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Collateral Consequences of Pretrial Diversion Programs Under the Heck Doctrine

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Collateral Consequences of Pretrial Diversion Programs Under the *Heck* Doctrine

Bonnie Gill*

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I. Introduction

In June of 2003 Officer Billy Collins was called to a domestic disturbance in the city of Corpus Christi, Texas.¹ The source of the disruption, Christopher DeLeon, refused to leave his home, and Collins attempted to take him into custody.² The two men fought, and the police officer sprayed DeLeon with mace several times before drawing his baton.³ According to DeLeon's account, the two men wrestled over the baton and DeLeon eventually overcame Officer Collins, forcing him to the ground.⁴ DeLeon then backed up and stood against the wall with his hands in the air, his two-year-old child beside him.⁵ His wife stepped into the space between the officer and her husband.⁶ Officer Collins then drew his weapon and, as an unarmed DeLeon protested from across the

1. DeLeon v. City of Corpus Christi, 488 F.3d 649, 651 (5th Cir. 2007); DeLeon v. City of Corpus Christi, No. C-05-096, 2005 U.S. Dist. LEXIS 44191, at *2 (S.D. Tex. Aug. 24, 2005).

2. *DeLeon*, 488 F.3d at 651.

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

room, shot at DeLeon four times.⁷ DeLeon fell to the ground, and Collins shot at him twice more.⁸ In total, Officer Collins hit DeLeon with four bullets: twice in the chest, once in the side, and once in his left arm.⁹

Once the violence ceased, DeLeon (who survived the shooting) was charged with aggravated assault of a police officer for his role in the fight.¹⁰ Instead of proceeding to trial, DeLeon entered into a deferred adjudication program,¹¹ part of which required him to plead guilty to the charge of aggravated assault of a police officer.¹² DeLeon paid a \$2,500 fine and was put on probation for ten years.¹³ Following successful completion of his probationary period, DeLeon would become eligible to have his charges dismissed.¹⁴

Subsequent to his plea, however, and before completing the probationary period required by the diversion program, DeLeon filed a complaint against Collins under 42 U.S.C. § 1983,¹⁵ asserting false arrest, false imprisonment, use of excessive force, and malicious prosecution.¹⁶ The United States District Court for the Southern District of Texas dismissed DeLeon's complaint for failure to state a claim,¹⁷ finding that his suit was barred under the doctrine established by the Supreme Court in *Heck v. Humphrey*.¹⁸ The *Heck* doctrine, which is discussed in detail

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. Texas's deferred adjudication program is one of several pretrial programs discussed in this Note, all of which will be referred to as "pretrial diversion programs" for the sake of consistency.

12. *DeLeon v. City of Corpus Christi*, 488 F.3d 649, 651 (5th Cir. 2007).

13. *Id.* at 653.

14. *Id.*

15. The statute, enacted as part of the Civil Rights Act of 1871, provides that "[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . 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 . . ." 42 U.S.C. § 1983 (2018).

16. *DeLeon*, 488 F.3d at 651.

17. *DeLeon v. City of Corpus Christi*, No. C-05-096, 2005 U.S. Dist. LEXIS 44191, at *2, *8 (S.D. Tex. Aug. 24, 2005).

18. 512 U.S. 477 (1994).

below,¹⁹ essentially bars a would-be plaintiff from bringing a civil rights suit under 42 U.S.C. § 1983 if doing so would call into question the underlying conviction.²⁰ If DeLeon won his civil rights suit, for example, it might imply that his conviction (i.e., his guilty plea and probation term) was invalid. The incongruity of a conviction followed by a vindication of a civil rights suit is exactly what the *Heck* doctrine purports to protect against.²¹ The *Heck* doctrine thus necessarily implicates the question of whether a defendant's completion of pretrial diversion programs constitutes a conviction. Under *Heck*, a § 1983 action may only proceed if the conviction or sentence underlying the challenge will not be called into question.²² This has come to be known as a "favorable termination" requirement.²³ In DeLeon's case, because DeLeon pleaded guilty and executed a sworn statement that he intentionally struck Officer Collins,²⁴ the district court found "that

19. See *infra* Part III.C (tracing the development and subsequent interpretation of the doctrine).

20. See *Heck*, 512 U.S. at 487 (holding that a potential § 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 . . . or called into question by a federal court's issuance of a writ of habeas corpus"); *DeLeon*, 2005 U.S. Dist. LEXIS 44191, at *3 ("A plaintiff is barred from bringing a section 1983 claim if it is a collateral attack on the judgment in his criminal proceeding.").

21. See *Heck*, 512 U.S. at 484–85 ("This Court has long expressed similar concerns for finality and consistency and has generally declined to expand opportunities for collateral attack.").

22. See *id.* at 487 ("[T]he district court must consider whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence.").

23. See *id.* at 492 (Souter, J., concurring) ("[T]he Court appears to take the position that . . . § 1983 requires (and, presumably, has always required) plaintiffs seeking damages for unconstitutional conviction or confinement to show the favorable termination of the underlying proceeding."); *S.E. v. Grant Cty. Bd. of Educ.*, 544 F.3d 633, 637 (6th Cir. 2008) ("The requirement that the conviction or sentence has been reversed, expunged, or invalidated is analogous to the similar requirement in the tort of malicious prosecution and is called the 'favorable termination' requirement of *Heck*."); *Gilles v. Davis*, 427 F.3d 197, 211 (3d Cir. 2005) ("[W]e hold the ARD program is not a favorable termination under *Heck*.").

24. See *DeLeon*, 2005 U.S. Dist. LEXIS 44191, at *5 ("In addition to entering a guilty plea, plaintiff executed a sworn judicial confession stipulating that he 'knowingly and intentionally' struck Officer Collins.").

plaintiff's plea of guilty and the deferred adjudication shall be treated as a conviction."²⁵ The Fifth Circuit affirmed.²⁶

DeLeon's experience, in which he (perhaps unknowingly) traded his right to bring a civil rights action for the option of entering a deferral program, provides an apt example of the difficult, and often severe, consequences that stem from the *Heck* doctrine as it is currently applied by several courts of appeals. Pretrial diversion programs such as the deferred adjudication program DeLeon entered into are prevalent in state and federal courts across the country.²⁷ Indeed, they have been touted as an advance in criminal justice reform, allowing those who have committed or been accused of relatively minor crimes to avoid the costs of a trial.²⁸ Similarly, such programs provide overburdened courts with an alternate way to deal with the flood of relatively routine cases.²⁹ And pretrial diversion programs promise a host of cost savings to the state and federal systems that implement them.³⁰ A man like DeLeon, accused of assault, would

25. *Id.*

26. *See* DeLeon v. City of Corpus Christi, 488 F.3d 649, 651 (5th Cir. 2007) ("We conclude that a deferred adjudication order is a conviction for the purposes of *Heck*'s favorable termination rule.").

27. *See, e.g.*, BUREAU OF JUSTICE ASSISTANCE, U.S. DEP'T. OF JUSTICE, PRETRIAL DIVERSION PROGRAMS RESEARCH SUMMARY 2 (2010) [hereinafter DOJ RESEARCH] (cataloguing various types of pretrial diversion programs including "statewide diversion programs, prebooking programs, postbooking programs, and post-plea programs"); *infra* notes 51–66 and accompanying text (summarizing and evaluating federal and state pretrial diversion programs).

28. *See, e.g.*, CHARLES COLSON TASK FORCE ON FEDERAL CORRECTIONS, TRANSFORMING PRISONS, RESTORING LIVES ix (2016) [hereinafter TASK FORCE], <https://perma.cc/GLQ6-VZ55> (PDF) (highlighting the benefits of implementing pretrial diversion programs in the federal system, including reducing costs, improving public safety, preventing future crimes, and rehabilitation).

29. *See, e.g.*, DOJ RESEARCH, *supra* note 27, at 3 ("Pretrial diversion programs have been shown to be time-effective because they keep court dockets from becoming too large."); CALIFORNIANS FOR SAFETY & JUSTICE, CRIME & JUSTICE INST., PRETRIAL PROGRESS: A SURVEY OF PRETRIAL PRACTICES & SERVICES IN CALIFORNIA 4 (2015) ("[C]ounties implementing pretrial practices are becoming pioneers in a larger shift toward reducing over-reliance on incarceration and instead aligning local resources with best practices—a shift with significant public support.").

30. *See, e.g.*, TASK FORCE, *supra* note 28, at xi (listing a potential savings of \$5 billion dollars if certain recommendations surrounding federal pretrial diversion programs were to be implemented).

understandably be eager to accept a plea deal and return to his work and family, rather than risk time in prison or jail. Furthermore, he might well be willing to accept a wide variety of plea bargains to avoid the collateral consequences that often stem from a criminal conviction.³¹ Why, then, should DeLeon, and others like him, be forced to give up a legitimate civil rights action in order to take advantage of these programs? Furthermore, DeLeon and others like him cannot even be fully aware of what rights they are giving up, if the courts themselves are uncertain.

As it currently stands, the collateral consequences of accepting a deal involving participation in a pretrial diversion program differ based on where the accused happens to live. In particular, circuit courts disagree on whether participation in a pretrial diversion program counts as a favorable termination of the conviction or sentence such that a § 1983 action challenging the conviction can proceed.³² Like the Fifth Circuit, the Second³³ and Third³⁴ Circuits consider pretrial diversion programs to be convictions such that a subsequent § 1983 action would be barred. However, the Sixth,³⁵ Tenth,³⁶ and Eleventh³⁷ Circuits have held the opposite.

31. See *National Inventory of the Collateral Consequences of Conviction*, NAT'L REENTRY RES. CTR., <https://perma.cc/43PK-WBFL> (last visited Sept. 17, 2019) (providing a searchable database of collateral consequences) (on file with the Washington and Lee Law Review).

32. Compare *Gilles*, 427 F.3d at 211 (“[T]he ARD program imposes several burdens upon the criminal defendant not consistent with innocence, including a probationary term We agree . . . that probation constitutes an ‘unfavorable’ period of judicially imposed limitations on freedom.”), and *Taylor v. Gregg*, 36 F.3d 453, 455–56 (5th Cir. 1994) (holding that pretrial diversion programs are not favorable terminations), with *Vasquez Arroyo v. Starks*, 589 F.3d 1091, 1095 (10th Cir. 2009) (“The diversion agreements resulted in deferral of prosecution of the offenses at issue. As a consequence . . . there are no ‘outstanding judgments’ or ‘convictions or sentences’ against [the plaintiff].”).

33. See *Roesch v. Otarola*, 980 F.2d 850, 853 (2d Cir. 1992) (“[W]e hold [that a] trial rehabilitation program is not a termination in favor of the accused for purposes of a civil rights suit.”).

34. See *Gilles v. Davis*, 427 F.3d 197, 211 (3d Cir. 2005) (“[W]e hold the [pretrial diversion] program is not a favorable termination under *Heck*.”).

35. See *S.E. v. Grant Cty. Bd. of Educ.*, 544 F.3d 633, 639 (6th Cir. 2008) (“We hold that *Heck* is inapplicable, and poses no bar to plaintiffs’ claims.”).

36. See *Vasquez Arroyo*, 589 F.3d at 1095 (“[W]e have determined that the Kansas pretrial diversion agreements are not outstanding convictions and therefore these § 1983 claims impugning their validity are not barred by *Heck*.”).

37. See *McClish v. Nugent*, 483 F.3d 1231, 1252 (11th Cir. 2007) (“[W]e reverse the district court’s grant of summary judgment . . . on the grounds that

Following the Introduction, Part II of this Note gives an overview of federal and state pretrial diversion programs. Part III explores the statutory and doctrinal background of 42 U.S.C. § 1983, including its interaction with another civil rights statute, 28 U.S.C. § 2254, the federal habeas statute. Both statutes are essential to understanding the *Heck* doctrine's purpose and application to pretrial diversion participants. Part III also explores the development and interpretation of the *Heck* doctrine in four Supreme Court cases. Part IV discusses the circuit split as it currently stands. Part V presents three proposals for resolving the split and analyzes how closely the proposals adhere to the original purpose of § 1983 as well as the potential implications of these proposals on policy concerns. This Note concludes by suggesting that the Court revisit the issue presented by the *Heck* circuit split and clarify that challenges to allegedly unconstitutional investigatory practices³⁸ should never be barred by *Heck*.

II. An Overview of Pretrial Diversion Programs

Policy-makers on both sides of the political aisle agree that the criminal justice system in the United States as currently constituted is significantly flawed.³⁹ States and the federal system have instituted various initiatives to address some of these flaws.⁴⁰ In the United States, the most common alternatives to imprisonment for non-violent criminal offenders are fines, probation, and community service.⁴¹ In addition to growing trends

Holmberg's § 1983 claim was *Heck*-barred.”).

38. See *id.* at 1250 (dividing § 1983 actions into two categories, one “involv[ing] suits seeking damages for allegedly unconstitutional conviction or imprisonment and the other “for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid”).

39. See TASK FORCE, *supra* note 28, at ix (“There is broad, bipartisan agreement that the costs of incarceration have far outweighed the benefits, and that our country has largely failed to meet the goals of a well-functioning justice system.”).

40. See Christine S. Scott-Hayward, *Rethinking Federal Diversion: The Rise of Specialized Criminal Courts*, 22 BERKELEY J. CRIM. L. 47, 50 (2017) (identifying the rise in front-end specialized court systems in the federal system since 2013).

41. See Nora V. Demleitner et al., *Sentencing Outcomes: Nonprison Punishments*, in SENTENCING LAW AND POLICY (5th ed. forthcoming) (outlining the

in assigning alternative sanctions to non-violent offenders, alternative courts have been established in over 1,500 jurisdictions.⁴² The most common alternative courts are drug courts,⁴³ but jurisdictions have also established therapeutic courts, mental health courts, and community courts.⁴⁴ Some of these alternate courts are back-end or reentry programs, meaning that offenders enter the programs at the termination of their sentence.⁴⁵ Others are front-end programs, which substitute an alternate approach for trial in a traditional court.⁴⁶ This Note focuses on front-end programs, which at least temporarily divert offenders from the criminal justice system. Although the details of individual diversion program statutes differ by jurisdiction,⁴⁷ the programs by definition share an emphasis on avoiding trial. This Part will provide an overview of the growth of pretrial diversion programs in the country as well as a brief discussion of the language used by the implementing statutes to discuss guilt, conviction, and collateral consequences.

A. Purpose and Prevalence of Pretrial Diversion

In general, pretrial diversion programs “provid[e] an alternative for prosecution for an individual selected for placement in a program of supervision.”⁴⁸ The programs are voluntary and

alternatives to imprisonment commonly implemented based on Bureau of Justice statistics).

42. See *Drug Courts*, NAT'L INST. OF JUST., <https://perma.cc/US8G-BF5T> (last visited Sept. 17, 2019) (giving statistics for alternative courts) (on file with the Washington and Lee Law Review).

43. *Id.*

44. See Demleitner, *supra* note 41, at 58 (“The broader philosophical and practical labels used to describe this larger movement are ‘restorative justice’ and ‘therapeutic courts.’”).

45. See Scott-Hayward, *supra* note 40, at 50 (“Most of these courts are drug courts, and most operate at the back-end of the system as reentry courts.”).

46. See DOJ RESEARCH, *supra* note 27, at 2 (listing basic differences among pretrial, prebooking, postbooking, and post-plea diversion programs).

47. See *infra* notes 68–79 and accompanying text (cataloguing various elements of the pretrial diversion programs considered in this Note).

48. Thomas E. Ulrich, *Pretrial Diversion in the Federal Court System*, 66 FED. PROB. 30, 30 (2002). See NAT'L ASSOC. OF PRETRIAL SERVICES AGENCIES, PRETRIAL DIVERSION IN THE 21ST CENTURY: A NATIONAL SURVEY OF PRETRIAL DIVERSION PROGRAMS & PRACTICES 6 (2009) [hereinafter NAPSA] (“Pretrial

are intended, in part, to decrease recidivism by incentivizing defendants to complete the program rather than face prosecution.⁴⁹ They are also intended to relieve financial burdens on prison systems and accomplish additional policy goals such as rehabilitation and channeling of resources into other kinds of crime prevention.⁵⁰ Pretrial diversion programs, both state and federal, are becoming more prevalent in jurisdictions across the United States.⁵¹ The details of diversion programs vary across federal districts and states, reflecting the significant role that prosecutorial discretion plays in the process.⁵² Because the

diversion is a voluntary option that provides alternative criminal case processing—preferably resulting in dismissal of the charge—for eligible defendants.”); CENTER FOR HEALTH AND JUSTICE AT TASC, A NATIONAL SURVEY OF CRIMINAL JUSTICE DIVERSION PROGRAMS AND INITIATIVES 6 (2013) [hereinafter TASC]

In its most general usage, diversion means that an individual is placed on a justice track that is less restrictive and affords more opportunities for rehabilitation and restoration. In its most pure form, diversion may result in the avoidance or dropping of a charge and dismissal of a case completely. At either end of the diversion spectrum, the overriding goals are the same—to maximize the opportunity for success and minimize the likelihood of recidivism.

49. See Ulrich, *supra* note 48, at 30 (“Under diversion, the possibility that prosecution . . . might be suspended is meant to serve as an incentive to defendants to change their behavior and habits, particularly because it is clear that prosecution will occur if diversion is not completed successfully.”).

50. See, e.g., TASK FORCE, *supra* note 28, at xi (highlighting potential benefits of a unified approach to pretrial diversion in the federal system as including “lower costs, less crime, and a formerly incarcerated population better prepared to resume life as good neighbors, good parents, and good taxpayers”).

51. See, e.g., AUDIT OF THE DEPARTMENT’S USE OF PRETRIAL DIVERSION AND DIVERSION-BASED COURT PROGRAMS AS ALTERNATIVES TO INCARCERATION, OFFICE OF THE INSPECTOR GENERAL (2016), <https://perma.cc/6V5B-F2PX> (PDF) (“The *Smart on Crime* initiative, announced by the Department of Justice in August 2013 . . . encouraged federal prosecutors . . . to consider alternatives to incarceration such as pretrial diversion and diversion-based court programs where appropriate.”); Scott-Hayward, *supra* note 40, at 49 (“U-ACT [Utah Alternatives to Conviction Track] is the newest of an increasing number of ‘front-end specialized criminal courts’ operating in the federal system.”). See generally *Pretrial Diversion*, NAT’L CONF. OF ST. LEGISLATURES, <https://perma.cc/47JL-3EQA> (last visited Sept. 17, 2019) (on file with the Washington and Lee Law Review).

52. See James A. Shapiro, *Comity of Errors: When Federal Sentencing Guidelines Ignore State Law Decriminalizing Sentences*, 41 AKRON L. REV. 231, 231 (2008) (“Many states have criminal sentences that the United States

programs vary by jurisdiction, the procedural details also vary. For example, some programs require a defendant to admit guilt before entering the program.⁵³ Others require a judicial determination of guilt, rather than an admission.⁵⁴ Still others expressly indicate that the defendant is not admitting guilt.⁵⁵

Various jurisdictions have designed programs that use the jurisdiction's resources as effectively as possible to "generate the greatest return to communities and taxpayers in terms of cost savings, public safety, long-term health and personal stability for justice-involved populations, and overall community improvement."⁵⁶ A 2013 survey of diversion programs, focusing on programs that did not result in a conviction on the individual's record,⁵⁷ catalogued 298 programs operating in forty-five states, Washington, D.C., and the U.S. Virgin Islands.⁵⁸ The findings reflected an increase in the number of programs compared to those recorded by a similar survey in 1979, which found 127 pretrial diversion programs.⁵⁹

Sentencing Guidelines . . . refer to as 'diversionary dispositions.'"); Ulrich, *supra* note 48, at 31 ("In the federal court system, the use of diversion varies across districts, reflecting the discretion of the U.S. Attorney's Offices and district characteristics.").

53. See, e.g., KY. REV. STAT. ANN. § 533.250(1)(f) (West 2019) ("Any person shall be required to enter an Alford plea or a plea of guilty as a condition of pretrial diversion.").

54. See, e.g., Huval v. La. State Univ. Police Dep't, No. 16-00553-BAJ-RLB, 2018 WL 1095559, at *11, *14 (M.D. La. Feb. 28, 2018) (finding that because a defendant entered a pretrial diversion program "solely at the discretion of the District Attorney without any endorsement from a court" the program did not count as an admission or judicial determination of guilt).

55. See, e.g., KAN. STAT. ANN. § 22-2910 (2019) ("No defendant shall be required to enter any plea to a criminal charge as a condition for diversion.").

56. TASC, *supra* note 48, at 1.

57. See *id.* at 2 ("[T]he distinguishing characteristic for the purposes of this survey is that the program not result in a conviction on an individual's record.").

58. See *id.* at 17

A national survey conducted in 1979 noted that there were 127 known pretrial diversion programs. By 2010, the number of known programs had increased to 298, operating in 45 states, Washington DC, and the U.S. Virgin Islands. [The National Association of Pretrial Services Agencies] counts, at minimum, 80 diversion laws in place in 45 states.

59. See *id.* at 17 (discussing a similar survey conducted in 1979).

Because pretrial diversion programs tend to be community-based,⁶⁰ the details and terminology used vary across jurisdictions.⁶¹ According to the National Association of Pretrial Services Agencies (NAPSA):

Diversion most often includes: alternatives to traditional criminal justice proceedings for persons charged with criminal offenses; voluntary participation by the accused; access to defense counsel prior to a decision to participate; eligibility throughout the pretrial period (no sooner than the filing of formal charges and prior to a final adjudication of guilt); strategies—with input from the accused—to address the needs of the accused in avoiding behavior likely to lead to future arrests; and dismissal of charges or its equivalent, if the divertee successfully completes the diversion process.⁶²

Regardless of the terminology used, pretrial diversion programs “tend to be built around local needs, capacity, and partnerships.”⁶³ The goals across jurisdictions include reducing overcrowded prison populations, reducing costs, and rehabilitative policy initiatives.⁶⁴

Finally, pretrial diversion programs are designed for, and admit, only a very small subset of the offender population. According to the 2013 Treatment Alternatives for Safe Communities (TASC) survey, “all respondents use a risk assessment or pre-determined eligibility criteria to identify appropriate individuals for diversion placement” and most also have conditions for remaining in and completing the program.⁶⁵ Of the almost 300 programs surveyed, nearly all focused on individuals with behavioral health issues and/or individuals who

60. *See id.* at 1 (describing pretrial diversion programs as “community-based”).

61. *See id.* at 29 (“The language and vocabulary used in discussions of alternatives to arrest, detainment, conviction, sentencing, or post-sentence incarceration lacks common definitions and terminologies.”).

62. NAPSA, *supra* note 48, at 7.

63. TASC, *supra* note 48, at 29.

64. *See id.* (“[T]he prevalence of both ‘expediting case disposition’ and ‘increasing diversion options’ as motivators indicates a broader desire to pursue efficient alternatives, individual rehabilitation, and system reform.”).

65. NAPSA, *supra* note 48, at 16–17.

had “explicit eligibility criteria that limited program eligibility for first-time offenders.”⁶⁶

B. Survey of the Specific Programs at Issue in the Circuit Split

Although the pretrial diversion programs considered by the circuit courts vary somewhat, certain key elements remain consistent. All of the programs considered require the deferral, but not dismissal, of charges pending successful completion of the program.⁶⁷ Many involve both the judge and the prosecutor in a determination of whether the defendant is a good candidate for the program, considering factors such as the number of prior offenses and any history of mental health issues or addiction.⁶⁸ Of particular relevance for courts assessing whether participation in the program constitutes a sentence or conviction sufficient to bar a future § 1983 action is the question of the defendant’s guilt and whether the charges against the defendant remain on the record, are dismissed, or are totally expunged. Because the *Heck* bar is explicitly concerned with whether the civil action will implicate an underlying conviction, both of these conviction-centric elements naturally play a role in the courts’ assessments.

Interestingly, although the admission or acceptance of guilt by a defendant might seem to be a logical place to draw a line, a guilty plea—or lack thereof—is not dispositive to the *Heck* analysis. Circuit courts have come to opposite conclusions regardless of any admission of guilt by the participant-plaintiff. For example, the Kentucky statute considered in *S.E. v. Grant County Board of Education*⁶⁹ requires either an *Alford* plea⁷⁰ or a plea of guilty as a

66. TASC, *supra* note 48, at 28.

67. *See infra* notes 77–83 and accompanying text (describing various pretrial diversion programs).

68. *See, e.g.*, DOJ RESEARCH SUMMARY, *supra* note 27, at 1 (surveying the risk assessments and eligibility criteria used to determine needs of and place offenders in programs).

69. 544 F.3d 633 (6th Cir. 2008).

70. *See Alford Plea*, BLACK’S LAW DICTIONARY (2014) (“A guilty plea that a defendant enters as part of a plea bargain without admitting guilt.”); *see also* *North Carolina v. Alford*, 400 U.S. 25, 38 (1970) (holding that an accused may voluntarily, knowingly, and understandingly accept the imposition of a sentence even if his guilty plea contains a protestation of innocence).

condition for entering the program.⁷¹ The Sixth Circuit considering that case, however, specified in dicta that *Heck* would not bar that defendant's § 1983 action.⁷² As demonstrated by Christopher DeLeon's case, the Texas diversion statute also required a guilty plea,⁷³ but the Fifth Circuit explicitly left unanswered the question of whether successful completion of the program and a subsequent dismissal of charges would still bar DeLeon's case under *Heck*.⁷⁴ Meanwhile the parallel Kansas statute, which specifies that a defendant will *not* be required to enter a plea of any sort as a condition for entering into the program,⁷⁵ was an important rationale for the Tenth Circuit in ruling that *Heck* does not bar that plaintiff's claim.⁷⁶

Equally important, all pretrial diversion statutes considered by the circuits mandate that charges be dropped or even completely expunged following completion of the program. Kentucky's program specifies that any charges against the defendant will be dismissed, and furthermore that participation in the program "shall not constitute a criminal conviction."⁷⁷ The statute further notes that "pretrial diversion records shall not be introduced as evidence in any court in a civil, criminal, or other matter without the consent of the defendant."⁷⁸ Kansas's statute, however, specifies that participation in a diversion program will

71. See KY. REV. STAT. ANN. § 533.250(1)(f) (West 2008) ("Any person shall be required to enter an Alford plea or a plea of guilty as a condition of pretrial diversion.").

72. See *Grant Cty.*, 544 F.3d at 639 ("Given the facts of this case, where the plaintiff was neither convicted nor sentenced and was habeas-ineligible, we hold that *Heck* is inapplicable, and poses no bar to plaintiff's claims.").

73. See *DeLeon v. City of Corpus Christi*, 488 F.3d 649, 656 (5th Cir. 2007) (recognizing that DeLeon had to sign a sworn confession and plead either guilty or nolo contendere in order to be eligible for the diversion program).

74. See *id.* ("This case does not require that we decide whether a successfully completed deferred adjudication, with its more limited collateral consequences under Texas law, is also a conviction for the purposes of *Heck*.").

75. See KAN. STAT. ANN. § 22-2910 (2009) ("No defendant shall be required to enter any plea to a criminal charge as a condition for diversion.").

76. See *Vasquez Arroyo v. Starks*, 589 F.3d 1091, 1095 (10th Cir. 2009) (rejecting the district court's determination that the program constituted a judgment of criminal guilt).

77. KY. REV. STAT. ANN. § 533.258(1) (West 2008).

78. *Id.* § 533.258(3).

not be admissible in evidence in future criminal proceedings.⁷⁹ Kansas also requires that all criminal charges be dismissed with prejudice,⁸⁰ while Florida dismisses charges *without* prejudice.⁸¹ In Connecticut and Pennsylvania, charges are dismissed and erased⁸² or dismissed and expunged⁸³ following completion of the program.

As described above, pretrial diversion programs at the state level include a variety of different steps and requirements for participants to satisfy before being released from the system. Despite these differences, each of these programs is intended to provide an alternative to the trial court procedures for certain individuals who are eligible and selected to participate. However, depending on where an alleged offender lives when he or she agrees to enter a pretrial diversion program, there may be certain collateral consequences attached that may not be immediately apparent either to the offender or to his or her attorney. In particular, a person who decides to enter a pretrial diversion program may lose his or her opportunity to sue for monetary damages under the civil rights statute known as Section 1983. The next Part will explore the Section 1983 statute and its intersection with a similar statute, the federal habeas corpus act, as well as the development of the *Heck* doctrine.

79. See KAN. STAT. ANN. § 22-2910 (2009) (“[T]he following shall not be admissible as evidence in criminal proceedings . . . : (1) Participation in a diversion program; (2) the facts of such participation; or (3) the diversion agreement entered into.”).

80. See *id.* § 22-2909(a) (“A diversion agreement shall provide that if the defendant fulfills the obligations of the program . . . [the state] shall act to have the criminal charges against the defendant dismissed with prejudice.”).

81. See FLA. STAT. § 948.08(5)(c) (2007) (“[D]ismissal of charges without prejudice shall be entered in instances in which prosecution is not deemed necessary.”).

82. See CONN. GEN. STAT. § 54-56e(f) (1992) (“If a defendant . . . satisfactorily completes such defendant’s period of probation, such defendant may apply for dismissal of the charges Upon dismissal, all records of such charges shall be erased.”).

83. See PA. R. CRIM. P. 319, 320 (2005) (“When the defendant shall have completed satisfactorily the program prescribed . . . the defendant may move the court for an order dismissing the charges.”).

III. The Emergence of the Heck Doctrine

The *Heck* doctrine developed out of the interaction of two Reconstruction Era statutes, the Habeas Corpus Act of 1867 (codified at 28 U.S.C. § 2254)⁸⁴ and the Civil Rights Act of 1871 (codified at 28 U.S.C. § 1983).⁸⁵ The former authorizes state prisoners to petition federal courts to grant a writ of habeas corpus, a means to verify the legality of a person's imprisonment.⁸⁶ The latter provides a cause of action for individuals to sue for money damages if their civil rights are violated.⁸⁷ Following the passage of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), additional limitations were placed on the habeas process.⁸⁸ The language of these statutes, as well as the Supreme Court's subsequent interpretation,⁸⁹ creates an intersection of sorts for prisoners challenging the legality of their convictions.⁹⁰

84. See 28 U.S.C. § 2254 (2018) ("The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.").

85. See 42 U.S.C. § 1983 (2018)

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

86. See *Habeas Corpus*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("A writ employed to bring a person before a court, most frequently to ensure that the person's imprisonment or detention is not illegal."). See generally WILLIAM F. DUKER, A CONSTITUTIONAL HISTORY OF HABEAS CORPUS (1980).

87. See *Monroe v. Pape*, 365 U.S. 167, 180 (1961) (discussing the legislative history and purpose of the Civil Rights Act that gave rise to § 1983).

88. Pub. L. No. 104-132, 110 Stat. 1214 (1996). See Larry W. Yackle, *A Primer on the New Habeas Corpus Statute*, 44 BUFF. L. REV. 318, 386-93 (1996) (discussing modifications to exhaustion requirements and other limitations following passage of the Act).

89. See *infra* Part III.C (discussing *Preiser v. Rodriguez*, 411 U.S. 475 (1973), *Heck v. Humphrey*, 512 U.S. 477 (1994), *Spencer v. Kenma*, 523 U.S. 1 (1998), and *Wallace v. Kato*, 549 U.S. 384 (2007)).

90. See *Heck v. Humphrey*, 512 U.S. 477, 480 (1994)

This case lies at the intersection of the two most fertile sources of

A. Enactment and Purpose of Section 1983

Section 1983 creates a cause of action for any person deprived of “any rights, privileges, or immunities secured by the Constitution and laws” by a person acting “under the color of” state law.⁹¹ Generally, the statute is intended to protect individuals against an inappropriate use of state power.⁹² The Supreme Court has several times delved into the legislative history behind the statute’s enactment in order to determine its legislative purpose. In *Monroe v. Pape*,⁹³ the Court explained that “[i]t was not the unavailability of state remedies but the failure of certain States to enforce the laws with an equal hand that furnished the powerful momentum behind this force bill.”⁹⁴ Claims brought under § 1983 that are based on a state actor allegedly violating an individual’s civil rights—i.e. a state failing to enforce a constitutional right—are therefore a perfect example of how the statute functions as intended.

The Supreme Court has also interpreted the intended reach of the statute. The Court suggested a broad reading of the statute in *City of Newport v. Fact Concerts, Inc.*⁹⁵ by highlighting the historical context of the enactment.⁹⁶ The Court explained that

federal-court prisoner litigation—the Civil Rights Act of 1871 . . . and the federal habeas corpus statute. Both of these provide access to a federal forum for claims of unconstitutional treatment at the hands of state officials.

See also Lyndon Bradshaw, Comment, *The Heck Conundrum: Why Federal Courts Should Not Overextend the Heck v. Humphrey Preclusion Doctrine*, 2014 BYU L. REV. 185, 207 (2014) (identifying the functioning of the doctrines as overlapping circles, or, alternately, as the intersection between “§ 1983 Street” and “Habeas Street”).

91. 42 U.S.C. § 1983 (2018).

92. *See* *Green v. Dumke*, 480 F.2d 624, 628 n.8 (9th Cir. 1973)

As the debates at the time disclose, Congress sought to effectuate three purposes in enacting § 1983: (1) to override certain kinds of state laws; (2) to provide a remedy where state law was inadequate; and (3) to afford a federal remedy where the state remedy, while adequate in theory, was not available in practice.

See generally 15 AM. JUR. 2D *Civil Rights* § 64 (2018).

93. 365 U.S. 167 (1961).

94. *Id.* at 174–75.

95. 453 U.S. 247 (1981).

96. *See id.* at 258 (“It is by now well settled that the tort liability created

“members of the 42d Congress were familiar with common-law principles, including defenses previously recognized in ordinary tort litigation, and that they likely intended these common-law principles to obtain, absent specific provisions to the contrary.”⁹⁷ The Court then reiterated this broad reading of the statute’s application in *Briscoe v. LaHue*,⁹⁸ acknowledging that “it has been settled that the all-encompassing language of § 1983 . . . is not to be taken literally.”⁹⁹ Then, in *Kalina v. Fletcher*,¹⁰⁰ the Court compared the § 1983 cause of action to prior common law principles: “The coverage of the statute is thus broader than the pre-existing common law of torts. We have nevertheless recognized that Congress intended the statute to be construed in the light of common-law principles that were well settled at the time of its enactment.”¹⁰¹

Two broad themes thus emerge from the Court’s interpretation of § 1983. The first is that Congress intended the statute to be read broadly, to protect individuals when the state has acted improperly or failed to act to protect constitutional rights.¹⁰² The second theme is that while common law provides a basis for interpreting § 1983, common law is not coequal with the statute. Both of these themes come up in the Court’s jurisprudence in the line of cases that includes *Heck*.¹⁰³

by § 1983 cannot be understood in a historical vacuum.”).

97. *Id.*

98. 460 U.S. 325 (1983).

99. *Id.* at 330.

100. 522 U.S. 118 (1997).

101. *Id.* at 123.

102. Of course, even if the statute is theoretically available to a large swath of individuals, few plaintiffs ever get past the doctrine of qualified immunity. *See, e.g.,* *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (“The doctrine of qualified immunity protects government officials from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.” (citation omitted)).

103. *See infra* notes 134–193 and accompanying text (tracing these two themes).

B. Enactment and Purpose of Federal Habeas Corpus

The other statute that repeatedly appears in the *Heck* jurisprudence is the federal habeas statute, 28 U.S.C. § 2254.¹⁰⁴ The intersection of Section 1983 with the habeas statute, and particularly the way the two statutes function as resources for individuals challenging the state, illuminates the debate around the *Heck* doctrine in the lower courts. Of particular relevance, the federal habeas statute requires that a state prisoner exhaust all state remedies before bringing a claim under the statute,¹⁰⁵ one of the major justifications given by the Court when developing the *Heck* doctrine.¹⁰⁶

The Supreme Court took up the question of the availability of the federal habeas statute to state prisoners in several cases in the 1960s and 1970s. In *Fay v. Noia*,¹⁰⁷ Justice Brennan surveyed the history of the writ of habeas corpus as part of an inquiry into the boundaries of the federal and state systems of criminal justice.¹⁰⁸ He noted that “[i]ts root principle is that in a civilized society, government must always be accountable to the judiciary for a man’s imprisonment: if the imprisonment cannot be shown to conform with the fundamental requirements of law, the individual is entitled to his immediate release.”¹⁰⁹ Arguing for a broad interpretation of federal court jurisdiction in habeas petitions, Justice Brennan summarized the history of the statute by declaring that “Congress in 1867 sought to provide a federal forum for state prisoners having constitutional defenses by extending the habeas corpus powers of the federal courts to their constitutional

104. 28 U.S.C. § 2254 (2018). *See infra* Part III.C.1–4 (discussing the development of the *Heck* doctrine in part to monitor the intersection of the habeas statute with § 1983).

105. *See* § 2254(b)(1)(A) (“An application for a writ . . . shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State.”).

106. *See infra* Part III.C.2 (discussing the justifications for the development of the *Heck* bar, including that prisoners not be allowed to evade the exhaustion requirements of the habeas statute by instituting a § 1983 suit instead).

107. 372 U.S. 391 (1963).

108. *See id.* at 399–426 (tracing the development of the writ of habeas corpus from its origins in seventeenth-century English jurisprudence through the then-present).

109. *Id.* at 402.

maximum.”¹¹⁰ Under this approach, a court might be more inclined than not to err on the side of allowing state prisoners to collaterally attack a conviction if there were any reasonable claim of unconstitutionality.

Notably, however, Justice Brennan’s equitable view of the habeas statute did not go unquestioned, even decades before AEDPA legislation passed. Justice Clark’s dissent in *Fay* pointed out the significant effect this view of habeas has on both judicial efficiency¹¹¹ and the administration of justice.¹¹² A decade later, in *Schneckloth v. Bustamonte*,¹¹³ Justice Powell took up the question.¹¹⁴ Justice Powell characterized Justice Brennan’s view in *Fay* as “a revisionist view of the historic function that writ was meant to perform,”¹¹⁵ arguing instead that “recent scholarship has cast grave doubt on *Fay*’s version of the writ’s historic function.”¹¹⁶ As a result, Justice Powell pointed out that the writ of habeas corpus was then afforded an unreasonably “wide scope,” having little to do with its “historic, common-law development.”¹¹⁷ While

110. *Id.* at 426. The case concerned a prisoner, Charles Noia, who was convicted of felony murder along with two codefendants. *Id.* at 394. All three were convicted on the basis of confessions later found to have been coerced. *Id.* at 395. Noia’s two codefendants were released, but Noia failed to timely appeal and was then barred from filing a federal habeas petition for failure to exhaust state remedies. *Id.* at 398. Justice Brennan pointed out that while federal habeas jurisdiction must be limited, the intent of the habeas statute requires equitable treatment of “persons whom society has grievously wronged.” *Id.* at 441. Furthermore, “[i]f the States withhold effective remedy, the federal courts have the power and the duty to provide it.” *Id.*

111. *See id.* at 446 (Clark, J., dissenting) (“[T]here can be no question but that a rash of new applications from state prisoners will pour into the federal courts, and 98% of them will be frivolous, if history is any guide.”).

112. *See id.* (“After today state judgments will be relegated to a judicial limbo, subject to federal collateral attack—as here—a score of years later despite a defendant’s willful failure to appeal.”).

113. 412 U.S. 218 (1973).

114. *See id.* at 250 (Powell, J., concurring) (“While I join the opinion of the Court, it does not address what seems to me the overriding issue briefed and argued in this case: the extent to which federal habeas corpus should be available to a state prisoner seeking to exclude evidence from an allegedly unlawful search and seizure.”).

115. *Id.* at 252.

116. *Id.* at 253.

117. *Id.*

Justice Powell agreed that the writ functions as an important guardian of liberty for individuals,¹¹⁸ the broad reading established in *Fay* was, in his view, an “unprecedented extension . . . far beyond its historic bounds and in disregard of the writ’s central purpose.”¹¹⁹ Justice Powell also addressed whether a petitioner’s guilt or innocence should be a factor in whether a court may hear the petition,¹²⁰ arguing that because guilt is rarely at issue in Fourth Amendment claims, federal habeas should not be available.¹²¹ The costs of such broad interpretation, Justice Powell argued, are far too high, given that the cases coming before the courts are no longer about guilt or innocence, but rather about procedural defaults in earlier postures.¹²² Here, one begins to see the contraction of the Court’s interpretation of collateral attacks and the glimmerings of the guilt-or-innocence question that the Court will take up in the *Heck* line of cases.¹²³

118. *See id.* at 256 (“Habeas corpus indeed should provide the added assurance for a free society that no innocent man suffers an unconstitutional loss of liberty.”).

119. *Id.* at 259.

120. *See id.* at 258 (“I am aware that history reveals no exact tie of the writ of habeas corpus to a constitutional claim relating to innocence or guilt. Traditionally, the writ was unavailable even for many constitutional pleas grounded on a claimant’s innocence . . .”).

121. *See id.* (“Prisoners raising Fourth Amendment claims collaterally usually are quite justly detained. . . . Rarely is there any contention that the search rendered the evidence unreliable or that its means cast doubt upon the prisoner’s guilt.”).

122. *See id.* at 274

If these consequences flowed from the safeguarding of constitutional claims of innocence they should, of course, be accepted as a tolerable price to pay for cherished standards of justice at the same time that efforts are pursued to find more rational procedures. Yet, as illustrated by the case before us today, the question on habeas corpus is too rarely whether the prisoner was innocent of the crime for which he was convicted and too frequently whether some evidence of undoubted probative value has been admitted in violation of an exclusionary rule ritualistically applied.

123. *See infra* Part III.C.1 (discussing the Court’s opinion in *Preiser v. Rodriguez*, 411 U.S. 475 (1973)). *Preiser*, handed down just three weeks prior to *Schneckloth*, held that a state prisoner challenging the duration of his confinement may only bring an action under the federal habeas statute and not under 42 U.S.C. § 1983. *Preiser*, 411 U.S. at 500. Justices Douglas, Brennan, and Marshall dissented in both cases. *See id.* (Brennan, J., dissenting) (“Regrettably, the Court today . . . [draws] a distinction that is both analytically unsound and I fear, unworkable in practice.”); *Schneckloth*, 412 U.S. at 277 (Brennan, J.,

The Court's interpretation of the reach of the habeas statute continued to contract following *Schneekloth*. In later jurisprudence, the Court continued to emphasize the importance of preventing constant re-litigation of well-settled claims in the context of collateral attacks under the habeas statute. In 1990, in affirming a denial of a federal habeas petition in the Eighth Amendment context, the Court reaffirmed that "the purpose of federal habeas corpus is to ensure that state convictions comply with the federal law in existence at the time the conviction became final, and not to provide a mechanism for the continuing reexamination of final judgments based upon later emerging legal doctrine."¹²⁴ Following the enactment of AEDPA in 1996, the Court again pointed out that finality of judgment played a role in the legislative and judicial considerations driving the criminal justice system. In *Rhines v. Weber*,¹²⁵ for example, the Court explained that "AEDPA's 1-year limitations period 'quite plainly serves the well-recognized interest in the finality of state court judgments.' It 'reduces the potential for delay on the road to finality by restricting the time that a prospective federal habeas petitioner has in which to seek federal habeas review.'"¹²⁶ Two years earlier, the Court had reasoned that Congress intended "to further the principles of comity, finality, and federalism" by enacting AEDPA.¹²⁷ Thus, while the Court generally interprets § 1983 broadly, the Court's interpretation of the habeas statute has contracted over time, especially following the passage of AEDPA. Nonetheless, the two statutes continue to overlap, as seen in the development of the Court's *Heck* jurisprudence.

dissenting) ("It wholly escapes me how our citizens can meaningfully be said to have waived something as precious as a constitutional guarantee without ever being aware of its existence. . . . I respectfully dissent.").

124. *Sawyer v. Smith*, 497 U.S. 227, 234 (1990).

125. 54 U.S. 269 (2005).

126. *Id.* at 276 (citing *Woodford v. Garceau*, 538 U.S. 202, 206 (2003)).

127. *Woodford v. Garceau*, 538 U.S. 202, 206 (2003) (citing *Williams v. Taylor*, 529 U.S. 420, 436 (2000)).

C. Tracing the Supreme Court's Heck Jurisprudence

The *Heck* doctrine springs in part from the two statutes just discussed. In his majority opinion in *Heck*, Justice Scalia discussed the intersection of the § 1983 statute and the federal habeas statute.¹²⁸ Justice Scalia at first seemed to be following the Court's precedent in *Preiser v. Rodriguez*,¹²⁹ which explicates where habeas leaves off and § 1983 begins.¹³⁰ However, Justice Scalia eventually dismissed that line of reasoning and instead turned to tort law, comparing a § 1983 claim to an action for malicious prosecution.¹³¹ In Justice Scalia's view, the malicious prosecution line of reasoning was a closer analogy to the § 1983 statute.¹³² In some ways, the Justice's reasoning did pick up on some of the common law underpinnings of the § 1983 statute.¹³³ However, lower courts have recognized two alternate rationales from the *Heck* majority, and confusion over how to interpret *Heck* runs rampant.¹³⁴ The reasoning used by the circuit courts in the pretrial

128. See *Heck v. Humphrey*, 512 U.S. 477, 481 (1994) (rejecting the idea that Roy Heck's case could be solved under the rubric established in *Preiser* to differentiate between the two statutes).

129. 411 U.S. 475 (1973).

130. See *infra* notes 138–146 and accompanying text (analyzing *Preiser*).

131. See *Heck*, 512 U.S. at 484 (“The common-law cause of action for malicious prosecution provides the closest analogy to claims of the type considered here.”).

132. See *id.* (“[P]etitioner seeks not immediate or speedier release, but monetary damages, as to which he could not have sought and obtained fully effective relief through federal habeas corpus proceedings.” (quoting *Preiser*, 411 U.S. at 494)).

133. See *supra* notes 95–102 and accompanying text (identifying the common law elements from which § 1983 developed).

134. See, e.g., *DeLeon v. City of Corpus Christi*, 488 F.3d 649, 654 (5th Cir. 2007) (“*Heck*'s favorable termination doctrine is supported by two somewhat-independent rationales, which divide the Court and circuits even today.” (citations omitted)); Bradshaw, *supra* note 90, at 187 (identifying a circuit split over whether the *Heck* doctrine applies to bar a co-felon's civil rights suit); 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, 868 (2008) [hereinafter *Defining the Reach*] (identifying lower court confusion on the question of whether state prisoners ineligible for habeas relief have access to § 1983); Eric J. Savoy, Comment, *Heck v. Humphrey: What Should State Prisoners Use When Seeking Damages from State Officials, Section 1983 or Federal Habeas Corpus?*, 22 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 109, 138 (1996) (“[T]he anticipated Supreme Court case [*Heck*] has made a complex area of the law even more complicated.”).

diversion context is a direct consequence of the two rationales of *Heck* as interpreted in conjunction with the entire line of cases that discuss when and how a plaintiff is eligible to bring a § 1983 claim.

1. An Initial Approach: Habeas Is the Proper Remedy to Obtain Release

In *Preiser v. Rodriguez*,¹³⁵ state prisoners brought a § 1983 action against the New York State Department of Correctional Services alleging unconstitutional deprivation of “good-time” credits during their confinement.¹³⁶ Restoring the credits would result in each prisoner’s release from prison.¹³⁷ At issue in the case was whether the prisoners could sue under § 1983, rather than petitioning under the habeas statute.¹³⁸ As the Court noted, the issue was one “of considerable practical importance. For if a remedy under the Civil Rights Act is available, a plaintiff need not first seek redress in a state forum.”¹³⁹ In other words, the opportunity to choose a civil rights action under § 1983 instead of bringing a habeas petition would allow a plaintiff to avoid the exhaustion requirements of the habeas statute, thus frustrating the intent of Congress.¹⁴⁰ To assess the reasonableness of the claim, the Court examined both statutes, identifying that “the problem involves the interrelationship of two important federal laws.”¹⁴¹ In addition to probing congressional intent,¹⁴² the Court discussed the history of habeas proceedings as a means to secure

135. 411 U.S. 475 (1973).

136. *Id.* at 476.

137. *Id.*

138. *See id.* at 477 (“The question before us is whether state prisoners seeking such redress may obtain equitable relief under the Civil Rights Act, even though the federal habeas corpus statute . . . clearly provides a specific federal remedy.”).

139. *Id.*

140. *See id.* at 489 (“In amending the habeas corpus laws in 1948, Congress clearly required exhaustion of adequate state remedies as a condition precedent to the invocation of federal judicial relief under those laws.”).

141. *Id.* at 483.

142. *See id.* at 489 (suggesting that the broad language of § 1983 does not necessarily mean Congress intended it to be literally applicable to all possible plaintiffs).

release from unlawful physical confinement.¹⁴³ Ultimately the Court held that “when a state prisoner is challenging the very fact or duration of his physical imprisonment, and the relief he seeks is a determination that he is entitled to immediate release or a speedier release from that imprisonment, his sole federal remedy is a writ of habeas corpus.”¹⁴⁴ The *Preiser* case thus laid the groundwork for later discussions of the intersection of § 1983 with the habeas statute. Indeed, that question was one the Court explicitly took up in its next foray into the issue in *Heck*.

2. *The Heck Doctrine Takes Shape*

The issue before the Court in *Heck v. Humphrey* was “whether a state prisoner may challenge the constitutionality of his conviction in a suit for damages under [§ 1983].”¹⁴⁵ The petitioner, Roy Heck, was serving a fifteen year sentence for voluntary manslaughter of his wife. Heck alleged that prosecutors in his case had violated his constitutional rights by engaging in various unlawful investigation practices.¹⁴⁶ Importantly, Heck’s complaint sought only money damages, not injunctive relief or release from custody.¹⁴⁷ Under *Preiser*, therefore, his case did not fall within the boundaries of the federal habeas statute.

Justice Scalia’s majority decision immediately pointed to the preceding decision in *Preiser*, revisiting its assertion that “habeas corpus is the exclusive remedy for a state prisoner who challenges the fact or duration of his confinement . . . even though such a claim may come within the literal terms of § 1983.”¹⁴⁸ He then noted that the issue for Heck was not about confinement at all but rather monetary damages, therefore bringing the case outside of *Preiser*’s

143. *See id.* at 485 (“[O]ver the years, the writ of habeas corpus evolved as a remedy available to effect discharge from any confinement contrary to the Constitution or fundamental law.”).

144. *Id.* at 500.

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

146. *See id.* at 479 (alleging arbitrary investigation procedures, destruction of evidence, and use of an unlawful “voice identification procedure”).

147. *Id.*

148. *Id.* at 481.

holding.¹⁴⁹ Nonetheless, Justice Scalia noted that two dicta points in *Preiser* needed clarification. The first, suggesting that “a damages action by a state prisoner could be brought under § 1983 in federal court without any requirement of prior exhaustion of state remedies,” failed to take into account actions that would challenge the validity of the claimant’s underlying conviction.¹⁵⁰ Once a claim challenged an underlying conviction, the second dictum came into play, namely that state prisoners “attacking the validity of the fact or length of their confinement” must use the habeas statute.¹⁵¹ From there, however, Justice Scalia moved away from the consideration of the two statutes, instead turning to consider a completely different rationale for answering the question before the Court. Since the Court had previously compared § 1983 to tort liability, Justice Scalia reasoned that the common law would provide better guidance.¹⁵² The “closest analogy,” he found, was the tort of malicious prosecution, which “permits damages for confinement imposed pursuant to legal process.”¹⁵³ From there, the majority opinion reviewed the history of malicious prosecution and identified a key element in a cause of action for malicious prosecution: proof that the underlying criminal proceeding terminated in the would-be plaintiff’s favor.¹⁵⁴ Following this analogy and rationale, the Supreme Court held that “a § 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged . . . declared invalid . . . or called into question by a . . . writ of habeas corpus” in order to bring a suit for allegedly unconstitutional conviction or imprisonment.¹⁵⁵

As far as the *Heck* majority opinion goes, the holding was quite clear. However, Justice Souter’s concurrence complicated the issue

149. *See id.* (“This case is clearly not covered by the holding of *Preiser*.”).

150. *Id.* at 481–82.

151. *Id.* at 482.

152. *See id.* at 483 (“Thus, to determine whether there is any bar to the present suit, we look first to the common law of torts.”).

153. *Id.* at 484.

154. *See id.* (“This requirement avoids parallel litigation . . . and precludes the possibility of the claimant succeeding in the tort action after having been convicted in the underlying criminal prosecution.”).

155. *Id.* at 486–87.

by more closely examining the ways in which the habeas statute and § 1983 interact.¹⁵⁶ Justice Souter picked up on the second rationale of the majority opinion and offered it as a clearer standard.¹⁵⁷ He pointed out the oddities in using a common law analogy to resolve a statutory question when there were other possible means to resolve the issue.¹⁵⁸ He also disagreed with the decision to rely entirely on common law analogies, noting that “ordinary rules of statutory interpretation” should not be so completely set aside.¹⁵⁹ While the common law provided a useful aid in the inquiry, Justice Souter found that the methodology of *Preiser* would be more effective.¹⁶⁰ Therefore, the Justice suggested an alternative: “A state prisoner may seek federal-court § 1983 damages for unconstitutional conviction or confinement, but only if he has previously established the unlawfulness of his conviction or confinement, as on appeal or on habeas.”¹⁶¹ Indeed, Justice Souter pointed out that the majority opinion could be read to say exactly that much and no more.¹⁶² His fear was that, under an alternate reading, the holding “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.”¹⁶³ Indeed, as Justice Souter feared, lower courts immediately struggled to reconcile the majority’s holding with the realities of

156. *See id.* at 491–92 (Souter, J., concurring) (agreeing with the majority’s decision to begin by noting the interaction of the two statutes, but also criticizing the majority for not following the path further).

157. *See id.* at 498 (“A state prisoner may seek federal-court § 1983 damages for unconstitutional conviction or confinement, but only if he has previously established the unlawfulness of his conviction or confinement, as on appeal or on habeas.”).

158. *See id.* at 492–96 (pointing out that the Court traditionally relies on common law only when other statutory interpretation principles fail; that the majority ignores other aspects of malicious prosecution; and that any definition of “favorable termination” at the time of the statute’s enactment would have been vastly different than modern-day interpretations).

159. *Id.* at 492.

160. *See id.* at 497 (“Though in contrast to *Preiser* the state prisoner here seeks damages, not release from custody, the distinction makes no difference when the damages sought are for unconstitutional conviction or confinement.”).

161. *Id.* at 498.

162. *Id.* at 500.

163. *Id.*

cases arriving in the lower courts, and the Court was asked to revisit the issue just four years later in *Spencer v. Kenma*.¹⁶⁴

3. A Split Court Revisits Heck

The Court nuanced the discussion of the intersection between habeas and § 1983 in its 1998 decision in *Spencer*. There, petitioner Randy Spencer had filed a petition for a writ of habeas corpus to invalidate an order revoking his parole.¹⁶⁵ The petition alleged a violation of due process.¹⁶⁶ Although six months remained on his sentence when the claim was initially brought,¹⁶⁷ Spencer was no longer imprisoned by the time the district court got around to his case.¹⁶⁸ The issue before the Supreme Court was “whether petitioner’s subsequent release caused the petition to be moot because it no longer presented a case or controversy under Article III, § 2, of the Constitution.”¹⁶⁹ Spencer’s argument (as characterized by Justice Scalia) was that because *Heck* would bar his § 1983 claim unless he could demonstrate that the underlying conviction (here, his parole revocation) was invalid, the action to invalidate his parole revocation could not be moot.¹⁷⁰ In other words, the fact that Spencer wanted to sue for damages under § 1983 should be enough to imbue his habeas suit with controversy and thereby give him standing. Justice Scalia, unimpressed, called Spencer’s *Heck* argument “a great non sequitur.”¹⁷¹

Justice Souter, however, wrote a concurring opinion in which he joined the Court’s opinion but elaborated on the intersection of

164. 523 U.S. 1 (1998).

165. *See id.* at 3–4 (describing Spencer’s alleged violations of his parole conditions and his subsequent efforts to invalidate the order of revocation).

166. *Id.* at 5.

167. *Id.*

168. *Id.* at 6. As the Court notes, Spencer had returned to prison by the time his case reached the Supreme Court. *See id.* at 6 n.2 (“By the time the [instant] case reached the Eighth Circuit, petitioner was once again in prison, this time serving a 7-year sentence for attempted felony stealing. He is still there . . .”).

169. *Id.* at 7.

170. *Id.* at 17.

171. *Id.*

§ 1983 and the federal habeas statute.¹⁷² In fact, much of the opinion revisited ground already laid out in the *Heck* concurrence, with Justice Souter explaining that his rationale in *Heck* was equally applicable to Spencer's case.¹⁷³ Justice Souter concluded that "[t]he better view, then, is 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."¹⁷⁴ In Justice Souter's reasoning, therefore, whenever the federal habeas statute is not available to those not in custody, § 1983 should be, in order to satisfy both congressional intent and policy considerations.¹⁷⁵

Unfortunately for the lower courts, *Spencer* did little to clarify the boundaries of the *Heck* doctrine. While *Spencer*'s majority opinion was joined by eight of the nine Justices,¹⁷⁶ the majority did not directly address the question of whether the *Heck* doctrine barred Spencer's suit.¹⁷⁷ At the same time, Justice Souter's concurrence was joined by three other Justices,¹⁷⁸ and Justice Stevens agreed with its rationale in his dissent.¹⁷⁹ Therefore five Justices had arguably endorsed an alternate rationale for resolving the *Heck* bar, one in which the availability of a recourse

172. *Id.* at 18 (Souter, J., concurring).

173. *See id.* at 19–21 (reiterating his *Heck* rationale and applying his preferred holding to the new context).

174. *Id.* at 21.

175. *See id.* at 20 ("I also thought we were bound to recognize the apparent scope of § 1983 when no limitation was required for the sake of honoring some other statute or weighty policy."). Justice Souter's opinion picked up on at least one additional policy issue left unmentioned by the court: that an individual arguably should not lose access to a civil rights action for unconstitutional treatment by the state simply because that individual served his or her sentence. Such an individual might have an ever greater interest in pursuing justice if he or she had already undergone an allegedly unjust punishment.

176. *See id.* at 2 (listing all but Justice Stevens joining the majority).

177. *See id.* at 17 (foreclosing Spencer's *Heck* argument as "a great non sequitur").

178. *See id.* at 18 (listing Justices O'Connor, Ginsburg, and Breyer as joining Justice Souter's concurrence).

179. *See 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 § 1983.").

under habeas was the primary determination of whether an individual could bring suit under § 1983.

4. *Future Convictions Exempted from Heck*

The Court's most recent addition to *Heck* jurisprudence came in 2007 in *Wallace v. Kato*.¹⁸⁰ Petitioner Andre Wallace filed a § 1983 action against arresting officers for a violation of the Fourth Amendment.¹⁸¹ Wallace was arrested in 1994 in an investigation for the murder of a Chicago man, John Handy.¹⁸² Wallace, then fifteen years old, admitted to the murder during a police interrogation and signed a written confession.¹⁸³ He was convicted and sentenced to twenty-six years in prison.¹⁸⁴ The appellate court remanded the case for a new trial, concluding that his statements after his arrest were not admissible,¹⁸⁵ and eight years after the arrest, prosecutors dropped the charges.¹⁸⁶ The issue before the Court was whether Wallace's § 1983 suit was timely, since under Illinois law Wallace only had two years to file his § 1983 suit.¹⁸⁷ The Court therefore had to determine whether the two year clock began at the time of Wallace's arrest, or whether it began on the date on which the petitioner's conviction was vacated. Although the case was resolved on other grounds,¹⁸⁸ the *Heck*-specific issue in *Wallace* was whether the petitioner's § 1983 action, which had been barred under *Heck* while he was incarcerated, would be

180. 549 U.S. 384 (2007).

181. *See id.* at 386 n.1 (describing the suit as seeking damages arising from his unlawful arrest, as well as some additional claims not before the court).

182. *Id.* at 386.

183. *See id.* ("After interrogations that lasted into the early morning hours the next day, petitioner agreed to confess to Handy's murder.")

184. *Id.*

185. *Id.* at 387.

186. *See id.* at 386–87 ("On January 17, 1994, John Handy was shot to death . . . [T]wo days later, Chicago police officers located petitioner On April 10, 2002, prosecutors dropped the charges against petitioner.")

187. *See id.* at 387 (explaining that the statute of limitations for filing a federal § 1983 claim is based on the length of time the state provides for filing a personal injury tort—two years, in Illinois).

188. *See id.* at 391 (relying on state tolling law and common law to resolve Wallace's case).

outside the statute of limitations once that conviction was later vacated.¹⁸⁹ In another opinion by Justice Scalia, the Court suggested that “[a]spects of § 1983 which are not governed by reference to state law are governed by federal rules conforming in general to common-law tort principles.”¹⁹⁰ The Court then held that “the statute of limitations upon a § 1983 claim seeking damages for a false arrest in violation of the Fourth Amendment, where the arrest is followed by criminal proceedings, begins to run at the time the claimant becomes detained pursuant to legal process.”¹⁹¹ In other words, Wallace was out of luck. However, Justice Scalia also wrote that an expansion of the *Heck* bar to “impugn an anticipated future conviction” would be pushing the doctrine too far.¹⁹² “The impracticality of such a rule should be obvious.”¹⁹³ Under Justice Scalia’s view, the *Heck* bar could not be extended to cover anticipated convictions, only reasonably contemplated ones. In the context of pretrial diversion, such an approach might be particularly relevant, because in the majority of pretrial diversion programs there is no conviction.¹⁹⁴ Conviction is a possibility, but not necessarily a likelihood.

Although the bulk of the *Heck* doctrine is contained in Justice Scalia’s majority opinions in *Heck* and *Spencer* and in Justice Souter’s concurrences in both cases, important elements stem from *Preiser* and *Wallace* as well. *Preiser* outlined the primary policy rationale underlying the *Heck* doctrine: that plaintiffs should not be able to use § 1983 to avoid the exhaustion requirements of the habeas statute.¹⁹⁵ *Wallace* added the question of anticipated future convictions to the conversation.¹⁹⁶ Both themes, as well as the two competing rationales of *Heck* and *Spencer*, reappear in the cases decided in the circuit split, which will be discussed in the next Part.

189. *See id.* at 394 (“[I]t raises the question whether, assuming that the *Heck* bar takes effect when the later conviction is obtained, the statute of limitations on the once valid cause of action is tolled as long as the *Heck* bar subsists.”).

190. *Id.* at 388.

191. *Id.* at 397.

192. *Id.* at 393.

193. *Id.*

194. *See supra* notes 77–83 and accompanying text (describing the guilt and conviction aspects of certain pretrial diversion programs).

195. *Supra* notes 139–140 and accompanying text.

196. *Supra* notes 192–193 and accompanying text.

*IV. Ongoing Circuit Split on Pretrial Diversion Programs
Under Heck*

Following the Supreme Court's establishment of the *Heck* bar in 1994, lower courts have struggled to identify what constitutes a prior conviction for the purposes of the doctrine.¹⁹⁷ Many note the competing rationales espoused within Justice Scalia's majority opinion, which discussed the precedent established in *Preiser*, the tort of malicious prosecution, and the exhaustion of state remedies.¹⁹⁸ This Part will discuss the circuit split that currently exists as to whether participation in a pretrial diversion program bars an individual from bringing a later civil rights action under § 1983 for an incident stemming from the same act.

197. Recently, a Maryland federal district court followed the reasoning of the Fifth Circuit in *DeLeon* in holding that participation in Maryland's pretrial probation program barred a § 1983 claim. *See Stutzman v. Krenik*, 350 F. Supp. 3d 366, 379 (D. Md. 2018) ("Although a PBJ [probation before judgment] disposition . . . does not result in a formal conviction or judgment . . . it is, like a Texas deferred adjudication, a final judicial act. . . . More importantly, a PBJ, by statute, necessarily comes after a finding of guilt."). But the question of whether prior proceedings should count as a "conviction" also implicates no contest pleas, disciplinary convictions, and lesser-included offenses. *See, e.g., Taylor v. Cty. of Pima*, 913 F.3d 930, 935 (9th Cir. 2019) (holding that plaintiff could not recover damages under § 1983 for wrongful incarceration when his original arson convictions were vacated and he pled no contest to the same charges, was sentenced to time served, and was immediately released from prison); *Bourne v. Gunnes*, 921 F.3d 484, 491 (5th Cir. 2019) (reversing the district court's determination that a prisoner's excessive force claims would "implicate the validity of his disciplinary conviction for creating the disturbance that resulted in the use of force"); *Dennis v. City of Phila.*, 379 F. Supp. 3d 420, 430 (E.D. Pa. 2019) (concluding that *Heck* did not bar a § 1983 suit by a prisoner who had first obtained federal habeas relief and then pled no contest to a lesser-included offense); *Maloley v. Cent. Neb. Pub. Power & Irrigation Dist.*, 931 N.W.2d 139, 146 (Neb. 2019) (rejecting the argument that *Heck* should not bar constitutional due process claims that preceded trespass convictions).

198. *See, e.g., DeLeon v. Corpus Christi*, 488 F.3d 649, 654 n.22 (5th Cir. 2007) (comparing the majority opinions in *Heck* and *Spencer* to the concurrence of Justice Souter in *Heck* and the opinions of Justices Souter, Ginsburg, and Stevens in *Spencer* to support the proposition that both the Court and the circuits are divided). *See also supra* notes 148–155 and accompanying text (discussing the *Heck* opinion).

A. In Three Circuits, Pretrial Diversion Does Not Trigger the Heck Bar

In the Sixth, Tenth, and Eleventh Circuits, participation in a pretrial diversion program does not constitute a conviction for purposes of the *Heck* doctrine, regardless of the specifics of the program. The clearest assessment of why pretrial diversion should not be considered a conviction for purposes of the *Heck* doctrine comes out of the Eleventh Circuit.

1. No Conviction, No Heck Bar

The Eleventh Circuit suggested several reasons a pretrial diversion program should not trigger the *Heck* bar in *McClish v. Nugent*.¹⁹⁹ Following various altercations with the police in 2001, Edmund Holmberg was arrested for resisting a police officer.²⁰⁰ He was admitted to and completed a pretrial intervention program, after which the charge against him was dismissed.²⁰¹ Holmberg then brought a § 1983 suit against the arresting officers in the United States District Court for the Middle District of Florida alleging unlawful arrest, harassment, and knowingly using false testimony in preparing an affidavit.²⁰² The district court granted summary judgment to the defendants, ruling that Holmberg's wrongful arrest claim was barred by *Heck* because of his prior participation in the pretrial diversion program.²⁰³

The Eleventh Circuit began its analysis of the issue by exploring the rationale behind *Heck*, noting that the *Heck* bar was designed "to avoid the problem inherent in two potentially conflicting resolutions arising out of the same set of events by

199. 483 F.3d 1231 (11th Cir. 2007).

200. See *id.* at 1236 (describing the arrest of Holmberg after police officers arrived at his home and arrested his co-defendant Douglas McClish).

201. *Id.*

202. *Id.*

203. See *McClish v. Nugent*, No. 8:04-CV-2723-T-24TGW, 2006 WL 8440092, at *1, *10 (M.D. Fla. Jan. 20, 2006) ("[T]he Court concludes that Holmberg's participation in PTI, which resulted in a dismissal of the charge of resisting arrest without violence, is not a termination in his favor, and therefore, he is barred from bringing a § 1983 claim for false arrest."); *McClish*, 483 F.3d at 1233 (citing the same language from the district court).

foreclosing collateral attacks on convictions through the vehicle of a § 1983 suit.”²⁰⁴ The court then wrestled with the *Heck* and *Spencer* dichotomy, finding that *Spencer* suggested that § 1983 claims are only barred when habeas is available.²⁰⁵ The court articulated two kinds of potential challenges that would give rise to *Heck* issues: challenges to the judgment (the conviction itself)²⁰⁶ and challenges to procedures (the steps leading to the arrest or conviction).²⁰⁷ This division between types of challenges might be better characterized as a split between challenges to adjudicative procedures and challenges to investigatory procedures. Based on this articulation, the court reasoned that because the defendant was never convicted, he therefore could not fall within either category of *Heck* conflicts.²⁰⁸ As a result, the facts of his case would not even implicate the question of whether a pretrial diversion program constitutes a conviction. Instead, the court said, while pretrial diversion may not be a favorable termination, it is also not a conviction or a sentence.²⁰⁹

McClish also adopted the rationale of *Wallace* on the question of future convictions. The court reasoned that, under *Wallace*, “*Heck* only comes into play when there has been an outstanding criminal judgment or extant conviction, [and] *Heck* was not raised when there was in existence no criminal conviction that the cause of action would impugn.”²¹⁰ The would-be plaintiff, Holmberg, would by definition never be convicted because his case was already resolved through his entry into, and completion of, the

204. *McClish*, 483 F.3d at 1250.

205. *See id.* at 1251 n.19 (citing a prior decision in which a panel of the Eleventh Circuit relied on *Spencer* for the proposition that § 1983 claims were only barred when habeas relief remained available).

206. *See id.* at 1250 (“The primary category of cases barred by *Heck* involved suits seeking damages for allegedly unconstitutional conviction or imprisonment.”).

207. *See id.* (identifying a second category of cases involving suits to recover damages “for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid” (citing *Heck v. Humphrey*, 512 U.S. 477, 486 (1994))).

208. *Id.* at 1251.

209. *See id.* (“[T]he question is . . . whether *Heck* applies at all since Holmberg was never convicted of *any* crime.”).

210. *McClish v. Nugent*, 483 F.3d 1231, 1251 (11th Cir. 2007).

pretrial diversion program.²¹¹ Therefore, “to dismiss this § 1983 claim as barred by *Heck* because of a potential conflict that we know now with certainty will never materialize would stretch *Heck* beyond the limits of its reasoning.”²¹² Ultimately the court decided that based on these precedents, Holmberg’s pretrial diversion was not a conviction necessitating the use of the *Heck* bar.

2. No Guilt, No Heck Bar

The Tenth Circuit took a slightly different approach, focusing on the would-be plaintiff’s guilt rather than on a conviction. In *Vasquez Arroyo v. Starks*²¹³ the defendant, Martin Vasquez Arroyo, filed two pro se § 1983 actions in the United States District Court for the District of Kansas alleging false arrest and the forging of his signatures on pretrial diversion agreements.²¹⁴ The district court dismissed the claims, finding them barred by *Heck*.²¹⁵ On appeal, the Tenth Circuit specifically asked for briefing and argument as to “whether the *Heck v. Humphrey* bar applies to a Kansas pre-trial diversion agreement.”²¹⁶ The court also asked the parties to address the question of “whether *Heck v. Humphrey* applies when the plaintiff lacks an available remedy in habeas, in light of the circuit split on this issue.”²¹⁷

Like the Eleventh Circuit, the Tenth Circuit first reviewed the rationale behind *Heck*, highlighting the intersection of the habeas statute with the § 1983 statute.²¹⁸ In particular, the Tenth Circuit

211. See *Conviction*, BLACK’S LAW DICTIONARY (10th ed. 2014) (“The act or process of finding someone guilty of a crime; the state of having been proved guilty.”).

212. *McClish*, 483 F.3d at 1252 (citing *Wallace v. Kato*, 549 U.S. 384 (2007)).

213. 589 F.3d 1091 (10th Cir. 2009).

214. See *id.* at 1092 (describing Vasquez’s allegations, filed in December 2007 and January 2008 against three different state authorities).

215. See *Vasquez v. Starks*, No. 07-3298-SAC, 2008 WL 11429983, at *1, *3 (D. Kan. Apr. 25, 2008) (“The court concludes the diversion agreement in question is sufficiently analogous to a finding in a criminal action that it is reasonable to impose the *Heck* bar.”).

216. *Vasquez Arroyo*, 589 F.3d at 1093.

217. *Id.*

218. See *id.* (asserting that all nine Justices agreed that the key question in *Heck* was the intersection of habeas with § 1983).

cited its own precedent for the proposition that “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.”²¹⁹ The court then looked at the language of Kansas’s pretrial diversion statute which stated that “diversion is . . . a means to avoid a judgment of criminal guilt.”²²⁰ Making a key determination, the court characterized this language as “the opposite of a conviction in a criminal action.”²²¹ To support this reading, the court interpreted *Wallace* to mean that the *Heck* bar only applies “when there is an actual conviction, not an anticipated one.”²²² Because Vasquez Arroyo was not adjudged guilty, and *Heck* does not, under *Wallace*, bar claims purely to protect against possible future convictions, the court found that Vasquez Arroyo’s claim was not *Heck*-barred.²²³ Unfortunately, despite the court’s interest in directly addressing the intersection of § 1983 claims with the habeas statute, it ultimately decided the issue on the first prong of the inquiry, leaving the second question for another time.²²⁴

3. No Habeas, No Heck Bar

Although the Tenth Circuit did not reach the issue of whether a § 1983 action applies whenever a plaintiff lacks a habeas remedy,²²⁵ it noted that the boundaries of this intersection of

219. *Id.* at 1094 (citing *Butler v. Compton*, 482 F.3d 1277, 1279 (10th Cir. 2007)).

220. KAN. STAT. ANN. § 22-2906(3) (2008).

221. *Vasquez Arroyo*, 589 F.3d at 1095.

222. *Id.* at 1095; *see also* *Wallace v. Kato*, 549 U.S. 384, 393 (2007) (“[T]he *Heck* rule for deferred accrual is called into play only when there exists a conviction or sentence that has not been invalidated.” (internal citation and emphasis omitted)).

223. *See Vasquez Arroyo*, 589 F.3d at 1095 (“Here, there is no related underlying conviction that could be invalidated by Mr. Vasquez’s § 1983 actions.”).

224. *See id.* at 1096 (“Because we have determined that the Kansas pre-trial diversion agreements are not outstanding convictions . . . we need not decide whether *Heck* applies when the plaintiff lacks an available remedy in habeas.”).

225. *See id.* (declining to address the intersection of § 1983 and the federal

statutes remains an open question.²²⁶ And indeed this was exactly the question considered by the Sixth Circuit in *S.E. v. Grant County Board of Education*.²²⁷ A.E., a juvenile,²²⁸ brought a § 1983 suit in the Eastern District of Kentucky against the Grant County Board of Education and several administrators of her school system following A.E.'s participation in a diversion program.²²⁹ A.E. entered the program as a way to avoid formal court proceedings stemming from her possession and distribution of one pill of Adderall, which had been prescribed to her to manage a hyperactivity disorder.²³⁰ She completed the program, after which charges were diverted and dismissed.²³¹ The district court granted summary judgment to the defendants on the § 1983 claims “upon the doctrine of *Heck v. Humphrey*.”²³²

Although the Sixth Circuit affirmed the district court's findings on other grounds,²³³ the court clarified that the *Heck* doctrine would not bar a § 1983 claim from an individual who completed the state's pretrial diversion program.²³⁴ To reach this conclusion, the court reviewed the rationale behind the *Heck* decision, repeating Justice Scalia's recognition that *Heck*'s favorable termination requirement is analogous to a similar requirement in the context of malicious prosecution.²³⁵ The court

habeas statute).

226. *See id.* (noting that the Supreme Court has not yet resolved the issue and identifying the ongoing circuit split).

227. 544 F.3d 633 (6th Cir. 2008).

228. Although the juvenile aspect was not important to the court's reasoning here, Kentucky's pretrial diversion statute now formally adds that “[i]f a child successfully completes a diversion agreement, the underlying complaint shall be dismissed and further action related to that complainant shall be prohibited.” KY. REV. STAT. ANN. § 610.030(9)(a) (West 2019).

229. *Grant Cty.*, 544 F.3d at 635.

230. *Id.*

231. *Id.* at 636.

232. *Id.* at 635; *S.E. v. Grant Cty. Bd. of Educ.*, 522 F. Supp. 2d 826, 833 (E.D. Ky. 2007).

233. *See Grant Cty.*, 544 F.3d at 641 (affirming the district court on the basis of qualified immunity).

234. *See id.* at 639 (“Given the facts of this case, where the plaintiff was neither convicted nor sentenced and was habeas-ineligible, we hold that *Heck* is inapplicable, and poses no bar to plaintiff's claims.”).

235. *See id.* at 637 (“The requirement that the conviction or sentence has been reversed, expunged, or invalidated is analogous to the similar requirement in the

recognized that the *Heck* bar was intended to prevent duplicative or parallel litigation,²³⁶ but noted that the would-be plaintiff “was never in custody, was not convicted or sentenced, and was never eligible for habeas corpus relief.”²³⁷ The court focused on whether or not habeas was available to A.E., relying on the fact that previous circuit precedent had found that “the *Heck* bar to § 1983 litigation did not require a favorable termination of the criminal proceedings for plaintiffs who were not eligible to make habeas petitions.”²³⁸ The court thus implicitly followed Justice Souter’s approach to the *Heck* bar.

However, the Sixth Circuit simultaneously noted that the boundaries of the *Heck* doctrine remained unsettled, and that their holding would be in conflict with the Third Circuit’s decision in *Gilles v. Davis*²³⁹ and other circuits that held otherwise in the non-pretrial-diversion context.²⁴⁰ In fact, two circuits have considered the same issue and come to precisely the opposite conclusion.

B. In Two Circuits, Pretrial Diversion Bars Civil Rights Actions

In contrast to the conclusions drawn by the circuits discussed above, both the Second and Third Circuits have held that pretrial diversion programs do constitute convictions for purposes of a subsequent civil rights action under § 1983.²⁴¹ The programs

tort of malicious prosecution.”).

236. *See id.* (“This ensures that habeas corpus remains the exclusive remedy . . . and does not allow duplicative, collateral attack of convictions or sentences through § 1983 actions.”).

237. *Id.* at 638.

238. *Id.* at 639 (citing *Powers v. Hamilton Cty. Pub. Def. Comm’n*, 501 F.3d 592, 603 (6th Cir. 2007); *Cummings v. City of Akron*, 418 F.3d 676, 682 (6th Cir. 2005)).

239. 427 F.3d 197, 209 (3d Cir. 2005); *see infra* Part IV.B.2 (discussing *Gilles* in detail).

240. *See id.* (“We announced our disagreement with First, Third, Fifth, and Eighth Circuit determinations . . . [that] § 1983 claimants who were not eligible for habeas relief remained bound by *Heck*’s favorable termination requirement.”).

241. *See Gilles*, 427 F.3d at 211 (finding that defendant’s participation in a pretrial diversion program that may result in criminal prosecution and is not a favorable termination); *Roesch v. Otarola*, 980 F.2d 850, 855 (2d Cir. 1992)

considered by these circuits are not markedly different from those considered by the circuits above. In fact, the Second and Third Circuits used similar reasoning and justifications²⁴² in coming to a conclusion diametrically opposite to that of the Sixth, Tenth, and Eleventh Circuits.²⁴³

1. If Guilt Is Still Undetermined, There Is No Right to Bring Suit Under Section 1983

The Second Circuit decided *Roesch v. Otarola*²⁴⁴ in November 1992, prior to the Supreme Court's 1994 decision in *Heck*. Although the decision out of the Second Circuit predates the Supreme Court's decision in *Heck*,²⁴⁵ it squarely addressed the legal issue of whether participation in a pretrial diversion program constitutes a conviction,²⁴⁶ and the case is generally cited as adhering to one side of the circuit split.²⁴⁷ Carl Roesch filed a § 1983 action in the

(affirming the district court because the underlying criminal charge was not dismissed or set aside in favor of the defendant).

242. Compare *Gilles*, 427 F.3d at 209 (“By entering the . . . program, the defendant waives his right to prove his innocence, but at the same time, does not admit guilt.”), and *Roesch*, 980 F.2d at 852 (reasoning that the program completed by the defendant still “leaves open the question of the accused’s guilt”), with *Vasquez Arroyo v. Starks*, 589 F.3d 1091, 1095 (10th Cir. 2009) (“[U]nder Kansas law a diversion is a means to avoid a judgment of criminal guilt.” (citation omitted)), *S.E. v. Grant Cty. Bd. of Educ.*, 544 F.3d 633, 638 (6th Cir. 2008) (“A.E. was never in custody [and] was not convicted or sentenced.”), and *McClish v. Nugent*, 483 F.3d 1231, 1251 (11th Cir. 2007) (“[T]here was never a conviction in the first place.”).

243. See *infra* Part IV.D (cataloguing the elements cited by the circuits).

244. 980 F.2d 850 (2d Cir. 1992).

245. *Roesch* was decided in 1992; the Supreme Court handed down their decision in *Heck* in 1994.

246. See *Roesch*, 980 F.2d at 853 (“[W]e hold [the] trial rehabilitation program is not a termination in favor of the accused for purposes of a civil rights suit.”).

247. See, e.g., BRIAN R. MEANS, POSTCONVICTION REMEDIES § 11:5 (2018) (“The Second and Third Circuits have gone even further in ruling that *Heck* applies even if the plaintiff successfully completes the pretrial diversion program.”); MARTIN A. SCHWARTZ, SECTION 1983 LITIGATION: CLAIMS AND DEFENSES, 2018-2 SUPPLEMENT (2018) (identifying a “division of authority” in determining whether pretrial diversion counted as a conviction for purposes of the *Heck* doctrine and collecting cases). But see *Huval v. La. State Univ. Police Dept.*, No. 16-00553-BAJ-RLB, 2018 WL 1095559, at *11, *12 (M.D. La. Feb. 28, 2018) (identifying a circuit split between the Sixth, Tenth, and Eleventh Circuits on one hand, and the Third Circuit on the other, without citing the Second Circuit’s

United States District Court for the District of Connecticut against various parties including a police officer, alleging that the parties conspired to arrest him without probable cause and to revoke his probation.²⁴⁸ His suit stemmed from a 1986 arrest for breach of the peace and threatening and harassing his wife's family.²⁴⁹ Following his arrest, but prior to trial, a state judge admitted Roesch into Connecticut's accelerated pretrial rehabilitation program, which Roesch successfully completed in two years.²⁵⁰ Following completion of the program, all charges against Roesch were dismissed.²⁵¹ He then filed his § 1983 suit.²⁵² Finding that "a disposition pursuant to Connecticut's accelerated pretrial rehabilitation statute was not a termination in the appellant's favor," the district court granted summary judgment in favor of the defendants,²⁵³ and Roesch appealed.²⁵⁴

The Second Circuit cited several factors in concluding that Roesch's participation in a pretrial diversion program following his 1986 arrest precluded him from bringing a § 1983 action relating to that arrest.²⁵⁵ First, circuit precedent in *Singleton v. City of New York*²⁵⁶ (which discussed a similar New York statute) had previously held that "adjournment in contemplation of dismissal" was not a favorable termination for the purposes of a malicious prosecution claim.²⁵⁷ *Singleton's* precedent was based on the concept that an adjournment "leaves open the question of the accused's guilt."²⁵⁸ Furthermore, the court reasoned that the

decision in *Roesch*).

248. See *Roesch*, 980 F.2d at 852 (listing Roesch's allegations and claims). The revoked probation stemmed from an earlier, unrelated conviction. *Id.*

249. See *id.* (summarizing Roesch's charges for mailing offensive post cards and yelling obscenities at his wife's family in public).

250. See *id.* ("After Roesch successfully completed the two-year probationary period, the State Court dismissed the charges against him.").

251. *Id.*

252. *Id.*

253. *Id.* at 851.

254. *Id.* at 852.

255. See *Roesch v. Otarola*, 980 F.2d 850, 852–54 (2d Cir. 1992) (addressing the precedential, policy-based, and analogous reasons to affirm the district court).

256. 632 F.2d 185 (2d Cir. 1980).

257. *Roesch*, 980 F.2d at 852 (citing *Singleton*, 632 F.2d at 195).

258. *Id.*

program considered in *Singleton* “provide[d] a method for those charged . . . by behaving well and abiding by the judge’s instructions during a designated period to demonstrate that the charges should not be pursued.”²⁵⁹ Because the court concluded that the two pretrial diversion programs—Connecticut and New York—were materially the same, the *Singleton* precedent held significant weight.²⁶⁰ This was true despite the court expressly noting that completion of the program resulted in dismissal, and complete erasure, of all charges.²⁶¹ To bring a § 1983 claim, the court said, would require that the defendant either “pursue the criminal case to an acquittal” or receive “an unqualified dismissal.”²⁶²

The Second Circuit also considered the practical policy implications of allowing the § 1983 action to proceed, noting that if offenders were allowed to pursue civil rights actions, prosecutors would be less interested in allowing offenders into the program.²⁶³ In particular, the program would be “less desirable for the State to retain and less desirable for the courts to use because the savings in resources from dismissing the criminal proceeding would be consumed in resolving the constitutional claims.”²⁶⁴

259. *Id.*

260. *See id.* at 853–54 (extensively discussing *Singleton* and the similarities between the issues presented in that case and the case before the court with reference to both pretrial diversion statutes).

261. *See id.* at 853 (“A person who thinks there is not even probable cause to believe he committed the crime with which he is charged must pursue the criminal case to an acquittal or an unqualified dismissal, or else waive his section 1983 claim.”).

262. *Id.* The court also said that a § 1983 claim cannot allege harm on the basis of unfairness, only on a violation of due process, and that a pretrial diversion program is not a violation of due process. *Id.* at 854.

263. *See id.* at 853 (“If we permit a criminal defendant to maintain a section 1983 action after taking advantage of accelerated rehabilitation, the program, intended to give first-time offenders a second chance, would become less desirable for the State to retain.”).

264. *Id.*

2. If Not Clearly Innocent, Heck Bar Applies

Several years later, in *Gilles v. Davis*,²⁶⁵ Timothy Petit and James Gilles filed a § 1983 suit in the United States District Court for the Western District of Pennsylvania seeking damages following an arrest for resisting arrest, disorderly conduct, and failure to disperse.²⁶⁶ Petit was released almost immediately after the arrest and entered into Pennsylvania's Accelerated Rehabilitative Disposition (ARD) program,²⁶⁷ "which permits expungement of the criminal record upon successful completion of a probationary term."²⁶⁸ Petit completed the program and all charges were indeed expunged.²⁶⁹ In the § 1983 action, however, the district court granted the defendant's motion for summary judgment, stating that Petit's claims were barred under *Heck*²⁷⁰ and that expungement was not a favorable termination.²⁷¹ Petit appealed.²⁷²

The Third Circuit immediately turned to the language of Pennsylvania's pretrial diversion program.²⁷³ The court acknowledged that, according to the statute, an ARD participant "avoids trial and potential jail time,"²⁷⁴ and added that "the purpose of the ARD program is to rehabilitate offenders and promptly dispose of minor criminal charges."²⁷⁵ Furthermore, the

265. 427 F.3d 197 (3d Cir. 2005).

266. *See id.* at 202 (describing the arrest of Gilles for preaching against homosexual activity on a college campus and the arrest of Petit for videotaping the activity).

267. *See* PA. R. CRIM. P. 301 (2005) (specifying procedures used in Pennsylvania's pretrial diversion program).

268. *Gilles*, 427 F.3d at 202.

269. *See id.* at 209 ("After a successful probationary period, the charges were expunged from [Petit's] criminal record.").

270. *See id.* at 208 ("The District Court held that Petit's claims were barred under [*Heck*].").

271. *See id.* at 209 ("The District Court found . . . that under *Heck* expungement under the ARD Program is not a result 'favorable' to the plaintiff.").

272. *See id.* at 201 (tracing the claims and issues asserted by the plaintiff-appellants in the lower court).

273. *See id.* at 209 (citing the language of the Pennsylvania Rules of Criminal Procedure and the accompanying comments).

274. *Id.*

275. *Id.* at 209 n.9.

court noted that ARD participation “is not intended to constitute a conviction.”²⁷⁶ The court then considered how the statute approaches the question of guilt, stating that “[b]y entering the ARD program, the defendant waives his right to prove his innocence, but at the same time, does not admit guilt.”²⁷⁷ Indeed, the court explained, “both a guilty plea and an ARD are sufficient to bar a subsequent § 1983 claim.”²⁷⁸ Of course, if both an ARD diversion program and a guilty plea are sufficient, participation in the pretrial program must constitute something different than a plea of guilt.

Nonetheless, the court pointed out that the *Heck* bar was intended to prevent parallel litigation or the possibility of “two conflicting resolutions arising from the same transaction.”²⁷⁹ Then, the court cited to the Second Circuit’s opinion in *Roesch*²⁸⁰ and a Fifth Circuit opinion, *Taylor v. Gregg*,²⁸¹ which both held that similar pretrial diversion programs were not favorable terminations.²⁸² Based on these considerations, the court concluded that “the ARD program imposes several burdens upon the criminal defendant not consistent with innocence.”²⁸³ Although the court noted that “the strongest factor supporting the contention that ARD is a favorable termination is that successful completion of the ARD program results in dismissal of the criminal charge and expungement of the arrest record,”²⁸⁴ those considerations did not outweigh other factors discussed.²⁸⁵

276. *Id.* at 209.

277. *Id.*

278. *Id.* at 209 n.8.

279. *Id.* at 209.

280. *Id.* at 211. The *Gilles* court also traced *Roesch*’s reliance on *Singleton*, which determined that a similar program “le[ft] open the question of guilt.” *Id.*

281. 36 F.3d 453 (5th Cir. 1994).

282. *See Gilles v. Davis*, 427 F.3d 197, 211 (3d Cir. 2005) (“We find instructive opinions from the Second and Fifth Circuits that have addressed whether similar pre-trial probationary programs are a favorable termination sufficient to bring a subsequent civil suit.”).

283. *Id.* The court also said that probation is “an ‘unfavorable’ period of judicially imposed limitations on freedom.” *Id.*

284. *Id.* at 212 n.14.

285. *See id.* (“For the reasons noted, however, we believe the ARD program is not a favorable termination under *Heck*.”).

The *Gilles* opinion is particularly notable for its somewhat reluctant application of the *Heck* bar to Petit's claims. When considering whether Petit's lack of habeas relief affected his access to § 1983 actions,²⁸⁶ the court acknowledged that a plurality of Supreme Court Justices questioned the use of a *Heck* bar in such cases.²⁸⁷ Nonetheless, the Third Circuit refused to challenge current law and precedent.²⁸⁸ Instead, the court explicitly stated that it would consider itself bound until the Supreme Court itself unquestionably overrules or clarifies *Heck*.²⁸⁹ Meanwhile, in a dissent, Judge Fuentes argued that the *Heck* bar could not apply to Petit because he was not in custody and did not have access to relief under the habeas statute.²⁹⁰ Judge Fuentes gathered the votes contained in the various *Spencer* opinions²⁹¹ and concluded that "[u]nder the best reading of *Heck* and [*Spencer*], the favorable termination rule does not apply where habeas relief is unavailable."²⁹² Judge Fuentes explained that several circuits have

286. *See id.* at 210 (mulling the precedential value of the various piecemeal opinions arising from *Spencer* on the issue of the intersection of the § 1983 and habeas statutes).

287. *See id.* at 209–10 (“We recognize that concurring and dissenting opinions in [*Spencer*] question the applicability of *Heck* to an individual, such as Petit, who has no recourse under the habeas statute.”); *see also* *Spencer v. Kenma*, 523 U.S. 1, 21 (1998) (Souter, J., concurring) (“The better view, then, is that a former prisoner, no longer in custody, may bring a § 1983 action establishing the unconstitutionality of a conviction or confinement”); *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 § 1983.”).

288. *See Gilles*, 427 F.3d at 210 (“We join our sister courts . . . in following the Supreme Court’s admonition . . . to follow its directly applicable precedent, even if that precedent appears weakened by pronouncements in its subsequent decisions.” (citations omitted)).

289. *See id.* at 210 (“[We] leave to the Court the prerogative of overruling its own decisions.” (citations omitted)).

290. *See id.* at 212 (Fuentes, J., dissenting) (“*Heck*’s favorable termination rule cannot be applied to dismiss a § 1983 claim brought by a plaintiff not in custody.” (citing *Heck v. Humphrey*, 512 U.S. 477, 500 (1994))).

291. *See id.* at 217 (“Justice Souter’s concurrence in *Spencer* was joined by Justices O’Connor, Ginsburg, and Breyer. Justice Stevens dissented but indicated that ‘it is perfectly clear, as Justice Souter explains, that a petitioner who does not have a remedy under the habeas statute may bring an action under [§ 1983].” (citing *Spencer*, 523 U.S. at 25 n.8 (Stevens, J., dissenting))).

292. *Id.*

adopted Justice Souter's narrower interpretation of the favorable termination rule²⁹³ and argued that, in his view, "the District Court erred when it applied *Heck* without considering whether Petit could have brought his claim under habeas."²⁹⁴ Judge Fuentes also pointed out that the majority's opinion relied heavily on two cases that pre-dated *Heck*, including the Second Circuit's opinion in *Roesch*.²⁹⁵ Although the majority opinion in *Heck* relied on an analogy to malicious prosecution in explicating its rationale,²⁹⁶ Judge Fuentes instead read *Heck* as "extend[ing] the scope of the favorable termination rule in order to reconcile § 1983 with the federal habeas statute."²⁹⁷

Gilles and *Roesch* present clear examples of the confusion surrounding the circuit split addressed in this Note. Although *Gilles* hinted at a willingness to allow a § 1983 action to proceed following participation in a pretrial diversion program, at least in certain circumstances, the court was hamstrung by the precedents coming out of the Supreme Court's competing opinions in *Heck* and *Spencer*.²⁹⁸ Although *Roesch* predates *Heck*, the rationale still supports the use of the *Heck* bar for pretrial diversion participants.²⁹⁹ Moreover, comparing *Gilles* and *Roesch* with the cases out of the Sixth, Tenth, and Eleventh Circuits highlights the precedential morass that surrounds the issue. The five circuits discussed above are alike only in that not one is able to fully articulate the state of the law. Such is the situation Christopher DeLeon faced when deciding whether to accept entry into a pretrial diversion program.

293. *See id.* at 218 (summarizing cases out of the Second, Seventh, and Ninth Circuits allowing § 1983 actions because they would not interfere with the purpose of the habeas statute).

294. *Id.*

295. *See id.* (pointing out that both *Roesch* and *Singleton* were handed down prior to 1994).

296. *See Heck v. Humphrey*, 512 U.S. 477, 484 (1994) ("The common-law cause of action for malicious prosecution provides the closest analogy to claims of the type considered here.").

297. *Gilles v. Davis*, 427 F.3d 197, 219 (3d Cir. 2005) (Fuentes, J., dissenting).

298. *See supra* notes 287–289 and accompanying text (highlighting the court's reluctance to take a stance while the Supreme Court's position remains unclear).

299. *See, e.g., Gilles*, 427 F.3d at 211 (relying on the reasoning used in *Roesch* to justify its own conclusions).

C. An Undecided Circuit: Ongoing Diversion Bars Heck

DeLeon's situation, granted, was somewhat unique. For one thing, his pretrial diversion program consisted of a ten year probationary period.³⁰⁰ For another, pretrial diversion programs tend to be used for misdemeanor offenses, not for anything as severe as an assault on a police officer.³⁰¹ One could easily speculate as to the kinds of prosecutorial decision-making that went into trying to keep DeLeon's civil rights complaint quiet by offering him pretrial diversion instead. Although the Fifth Circuit declined to allow DeLeon's § 1983 lawsuit to proceed at that time, the court did leave open the possibility of joining the approach taken by the Sixth, Tenth, and Eleventh Circuits.³⁰² Furthermore, the Fifth Circuit recognized and clearly laid out the split in circuit court jurisprudence on this precise issue.³⁰³ Given the Fifth Circuit's prior jurisprudence in *Taylor*, however, it seems that the court is more likely to join the approach taken by the Second and Third Circuits if and when the issue is more directly presented.

In *DeLeon v. City of Corpus Christi*, the case presented at the beginning of this Note, Christopher DeLeon appealed the dismissal of his § 1983 claim for false arrest, false imprisonment, malicious prosecution, and use of excessive force in the United States District Court for the Southern District of Texas.³⁰⁴ At the time of the decision, DeLeon had not completed his pretrial diversion requirements;³⁰⁵ if successfully completed, the charge against him would be dropped.³⁰⁶ The district court reasoned that DeLeon's pretrial diversion did not count as a favorable termination under the terms of *Heck* and dismissed the complaint with prejudice.³⁰⁷

300. *Supra* notes 10–14 and accompanying text.

301. *Supra* notes 10–14 and accompanying text.

302. *Infra* note 308 and accompanying text.

303. *Infra* notes 309–314 and accompanying text.

304. *DeLeon v. City of Corpus Christi*, 488 F.3d 649, 651 (5th Cir. 2007).

305. *See id.* at 653 (using the future tense to explain that DeLeon's charges "will be" dismissed).

306. *Id.*

307. *DeLeon v. City of Corpus Christi*, C.A. No. C-05-096, 2005 U.S. Dist. LEXIS 44191, at *2, *8 (S.D. Tex. Aug. 24, 2005).

Taking up the appeal, the Fifth Circuit first revisited its own precedents, in which deferred adjudication was treated as the equivalent of a conviction for sentencing purposes.³⁰⁸ The court found those precedents non-binding, however, terming them “pure exercises in statutory interpretation” based on reading the sentencing guidelines as “anticipat[ing] deferred prosecutions and pleas of *nolo contendere* where a conviction is not formally entered.”³⁰⁹ Instead, the court turned to the rationale behind the *Heck* doctrine, highlighting the use of the words “conviction or sentence” in *Heck*’s majority opinion.³¹⁰ Reading *Heck*, the Fifth Circuit found that “[f]irst, an order deferring adjudication, though not formally a conviction or sentence, is its functional equivalent in light of *Heck*’s rationale. Second, an order deferring adjudication is, at least, one stage in an ongoing state criminal proceeding, which *Heck*’s rationale might protect.”³¹¹ The court then explicitly laid out the competing rationales of *Heck*, as espoused by Justice Scalia’s majority opinion (centered on narrowing the reach of the § 1983 statute by analogizing to malicious prosecution actions)³¹² and Justice Souter’s concurrence (focused on the intersection of § 1983 actions with the habeas statute).³¹³ Faced with these two competing approaches, the court firmly chose the former, writing that “[t]his circuit remains in the first camp, where *Heck* stands first for ‘the hoary principle that civil tort actions are not appropriate vehicles for challenging the validity of outstanding criminal judgments.’ In short, the common law animated *Heck*, and so it lights our way today.”³¹⁴ Under this approach, the court mused, the possibility of a future criminal proceeding might act as

308. *DeLeon*, 488 F.3d at 652 (citing *United States v. Cisneros*, 112 F.3d 1272 (5th Cir. 1997); *Caldwell v. Dretke*, 429 F.3d 521 (5th Cir. 2005)).

309. *Id.*

310. *See id.* (“When a plaintiff alleges tort claims against his arresting officers, the district court must first consider whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his *conviction or sentence*.” (citation omitted, emphasis in original)).

311. *Id.* at 654.

312. *See supra* notes 148–155 and accompanying text (discussing the *Heck* majority opinion).

313. *See supra* notes 156–163 and accompanying text (discussing the *Heck* concurrence).

314. *DeLeon*, 488 F.3d at 654 (citing *Heck v. Humphrey*, 512 U.S. 477, 486 (1994)).

a rationale for barring a subsequent action, since such was the rule for malicious prosecution cases historically.³¹⁵ However, after the Supreme Court foreclosed this approach in *Wallace*,³¹⁶ the “ongoing criminal state criminal proceedings” rationale “lacks merit.”³¹⁷

Still, the court concluded, the statute suggests that a deferred adjudication order, which must be signed by a judge, constitutes a final judicial act.³¹⁸ This conclusion was supported by prior decisions by Texas state courts,³¹⁹ which had previously concluded that under Texas law “there was a judicial finding that the evidence *substantiated* the defendants [sic] guilt beyond a reasonable doubt, but not a judicial finding of guilt.”³²⁰ The inquiry into DeLeon’s case could go no further while he remained in the program.³²¹ This, plus the judge’s ability to impose a variety of conditions on the defendant,³²² was enough for the court to declare that “a deferred adjudication order is a conviction for the purposes of *Heck*’s favorable termination rule.”³²³ The Fifth Circuit did explicitly state, however, that it was not addressing the question of whether a completed deferred adjudication program would also act to bar a § 1983 action.³²⁴ Further, the court modified the district

315. *See id.* at 655 (“Actions in malicious prosecution were also dismissed, however, where there was *any* pending criminal proceeding.” (emphasis in original)).

316. *See supra* notes 180–193 and accompanying text (discussing the Supreme Court’s opinion in *Wallace*).

317. *DeLeon v. City of Corpus Christi*, 488 F.3d 649, 655 (5th Cir. 2007).

318. *See id.* at 656 (“[A]lthough the Texas courts have in all circumstances held that these orders are not convictions, they have been accorded finality, for instance in the appellate context . . .”).

319. *See id.* at 653 (surveying Texas lower courts, the Texas Court of Criminal Appeals, and the Texas Code of Criminal Procedure).

320. *Id.*

321. *See id.* (“The proceedings halted at this juncture and were then simply deferred.”).

322. *See id.* at 656 n.33 (“The judge may . . . require any reasonable conditions of community supervision . . . that a judge could impose on a defendant placed on community supervision for a conviction that was probated and suspended, including conviction.” (citing TEX. CODE CRIM. PROC. ANN. art. 42.12, sec. 5(a) (West 2007))).

323. *Id.* at 656.

324. *See id.* (“This case does not require that we decide whether a successfully completed deferred adjudication, with its more limited collateral consequences under Texas law, is also a conviction for the purposes of *Heck*, and we do not

court's order of dismissal to make clear that the complaint was dismissed with prejudice *only until* the defendant could meet the threshold conditions required to bring a § 1983 suit without violating the *Heck* bar.³²⁵ Simultaneously the court put forth the possibility that DeLeon might have access to the habeas statute after completing the terms of his deferred adjudication.³²⁶ In other words, following *DeLeon* the Fifth Circuit remains unresolved as to whether completion of a pretrial diversion program would be sufficient to bar a subsequent § 1983 action under *Heck*.

Although *DeLeon* is the most recent case out of the Fifth Circuit, additional guidance as to how the court might rule on a plaintiff who, unlike DeLeon, completed his pretrial diversion program before bringing a § 1983 claim comes from the circuit's earlier decision in *Taylor v. Gregg*. The *Taylor* case, handed down just months after the Supreme Court's decision in *Heck*, involved an action for malicious prosecution in which the defendants entered pretrial diversion programs before bringing their claims.³²⁷ The court explained that "pre-trial diversion is an alternative to prosecution that diverts certain offenders from traditional criminal justice processing into a program of supervision."³²⁸ Furthermore, the court differentiated between acknowledging responsibility, as required to enter the program, versus admitting guilt, which the program does not require.³²⁹ The issue before the court was "whether a pre-trial diversion agreement terminates the criminal action in the plaintiff's favor" such that the plaintiff might bring a malicious prosecution claim.³³⁰ Although the issue was, at the time, an issue of first

decide that question.").

325. *See id.* at 657 ("A preferred order of dismissal in *Heck* cases decrees, 'Plaintiffs claims are dismissed with prejudice to their being asserted again until the *Heck* conditions are met.' We will modify the judgment accordingly." (citation omitted)).

326. *See id.* ("We do not decide whether DeLeon . . . otherwise may pursue federal habeas relief by successfully completing his deferred adjudication.").

327. *See Taylor v. Gregg*, 36 F.3d 453, 455 (5th Cir. 1994) ("Thereafter, Appellants entered into a pre-trial diversion agreement with the United States Attorney's Office. Appellants subsequently filed suit.").

328. *Id.*

329. *See id.* ("The offenders must acknowledge responsibility for their actions, but need not admit guilt.").

330. *Id.*

impression for the Fifth Circuit,³³¹ the court drew inspiration from the Second Circuit's decision in *Singleton*.³³² Relying largely on reasons of public policy,³³³ the Fifth Circuit adopted the Second Circuit's reasoning in holding that "[e]ntering a pretrial-diversion agreement does not terminate the criminal action in favor of the criminal defendant."³³⁴ Based on this reasoning, it seems likely that even if DeLeon had completed his pretrial diversion program, the Fifth Circuit may have followed its own reasoning in *Taylor* in determining that the potential chilling effect of allowing a § 1983 action to proceed would be enough of a deterrent to hold DeLeon's claim barred under *Heck*. After all, the Second Circuit similarly based its decision in *Roesch* on its earlier decision in *Singleton* in concluding that § 1983 actions would be barred for pretrial diversion participants.³³⁵

D. Elements Considered by the Circuit Courts

As seen from the case summaries above, the circuits considered a wide variety of rationales in assessing the question of the *Heck* bar in the context of pretrial diversion. The Third, Fifth, and Sixth Circuits explicitly followed the reasoning of the *Heck* majority, which weighed the importance of avoiding parallel litigation by analogizing to the tort of malicious prosecution.³³⁶

331. *See id.* ("The Fifth Circuit has not addressed whether a pre-trial diversion agreement is a favorable termination of a criminal action for purposes of maintaining a malicious prosecution claim.")

332. *See id.* at 455–56 (tracing the reasoning of *Singleton* in determining that "an adjournment in contemplation of dismissal is far from being in all respects favorable to the defendant" (citations omitted)).

333. *See id.* at 456 (describing the "chilling effect" on prosecutorial willingness to allow pretrial diversion if doing so would leave the door open to collateral attacks).

334. *Id.*

335. *See Roesch v. Otarola*, 980 F.2d 850, 851–54 (2d Cir. 1992) (comparing *Roesch*'s case to the facts and legal precedent of *Singleton* throughout the discussion and analysis).

336. *See S.E. v. Grant Cty. Bd. of Educ.*, 544 F.3d 633, 637 (6th Cir. 2008) ("The requirement that the conviction or sentence has been reversed, expunged, or invalidated is analogous to the similar requirement in the tort of malicious prosecution and is called the 'favorable termination' requirement of *Heck*."); *DeLeon v. City of Corpus Christi*, 488 F.3d 649, 652 (5th Cir. 2007) ("Our

Two circuits, the Sixth and Eleventh, highlighted the fact that no sentence was imposed in the pretrial programs at issue.³³⁷ All circuits acknowledged that there is no formal conviction involved under the statutory language of the specific pretrial diversion programs considered, though the language used by the circuits varies.³³⁸ For example, the Second Circuit found that the Connecticut program “leaves open the question of guilt,”³³⁹ while the Third Circuit reasoned that the a defendant participating in the Pennsylvania program is neither guilty nor innocent.³⁴⁰ The Fifth Circuit considered the Texas diversion program to be the “functional equivalent” of a conviction.³⁴¹

Five of the circuits (Third, Fifth, Sixth, Tenth, and Eleventh) considered the alternate possibility of habeas relief,³⁴² although

decisional path begins at *Heck* itself. The *Heck* Court held that a civil tort action, including an action under section 1983, is not an appropriate vehicle for challenging the validity of outstanding criminal judgments.”); *Gilles v. Davis*, 427 F.3d 197, 210 (3d Cir. 2005) (“In *Heck*, the Court held a § 1983 malicious prosecution claim was subject to the common law requirement that the plaintiff show the prior criminal proceeding terminated in his favor.”).

337. See *Grant Cty.*, 544 F.3d at 636 (“We note that in [the cited case], the plaintiff had been sentenced, unlike in the instant case.”); *McClish v. Nugent*, 483 F.3d 1231, 1251 (11th Cir. 2007) (“[T]he charge was eventually dismissed without prejudice pursuant to Florida’s pretrial intervention program.”).

338. See *Vasquez Arroyo v. Starks*, 589 F.3d 1091, 1095 (10th Cir. 2009) (“The diversion agreements resulted in deferral of prosecution of the offenses at issue. As a consequence, under Kansas law there are no outstanding judgments or convictions or sentences.”); *Grant Cty.*, 544 F.3d at 636 (“A.E. was charged in juvenile court with a trafficking violation that was diverted and dismissed after A.E. satisfied her diversion contract.”); *DeLeon*, 488 F.3d at 654 (“With deferred adjudication, there is no judgment of conviction and no sentence.”); *McClish*, 483 F.3d at 1251 (“Holmberg was never convicted of *any* crime.”); *Gilles*, 427 F.3d at 211 (describing the diversionary period as “an ‘unfavorable’ period of judicially imposed limitations on freedom in which the probationer’s violation of the program’s terms may result in criminal prosecution”); *Roesch*, 980 F.2d at 852–53 (“If the accused meets the conditions set by the court, the charges are dismissed, and all records of the charges are erased pursuant to [the statute].”).

339. *Roesch*, 980 F.2d at 852.

340. See *Gilles*, 427 F.3d at 209 (“By entering the . . . program, the defendant waives his right to prove his innocence, but at the same time, does not admit guilt.”).

341. *DeLeon*, 488 F.3d at 654.

342. See *Vasquez Arroyo*, 589 F.3d at 1094 (reviewing the Supreme Court’s jurisprudence on the intersection of habeas with § 1983); *Grant Cty.*, 544 F.3d at 639 (revisiting a prior case in which the Fifth Circuit had considered the intersection of the habeas and § 1983 statutes); *DeLeon*, 488 F.3d at 654

only the Third and Sixth Circuits addressed it explicitly. Both of those circuits found that the defendant before them did not have recourse to habeas relief. However, they then came to opposite conclusions. For the Sixth Circuit, a lack of habeas relief meant that a § 1983 action should be available,³⁴³ while for the Third Circuit the lack of habeas relief did not change the unavailability of § 1983.³⁴⁴ Meanwhile, the Eleventh Circuit gestured at the habeas remedy discussion in *Spencer*, but did not rely on it.³⁴⁵

Although the courts' reasoning tended to rely on the elements above, the courts also considered both circuit precedent and the purpose of the pretrial diversion statutes, aspects which necessarily vary by jurisdiction. For example, the Second, Third, Fifth, and Sixth Circuits considered persuasive authority either from their own related decisions,³⁴⁶ opinions in other circuits,³⁴⁷ or similarly situated state courts.³⁴⁸ This played a particularly

(acknowledging and dismissing Justice Souter's concurring rationale in *Spencer v. Kenma*); *McClish*, 483 F.3d at 1251 n.19 ("The logic of our reasoning . . . is clear: If *Heck* only bars § 1983 claims when the alternative remedy of habeas corpus is available, then *Heck* has no application to Holmberg's claim."); *Gilles*, 427 F.3d at 209 ("We recognize that concurring and dissenting opinions in *Spencer v. Kenma* question the applicability of *Heck* to an individual, such as Petit, who has no recourse under the habeas statute." (citation omitted)).

343. See *Grant Cty.*, 544 F.3d at 639 ("[W]e announced our disagreement with [other circuit courts] that, in spite of the *Spencer* decision, § 1983 claimants who were not eligible for habeas relief remained bound by *Heck*'s favorable termination requirement.").

344. See *Gilles*, 427 F.3d at 210 ("But these opinions do not affect our conclusion that *Heck* applies to Petit's claims.").

345. See *McClish*, 483 F.3d at 1251 n.19 (citing a prior case in which the circuit court interpreted the Supreme Court's opinions in *Spencer v. Kenma* as a majority of the Court "express[ing] the view that § 1983 claims are barred only when the alternative remedy of habeas relief is available").

346. See *Grant Cty.*, 544 F.3d at 637–39 (citing the reasoning from two prior Sixth Circuit cases); *Roesch v. Otarola*, 980 F.2d 850, 853 (2d Cir. 1992) ("We are unpersuaded that these previously rejected arguments form a basis for distinguishing the Connecticut provision, and we have no authority to reconsider the holding in *Singleton*.").

347. See *S.E. v. Grant Cty. Bd. of Educ.*, 544 F.3d 633, 638 (6th Cir. 2008) (exploring the reasoning in *Gilles*); *Gilles v. Davis*, 427 F.3d 197, 210 (3d Cir. 2005) ("We find instructive opinions from the Second and Fifth Circuits that have addressed whether similar pretrial probationary programs are a favorable termination sufficient to bring a subsequent civil suit.").

348. See *DeLeon v. City of Corpus Christi*, 488 F.3d 649, 653–55 (5th Cir. 2007) (citing similar opinions by the Texas Court of Criminal Appeals, the

interesting role in the Third Circuit decision, *Gilles*, in which the court suggested that it might otherwise allow a § 1983 action to proceed, but felt bound by the language of the Supreme Court's holding in *Heck*.³⁴⁹ Meanwhile, the Third, Fifth, and Tenth Circuits assessed the purpose of the relevant pretrial diversion statute to determine whether the legislature intended the program to be considered a conviction.³⁵⁰ These jurisdiction-specific rationales, which further muddied the waters of the circuit split, are another reason a coherent resolution of the split would benefit the lower courts and the defendants seeking to access them.

V. Three Proposals for Resolving the Split

Given the confusion in the lower courts described above, the Supreme Court must now step in to settle this area of law. Several approaches hinted at in the decisions above offer possible paths. These include the habeas-centric approach espoused by Judge Fuentes, dissenting in part in *Gilles v. Davis*,³⁵¹ the future-conviction approach discussed by Justice Scalia in *Wallace v. Kato*,³⁵² and the distinction between “challenges to procedures”

Missouri Supreme Court, and the California Supreme Court).

349. See *Gilles*, 427 F.3d at 210 (“We doubt that *Heck* has been undermined, but to the extent its continued validity has been called into question, we . . . follow[] the Supreme Court’s admonition to lower federal courts to follow its directly applicable precedent, even if that precedent appears weakened . . .” (citations and internal quotation marks omitted)).

350. See *Vasquez Arroyo v. Starks*, 589 F.3d 1091, 1095 (10th Cir. 2009) (“[U]nder Kansas law a diversion is a means to avoid a judgment of criminal guilt, the opposite of a conviction in a criminal action.”); *DeLeon*, 488 F.3d at 655 (“Deferred adjudication was not intended as a radical departure, rather, the Texas legislature enacted these procedures with the purpose to remove from existing statutes the limitations that have acted as barriers to effective systems of community supervision.” (citation and internal ellipses omitted)); *Gilles*, 427 F.3d at 209 (“The Comment to Rule 312 of the [statute] states that ‘acceptance into an ARD program is not intended to constitute a conviction,’ but ‘it may be statutorily construed as a conviction for purposes of computing sentences on subsequent convictions.’” (citing PA. R. CRIM. P. 312)).

351. See *Gilles*, 427 F.3d at 212 (Fuentes, J., dissenting) (“[U]nder *Heck* and *Spencer* . . . *Heck*’s favorable termination rule cannot be applied to dismiss a § 1983 claim brought by a plaintiff not in custody.”).

352. See *Wallace v. Kato*, 549 U.S. 384, 393 (2007) (“What petitioner seeks, in other words, is the adoption of a principle that goes well beyond *Heck*: that an action which would impugn an anticipated future conviction cannot be brought

and “challenges to judgments” mentioned in *McClish*.³⁵³ These possible resolutions will be assessed in turn.

A. Exploring the Intersection of Federal Habeas and Section 1983

The first proposal traces the split between the *Heck* majority rationale and Justice Souter’s *Heck* concurrence, a dichotomy which is clearly laid out in Judge Fuentes’s dissent in *Gilles*. Judge Fuentes summarized his dissent in *Gilles* by saying that “under *Heck* and *Spencer* . . . *Heck*’s favorable termination rule cannot be applied to dismiss a § 1983 claim brought by a plaintiff *not in custody*.”³⁵⁴ Indeed, Judge Fuentes characterized the majority’s opinion dismissing the plaintiff’s claim as based on a faulty assumption that the *Heck* question even applied to his situation.³⁵⁵ On the contrary, Judge Fuentes suggested, a proper reading of *Heck* and *Spencer* requires that “the favorable termination rule does not apply where habeas relief is unavailable.”³⁵⁶ Judge Fuentes’s approach directly picked up where Justice Souter left off in *Spencer*, reiterating the importance of “avoid[ing] collisions at the intersection of habeas and § 1983.”³⁵⁷ Indeed, the majority opinion in *McClish* took the same approach, arguing that the plaintiff’s suit “does not represent the sort of collateral attack foreclosed by *Heck* for the straightforward reason that it is not collateral to anything—the § 1983/habeas conflict addressed in

until that conviction occurs and is set aside. The impracticality of such a rule should be obvious.”).

353. See *McClish v. Nugent*, 483 F.3d 1231, 1250 (11th Cir. 2007).

The primary category of cases barred by *Heck* involved suits seeking damages for allegedly unconstitutional conviction or imprisonment. However, the Court also noted that a second category of cases—suits to recover damages “for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid”—raised similar conflicts. (citing *Heck v. Humphrey*, 512 U.S. 477 (1994)).

354. *Gilles*, 427 F.3d at 212 (Fuentes, J., dissenting) (emphasis added).

355. See *id.* at 216 (“Like the District Court, the majority assumes that the favorable termination rule in *Heck* applies to Petit’s claim. But because Petit was not in custody when he filed his § 1983 action, *Heck* does not apply.”).

356. *Id.* at 217.

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

Heck is nonexistent when, as here, there was never a conviction in the first place.”³⁵⁸

This habeas-centric approach is an appealing resolution to the split because of its simplicity and the clear, bright-line rule it offers for courts. Under this approach, if the plaintiff bringing a § 1983 action is not in custody at the time, the *Heck* doctrine does not bar his or her suit. All of the plaintiffs in the cases above, therefore, would have access to the courts through § 1983, as none of them were in custody at the time they initiated their suit. This includes Christopher DeLeon, who was still participating in his pretrial diversion program but who was not officially in custody and, as the Fifth Circuit acknowledged, was without access to a habeas proceeding.³⁵⁹ Furthermore, this approach allows more access to the courts for plaintiffs who have a justifiable claim against a state actor for the deprivation of rights. A plaintiff who can assert a legitimate claim under § 1983, like DeLeon, should not be unduly barred by a threshold issue such as the *Heck* doctrine. Such a bar subverts the very purpose of § 1983, which exists in part to protect individuals against abuses of power by the state.³⁶⁰

One limitation to this approach, however, is that participants still enrolled in a pretrial diversion program remain eligible to have charges re-filed against them, should they fail to complete the program successfully. Because the burden of a civil suit at the same time the plaintiff remains under threat of conviction is exactly what *Heck* was intended to guard against,³⁶¹ a resolution along these lines might require that plaintiffs remain barred by the *Heck* doctrine until they have completed their pretrial diversion successfully. Another limitation is that a habeas-centric approach to *Heck* cases involving pretrial diversion programs would not actually legally define pretrial diversion programs as “convictions” or “not convictions” in a meaningful way. In other

358. *McClish*, 483 F.3d at 1251.

359. *See supra* notes 304–307 and accompanying text (enumerating the specifics of DeLeon’s case).

360. *See supra* Part II.A (discussing the enactment and purpose of the Civil Rights Act of 1871, including the § 1983 cause of action).

361. *See Heck v. Humphrey*, 512 U.S. 477, 484 (1994) (“This requirement avoids parallel litigation . . . and precludes the possibility of the claimant succeeding in the tort action after having been convicted in the underlying criminal prosecution.”).

words, taking such an approach would have little, if any, impact on the question of whether a pretrial diversion program constitutes (or rather, should constitute) a conviction for purposes of sentencing, immigration, or other subsequent suits.

Finally, the most significant barrier to taking this approach is that it does nothing to resolve the debate over whether to follow the rationale of the *Heck* majority or that of Justice Souter's *Heck* concurrence and the pieced together *Spencer* "majority." Indeed, an entirely different circuit split has sprung up around this debate.³⁶² While the bright line rule is appealing in theory, it would therefore likely be ineffective in practice.

B. Focusing on Anticipated Future Convictions

A second resolution would take inspiration from Justice Scalia's majority opinion in *Wallace*, in which he criticized the idea that the *Heck* bar could be extended to cover "action[s] which would impugn *an anticipated future conviction*."³⁶³ In *Wallace*, the petitioner tried to argue that the statute of limitations for his § 1983 suit was tolled until any possibility of conviction was set aside.³⁶⁴ According to the petitioner's argument, the *Heck* doctrine implied that if there was any possible future cause of action that might bar his § 1983 suit, the statute of limitations could not possibly accrue until all of those potential future convictions either took place (thereby barring the suit) or were invalidated (thereby allowing the suit to go forward).³⁶⁵ Justice Scalia maligned the highly uncertain nature of this inquiry, noting that "[t]he impracticality of such a speculative rule is obvious."³⁶⁶

However, following Justice Scalia's reasoning leads to interesting implications for the *Heck* bar in the context of pretrial

362. See, e.g., *Defining the Reach*, *supra* note 134, at 868 (analyzing the circuit split over whether an individual's access to habeas necessarily bars a subsequent § 1983 suit).

363. *Wallace v. Kato*, 549 U.S. 384, 393 (2007) (emphasis in original).

364. See *id.* at 391 ("This would end the matter, were it not for petitioner's contention that *Heck v. Humphrey* compels the conclusion that his suit could not accrue until the State dropped its charges against him." (citation omitted)).

365. *Id.* at 393.

366. *Id.* at 385.

diversion programs. If a speculative, future conviction is clearly no bar to a § 1983 action under *Heck*, a pretrial diversion program that leaves open the possibility of charges while the program is in process should not be a bar, either. Of course, the possibility of charges being re-filed during participation in a pretrial diversion program is much less speculative than the future convictions that Justice Scalia imagined in *Wallace*. Nonetheless, the boundary that Justice Scalia placed on *Heck* in *Wallace*—that future convictions are not contemplated by the *Heck* bar—might lead to creative, if somewhat attenuated, arguments that pretrial diversion programs only create the possibility of conviction, not a conviction in and of itself.

To put this in context, consider Christopher DeLeon, who was given a ten year probation as part of a deferred adjudication program.³⁶⁷ DeLeon filed a § 1983 action while still serving his probation, and remained under the threat of a possible future conviction as long as that period of time lasted. Under a *Wallace*-inspired rule, the fact that DeLeon's charges were not yet dismissed should not bar his § 1983 action, because to bar the action purely based on an anticipated future conviction would be, as Justice Scalia puts it, "impractical." On the other hand, given that DeLeon and the courts were aware of the charges hanging over his head, his possible future conviction for those charges due to some violation of his probation does not seem particularly speculative.³⁶⁸ In fact, the Fifth Circuit explicitly recognized that, prior to *Wallace*, an ongoing criminal proceedings rationale to support the *Heck* bar might have worked well as a rule.³⁶⁹ But it did not then suggest that the opposite might be true—that, post-*Wallace*, ongoing criminal proceedings would by definition *not* bar a § 1983 suit under *Heck*. Indeed, such a rule would probably push Justice Scalia's dictum, that "action[s] which would impugn

367. See *supra* notes 1–14 and accompanying text (recounting DeLeon's case).

368. The exact terms of DeLeon's probation are not clear from the case, but in general "[n]early a third of the roughly 2.3 million people who exit probation or parole annually fail to successfully complete their supervision for a wide range of reasons, such as committing new crimes, violating the rules, and absconding." PEW CHARITABLE TRUSTS, PROBATION AND PAROLE SYSTEMS MARKED BY HIGH STAKES, MISSED OPPORTUNITIES 2 (2018), <https://perma.cc/BNG4-M5SS> (PDF).

369. See *supra* notes 315–317 and accompanying text (tracing the Fifth Circuit's consideration of *Wallace*).

an anticipated future conviction” do not fall under the *Heck* bar, too far. While convictions under pretrial diversion are not certain, they are also not particularly speculative.

C. Splitting Adjudication from Investigation

However, at least one additional bright line rule emerges from these cases, one which relies on being able to split adjudicative proceedings (such as hearings or trials) from investigatory procedures (pursuits, arrests, police interviews, and the like). Using different terms, the majority opinion in *McClish* discussed these two different kinds of conflicts, either of which might give rise to the *Heck* threshold question.³⁷⁰ One, the kind of suit most often barred by *Heck*, “involved suits seeking damages for allegedly unconstitutional conviction or imprisonment.”³⁷¹ The other category described in *McClish* included cases to recover “for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid.”³⁷² The first category involves § 1983 actions that challenge the judgment entered against the plaintiff, which in the context of pretrial diversion programs would mean challenges to the decision to enter a pretrial diversion program at all. These challenges would likely be rare or impossible to field, in this context, in part because a participant in the program technically enters voluntarily and would have little to challenge in the adjudicative process.³⁷³ The second category, however, in the context of pretrial diversion programs, would include challenges to the investigatory procedures that brought the alleged offender before the court in the first place. These

370. See *McClish v. Nugent*, 483 F.3d 1231, 1250 (11th Cir. 2007) (“*Heck* articulated two different categories of cases where conflicts might arise.”).

371. *Id.*

372. *Id.*

373. See, e.g., NAPSA, *supra* note 48, at 5 (defining pretrial diversion as “any voluntary option that provides alternative criminal case processing for a defendant charged with a crime”). Of course, “voluntary” is a somewhat relative term, given the countless collateral consequences that often accompany convictions. See, e.g., *National Inventory of the Collateral Consequences of Conviction*, *supra* note 31, at 1 (providing a database of the numerous collateral implications stemming from having a criminal record).

challenges would include those brought by Christopher DeLeon, whose § 1983 action sought to challenge the validity of his arrest and the use of force by the officer who entered his home, as well as those of many of the other plaintiffs in the cases described above. Tracing the *Heck* bar along these lines would allow plaintiffs with a cognizable § 1983 claim to move forward, while still upholding the premises of the *Heck* doctrine by maintaining the legitimacy of the underlying pretrial diversion “conviction.” Indeed, Justice Scalia himself recognized the division between the two categories in *Spencer*.³⁷⁴ In his majority opinion, Justice Scalia explained that “[i]f, for example, petitioner were to seek damages for using the wrong procedures, not for reaching the wrong result, and if that procedural defect did not necessarily imply the invalidity of the revocation, then *Heck* would have no application [at] all.”³⁷⁵ Identifying challenges to procedural defects as challenges in the investigatory process, and challenges to “the wrong result” as challenges to the adjudication process, would establish a rule that would help lower courts identify exactly where to draw the line when faced with a would-be plaintiff who was also a participant in a pretrial diversion program. If that individual wanted to challenge his or her legal proceedings, including the procedures through which he or she entered into pretrial diversion, such a suit would be barred under *Heck*. If, however, an individual wanted to challenge the search that led to his arrest, or the circumstances of her arrest, those challenges would not be *Heck*-barred.

While this approach would still be somewhat labor-intensive, requiring courts to delve into the specific facts of each plaintiff’s previous participation in the justice system, such a rule would be more in line with the primary intent of *Heck*, which was to prevent collateral attacks on otherwise final judgments.³⁷⁶ Equally important, it would allow more access to the courts for those plaintiffs who, like DeLeon, have a cognizable § 1983 claim, assert legitimate complaints against a state actor, and who should not be barred from these claims merely because they have entered a

374. See *Spencer v. Kenma*, 523 U.S. 1, 17 (1998) (articulating differences between the two categories).

375. *Id.* (citations and internal quotation marks omitted).

376. See *Heck v. Humphrey*, 512 U.S. 477, 484–85 (1994) (“This Court has long expressed similar concerns for finality and consistency and has generally declined to expand opportunities for collateral attack.”).

pretrial diversion program under which they have not been “convicted” in any real sense.

Of the three proposals explored above, the proposal suggested by the majority opinion in *McClish* best aligns with both the purpose of the § 1983 statute and the policy considerations that undergird the *Heck* line of cases. Section 1983, as interpreted by the Supreme Court, primarily acts to protect individuals against the abuse of state power.³⁷⁷ In addition, although § 1983 is not coequal with the common law, common law principles should be used as an aid to interpret it.³⁷⁸ Drawing a line between challenges to adjudicative determinations and challenges to investigatory proceedings maintains the rights of individuals against the state, because they will still be able to challenge acts that have violated their constitutional rights. Simultaneously, it does not conflict with the rationale offered in *Heck*, which leverages the similarities between § 1983 and the common law tort action for malicious prosecution to show that collateral attacks on legitimate convictions should not be allowed.³⁷⁹ It would also take care of the Sixth Circuit’s concern that allowing collateral challenges for those in pretrial diversion would have a chilling effect on prosecutors’ willingness to offer pretrial diversion,³⁸⁰ because prosecutors would know that the adjudication process—the negotiation and acceptance of the pretrial diversion—would not be subject to challenge.

Establishing a bright line between challenges to adjudication and challenges to investigatory procedures also answers several, although not all, of the policy concerns that arise when pretrial diversion participants are barred from bringing § 1983 actions purely because of their participation in the program. Does any court really think it is fair to pretrial diversion participants to have

377. *Supra* notes 92–99 and accompanying text.

378. *Supra* notes 100–101 and accompanying text.

379. *See supra* notes 152–155 and accompanying text (tracing Justice Scalia’s rationale).

380. *See S.E. v. Grant Cty. Bd. of Educ.*, 544 F.3d 633, 638 (6th Cir. 2008) (citing the lower court as agreeing “that it would constitute poor public policy to permit a criminal defendant to obtain lenient treatment by submitting to a benevolent program of this kind and then turn around and sue the arresting officer”).

their civil rights suits, alleging unconstitutional behavior by a person acting “under color of” state law, barred purely because they have entered into pretrial diversion? Given the multitude of collateral consequences that stem from a criminal conviction, concerns about maintaining family and work relationships, and the distressing experience of being in prison in general, an individual’s choice to accept pretrial diversion should not have to be at the expense of their right to pursue justice. The adjudicative-investigatory divide helps solve this unenviable dilemma. In addition, the rule would ensure equal treatment to individuals asserting a federal cause of action despite the fact that pretrial diversion programs vary by state.

Some issues remain. For example, such a rule would preclude an individual from challenging a prosecutor’s decision to not offer pretrial diversion at all, especially if the individual felt that such a decision was being made on racial or other constitutionally protected grounds. Given that legislatures manage the implementation of state pretrial diversion programs, however, they would also be able to appropriately set up mechanisms to combat this potential issue.³⁸¹

Whatever the approach, a clearer rule of law in this area would protect the individual’s right to negotiate freely and to choose his or her own path with full knowledge of the potential consequences. Justice Stevens, writing in dissent in *Spencer*, cites a litany of cases for the proposition that above all, “[t]he individual’s right to the protection of his own good name reflects no more than our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty.”³⁸² As it currently stands, an individual entering into a pretrial diversion program in many jurisdictions cannot know whether he will lose his right to bring a § 1983 action under the *Heck* bar, because the

381. See, e.g., DOJ RESEARCH, *supra* note 27, at 2 (summarizing the implementation of statewide diversion programs). *But see* Shaila Dewan & Andrew W. Lehren, *After a Crime, the Price of a Second Chance*, N.Y. TIMES, Dec. 12, 2016, at A1 (“Prosecutors exert almost total control over diversion, deciding who deserves mercy and at what price . . . The prosecutors who grant diversion often benefit directly from the fees . . .”).

382. *Spencer*, 523 U.S. at 24 n.5 (Stevens, J., dissenting).

courts themselves cannot decide. With such stakes, the image presented is hardly one of a “decent system of ordered liberty.”³⁸³

VI. Conclusion

As pretrial diversion programs proliferate, courts will have to assess an increasing number of issues having to do with the collateral consequences stemming from these programs—including, for example, immigration,³⁸⁴ state and federal sentencing,³⁸⁵ juvenile sentencing,³⁸⁶ and even how to adapt procedural rules to recognize the possibility of deferred adjudication.³⁸⁷ By clarifying the *Heck* rule in the context of pretrial diversion programs, the Supreme Court will give lower courts the guidance they need to deal fairly with plaintiffs who wish to assert a civil rights action under § 1983. More importantly, it will allow people like Christopher DeLeon to enter pretrial diversion programs with full awareness of all the potential

383. *Id.*

384. *See, e.g.*, SHANE DIZON & NADINE K. WETTSTEIN, *Definition and Analysis of Convictions for Immigration Purposes*, in 3 IMMIGRATION L. SERV. 2d § 13:21 (2018 Update) (identifying a circuit split in determining whether adjudications are final before commencing deportation proceedings).

385. *See, e.g.*, *United States v. Martinez-Melgar*, 591 F.3d 733, 737 (4th Cir. 2010) (finding defendant’s participation in a drug treatment program did not count as a conviction under the Federal Sentencing Guidelines when it was not shown he admitted guilt in open court); *United States v. Jones*, 448 F.3d 958, 960 (7th Cir. 2006) (“[I]t should be clear that whatever the semantics of the terms ‘conviction’ and ‘sentence,’ court-ordered dispositions of supervision are properly counted in the computation of criminal history under U.S.S.G. § 4A1.2.”). The Guidelines state that, when determining a range, “[d]iversion from the judicial process without a finding of guilt (*e.g., deferred prosecution*) is not counted. A diversionary disposition resulting from a finding or admission of guilt . . . is counted as a sentence . . . even if a conviction is not formally entered.” U.S. SENTENCING GUIDELINES MANUAL § 4A1.2(f) (U.S. SENTENCING COMM’N 2004) (emphasis added).

386. *See, e.g.*, Jeremy W. Hochberg, Note, *Should Juvenile Adjudications Count as Prior Convictions for Apprendi Purposes?*, 45 WM. & MARY L. REV. 1159, 1159 (2004) (evaluating a circuit split that existed as of 2004 in the context of sentencing determinations).

387. *See, e.g.*, *United States v. Saena Tech Corp.*, 140 F. Supp. 3d 11, 46 (D.D.C. 2015) (assessing in detail the interaction of deferred prosecution agreements with the Speedy Trial Act).

collateral consequences. The most effective rule to accomplish these goals would be to separate challenges to adjudication from challenges to investigatory procedures, maintaining the *Heck* bar for the former but eliminating it for the latter.