not leading to confinement and whether or not any confinement continued when the § 1983 action was filed. Indeed, although *Heck* did not present such facts, the majority acknowledged the possibility that even a released prisoner might not be permitted to bring a § 1983 action implying the invalidity of a conviction or confinement without first satisfying the favorable-termination requirement.

Id. at 19–20.

68. *Id.* at 21.

69. *Id.* at 20.

70. *See id.* at 17 (majority opinion) ("It is not certain, in any event, that a § 1983 damages claim would be foreclosed. If, for example, petitioner were to seek

four Justices agreed with Justice Souter's conception of the relationship between habeas and § 1983.⁷¹ Justices O'Connor, Ginsburg, and Breyer joined in Justice Souter's concurrence.⁷² Justice Ginsburg, a member of the *Heck* majority, concurred separately to express her agreement with Justice Souter's limited reading of *Heck*: "I have come to agree with Justice Souter's reasoning: Individuals without recourse to the habeas statute because they are not 'in custody' . . . fit within § 1983's 'broad reach.'" ⁷³ Likewise, Justice Stevens endorsed this view in his dissent.⁷⁴ Thus, five Justices, although not in any one majority opinion, supported the proposition that a prisoner no longer in custody need not satisfy a favorable termination requirement to bring an action under § 1983, even if success in that action necessarily implies the invalidity of an outstanding conviction.⁷⁵ This left the federal circuit courts to extrapolate and apply the true "majority" position. The result, predictably, was a circuit split.

II. THE CIRCUIT SPLIT OVER CUSTODY AND *HECK*'S FAVORABLE-TERMINATION REQUIREMENT

Part II of this Article details the differing approaches taken by the United States Courts of Appeals in determining whether an ex-prisoner's suit for damages may proceed. The circuit courts have reached conflicting conclusions over whether *Heck*'s bar is unqualified, preventing suits by those who have no remedy in habeas. In particular, four circuits have refused to find any exceptions to *Heck*'s bar, while seven rely on Justice Souter's concurrences to

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.'" (internal citations omitted)).

71. For a discussion of the weight to be accorded Justice Souter's *Spencer* principle versus footnote 10 in *Heck*, see Bruce Ellis Fein, *Heck v. Humphrey After Spencer v. Kemna*, 28 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 1, 23-25 (2002).

72. *Spencer*, 523 U.S. at 18 (Souter, J., concurring). Justice Breyer replaced Justice Blackmun, who joined Justice Souter's concurrence in *Heck*, on the Court. Justice Stevens, who also joined Justice Souter's *Heck* concurrence, adopted the position in a separate dissent. *Spencer*, 523 U.S. at 22 (Stevens, J., dissenting)

73. *Id.* at 21 (Ginsburg, J., concurring).

74. *Id.* at 25 n.8 (Stevens, J., dissenting) ("Given 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.").

75. *See, e.g.*, *Muhammad v. Close*, 540 U.S. 749, 752 n.2 (2004) (per curiam) ("Members of the Court have expressed the view that unavailability of habeas for other reasons may also dispense with the *Heck* requirement. This case is no occasion to settle the issue." (citations omitted)).

support limited exceptions requiring good faith and practicality. This Part examines the varied approaches to answering this question.

A. Circuit Courts Finding that Custody Is Irrelevant Under *Heck's* Binding Precedent

Four circuit courts have held that *Heck's* bar to § 1983 suits that imply the invalidity of an extant conviction is absolute and remains unaffected by the *Spencer* concurrence and dissent.

1. *The First Circuit*

Five months after *Spencer*, in *Figueroa v. Rivera*,⁷⁶ the First Circuit became the first U.S. appeals court to grapple with the application of *Heck's* favorable-termination requirement to a prisoner without a habeas remedy. In *Figueroa*, the plaintiffs sued on behalf of a relative who died in prison while his state habeas petition was “languish[ing]” in court.⁷⁷ Because of the prisoner’s death, the district court dismissed his habeas petition as moot.⁷⁸ The § 1983 suit alleged constitutional violations against members of law enforcement who had allegedly framed and prosecuted the prisoner for the crime for which he was incarcerated at the time of his death.⁷⁹ The district court dismissed the action for failure to state a claim, invoking *Heck's* explanation that the Court’s holding “do[es] not engraft an exhaustion requirement upon § 1983, but rather den[ies] the existence of a cause of action.”⁸⁰

The First Circuit upheld the district court’s decision. Although plaintiff’s claim of “fundamental unfairness” struck “a responsive chord,” the court nevertheless held that *Heck* barred the claim: “Here, the appellants do not allege that an authorized tribunal or executive body overturned or otherwise invalidated [the decedent’s] conviction. Consequently, *Heck* bars the unconstitutional conviction and imprisonment claims.”⁸¹ *Heck* left no room for equitable exceptions and absent a clearer directive from the Supreme Court, the First Circuit declined to find one.

In a footnote, the First Circuit discussed and rejected the notion that the concurring and dissenting opinions in *Heck* and *Spencer* can

76. 147 F.3d 77 (1st Cir. 1998).

77. *See id.* at 79.

78. *See id.* at 79–80.

79. *See id.* at 80.

80. *See id.*; *see also* *Heck v. Humphrey*, 512 U.S. 477, 489 (1994).

81. *Figueroa*, 147 F.3d at 80-81.

be read to provide an exception to *Heck*'s otherwise sweeping favorable-termination requirement:

We are mindful that dicta from concurring and dissenting opinions in a recently decided case may cast doubt upon the universality of *Heck*'s "favorable termination" requirement. The Court, however, has admonished the lower federal courts to follow its 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. We obey this admonition.⁸²

Fifteen years later, *Figueroa* remains good law in the First Circuit.⁸³

2. *The Fifth Circuit*

In *Randell v. Johnson*,⁸⁴ the Fifth Circuit addressed a § 1983 claim by an ex-inmate seeking damages for an allegedly improper sentence calculation.⁸⁵ Police arrested Randell and charged him with driving while intoxicated.⁸⁶ Randell alleged that he was incarcerated from September 1996 to June 1997 because of a warrant from the Texas Board of Pardons and Paroles.⁸⁷ Randell alleged that he was not given credit for this time and consequently had to serve that time over again.⁸⁸ When Randell filed his § 1983 suit, he was no longer in custody and therefore could not file a habeas petition.⁸⁹ He sought compensatory damages of \$1000 per day for each day doubly-served.⁹⁰ The district court dismissed the suit as frivolous.⁹¹

The Fifth Circuit affirmed on the grounds that Randell's suit failed to state a claim.⁹² Like the plaintiffs in *Figueroa*, Randell argued that he need not meet *Heck*'s favorable-termination requirement because

82. *Id.* at 81 n.3 (citations omitted) (internal quotation marks omitted).

83. *See, e.g.*, *Traudt v. Roberts*, No. 10-CV-12-JL, 2013 WL 3754862, at *6-7 (D.N.H. July 15, 2013) ("This court, of course, is bound to follow directly applicable precedent from the Court of Appeals for the First Circuit. That precedent, *Figueroa*, expressly rejects the notion that—notwithstanding the concurring opinion in *Spencer*—*Heck* does not apply when the plaintiff can no longer obtain habeas relief from the conviction that his § 1983 suit calls into question.").

84. 227 F.3d 300 (5th Cir. 2000) (per curiam).

85. *See id.* at 300-01.

86. *Id.* at 300.

87. *See id.*

88. *See id.*

89. *See id.* at 301.

90. *Id.* at 300-01.

91. *Id.* at 300.

92. *Id.* at 301.

he was ineligible for federal habeas relief.⁹³ The Fifth Circuit rejected Randell's assertion, finding that *Heck* unequivocally requires a plaintiff seeking damages in a § 1983 suit to first demonstrate a favorable termination.⁹⁴

Consistent with the *Figueroa* court's approach, the Fifth Circuit rejected the argument that Justice Souter's concurrences changed the post-*Heck* legal landscape: "[W]e decline to announce for the Supreme Court that it has overruled one of its decisions [and we] agree with the First Circuit."⁹⁵

3. *The Third Circuit*

In *Gilles v. Davis*,⁹⁶ decided in 2005, the Third Circuit expanded *Heck*'s bar against § 1983 claims to guilty pleas and entry into an "Accelerated Rehabilitative Disposition" (ARD) program.⁹⁷ University police charged plaintiff Timothy Petit with "resisting arrest, disorderly conduct, and failure of disorderly persons to disperse."⁹⁸ Released from custody that same day, Petit entered into the ARD program that "permits expungement of the criminal record upon successful completion of a probationary term."⁹⁹ Petit successfully completed the program,¹⁰⁰ and then filed a § 1983 complaint seeking damages for multiple alleged First Amendment violations.¹⁰¹

The district court dismissed Petit's claims as barred by *Heck*.¹⁰² Despite Petit's successful completion of the ARD program, the district court found that under *Heck*, expungement under an ARD

93. *See id.*

94. *See id.*

95. *See id.*; *see, e.g.*, *Thomas v. Louisiana Dep't of Soc. Servs.*, 406 F. App'x 890, 898 n.5 (5th Cir. 2010) ("In *Randell*, we noted that several other circuits do not apply *Heck*'s favorable termination rule when the plaintiff is no longer in custody. The Supreme Court has suggested that this issue is unsettled. Regardless of this uncertainty, *Randell* remains good law in this circuit, and we share its reluctance to 'announce for the Supreme Court that it has overruled one of its decisions.'" (citations omitted)); *Walker v. LeBlanc*, No. 12-CV-1950, 2012 WL 6962108, at *1 (W.D. La. Nov. 28, 2012).

96. 427 F.3d 197 (3rd Cir. 2005).

97. *See id.* at 201.

98. *Id.* at 202.

99. *See id.*

100. *Id.* at 209.

101. *See id.* at 203.

102. *Id.* at 208.

program is not a favorable termination of the conviction.¹⁰³ The Third Circuit agreed and affirmed the dismissal.

The court reasoned that the principle in favor of avoiding parallel litigation that could result in conflicting adjudications was equally applicable in the ARD context because acceptance into the ARD program “may be construed as a conviction for purposes of computing sentences on subsequent convictions,” and “[b]y entering the ARD program, the defendant waives his right to prove his innocence”.¹⁰⁴

Petit’s underlying disorderly conduct charge and his § 1983 First Amendment claim require answering the same question—whether Petit’s behavior constituted protected activity or disorderly conduct. If ARD does not constitute a favorable termination, success in the § 1983 claim would result in parallel litigation over whether Petit’s activity constituted disorderly conduct and could result in a conflicting resolution arising from the same conduct.¹⁰⁵

Recognizing that some courts had questioned *Heck*’s continued validity in light of the *Spencer* concurrences and dissent, the Third Circuit joined the First and Fifth Circuits in rejecting that contention.¹⁰⁶

4. *The Eighth Circuit*

In *Entzi v. Redmann*,¹⁰⁷ the Eighth Circuit in 2007 became the fourth federal appeals court to hold that *Heck*’s favorable-termination requirement was not subject to exceptions. In *Entzi*, the plaintiff filed a § 1983 suit to recover damages for the loss of performance-based sentence-reduction credits that allegedly extended the term of his sentence by more than a year.¹⁰⁸ The district court dismissed Entzi’s civil rights suit on the pleadings, and the Eighth Circuit affirmed.¹⁰⁹

103. *See id.* at 209.

104. *Id.*

105. *Id.*

106. *See id.* at 209–10 (adhering to “the Supreme Court’s admonition to lower federal courts to follow its 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” (internal quotations omitted)). *Gilles* remains good law in the Third Circuit. *See, e.g.*, *Ashton v. City of Uniontown*, 459 F. App’x 185, 187–88 (3d Cir. 2012); *Robinson v. N.J. State Police*, No. 11-6070, 2012 WL 5944381, at *2 (D.N.J. Nov. 27, 2012).

107. 485 F.3d 998 (8th Cir. 2007).

108. *See id.* at 1003.

109. *Id.* at 1000.

The Eighth Circuit found that a person challenging the duration of imprisonment or the loss of sentence-reduction credits must do so by seeking a writ of habeas corpus.¹¹⁰ Habeas corpus was no longer available to Entzi because it was both untimely and mooted by his release from prison.¹¹¹ Entzi, like the plaintiffs in *Figueroa*, *Randell*, and *Gilles*, argued that this removed his case from *Heck*'s grasp.¹¹² The court recognized no such exception:

Entzi relies on a later decision of the Supreme Court, in which a combination of five concurring and dissenting Justices agreed in *dicta* that "a former prisoner, no longer 'in custody,' may bring a § 1983 action establishing the unconstitutionality of a conviction or confinement without being bound to satisfy a favorable-termination requirement that it would be impossible as a matter of law for him to satisfy." Absent a decision of the Court that explicitly overrules what we understand to be the holding of *Heck*, however, we decline to depart from that rule.¹¹³

In sum, these Circuits recognized the potential for unfairness inherent in such a strict application of *Heck*'s bar, but their decisions reflect an unwillingness to carve out any exceptions that, in their view, would impermissibly deviate from Supreme Court precedent. Having "definitively decided, in the negative, the question of whether a prisoner who is precluded from pursuing habeas relief can file a § 1983 action" that challenges the validity of an outstanding conviction,¹¹⁴ the prerogative to alter that holding rests solely with the Supreme Court.

110. *See id.* at 1003.

111. *See id.* at 1000, 1003.

112. *See id.* at 1003.

113. *Id.* (internal citations omitted). Courts in the Eighth Circuit continue to apply *Entzi*'s interpretation of *Heck*. *See, e.g.,* *Marlowe v. Fabian*, 676 F.3d 743, 746–47 (8th Cir. 2012) ("We have recognized that this type of § 1983 plaintiff must show a favorable termination by state or federal authorities even when he is no longer incarcerated."); *Newmy v. Johnson*, No. 3:13CV00132 JLH–JTR, 2013 WL 2552734, at *2 (E.D. Ark. June 10, 2013) ("The minority of circuits, including the Eighth Circuit, have held that *Heck*'s holding is not limited to those in custody and that because the statements in *Spencer* are *dicta*, those statements do not overrule *Heck*'s holding.").

114. *Dible v. Scholl*, 410 F. Supp. 2d 807, 822 (N.D. Iowa 2006).

B. Circuit Courts Finding that the *Spencer* “Majority” Permits Exceptions to the *Heck* Bar in Limited Circumstances

Six circuits¹¹⁵ have taken the position that in *Spencer*, five of the nine Justices embraced a less expansive interpretation of *Heck* that permits civil rights suits to proceed even if their success would necessarily imply the invalidity of an extant conviction. These holdings do not stand for the proposition that some federal remedy must always be available. To the contrary, these courts crafted their exceptions to *Heck*'s otherwise broad prohibition in a very limited fashion, usually requiring that the plaintiff never had, or never would have (on mootness grounds), an opportunity to petition for a writ of habeas corpus.

1. The Eleventh Circuit

The Eleventh Circuit in *Harden v. Pataki*¹¹⁶ permitted a § 1983 claim to proceed when federal habeas relief was no longer available. In *Harden*, the court held “that a claim filed pursuant to 42 U.S.C. § 1983 seeking damages and declaratory relief for the violation of a state prisoner’s federally protected extradition rights is not automatically barred by *Heck*.”¹¹⁷ In 1986, while serving a twenty-five year sentence in Kansas, plaintiff Major Harden was extradited to Suffolk County, New York, where he was convicted and sentenced to another twenty-five year term for a separate crime.¹¹⁸ After release from confinement in 2000 on yet another crime, Harden alleged that he was extradited to New York to serve the sentence imposed on the 1986 conviction without a warrant, waiver of his rights, or a habeas hearing.¹¹⁹ The district court applied *Heck* and dismissed the suit for failing to state a cognizable claim because the 1986 conviction remained unchallenged.¹²⁰

The Eleventh Circuit reversed. First, the court found that the alleged violations of extradition procedures, namely the failure to procure a signed warrant or hold a habeas hearing, do not relate to Harden’s guilt or innocence.¹²¹ Therefore, the court reasoned, success

115. This does not include the Second Circuit, which is discussed separately in Part II.C., *infra*.

116. 320 F.3d 1289 (11th Cir. 2003).

117. *Id.* at 1301–02.

118. *Id.* at 1292.

119. *Id.*

120. *See id.*

121. *See id.* at 1298.

on Harden's claim would not conflict with his underlying conviction.¹²² Accordingly, Harden's claim fell outside *Heck*'s scope.

The court also found a "second reason" why *Heck* did not bar Harden's suit.¹²³ Unlike those courts discussed in Part II.A, the Eleventh Circuit abided by the *Spencer* concurring and dissenting opinions' explanation that "*Heck* should be read as permitting a prisoner to bring a § 1983 action establishing the unconstitutionality of a conviction or confinement without being bound to satisfy a favorable-termination requirement that it would be impossible as a matter of law for him to satisfy."¹²⁴ The court found this rationale directly applicable to Harden because habeas relief is not available once a person has been extradited, even if the extradition was illegal.¹²⁵ Applying the *Spencer* analysis to *Harden*, the court rejected the untenable result that "a claim for relief brought by a person already extradited would be placed beyond the scope of § 1983, when exactly the same claim could be redressed if brought by a person to be, but not yet, extradited."¹²⁶ To hold otherwise, the court concluded, would "deny any federal forum for claiming a deprivation of federal rights to those who *cannot* first obtain a favorable state ruling."¹²⁷

2. *The Ninth Circuit*

The following cases are illustrative of limited exceptions to *Heck*'s bar recognized by the Ninth Circuit. In *Cunningham v. Gates*,¹²⁸ the court held that Cunningham's claims were unaffected by *Heck* even though he no longer had access to habeas.¹²⁹ It was not that Cunningham was never or no longer incarcerated; it was simply that

122. *See id.*

123. *See id.*

124. *See id.* (internal quotations omitted).

125. *See id.* at 1299.

126. *Id.*

127. *See id.* at 1298 (quoting *Heck v. Humphrey*, 512 U.S. 477, 500 (1994) (Souter, J., concurring) (emphasis added)). Within the Eleventh Circuit, however, this holding is read narrowly. In *Domotor v. Wennet*, 630 F. Supp. 2d 1368 (S.D. Fla. 2009), *aff'd*, 356 F. App'x 316 (11th Cir. 2009), the district court barred a § 1983 claim where the plaintiff, although now ineligible for habeas relief, had not pursued that means of redress when it was available. *Id.* at 1380. The court found that to allow the plaintiff to circumvent the applicable state exhaustion requirements but permit a collateral attack in federal court is the exact circumstance that *Heck* sought to prevent. *See id.*

128. 312 F.3d 1148 (9th Cir. 2002).

129. *See id.* at 1153 n.3.

he had let the time in which to file a petition lapse.¹³⁰ The court rejected Cunningham's argument that *Heck* was inapposite under these circumstances, finding the argument inconsistent with the view taken by the concurring and dissenting *Spencer* Justices.¹³¹ Habeas relief was "impossible as a matter of law" in Cunningham's case because he failed to pursue it in a timely manner, not simply because he was no longer incarcerated. The court declined to permit Cunningham's own (and seemingly intentional) failure to timely pursue a remedy under habeas to operate as a means to circumvent *Heck's* reach.¹³²

However, just two weeks after the court's decision in *Cunningham*, the Ninth Circuit in *Nonnette v. Small*¹³³ permitted a § 1983 claim to proceed even though, like in *Cunningham*, the plaintiff was barred from seeking relief through habeas. In *Nonnette*, the plaintiff, while incarcerated, stabbed another inmate during a prison fight.¹³⁴ A disciplinary proceeding assessed Nonnette a 360-day loss of good-time credits and 100 days in administrative segregation.¹³⁵ Nonnette first exhausted his prison administrative remedies, as required by § 1983, before seeking alternative forms of relief.¹³⁶ The remedy for such "good time" deprivation is ordinarily found in a petition for writ of habeas corpus, but Nonnette was ineligible for habeas relief because he already had been released from custody.¹³⁷ Under those circumstances, the Ninth Circuit held that *Heck* did not bar Nonnette from maintaining a § 1983 claim.¹³⁸ Distinguishing the facts from *Cunningham*, the court premised its decision in *Nonnette* on the plaintiff's timely *attempt* to satisfy the favorable-termination requirement, the failure of which was directly attributable to the brevity of his incarceration.¹³⁹ Moreover, the court recognized that it

130. *See id.*

131. *See id.*

132. *See id.*

133. 316 F.3d 872 (9th Cir. 2002).

134. *Id.* at 874.

135. *Id.*

136. *See id.* at 874 n.2.

137. *See id.* at 875–76.

138. *Id.* at 876.

139. *See id.* at 874–77 & n.6 (emphasis added) ("The fact that Nonnette has been released from the incarceration that his civil suit, if successful, would impugn, and that a habeas petition would be moot for that reason, differentiates this case from our recent decision in *Cunningham v. Gates*, 312 F.3d 1148 (9th Cir. 2002). In *Cunningham*, the plaintiff brought a civil suit that would have impugned the conviction for which he was still incarcerated; habeas corpus was unavailable only

was not Nonnette's underlying conviction that gave rise to his § 1983 suit, but rather the *procedures* by which his incarceration allegedly was extended. Thus, like the court in *Harden*, the Ninth Circuit found *Heck* not directly applicable.¹⁴⁰

Unlike the Eleventh Circuit in *Harden*, however, the Ninth Circuit refused to consider that the concurring and dissenting opinions in *Spencer* had affected *Heck*'s precedential power.¹⁴¹ Additionally, the *Nonnette* court "emphasize[d]" that its holding "affects only former prisoners challenging loss of good-time credits, revocation of parole or similar matters."¹⁴² Thus, plaintiffs seeking damages for pure unconstitutional conviction or imprisonment claims must still satisfy *Heck*'s favorable-termination requirement regardless of custodial status or habeas availability.¹⁴³

These cases are contrasted appropriately with the Ninth Circuit's holding in *Guerrero v. Gates*,¹⁴⁴ where the court held plaintiff's § 1983 claims of wrongful arrest, malicious prosecution, and conspiracy barred by *Heck* because, although no longer in custody, the plaintiff never challenged his convictions prior to his civil rights suit.¹⁴⁵ *Nonnette*, the court explained, "was founded on the unfairness of barring a plaintiff's potentially legitimate constitutional claims when the individual immediately pursued relief after the incident giving rise to those claims and could not seek habeas relief only because of the shortness of his prison sentence."¹⁴⁶ The court reiterated that *Nonnette*'s reprieve from *Heck* was limited to challenges to prison administrative proceedings, not to challenges to an extant conviction.¹⁴⁷

because he had let the time for such a petition expire. Under those circumstances, we declined to take the case out of the rule of *Heck*.").

140. *See id.* at 877 n.5.

141. *See id.* ("We recognize that, if *Heck* precluded Nonnette's action, we would not be free to consider it undermined by the opinions in *Spencer*. The Supreme Court retains the sole prerogative of overruling its own decisions. We conclude that *Heck* does not control, and reach that understanding of *Heck*'s original meaning with the aid of the discussions in *Spencer*.").

142. *Id.* at 877 n.7.

143. *See id.*; *see also* Garber v. City of Los Angeles Gen. Servs. Dep't, 509 F. App'x 667, 667 (9th Cir. 2013); Cooper v. Ramos, 704 F.3d 772, 784–85 (9th Cir. 2012).

144. 442 F.3d 697 (9th Cir. 2003).

145. *See id.* at 705.

146. *Id.*

147. *See id.*; *see also* Rouse v. Connor, No. 12-2121 PJH, 2012 WL 2368464, at *10 (N.D. Cal. June 21, 2012) (challenging an underlying conviction barred under *Nonnette*); Wesbecher v. Landaker, No. CIV 01-2410, 2008 WL 2682614, at *4 (E.D.

3. The Sixth Circuit

Similar to the Ninth Circuit's holding in *Nonnette*, the Sixth Circuit in *Powers v. Hamilton County Public Defender Commission*¹⁴⁸ adopted the position that when a prisoner is precluded from seeking the invalidation of his conviction through habeas because of a limited term of incarceration, an action under § 1983 is not barred by *Heck*. In *Powers*, the plaintiff pled no contest to misdemeanor reckless driving, was sentenced to thirty days in jail, and fined \$250.¹⁴⁹ Twenty-seven days of the sentence were suspended, but Powers failed to pay the fine in violation of his probation.¹⁵⁰ He again pled no contest, and the original thirty-day sentence was restored and served.¹⁵¹ After his release, Powers sued the state's public defender's office for failure to seek an indigency hearing to determine his ability to pay the fine.¹⁵² The district court granted summary judgment in favor of Powers.¹⁵³

The Sixth Circuit affirmed the district court on two grounds. First, the court held *Heck* inapplicable because Powers was foreclosed from challenging his incarceration in a habeas petition.¹⁵⁴ The court noted that the dispositive factor was the length of Powers' incarceration, not the fact that he was no longer incarcerated.¹⁵⁵ Unwilling to accept that "Justice Souter intended to carve out a broad *Heck* exception for all former prisoners," the Sixth Circuit read the better rule as precluding only those actions by former prisoners who had sufficient access to habeas relief but chose not to pursue it.¹⁵⁶ The court rejected the reasoning of the First, Third, Fifth, and Eighth Circuits that "decreed themselves bound by *Heck* to the exclusion of Justice Souter's comments in his *Heck* and *Spencer* concurrences."¹⁵⁷

Cal. July 1, 2008) (explaining that plaintiff's failure to expeditiously seek habeas relief while in custody foreclosed his § 1983 action under *Nonnette*).

148. 501 F.3d 592 (6th Cir. 2007).

149. *Id.* at 597.

150. *See id.*

151. *See id.*

152. *See id.* at 597–98.

153. *See id.* at 598.

154. *See id.* at 601.

155. *See id.*

156. *See id.* at 601–02.

157. *See id.* at 602. This view has been called into question in subsequent Sixth Circuit opinions. *See, e.g.,* Harrison v. Michigan, 722 F.3d 768, 773–74 & n.1 (6th Cir. 2013) ("In the wake of *Spencer*, a circuit split has developed concerning the significance of Justice Souter's concurring opinion, with several circuits convinced that it must be considered *dictum* because it was unnecessary to the holding of the case (*i.e.*, that *Spencer*'s habeas claim was moot), and other circuits, including our

Instead, the Sixth Circuit limited *Heck* to its facts and followed “the ordinary rule refinement that appellate courts [must] necessarily engage in.”¹⁵⁸ The court declined to cast aside the view of five Justices in *Spencer* that *Heck*’s bar is not as expansive as it seems.¹⁵⁹ The court also permitted Powers’ suit to proceed because the claims in his § 1983 action challenged the procedures by which he was incarcerated, and not the conviction itself.¹⁶⁰

4. *The Fourth Circuit*

In *Wilson v. Johnson*,¹⁶¹ decided in 2008, the Fourth Circuit sided with those circuits interpreting *Heck*’s reach through the lens of the *Spencer* concurrences and dissent. The opinion appears grounded in a policy-based rationale, with the court expressing concern over the possibility that strict adherence to *Heck* would mean that “[i]f a prisoner could not, as a practical matter, seek habeas relief, and after release, was prevented from filing a § 1983 claim, § 1983’s purpose of providing litigants with ‘a uniquely federal remedy’ . . . would be severely imperiled.”¹⁶² Wilson was to serve six months for grand larceny of a motor vehicle.¹⁶³ Scheduled for release in April of 2006, the Virginia Department of Corrections changed the release date to July of that same year.¹⁶⁴ Wilson filed a grievance with the prison administration, but received no response.¹⁶⁵ Wilson was released in July 2006 and thereafter filed suit seeking monetary damages for wrongful imprisonment.¹⁶⁶

The Fourth Circuit reversed the district court, which had dismissed Wilson’s claim. The court held that it was the broad reach of § 1983, not of *Heck*, that must be weighed heavily.¹⁶⁷ Reasoning that *Heck* did not conclusively answer the question of whether a prisoner who,

own, equally convinced that because a majority of the Court endorsed it, the concurring opinion created an exception to *Heck*’s favorable-termination requirement. Hence, even though, in the 15 years since *Spencer*, the Supreme Court has never recognized such an exception, we are bound by *Powers* and, therefore, must treat Justice Souter’s ‘holding’ as law.”).

158. *Powers*, 501 F.3d at 602.

159. *See id.* at 603.

160. *See id.*

161. 535 F.3d 262 (4th Cir. 2008).

162. *See id.* at 262, 268 (quoting *Wilson v. Garcia*, 471 U.S. 261, 271–72 (1985) (internal citation omitted)).

163. *Johnson*, 535 F.3d at 263.

164. *Id.*

165. *Id.*

166. *See id.* at 263–64.

167. *See id.* at 266.

because of the duration of his incarceration, effectively had no remedy in habeas needed to meet the favorable-termination requirement, the court rationalized that the *Spencer* plurality provided a rule consistent with the “sweeping breadth, high purposes, and uniqueness of § 1983.”¹⁶⁸ “Quite simply,” the court concluded, “we do not believe that a habeas ineligible former prisoner seeking redress for denial of his most precious right—freedom—should be left without access to a federal court.”¹⁶⁹ Despite this far-reaching sentiment, the court stopped short of recognizing a right to an all-encompassing federal remedy.¹⁷⁰

5. *The Tenth Circuit*

In 2010, the Tenth Circuit in *Cohen v. Longshore*¹⁷¹ confronted *Heck*'s applicability to false imprisonment claims based on allegedly unlawful immigration detention. The court held that “[i]f a petitioner is unable to obtain 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.”¹⁷² The Tenth Circuit acknowledged the split and analyzed the merits of each side’s position.¹⁷³ The court could not agree with those circuits holding that the *Heck* favorable-termination requirement unequivocally prevents § 1983 claims where a prisoner’s release forecloses a remedy under habeas. Given the Supreme Court’s own admission in *Muhammad v. Close*,¹⁷⁴ and the fact that the prisoner in *Heck* was still incarcerated, the court considered this to be an unsettled question of law and was not persuaded that *Heck* must always be applied to petitioners

168. *See id.* at 268 (quotation marks omitted) (alterations omitted).

169. *See id.*

170. In its discussion of whether application of the *Heck* bar would unduly frustrate the broad scope of § 1983, the court qualified prisoners as those who “could not, *as a practical matter*, seek habeas relief.” *Id.* This suggests that the holding is limited to prisoners, like those in *Powers* and *Nonnette*, who could not have filed a habeas petition because of mootness or the fact that they were never incarcerated. *See id.* Indeed, the Fourth Circuit has subsequently interpreted *Johnson* accordingly. *See, e.g.,* Campbell v. Beckley Police Dep’t, 390 F. App’x 246, 248 (4th Cir. 2010) (“[W]hen a former prisoner is challenging the validity of his past confinement, and *due to his release* ‘would be left without any access to federal court if his § 1983 claim was barred[,]’ this court has allowed the former prisoner’s § 1983 claim to proceed.” (emphasis added)).

171. 621 F.3d 1311 (10th Cir. 2010).

172. *Id.* at 1316–17.

173. *See id.* at 1315–17.

174. 540 U.S. 749 (2004); *see also supra* note 75 and accompanying text (noting that it remains unsettled whether *Heck*'s favorable-termination requirement applies when habeas is no longer available).

without a habeas remedy.¹⁷⁵ The court further held that this approach “is both more just and more in accordance with the purpose of § 1983.”¹⁷⁶ But, like the Fourth Circuit in *Wilson*, the Tenth Circuit applied a “practicality-based” exception and would only lift *Heck*’s bar where the petitioner, for reasons outside of his own control, could not first seek to invalidate the conviction through habeas.¹⁷⁷

6. *The Seventh Circuit*

Finally, in *Burd v. Sessler*,¹⁷⁸ the Seventh Circuit addressed whether a plaintiff may seek damages against prison officials in their individual capacities for the alleged violation of an individual’s right to access the courts without satisfying *Heck*’s favorable-termination requirement. In *Burd*, the plaintiff alleged that the defendant prison officials deprived him of access to the courts by preventing him from using the prison library during the thirty-day window in which to file a motion to withdraw his guilty plea.¹⁷⁹ Burd never sought to set aside his conviction through federal or state habeas petitions prior to filing his § 1983 suit.¹⁸⁰ Burd was released from prison in November 2011, with parole scheduled to end one year later.¹⁸¹ The district court dismissed Burd’s suit, finding the claim barred by *Heck*.¹⁸²

The Seventh Circuit affirmed. First, the court held that success on Burd’s claim—that he was denied access to the courts by prison officials—would necessarily demonstrate that there was merit to his claim and that he should have been able to withdraw his plea.¹⁸³ This result placed Burd’s claim squarely in *Heck*’s scope. Second, the court rejected Burd’s claim that, because he was no longer in custody, and therefore ineligible for habeas relief, *Heck* was inapplicable and he should have been permitted to pursue his claim under § 1983.¹⁸⁴ However, the court’s decision was not premised on a broad reading of *Heck*’s bar; rather, Burd’s claim was rejected because he “*could* have

175. *Cohen*, 621 F.3d at 1316.

176. *Id.*

177. *See id.* at 1317; *see also* Taylor v. City of Bixby, Okla., No. 12-CV-0066-CVE-FHM, 2012 WL 6115051, at *7 (N.D. Ok. Dec. 10, 2012) (“Pursuant to *Cohen*, plaintiff’s claims are subject to the favorable-termination requirement if plaintiff has not been diligent in pursuing his claims.”).

178. 702 F.3d 429 (7th Cir. 2012).

179. *See id.* at 430–31.

180. *See id.* at 431.

181. *Id.*

182. *See id.*

183. *See id.* at 434–35.

184. *See id.* at 435.

sought collateral relief at an earlier time but declined the opportunity and waited until collateral relief became unavailable before suing.”¹⁸⁵ Adhering to the concerns of the concurring Justices in *Spencer*, while at the same time refusing to permit an end-run around *Heck*, the court in *Burd* took the position that only when a § 1983 plaintiff ignores the opportunity to seek collateral relief while incarcerated will his action be barred by *Heck* upon release.¹⁸⁶

Although the circuits have split on the issue of whether *Heck*'s bar is absolute regardless of the claimant's custodial status, those circuits following Justice Souter's approach have limited their holdings, finding *Heck* inapplicable most often when habeas relief is unavailable through no fault of the plaintiff. Indeed, no circuit court has read the *Spencer* concurrences to imply an absolute entitlement to a federal remedy at any time for a constitutional violation. That is, of course, until *Poventud*.

C. *Heck* in the Second Circuit

The Court in *Poventud II* claimed that “[u]nder the law of this Circuit, a plaintiff asserting the unconstitutionality of his conviction or incarceration must have access to a federal remedy.”¹⁸⁷ In the wake of *Poventud II*'s vacatur, the question of how far the Second Circuit took Justice Souter's proposed *Heck* exception remains unanswered.¹⁸⁸ This Section catalogues the application of *Heck* and *Spencer* in the Second Circuit prior to the *Poventud* line of cases, informing the basis for Part IV's discussion.

185. *Id.* at 436.

186. *See id.* at 435–36; *see also* DeWalt v. Carter, 224 F.3d 607, 616–17 (7th Cir. 2000).

187. *Poventud II*, 715 F.3d 57, 60 (2d Cir. 2013), *vacated en banc on other grounds*, 750 F.3d 121 (2d Cir. 2014).

188. *Compare* Teichmann v. New York, 769 F.3d 821, 827 (2d Cir. 2014) (Livingston, J., concurring in part and concurring in the judgment in part) (“Referring to this line of cases, Judge Calabresi describes the ‘law in this Circuit’ as holding that ‘when a plaintiff does not have access to habeas—at least where the plaintiff has not intentionally caused habeas to be unavailable—favorable termination of the underlying sentence or conviction is not required.’ While our *en banc* decision in *Poventud v. City of New York* may not have disturbed certain precedents in this area, the *Poventud* panel decision has been vacated and I respectfully disagree with my colleague's characterization of our still-binding case law.” (internal citations omitted)), *with id.* at 830 (Calabresi, J., concurring) (“I believe that the law of our Circuit remains as it was despite our recent *en banc* decision in *Poventud*.”).

1. Jenkins v. Haubert

The Second Circuit's first occasion to analyze the dual application of *Heck* and *Spencer* arose in *Jenkins v. Haubert*.¹⁸⁹ In *Jenkins*, the court confronted the question of whether a § 1983 claim is cognizable "where a prisoner (or former prisoner) alleges a constitutional violation arising out of the imposition of intra-prison disciplinary sanctions that have no effect on the duration of the prisoner's overall confinement."¹⁹⁰

Jenkins, a prisoner at Green Haven Correctional Facility, was the subject of two disciplinary proceedings.¹⁹¹ At the first disciplinary hearing on July 26, 1994, defendant Lieutenant Haubert denied Jenkins' request to call four witnesses on his behalf because none of the individuals had witnessed the events precipitating the hearing.¹⁹² Haubert sentenced Jenkins to thirty days in "keep-lock."¹⁹³ After unsuccessfully appealing to the Green Haven superintendent, Jenkins filed a New York C.P.L.R. Article 78 claim alleging that Haubert's refusal to let the four witnesses testify amounted to a violation of Jenkins' due process rights.¹⁹⁴ On November 23, 1994, Jenkins found himself again before Lieutenant Haubert in a second disciplinary hearing.¹⁹⁵ Jenkins requested that Haubert recuse himself on bias grounds, but Haubert denied the request.¹⁹⁶ Haubert found Jenkins guilty and sentenced him to an additional thirty days in keep-lock.¹⁹⁷ Jenkins' administrative appeal was denied as meritless.¹⁹⁸

After the New York Supreme Court dismissed his Article 78 claim, Jenkins filed suit under § 1983, alleging violations of his Fourteenth Amendment right to due process.¹⁹⁹ The district court dismissed Jenkins' claim, in relevant part, as barred by *Heck*'s favorable-

189. 179 F.3d 19 (2d Cir. 1999).

190. *See id.* at 21.

191. *See id.* at 20.

192. *Jenkins v. Haubert*, No. 95 Civ. 5453, 1996 WL 350685, at *1 (S.D.N.Y. June 26, 1996).

193. *Jenkins*, 179 F.3d at 20–21 (describing keep-lock as "a form of administrative segregation in which the inmate is confined to his cell, deprived of participation in normal prison routine, and denied contact with other inmates").

194. *Id.* at 21.

195. *See id.*

196. *See id.*

197. *See id.*

198. *See id.*

199. *See id.* at 21.

termination requirement.²⁰⁰ The district court reasoned that the Supreme Court's application of *Heck* in *Edwards v. Balisok*²⁰¹ foreclosed challenges to intra-prison disciplinary decisions without first showing favorable termination, even though the disciplinary decision in *Edwards* affected the duration of the sentence.²⁰²

The Court of Appeals disagreed, recognizing a distinction between challenges to the conditions of confinement, including disciplinary sanctions such as keep-lock, and challenges to the fact or duration of confinement.²⁰³ The court held that a § 1983 claimant challenging only the conditions of confinement does not need to satisfy *Heck*'s favorable-termination requirement because the challenged disciplinary "convictions" were irrelevant to the fact or duration of Jenkins' sentence.²⁰⁴ The court further reasoned that applying *Heck*'s bar in this situation "would contravene the pronouncement of five justices that some federal remedy—either habeas corpus or § 1983—must be available."²⁰⁵

2. *Leather v. Eyck*

On the same day that *Jenkins* was issued, the Second Circuit issued *Leather v. Eyck*,²⁰⁶ relying on *Jenkins*' implied secondary holding that a § 1983 claim is not barred by *Heck* when a claimant is not in the custody of the state and therefore has no remedy under habeas. John Leather brought suit alleging that he was selectively prosecuted in retaliation for the lawful exercise of his right to free speech.²⁰⁷ Leather claimed that members of the Putnam County Sheriff's

200. *Jenkins v. Haubert*, No. 95 Civ. 5453, 1998 WL 148332, at *3 (S.D.N.Y. Mar. 30, 1998).

201. 520 U.S. 641 (1997).

202. *Jenkins*, 1998 WL 148332, at *3.

203. *Jenkins*, 179 F.3d at 27. *Balisok* concerned a challenge to prison disciplinary procedures that affected the loss of good-time credits. *Balisok*, 520 U.S. at 643. The claimant alleged deceit and bias on the part of a prison official. *Id.* at 647. Thus, although the claim was framed as challenging procedures, a successful outcome would imply the invalidity of the imposed punishment.

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

205. *See id.* To be sure, the court cautioned that "[w]e do not rest our holding solely on our tally of votes on the Court for Justice Souter's view of *Heck*." *Id.* The court's explanation, however, indicates that *Heck* was never really an issue because the bar only applies if the claim challenges the conviction, and the court found that Jenkins's claim plainly did not. *See id.* Yet, the court indicated support for the idea that a federal remedy must always be available.

206. 180 F.3d 420 (2d Cir. 1999) (Calabresi, J.). I note the author because of Judge Calabresi's central role in the *Poventud* debate discussed in Part III, *infra*.

207. *Leather*, 180 F.3d at 422.

Department, in retaliation for Leather's opposition of the Department's control of the county's E-911 communications center, waited for him to leave a restaurant where Leather had been dining with his wife for the purpose of affecting an arrest for driving while intoxicated.²⁰⁸ Leather was successfully prosecuted on a lesser charge, assessed a \$300 fine, and had his license suspended for ninety days.²⁰⁹ Because Leather was never in custody, he never had access to habeas as a means of challenging his conviction. Recognizing that even though the facts of *Jenkins* presented a challenge to conditions of prison confinement, and thus did not trigger *Heck*'s favorable-termination requirement, the *Leather* panel nevertheless followed *Jenkins*' pronouncement that "to apply the *Heck* rule in such circumstances [where habeas is not available] would contravene the pronouncement of five justices that some federal remedy . . . must be available."²¹⁰

3. *Green v. Montgomery*

Months later, the Second Circuit reaffirmed the holding in *Leather*, albeit in dicta in a footnote. In *Green v. Montgomery*,²¹¹ the court certified questions to the New York Court of Appeals to determine whether the district court's grant of summary judgment was proper under New York law.²¹² Defendants, who had won summary judgment in the district court on collateral estoppel grounds, argued in the alternative that permitting Green's § 1983 claim to continue would run afoul of *Heck* because a finding that the officers used excessive force would imply the invalidity of Green's conviction for reckless endangerment.²¹³ Writing for the panel, Judge Calabresi rejected the defendants' contention, pointing to the holding in *Leather*: "We have held, however, that *Heck* acts only to bar § 1983 suits when the plaintiff has a habeas corpus remedy available to him (i.e., when he is in state custody)."²¹⁴ This was not, however, the basis for the court's ultimate holding, which certified questions to the New York Court of Appeals because the resolution of the federal questions presented in Green's suit turned on unsettled questions of

208. *Id.*

209. *Id.*

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

211. 219 F.3d 52 (2d Cir. 2000) (Calabresi, J.).

212. *See id.* at 55.

213. *See id.* at 60 n.3.

214. *See id.* (citing *Leather*, 180 F.3d at 423–24 and *Jenkins*, 179 F.3d at 21)).

state law.²¹⁵ When the New York Court of Appeals answered, the Second Circuit affirmed the district court's grant of summary judgment in favor of the defendants on that basis alone.²¹⁶

4. Huang ex rel. Yu v. Johnson

In *Huang ex rel. Yu v. Johnson*,²¹⁷ the court addressed a § 1983 suit alleging that New York state correction officers violated plaintiff's son's constitutional rights by failing to conduct a hearing prior to placement in a residential facility and failing to properly credit her son's sentence with time served, resulting in illegal custody for eighty-three days.²¹⁸ Analyzing the claim under *Heck* as a threshold matter, the court reviewed the Circuit's recent holdings in *Jenkins*, *Leather*, and *Sims v. Artuz*²¹⁹ and concluded that this line of cases precluded the application of *Heck*'s bar to a § 1983 challenge where the plaintiff was not in custody, even if it indeed challenges the fact *or duration* of the incarceration.²²⁰

III. POVENTUD V. CITY OF NEW YORK

A. Background

In March 1997, two men robbed livery driver Yuonis Duopo at gunpoint and shot him, non-fatally, in the head or neck.²²¹ Although an initial New York City Police Department (NYPD) Crime Scene Unit (CSU) search of the cab revealed only a single shell casing, five one-dollar bills, and a black hat, all found in the back seat, NYPD Detective Frankie Rosado conducted a second search and uncovered a wallet on the floor by the front passenger seat.²²² The wallet contained two ID cards belonging to Francisco Poventud.²²³ Armed

215. *See id.* at 60–61.

216. *Green v. Montgomery*, 245 F.3d 142, 143 (2d Cir. 2001) (per curiam) (“The answer to the second certified question [concerning collateral estoppel] resolves all federal issues in [Green’s] appeal.”).

217. 251 F.3d 65 (2d Cir. 2001).

218. *See id.* at 66–67.

219. 230 F.3d 14, 24 (2d Cir. 2000) (holding § 1983 action not barred where challenge is to conditions of confinement, rather than fact *or duration*).

220. *Huang*, 251 F.3d at 75.

221. *Poventud v. City of New York*, No. 07 Civ. 3998, 2012 WL 727802, at *1 (S.D.N.Y. Mar. 6, 2012) [hereinafter *Poventud I*].

222. *Poventud III*, 750 F.3d 121, 125 (2d Cir. 2014) (en banc); *see also Poventud II*, 715 F.3d 57, 58 (2d Cir. 2013), *vacated en banc on other grounds*, 750 F.3d 121 (2d Cir. 2014).

223. *Poventud III*, 750 F.3d at 125.

with a suspect, NYPD Sergeant Kenneth Umlauf prepared a photo array using one of the ID photos and presented it to Duopo.²²⁴ Duopo positively identified Francisco Poventud as the shooter.²²⁵ However, unbeknownst to the NYPD, Francisco Poventud was incarcerated at the time of the shooting.²²⁶ Thus, police turned to Francisco's brother, Marcos. Detectives replaced Francisco's picture with Marcos's and showed the array again to Duopo.²²⁷ Upon seeing the array a fourth time,²²⁸ Duopo positively identified Marcos Poventud as his assailant.²²⁹ Police arrested Marcos and co-defendant Robert Maldonado, both of whom Duopo subsequently identified in a lineup.²³⁰ Police failed to preserve the original array containing Francisco Poventud's picture and failed to disclose Duopo's original identification to both the Bronx County District Attorney's Office and defense counsel.²³¹

At trial, Marcos Poventud asserted an alibi defense: he testified that on the night of the shooting he was playing video games at a neighbor's house.²³² Duopo was the only witness at trial to identify Marcos Poventud as the shooter, and it took him four times to do so.²³³ Evidence of his initial identification of Francisco was never presented. The jury convicted both defendants, convicting Poventud of second degree attempted murder, first degree attempted robbery, first degree assault, and second degree criminal possession of a weapon.²³⁴ He was later sentenced to an indeterminate sentence of ten to twenty years imprisonment.²³⁵

In 2002, Marcos's alleged accomplice, Maldonado, successfully challenged an evidentiary ruling, and the New York Court of Appeals overturned his conviction.²³⁶ At the same time, however, Poventud's

224. *Id.*

225. *Id.*

226. *Id.*

227. *Id.* at 125.

228. Duopo was unable to conclusively identify Marcos Poventud the first three times he was shown a photo array containing Marcos's picture. *Id.*

229. *Id.*

230. *Id.*

231. *Id.*

232. *Id.*

233. *See id.*

234. *Id.*

235. *Id.*

236. *People v. Maldonado*, 97 N.Y.2d 522, 743 N.Y.S.2d 389 (2002).

conviction was affirmed, and leave to appeal was denied.²³⁷ Only during Maldonado's retrial did evidence of the suppressed identification come to light.²³⁸ Maldonado was acquitted and Poventud filed a motion pursuant to New York Criminal Procedure Law § 440.10 to vacate his conviction on the ground that the prosecution, albeit through no fault of their own, withheld evidence in violation of *Brady v. Maryland*²³⁹ and *People v. Rosario*.²⁴⁰ The New York Supreme Court, Bronx County, granted the motion in October 2005, some eight years after his conviction.²⁴¹

The prosecution filed a notice of appeal and successfully argued that Poventud should be denied bail while awaiting his retrial.²⁴² As an alternative disposition, the prosecution offered Poventud immediate release if he pled guilty to third degree attempted robbery, a non-violent Class-E felony.²⁴³ Poventud accepted the plea in January 2006, was sentenced to one year, and was immediately released.²⁴⁴

B. *Poventud I*—The District Court

On May 22, 2007, Poventud filed an action pursuant to 42 U.S.C. § 1983 in the United States District Court for the Southern District of New York against, inter alia, the City of New York, alleging deprivation “of his Due Process and Fair Trial rights under the Fifth, Sixth, and Fourteenth Amendments.”²⁴⁵ In June 2011,²⁴⁶ the defendants moved for summary judgment, asserting that Poventud's constitutional claims were barred by *Heck*.²⁴⁷ Finding that Poventud's suit was “rooted in due process violations arising from the

237. *Poventud III*, 750 F.3d at 125; see also *People v. Poventud*, 300 A.D.2d 223, 752 N.Y.S.2d 654 (1st Dep't 2002), *leave denied*, 1 N.Y.3d 578, 775 N.Y.S.2d 794, 807 N.E.2d 907 (2003).

238. *Poventud III*, 750 F.3d at 125.

239. 373 U.S. 83 (1963).

240. 9 N.Y.2d 286 (1961).

241. *People v. Poventud*, 802 N.Y.S.2d 605 (2005).

242. *Poventud III*, 750 F.3d at 126.

243. *Id.*

244. *Id.*

245. *Poventud I*, No. 07 Civ. 3998, 2012 WL 727802, at *1 (S.D.N.Y. Mar. 6, 2012).

246. In 2009, Poventud moved to stay his § 1983 action while he pursued a C.P.L. § 440.10 motion in New York state court seeking to invalidate his guilty plea as involuntary. Although the district court granted the stay, Poventud later withdrew his § 440 motion, resumed his § 1983 suit, and left his guilty plea unchallenged. *Poventud II*, 715 F.3d 57, 57 (2d Cir. 2013), *vacated en banc on other grounds*, 750 F.3d 121 (2d Cir. 2014).

247. *Poventud I*, 2012 WL 727802, at *1.

prosecution's failure to reveal evidence which [Poventud] alleges would have supported his alibi defense" at trial, success on these claims would "logically imply the invalidity" of his guilty plea because Poventud pled guilty to conduct "which necessarily required his presence at the scene of the crime."²⁴⁸ Put simply, if the suppressed misidentification evidence upon which Poventud based his claims gave rise to damages, it must imply the invalidity of his guilty plea because it is irreconcilable with Poventud being present at the scene of the crime. Because of this inconsistency—denying his presence at the scene of the crime at trial but then admitting to it in his plea—the district court concluded that Poventud could not succeed on his claim because he could not show that "the challenged conviction has been reversed, expunged, invalidated, or called into question."²⁴⁹ The district court granted summary judgment in favor of the defendants.²⁵⁰

C. *Poventud II*—Exception to the Heck Bar Broadly Construed

Poventud appealed the district court's grant of summary judgment to the United States Court of Appeals for the Second Circuit.²⁵¹ The three-judge panel, comprised of then-Chief Judge Dennis Jacobs, Judge Guido Calabresi, and Judge Robert Sack, divided over the issue of whether Poventud's release from custody constituted an exception to *Heck*'s bar. Judge Calabresi, joined by Judge Sack, wrote for the majority and held that "[u]nder the law of this Circuit, a plaintiff asserting the unconstitutionality of his conviction or incarceration must have access to a federal remedy As Poventud is no longer in custody [and therefore cannot seek habeas relief], *Heck* does not bar his claims under § 1983."²⁵²

The panel decision explained that the Second Circuit had adopted the limited view of *Heck* preferred by the concurring and dissenting

248. *Id.* at *3.

249. *Id.* Specifically, the district court concluded that:

Although Plaintiff's initial conviction was vacated and a retrial granted, Plaintiff was not exonerated of the charges on which he was originally indicted and convicted. Instead, those charges were dismissed, prior to retrial, because Plaintiff agreed to plead guilty to a related charge stemming from the same events. Plaintiff therefore cannot show that his initial conviction has been reversed, expunged, invalidated, or called into question within the meaning of the *Heck* rule, and his subsequent guilty plea and reconviction is fatal to his § 1983 claim.

Id. (internal citation omitted).

250. *Id.* at *4.

251. *Poventud II*, 715 F.3d 57 (2d Cir. 2013), *vacated en banc on other grounds*, 750 F.3d 121 (2d Cir. 2014).

252. *Id.* at 60.

Justices in *Spencer*.²⁵³ The majority held that this circuit had consistently reaffirmed the holdings in *Jenkins* and *Leather* that “*Heck*’s favorable termination requirement applies only to plaintiffs who are in custody.”²⁵⁴ Claimants with no remedy in habeas may pursue their claims under § 1983.²⁵⁵ The court viewed Poventud’s guilty plea as a possible defense to his claim for damages, but not a bar to the action.²⁵⁶ Holding otherwise would have denied Poventud any federal forum to seek redress for his alleged constitutional violation. Thus, the court concluded that, because Poventud was no longer in custody, the district court incorrectly barred his claim.²⁵⁷

Chief Judge Jacobs dissented, fervently rejecting both the majority’s reliance on Supreme Court dicta and the majority’s expansion of what he deemed already flawed post-*Heck* Second Circuit case law.²⁵⁸ Judge Jacobs posited that pre-*Heck* Second Circuit cases barred § 1983 claims that challenged the validity of outstanding convictions and the Supreme Court’s holding in *Heck* simply affirmed the Circuit’s position.²⁵⁹ Moreover, he argued that the line of cases cited by the majority failed to effect a reversal of this Circuit’s precedent.²⁶⁰

Even if it were appropriate to rely on the concurring and dissenting *Spencer* opinions to limit *Heck*’s application, Judge Jacobs viewed the majority’s holding as incongruous with any tenuous exceptions discernible in the Circuit’s post-*Heck* jurisprudence.²⁶¹ *Jenkins*, *Leather*, *Green*, and *Huang* were all either distinguishable or inapposite, and their holdings fell short of the broad and generalized rule adopted by the majority.²⁶² These cases merely expressed support for *Spencer*’s narrow exception; they did not hold it

253. *See supra* Part I.B.

254. *Poventud II*, 715 F.3d at 61.

255. *See id.*

256. *See id.* at 61 n.2.

257. *Id.* at 62.

258. *Id.* at 66 (Jacobs, C.J., dissenting).

259. *Id.* at 67–68, 72. Judge Jacobs acknowledged Justice Souter’s attempt to narrow the majority’s holding in *Heck*, but countered with the majority’s response, which explicitly rejected Souter’s proposed limitation. *See id.* at 72 (citing *Heck v. Humphrey*, 512 U.S. 477, 490 n.10 (1994)). Judge Jacobs was critical of the majority’s discountenance of this proposition as both a footnote and dicta, because he believed the majority relied on nothing more. *See id.*

260. *See id.* at 67–68 & n.4.

261. *Id.* at 69.

262. *See id.* at 70.

absolute.²⁶³ Judge Jacobs remained resolute in his belief that *Heck*'s bar remained in full force.²⁶⁴

With the majority's holding, the Second Circuit had diverged from both sides of the circuit split.²⁶⁵

D. *Poventud III*—Vacatur and Narrower Ground

Following the panel's opinion, a majority of active judges on the Second Circuit voted to rehear the case en banc to determine, inter alia, the implications of custody (and access to habeas) as it interacts with § 1983 claims that would otherwise imply the invalidity of an outstanding conviction.²⁶⁶ In addition to the parties' briefs, the court drew amici from various criminal defense and state prosecutorial organizations.²⁶⁷ On September 25, 2013, fifteen judges heard oral argument.²⁶⁸ On January 16, 2014, nine judges upheld *Poventud*'s right to sue under § 1983.²⁶⁹ Underscoring the extraordinary facts and considerable legal questions presented, there were two concurring opinions, one opinion concurring in part and dissenting in part, and two dissenting opinions.²⁷⁰ Judge Richard C. Wesley, writing for the majority, found that *Poventud*'s § 1983 claim is not barred by *Heck* because it does not necessarily imply the invalidity of his outstanding conviction.²⁷¹ Thus, the Court declined to reach the issue that so sharply divided the original panel: whether a plaintiff challenging an allegedly unconstitutional conviction or incarceration who is no

263. *See id.*

264. *Poventud II*, 715 F.3d at 70 (“I decline to argue over dicta distilled from dicta—especially when the Supreme Court, ten sister Circuits, and numerous cases in this Circuit counsel otherwise.”).

265. *See id.*; *see also supra* Part II.A–B.

266. *Poventud III*, 750 F.3d at 124 (2d Cir. 2014) (en banc).

267. *See, e.g.*, Brief for District Attorneys Association of the State of New York as Amicus Curiae in Support of Defendants-Appellees, *Poventud III*, 750 F.3d 121 (2d Cir. 2014) (No. 12-1011-CV), 2013 WL 4038709; Brief for Amici Curiae States of New York, Connecticut, and Vermont in Support of Appellees, *Poventud III*, 750 F.3d 121 (2d Cir. 2014) (No. 12-1011-CV), 2013 WL 4038710.

268. *See* Mark Hamblett, *Full Circuit to Hear Arguments on Ex-Inmate's Right to Sue*, N.Y. L.J., Sept. 25, 2013, available at <http://www.newyorklawjournal.com/PubArticleFriendlyNY.jsp?id=1202620673996>. In addition to the thirteen active circuit judges, Senior Circuit Judges Calabresi and Sack were eligible to participate in the en banc rehearing because they were members of the original three-judge panel. *See* 28 U.S.C. § 46(c)(1) (2012).

269. *Poventud III*, 750 F.3d 121.

270. *See Id.* at 138 (Lynch, J., concurring); *id.* at 146 (Lohier, J., concurring); *id.* at 147 (Chin, J., concurring in part and dissenting in part); *id.* at 150 (Jacobs, J., dissenting); *id.* at 165 (Livingston, J., dissenting).

271. *Id.* at 127 (majority opinion).

longer in custody, and therefore is ineligible for habeas, may pursue a claim under § 1983.²⁷²

1. *The Majority Opinion*

Although the majority upheld Poventud's right to sue under § 1983, it did so on a substantially narrower ground than the original panel. Avoiding the question of whether custody alters a court's *Heck* analysis, the majority's decision rested on the conclusion that Poventud's claims do not impugn his extant conviction by guilty plea.²⁷³ Poventud had successfully challenged his 1998 trial conviction.²⁷⁴ His § 1983 claims related only to the improper procedures used in obtaining that conviction.²⁷⁵ Thus, concluded the majority, Poventud's subsequent guilty plea is "entirely independent" of the alleged deficiencies at issue in his suit.²⁷⁶ Consequently, success on those claims would not render invalid Poventud's separate 2006 plea.²⁷⁷

Although the court's decision vacated the prior panel opinion, it did not address the issue that so fiercely divided those judges. Indeed, the majority on several occasions reiterated that it declined to reach the issue and expressed no views on the prior panel's analysis or conclusion.²⁷⁸ "As we note several times in this opinion," wrote Judge Wesley, "we decide this matter on the narrowest possible grounds without passing any judgments on the views previously expressed by either the members of the panel majority . . . or by the then lone dissenter."²⁷⁹

2. *Judge Jacobs' Principal Dissent*²⁸⁰

Judge Jacobs, writing for the dissent,²⁸¹ argued that because Poventud's guilty plea conclusively placed him at the scene of the crime with the intent to commit robbery, an award of damages for civil claims that are grounded in Poventud's professed innocence

272. *Id.* at 125 n.1.

273. *Id.* at 127.

274. *See id.* at 136.

275. *See id.*

276. *See id.*

277. *See id.*

278. *See id.* at 125 n.1, 127 n.7, 138 n.22.

279. *Id.* at 127 n.7.

280. Because Judge Livingston's dissenting opinion focuses primarily on the majority's *Brady* analysis, this Article focuses on Judge Jacobs' dissent.

281. Judges Cabranes, Raggi, Livingston, and Droney joined Judge Jacobs' dissent.

unquestionably implies the invalidity of that plea and thus plainly invokes *Heck*.²⁸² Finding that Poventud's claim necessarily implies the invalidity of his extant conviction, Judge Jacobs turned to the issue that "launched th[e] rehearing *en banc*: whether the *Heck* bar applies only to persons in custody, as the majority of the three-judge panel held; whether there are any exceptions to the *Heck* bar; and whether any exceptions that may exist would save Poventud's claim."²⁸³ Judge Jacobs and his colleagues rejected the bright-line custody-based holding of the original panel and argued that even if exceptions to *Heck* do exist, a point the dissent in no way concedes, Poventud's suit does not fall within them.²⁸⁴

First, Judge Jacobs contended that even if *Spencer's* proposed exception to *Heck* was the law, it would not apply here. Poventud's ability to seek a favorable termination was not "*impossible as a matter of law*."²⁸⁵ In fact, Poventud had filed a collateral attack in state court challenging the voluntariness of his guilty plea, but withdrew it prior to an evidentiary hearing.²⁸⁶ Thus, because Poventud remained able to refile his motion to vacate the plea, compliance was not impossible as a matter of law.

Second, the dissent addressed the original panel's interpretation of *Heck* within the Second Circuit. The dissent perceived an implicit rejection in the majority opinion of the original panel's conclusion, despite the majority taking pains to emphasize the *en banc* panel's neutrality.²⁸⁷ Jacobs contended that the majority's acknowledgment—that Poventud's claims would be barred under *DiBlasio v. City of New York*²⁸⁸ if they sounded in malicious prosecution—is incompatible with the original panel's decision because the *Heck* rule

282. *Poventud III*, 750 F.3d at 154 (Jacobs, J., dissenting).

283. *Id.* at 163.

284. *Id.*

285. *Id.* at 163 (Jacobs, J., dissenting) (quoting *Spencer v. Kemna*, 523 U.S. 1, 21 (1998) (Souter, J., concurring)).

286. *See id.* at 164; *see also Poventud I*, No. 07 Civ. 3998, 2012 WL 727802, at *1 (S.D.N.Y. Mar. 6, 2012).

287. *See id.* at 165; *see also id.* at 125 n.1, 127 n.7, 138 n.22.

288. 102 F.3d 654 (2d Cir. 1996). In *DiBlasio*, the plaintiff successfully secured a writ of habeas corpus because of the prosecution's alleged failure to produce or identify a confidential informant. *See id.* at 655. On retrial, plaintiff was convicted of a lesser offense. *See id.* The plaintiff thereafter filed a § 1983 claim alleging, *inter alia*, malicious prosecution. *See id.* The district court dismissed the suit and the Second Circuit affirmed. Because the plaintiff's retrial ended in a conviction, the proceedings had not terminated in plaintiff's favor. *See id.* at 658. Accordingly, because plaintiff could not show a favorable-termination, he likewise could not prove all the elements of a malicious prosecution claim. *See id.* at 657.

was not implicated in *DiBlasio*.²⁸⁹ Judge Jacobs additionally pointed to a footnote in *Poventud III*, where the majority stressed that success on Poventud's § 1983 claim would do nothing to impeach the validity of the 2006 conviction by guilty plea, because this consideration "would be obviated but for the [otherwise applicable] bar of *Heck*."²⁹⁰ In other words, the majority acknowledged that Poventud's freedom was irrelevant because, even though he was no longer in custody, the majority conceded that *Heck* would bar claims relating to his outstanding 2006 guilty plea.²⁹¹ If the rule announced in the original panel decision were correct, there would be no need to consider that possibility.

Lower courts in the Second Circuit must now grapple with this litany of distinctly divided opinions to ascertain how *Heck*'s favorable termination requirement is to be applied going forward.

IV. THE *POVENTUD II* PANEL DECISION INCORRECTLY EXPANDED THE LIMITED EXCEPTIONS PREVIOUSLY RECOGNIZED BY THE SECOND CIRCUIT

This Part analyzes prior Second Circuit decisions interpreting the limits of *Heck* and compares the reasoning in those cases with the holding in *Poventud II*. First, this Part considers whether limiting *Heck*'s bar only to claims brought by persons who are eligible for (or were eligible for and failed to diligently pursue) habeas relief is appropriate, given *Heck*'s core concerns. Next, it argues that the holdings in *Jenkins*, *Leather*, and *Green* do not stand for the broad proposition that, where habeas relief is unavailable to a former prisoner, § 1983 relief must be also. Further, this Part argues that *Huang*, while expanding on the narrow exceptions recognized in the previous cases, nevertheless stopped short of the broader conclusion reached in *Poventud II*, permitting § 1983 suits whenever habeas is unavailable. Next, this Part assesses whether *Huang* can be reconciled with *Heck* and *Spencer*, and concludes that it can if narrowly construed. Finally, this Part examines *Poventud III* to determine whether it implicitly rejected *Poventud II*'s holding and argues that although it remains unclear, courts in the Second Circuit should read these cases as narrowly as possible, limiting the exceptions to the facts presented in conformance with a majority of other circuit courts.

289. *Poventud III*, 750 F.3d at 164.

290. *Id.* at 138 n.22, 164.

291. *See id.* at 136 n.19.

A. These Narrow Interpretations Accord with *Heck*

Heck's core concerns are not frustrated by the narrow exceptions recognized in the majority of circuit courts. As an initial matter, neither *Heck* nor *Spencer* was required to address whether the favorable-termination requirement applies when a § 1983 plaintiff cannot challenge an outstanding conviction through a habeas petition.²⁹² It is clear from *Heck* and, indeed, from all circuit courts, that when § 1983 and habeas overlap, a prisoner must show a favorable termination before a civil suit for damages can lie.²⁹³ However, there is less support for the extension of this principle to cases where no such overlap exists.

Heck's footnote ten is a source of controversy regarding the breadth of *Heck*'s holding. Some courts have cited footnote ten to support the proposition that *Heck*'s bar is absolute.²⁹⁴ Others have rejected that assertion, determining footnote ten to be nothing more than non-binding dicta.²⁹⁵ In footnote ten, Justice Scalia responded directly to Justice Souter's concern that the majority holding would leave former prisoners without a remedy once they are released from custody, stating, "[w]e 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."²⁹⁶ Moreover, Justice Scalia prefaced his response by noting that "no real-life example" of Justice Souter's objections "comes to mind."²⁹⁷ Footnote ten highlights two important reasons why the narrow exceptions recognized in Part II.B are consonant with *Heck*'s holding and why post-*Heck* Second Circuit cases can be appropriately narrowed to accord with Supreme Court precedent.

Careful review of the plain text of *Heck* gives credence to the idea that *Heck* only applies to *former* prisoners. Former prisoners, unlike those who were never incarcerated, had access to habeas at some point. Barring § 1983 claims by former prisoners eliminates the incentive to end-run state habeas exhaustion requirements, a concern

292. See *supra* Part I.B.1–2.

293. See *supra* note 48 and accompanying text; see also *supra* Part II.

294. See, e.g., *Entzi v. Redmann*, 485 F.3d 998, 1003 (8th Cir. 2007); see also *Wilson v. Johnson*, 535 F.3d 262, 262 (4th Cir. 2008) (Hanson, J., dissenting) (holding that footnote ten "is part of the core holding of *Heck*").

295. See, e.g., *Jenkins v. Haubert*, 179 F.3d 19, 21, 26–27 (2d Cir. 1999); *Dolney v. Lahammer*, 70 F. Supp. 2d 1038, 1040–42 & n.1 (D.S.D. 1999).

296. *Heck v. Humphrey*, 512 U.S. 477, 490 n.10 (1994) (emphasis added).

297. See *id.*

expressed by the Court in *Heck*.²⁹⁸ There is no risk of subversion, however, when habeas was never possible. It is notable that most circuits recognizing an exception for *former* prisoners have required a good faith pursuit of habeas when applicable, in order to alleviate this concern.²⁹⁹ Moreover, even permitting suits by plaintiffs who were never or are no longer incarcerated does nothing to thwart “the hoary principle that civil tort actions are not appropriate vehicles for challenging the validity of outstanding criminal judgments.”³⁰⁰ First, it is axiomatic that a claimant who was never incarcerated cannot intend to subvert habeas’ exhaustion requirements in order to seek release through a § 1983 claim because release was never a concern; the claimant seeks only damages. Second, a claimant who is no longer incarcerated cannot seek to use a favorable civil judgment, even if it implies the invalidity of an outstanding conviction, as an impermissible, roundabout means of achieving release because there is no release being sought.³⁰¹ Roy Heck, however, could have used a favorable civil judgment to “bolster a habeas claim for release,”³⁰² and the result in *Heck* flows logically from that fact.

Furthermore, the circuit split evidences numerous “real-life” examples where applying *Heck* broadly foreclosed any form of federal relief for constitutional violations, undercutting the thrust of Justice Scalia’s argument.³⁰³ Thus, as multiple scholars have argued, footnote ten should be recognized as dicta.³⁰⁴ This Article proceeds to

298. See *Johnson v. Pottawotomie Tribal Police Dep’t*, 411 F. App’x 195, 198 (10th Cir. 2011) (“The purpose behind *Heck* is to prevent litigants from using a § 1983 action, with its more lenient pleading rules, to challenge their conviction or sentence without complying with the more stringent exhaustion requirements for habeas actions.” (quotations omitted)); *Dyer v. Lee*, 488 F.3d 876, 880 (11th Cir. 2007).

299. See *supra* Part II.B.

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

301. See Note, *Defining the Reach of Heck v. Humphrey: Should the Favorable Termination Rule Apply to Individuals who Lack Access to Habeas Corpus?*, 121 HARV. L. REV. 868, 882 (2008).

302. See *id.* at 882; see also *supra* notes 36–39 and accompanying text.

303. See *supra* Part II.B. These examples include suits brought: (1) by the family of a deceased prisoner who died while his habeas petition was pending; (2) by a person who was never incarcerated, but successfully completed an Alternative Rehabilitation Disposition program; and (3) by a person who diligently sought habeas relief only to have his petition mooted upon his release.

304. See, e.g., Fein, *supra* note 71, at 25; Note, *supra* note 301, at 881–82 (“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 favorable termination requirement to such claims ‘received the full and careful consideration of the

examine post-*Heck* case law in the Second Circuit and proposes interpretations accordant with this view.

B. *Jenkins, Leather, and Green* Did not Create an Absolute Right to File Suit Under Section 1983

Judge Calabresi's decision principally relied on the Second Circuit's prior decisions in *Jenkins, Leather, and Green* to conclude that "[o]ur Court has adopted Justice Souter's dicta in *Spencer*."³⁰⁵ This reliance, however, is unfounded. None of these cases stand for the broad proposition that an ex-prisoner, for whom habeas is no longer available, has an absolute right to seek damages under § 1983.³⁰⁶ Moreover, these cases presented facts materially distinguishable from those in *Poventud*, and close examination of their holdings reveals that exceptions to *Heck*'s bar are best confined to these limited circumstances rather than universally applied.³⁰⁷

Jenkins concerned a challenge against intra-prison disciplinary sanctions and the process by which those sanctions were determined.³⁰⁸ The court permitted the suit to proceed because *Heck* plainly was inapplicable to these facts. *Jenkins*' suit sought damages for "using the wrong procedures, not for reaching the wrong result,"³⁰⁹ a category of claims clearly deemed permissible in *Heck*. Indeed, *Heck* only applies if the suit challenges the validity or length of confinement, an element wholly missing from *Jenkins*'s allegations. Success on *Jenkins*'s claims would have done nothing to invalidate the conviction placing him in prison in the first place. Thus, the court properly held *Heck* inapplicable.³¹⁰ *Jenkins* is suitably analogized to the Eleventh Circuit's holding in *Harden* because neither suit implicated the plaintiff's underlying guilt or innocence. They simply challenged the extraneous processes by which subsequent treatment was decided.³¹¹

[C]ourt."'). *But see* Schneidau, *supra* note 58, at 659 & n.108 (2010) (citing cases that held footnote ten as "part of the core holding of *Heck* by which [courts] are bound").

305. *Poventud II*, 715 F.3d 57, 61 (2d Cir. 2013), *vacated en banc on other grounds*, 750 F.3d 121 (2d Cir. 2014).

306. *See supra* Part II.C; *see also* Teichmann v. New York, 769 F.3d 821, 827 & n.1 (2d Cir. 2014) (Livingston, J., concurring in part and concurring in the judgment in part).

307. *See supra* Part II.C.

308. *See supra* notes 189–98 and accompanying text.

309. *Heck v. Humphrey*, 512 U.S. 477, 482–83 (1994); *see also supra* notes 41–43 and accompanying text.

310. *See supra* notes 202–04 and accompanying text.

311. *See supra* notes 121–22, 202–04 and accompanying text.

Moreover, it is of no moment that the court pronounced that, even if Jenkins's suit did in fact impugn his underlying conviction, applying *Heck's* bar would be counter to the position taken by five current Justices.³¹² The statement may be factually correct, but that alone does not give it the force of law.³¹³ First, as discussed in Parts II.A and II.B above, it remains unsettled whether the *Spencer* concurrences and dissent succeeded in limiting the sweeping bar of *Heck*.³¹⁴ Second, the statement in *Jenkins* was hardly necessary to the court's conclusion that the suit may proceed, a point conceded in the opinion, and is thus properly categorized as dicta.³¹⁵ It is not characterized as an alternative holding, but purely a signal of agreement with *Spencer's* proposed constraint. *Jenkins*, therefore, is best viewed as a straightforward application of, rather than an exception to, *Heck*.³¹⁶

The court's decision in *Leather* appears on its face to directly support the conclusion reached by Judge Calabresi in *Poventud II*. However, there is a factor in *Leather* that should properly distinguish its holding from the issue presented in *Poventud*. The plaintiff in *Leather* was never incarcerated. This distinction is significant for two reasons. As discussed above, the majority in *Heck* addressed directly Justice Souter's concern that prisoners no longer in custody would be left without a remedy if *Heck's* bar were applied so absolutely: "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."³¹⁷ Interpreted literally, this removes the facts of *Leather* from *Heck's* purview under the theory that *Heck* bars claims only by *former* prisoners.³¹⁸ Former prisoners, unlike those who were never imprisoned, had access to habeas at some point.

312. See *supra* note 204 and accompanying text.

313. See Note, *supra* note 301, at 881 (noting that dicta is "a statement not addressed to the question before the court or necessary for its decision") (citing Fein, *supra* note 71, at 13).

314. See *supra* Parts II.A and II.B.

315. See *supra* notes 203–04 and accompanying text.

316. Jenkins, like Heck, was in prison, but his claims had nothing to do with the conviction that resulted in his incarceration.

317. *Heck v. Humphrey*, 512 U.S. 477, 490 n.10 (1994) (emphasis added); see also *supra* notes 53–57 and accompanying text.

318. Of course, it must be recognized that regardless of whether a person was ever incarcerated, the possibility of conflicting judgments concerning the validity of the conviction may still arise. But, as discussed in Part IV.A above, the consequences of such conflicting judgments are much more limited.

This position is accordant with the holdings of a majority of the circuits discussed in Part II.B where the courts barred actions under *Heck* when former prisoners failed to avail themselves of accessible remedies while they were incarcerated.³¹⁹ These courts were not opposed to exceptions under *Heck*, but only acknowledged them when the claimant had made a good faith effort to pursue an available remedy such as habeas, or when such an opportunity was never possible for reasons outside the claimant's control.³²⁰ Suits could proceed where the plaintiff *never* had access to habeas, either because they were never incarcerated or the period of incarceration was too short for habeas to be practically available.³²¹ Thus, one could conclude that *Leather* supports the proposition that those who *never* had access to habeas, as opposed to those who *no longer* have access, may bring suit under § 1983.³²²

Reading *Leather* this way further limits concerns that it may run afoul of *Heck*'s primary objective: to prevent a prisoner from obtaining a civil judgment implying the invalidity of the conviction for which he is currently incarcerated.³²³ True, conflicting judgments may arise, but it is entirely possible to avoid a scenario where a prisoner remains incarcerated despite a court judgment finding his conviction illegal.³²⁴ This restrained conception of *Leather* is reconcilable with those circuits that have found exceptions to *Heck* without creating an easy means of vitiating *Heck*'s core concerns.³²⁵ Thus, *Leather* is

319. *See supra* Part II.B.

320. *See supra* Part II.B.

321. *See supra* Part II.B.

322. One could also argue that a suit alleging selective prosecution is an attack on the procedure, not the resulting conviction. "A selective-prosecution claim is not a defense on the merits to the criminal charge itself, but an independent assertion that the prosecutor has brought the charge for reasons forbidden by the Constitution." *United States v. Armstrong*, 517 U.S. 456, 463 (1996). Some courts have rejected this assertion. *See, e.g.*, *Schwartz v. N. M. Corr. Dep't Prob. & Parole*, 384 F. App'x 726, 730 (10th Cir. 2010) ("Thus, Mr. Schwartz's claim would seem to be barred by *Heck* as an improper challenge to his probation revocation under the guise of a § 1983 action."); *Omegbu v. Milwaukee Cnty.*, 326 F. App'x 940, 942–43 (7th Cir. 2009) ("A decision here that Omegbu was selectively prosecuted would mean that his conviction was unlawful; thus his equal-protection claim is barred under *Heck*."). However, it is conceivable that if the plaintiff were not to contest guilt and seek only damages for the choice to prosecute him or her specifically, *Heck* would not apply. *See Heck*, 512 U.S. at 482–83 (distinguishing between "a § 1983 claim for using the wrong procedures" and one "for reaching the wrong result").

323. *See Heck*, 512 U.S. at 484; *see also* Note, *supra* note 301, at 881.

324. *See supra* notes 298–300 and accompanying text.

325. *See supra* Part II.B.

properly read to permit a § 1983 suit when the claimant was never in custody.

Finally, *Green* is a tale of two decisions.³²⁶ In the first, the panel certified questions to the New York Court of Appeals to determine if collateral estoppel was appropriate under state law.³²⁷ Although the district court had granted summary judgment against Green on that basis, the defendants had alternatively argued on appeal that Green's claims were barred under *Heck*.³²⁸ In a footnote in that first opinion, Judge Calabresi addressed that alternative contention, stating that *Leather* permits § 1983 suits when the plaintiff cannot seek relief through habeas.³²⁹ The panel stayed their final decision, pending the response from the state court. The New York Court of Appeals responded that collateral estoppel was applicable under New York law, and the second opinion affirmed the district court's judgment solely on that basis.³³⁰ Like the statement in *Jenkins*, this statement was wholly divorced from the court's actual ruling.³³¹ Remove it from the court's opinion and the outcome remains the same. There is no doubt that these judges expressed a preference for this expansive position, but neither *Jenkins* nor *Leather* nor *Green* rested on that holding.

Accordingly, while all three cases express support for the holding ultimately reached in *Poventud II*, not one of them materially relies on that premise to reach its conclusion.³³² Given the questionable support for the original panel's determination in the *Heck* and *Spencer* decisions as well as those circuits finding exceptions, these Second Circuit cases should not be read to stand for this expansive proposition, but rather as recognizing limited exceptions particular to the factual scenarios presented in each.

326. See *Green v. Montgomery*, 219 F.3d 52 (2d Cir. 2000), *conforming to answer to certified question* in 245 F.3d 142 (2d Cir. 2001).

327. See *supra* notes 211–15 and accompanying text.

328. See *supra* note 212 and accompanying text.

329. See *supra* note 213 and accompanying text.

330. See *supra* note 215 and accompanying text.

331. See *supra* notes 214–15 and accompanying text.

332. See *Teichmann v. New York*, 769 F.3d 821, 827 & n.1 (2d Cir. 2014) (Livingston, J., concurring in part and concurring in the judgment in part).

C. Even Though *Huang* Expands Upon the Limited Exceptions in *Jenkins*, *Leather*, and *Green*, it Does not Permit Section 1983 Suits Whenever Habeas Relief Is Unavailable

Although this Article argues that the decision in *Poventud II* is unsupported by the holdings in *Jenkins*, *Leather*, and *Green*, it nevertheless concedes that *Huang* represents an undeniable expansion of those limited holdings. *Huang* permitted a § 1983 suit to proceed even though it clearly challenged the duration of incarceration.³³³ Yet the court drew a distinction, recognizing that the suit only challenged the duration and did not attack the *validity* of the conviction.³³⁴ This perhaps intimates that if the suit were to challenge the validity of the conviction, even though *Huang*'s son was no longer incarcerated, *Heck* may have barred the suit.³³⁵ To borrow from Judge Jacobs' dissent, this distinction "would be obviated but for the bar of *Heck*."³³⁶ This caveat gives teeth to the idea that, despite the court's acknowledgment that five Justices in *Spencer* supported an absolute right to a federal remedy, the Second Circuit was unwilling to explicitly go that far absent a clearer indication from the Supreme Court.

Indeed, some lower courts have construed *Huang*'s holding to be more limited than it may appear on its face. In *Browdy v. Karpe*,³³⁷ the District Court for the District of Connecticut interpreted *Huang* as permitting § 1983 suits so long as they only challenged the duration and not the validity of an outstanding conviction.³³⁸ Thus, *Huang*'s exception to *Heck* applied only in certain circumstances where habeas was unavailable to address a constitutional wrong, unless the claims by their nature attacked the validity of the conviction.³³⁹ Finding that *Browdy*'s claim directly implicated the validity of his conviction, the district court concluded that *Huang* was inapposite.³⁴⁰ If *Huang* stood for an absolute remedy under § 1983, the claim could not have been

333. See *supra* note 219 and accompanying text.

334. See *Huang ex rel. Yu v. Johnson*, 251 F.3d 65, 75 (2d Cir. 2001).

335. See *id.*

336. See *supra* notes 285, 287–88 and accompanying text.

337. No. 3:00 CV 1866, 2004 WL 2203464 (D. Conn. Sept. 20, 2004) (Droney, D.J.), *aff'd*, 131 F. App'x 751 (2d Cir. 2005) ("Finally, even if [plaintiff] could clear these significant hurdles, his . . . claims would be barred because they necessarily implicate the validity of his conviction, which continues to have collateral consequences despite the conclusion of the imposed term of incarceration." (citing *Huang*, 251 F.3d at 73–74.)).

338. See *Browdy*, 2004 WL 2203464, at *6.

339. See *id.*

340. See *id.* at *8.

dismissed on that basis. It is true that Browdy brought his § 1983 suit while still incarcerated and with a state habeas petition pending, but these points further highlight why *Huang's* holding must be read narrowly. If courts permit post-custodial § 1983 suits to proceed because habeas is no longer available, yet deny those same suits if brought while the prisoner is still incarcerated, it would create the perverse incentive to circumvent habeas' strict state exhaustion requirements by waiting until one's prison term expires. This untoward result conflicts with the Supreme Court's rationale in *Heck*.³⁴¹ Nevertheless, other district courts in the Second Circuit have applied a bright-line custody analysis to determine whether *Heck* bars a particular action.³⁴²

Huang's holding is an outlier among the six other circuit courts that recognize some limited exception to *Heck's* bar. At first glance, the case closest to *Huang* is *Wilson*, in the Fourth Circuit.³⁴³ Though not explicit, the Fourth Circuit's reasoning appears to imply a "good faith" or "practicality" requirement similar to the Sixth, Seventh, Ninth, and Tenth Circuits.³⁴⁴ The Court's pronouncement that "[i]f a prisoner could not, as a practical matter, seek habeas relief, and after release, was prevented from filing a § 1983 claim," suggests that the exception is only warranted if some outside force, such as time, is the reason that the conviction remains outstanding.³⁴⁵ And, indeed, the Fourth Circuit more recently has limited *Wilson's* holding to apply only to situations where the § 1983 claimant was either never

341. See Jones, *supra* note 58, at 166 ("The Supreme Court's rationale in *Heck* was relatively straightforward: it would be improper for a prisoner to use a civil damages action to circumvent the habeas statute's strict requirements.").

342. See, e.g., Hardy v. Fischer, 701 F. Supp. 2d 614, 620 n.6 (S.D.N.Y. 2010) ("The Court recognizes that *Heck's* favorable termination requirement does not bar plaintiffs who are not in custody—and thus have no remedy through habeas relief—from seeking relief pursuant to section 1983."); Dallas v. Goldberg, No. 95 Civ. 9076, 2002 WL 1013291, at *10 (S.D.N.Y. May 20, 2002).

343. See *supra* Part II.B.4.

344. See *supra* note 170 and accompanying text.

345. See *supra* note 170 and accompanying text; see also Bishop v. Cnty. of Macon, 484 F. App'x 753, 755 (4th Cir. 2012) ("Wilson does not permit a plaintiff to end-run *Heck* by simply sitting on his rights until all avenues for challenging a conviction have closed."); Gilchrist v. Pinson, No. 5:11-01746, 2013 WL 3946278, at *5-6 (D.S.C. July 31, 2013) ("To hold that *Wilson* exempts Plaintiff from *Heck's* holding would run counter to the Fourth Circuit's warning that *Heck* cannot be circumvented by a plaintiff who fails to take advantage of all available rights. Thus, even though Plaintiff is no longer a prisoner, the court finds that § 1983 suit, with respect to Defendants' actions in May 2009, is barred by *Heck*." (citation omitted)).

incarcerated or was incarcerated, but for a time insufficient to seek habeas relief.³⁴⁶

Huang can and should be read to imply the same practicality requirement. Yu, the juvenile son whose incarceration was at issue, had roughly four months during which to challenge the extension of his incarceration from late December 1997 to April 1998.³⁴⁷ This is an equivalent time period to that in *Wilson*.³⁴⁸ Despite the court's reliance on the holding in *Leather*,³⁴⁹ as discussed above, *Leather* does not support this broad proposition.³⁵⁰ The plaintiff in *Leather* was fined, rather than incarcerated, making habeas an impossibility.³⁵¹ The same can be said about Yu's period of incarceration, which was too short a time period to make habeas a practical option. Although the court's opinion posits a broad, sweeping rule, its incongruity with all other circuit courts should lead the lower courts to discern a narrower holding and look to the impossibility or impracticability of habeas relief, rather than a simple, but more expansive, custody versus no custody determination.

In light of the foregoing, *Poventud II*'s characterization of these cases seems misleading and, in any event, resulted in an unwarranted expansion of case law that should be limited to their facts. *Jenkins* and *Green* were ultimately decided on other grounds.³⁵² *Leather* was not a "former prisoner," thus materially distinguishing his claim from those analyzed in *Heck* and *Spencer*.³⁵³ *Huang*, read broadly, is an outlier among all circuit courts and can only accord with the more

346. See *Bishop*, 484 F. App'x at 755. Even under *Bishop* and *Wilson*, it remains unclear whether the prisoner is still required to seek habeas relief while incarcerated, as the plaintiff in *Wilson* did, even if it will eventually be deemed moot on his forthcoming release.

347. See *supra* notes 216–19 and accompanying text. It is also noteworthy that habeas relief is available to minors in state custody. See, e.g., *Schall v. Martin*, 467 U.S. 253 (1984).

348. See *supra* Part II.B.4.

349. See *Huang ex rel. Yu v. Johnson*, 251 F.3d 65, 75 (2d Cir. 2001) ("In light of our holding in *Leather*, and in light of both the *Spencer* majority's dictum and the fact that the *Spencer* concurrences and dissent 'revealed that five justices hold the view that, where federal habeas corpus is not available to address constitutional wrongs, § 1983 must be,' we conclude that Huang's Section 1983 claim must be allowed to proceed." (citations omitted)).

350. See *supra* notes 205–09 and accompanying text.

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

352. See *supra* notes 189–204, 211–15 and accompanying text; see also *Teichmann v. New York*, 769 F.3d 821, 827 & n.1 (2d Cir. 2014) (Livingston, J., concurring in part and concurring in the judgment in part).

353. See *supra* notes 205–09 and accompanying text; see also *Teichmann*, 769 F.3d at 827 & n.1.

liberal interpretations of *Heck* and *Spencer* if restricted to its “practicability of habeas” requirement. Lower courts should read these cases narrowly, addressing the threshold *Heck* question only when directly applicable, and should hold suits as barred unless the plaintiff was either never in custody or was not in custody long enough to make habeas a viable option.

D. Lower Courts Should Apply the Second Circuit’s *Heck* Precedent Narrowly Going Forward

In *Poventud III*, the en banc Second Circuit vacated *Poventud II* and allowed Marcos Poventud’s suit to proceed because his claim did not imply the invalidity of his later (and still extant) guilty plea, not because the court recognized an unrestricted right to a federal remedy.³⁵⁴ With *Poventud II*’s holding vacated, either procedurally by rehearing en banc or simply because the court reached its decision on a narrower ground, the question remains whether such a broad right exists within the Second Circuit.³⁵⁵ In other words, were an analogous situation to present itself, can courts in the Second Circuit rely on *Poventud II*’s rationale to permit a § 1983 claim that necessarily implies the invalidity of an outstanding conviction if habeas is no longer available?³⁵⁶ This Section argues that language in the majority opinion cannot be deemed an explicit rejection of the result reached in *Poventud II*, but advises lower courts that a narrow reading and application of the Circuit’s prior *Heck* precedent is compatible with *Heck*, *Spencer*, and the majority of circuit courts.

Judge Jacobs’s dissent in *Poventud III* submits that the majority implicitly rejected *Poventud II*’s analysis and therefore holds that *Heck*’s bar is not defeated simply by a prisoner’s release from custody.³⁵⁷ First, Judge Jacobs protests that the majority’s concession that Poventud’s claims would be barred under *DiBlasio v. City of*

354. See *supra* notes 264–77 and accompanying text.

355. Compare, e.g., *Teichmann*, 769 F.3d at 827 (Livingston, J., concurring in part and concurring in the judgment in part) (“I respectfully disagree with [Judge Calabresi’s] characterization of our still-binding case law.”), with *Teichmann*, 769 F.3d at 830 (Calabresi, J., concurring) (explaining the *Poventud III* decision “explicitly did nothing to disturb” the Second Circuit’s prior *Heck* holdings (emphasis in original)).

356. An example of such a situation can be illustrated by altering the facts of *Poventud*. Suppose Poventud failed to vacate his initial conviction and instead served two more years in prison. Once released, he filed the same suit, alleging that his trial rights were violated by his 1998 conviction. Even though the claims would be procedurally-based *Brady* claims, Poventud could be successful only if the jury were to find that he was wrongfully convicted.

357. *Poventud III*, 750 F.3d at 163 (Jacobs, J., dissenting).

*New York*³⁵⁸ if sounding in malicious prosecution cannot be reconciled with the original *Poventud II* panel's holding.³⁵⁹ But, as the majority in *Poventud III* notes, favorable-termination is an element of the tort of malicious prosecution.³⁶⁰ Thus, a suit alleging malicious prosecution cannot succeed without a favorable termination of the underlying conviction.³⁶¹ The plaintiff's custodial status never comes into play unless a favorable termination is first shown. Therefore, the majority's statement can properly be characterized as a recognition that failure as a matter of law to prove an element of an alleged offense would bar Poventud's suit, not as a rejection of the original panel's analysis.³⁶²

Nevertheless, Judge Jacobs cites the footnote wherein the majority reiterates that it finds no reason to conclude that success on Poventud's claim would impugn his 2006 guilty plea conviction.³⁶³ Jacobs does so because, even though Poventud is now released, the majority there is expressing concern about whether the claim would impugn the 2006 conviction, a concern, Jacobs notes, "that would be obviated but for the bar of *Heck*."³⁶⁴

This point is well-taken, but hardly conclusive. As an initial matter, even if the court were to hint that it was rejecting the *Poventud II* analysis, such language would be dicta. The court's decision clearly rests on the finding that Poventud's suit alleged a procedurally-focused *Brady* claim that was independent from his later guilty plea.³⁶⁵ In any event, the majority's purposeful circumscription of Poventud's claims is not a definitive acknowledgment that *Heck*'s bar remains in force. It may be because the court was trying to signal that custody is not the critical concern in a *Heck* analysis. It may be because a claim by Poventud regarding the 2006 conviction would have sounded in malicious prosecution, the elements of which cannot be met with the 2006 conviction remaining unchallenged. What does seem clear, however, is that a majority of the active judges on the

358. 102 F.3d 654 (2d Cir. 1996). For a brief discussion of *DiBlasio*, see *supra* note 288.

359. *Poventud III*, 750 F.3d at 164 (Jacobs, J., dissenting); see also *id.* at 136 (majority opinion).

360. See *id.* at 136 (majority opinion).

361. See *id.* at 132.

362. Judge Jacobs also disagrees with the majority's determination that Poventud's complaint does not sound in malicious prosecution. *Poventud III*, 750 F.3d at 155 (Jacobs, J., dissenting).

363. *Poventud III*, 750 F.3d at 162.

364. See *id.* at 164 (Jacobs, J., dissenting).

365. See *supra* notes 276–77 and accompanying text.

Second Circuit are unwilling to extend *Heck* precedent to the extent Judges Calabresi and Sack did in *Poventud II*.³⁶⁶

In the last analysis, district courts should read the Second Circuit's *Heck* precedent as conforming with that of the Fourth, Sixth, Seventh, Ninth, and Tenth Circuits, where claims are permitted if the plaintiff was never incarcerated or incarcerated for a period of time so short as to render a habeas petition unavailable. The en banc vacatur has given the Circuit, and the lower courts for that matter, an opportunity to refine previously flawed case law and adopt a standard more in line with a majority of other circuit courts. *Jenkins*, *Leather*, *Green*, and *Huang* can all be read in a limited fashion that heeds the concerns expressed by Justice Souter in his *Heck* and *Spencer* concurrences while remaining within the bounds of *Heck*'s majority holding.

CONCLUSION

Dicta in the Supreme Court's decisions in *Heck v. Humphrey* and *Spencer v. Kemna* has created a division amongst the circuit courts of appeals as to whether *Heck*'s favorable-termination requirement applies to non-habeas-eligible plaintiffs. Given the numerosity of § 1983 claims and habeas petitions filed each year,³⁶⁷ the stakes in this area of the law are high. At present, the majority of circuits have recognized limited exceptions where the plaintiff was either never in custody or was in custody for such a brief period of time that any attempt at habeas relief would have been futile. Until the Second Circuit's decision in *Poventud II*, no circuit had held *Heck* inapplicable solely by virtue of the plaintiff's custodial status.

This Article argues that the Second Circuit's basis for reaching this conclusion was premised on the erroneous reading of post-*Heck* Second Circuit case law, but that these cases can be read in accordance with *Heck*'s core concerns. This approach is consistent with the "hoary principle"³⁶⁸ that § 1983 claims are inappropriate substitutes for claims traditionally reserved for habeas, yet respectful of Justice Souter's concern that some would be without a federal remedy for constitutional violations. Going forward, therefore, courts in the Second Circuit should abandon *Poventud II*'s analysis and

366. See *Teichmann v. New York*, 769 F.3d 821, 830 (2d Cir. 2014) (Calabresi, J., concurring) (noting that the *Heck* analysis in the *Poventud II* panel decision "has been forcefully attacked by a significant number of judges" on the Second Circuit).

367. See *supra* note 8 and accompanying text.

368. *Heck v. Humphrey*, 512 U.S. 477, 486 (1994).

forgo application of *Heck's* favorable-termination requirement when the unavailability of habeas cannot be attributed to the plaintiff.