When the Heck Does This Claim Accrue? Heck v. Humphrey's Footnote Seven and § 1983 Damages Suits for Illegal Search and Seizure

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When the Heck Does This Claim Accrue?  
*Heck v. Humphrey*'s Footnote Seven and § 1983 Damages Suits for Illegal Search and Seizure

John Stanfield Buford*

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I. Introduction

Police illegally search your house and uncover evidence against you. Perhaps
the trial judge suppresses this evidence; perhaps the judge does not
and you must seek appellate review. Regardless of the path, ultimately you
successfully defend yourself against the criminal charges. You seek damages
under 42 U.S.C. § 19831 from the police for their unconstitutional conduct.
The applicable Supreme Court case law says that no § 1983 cause of action
lies if success on that claim "would necessarily imply the invalidity of [the
plaintiff's] conviction or sentence."2 As a counterexample, however, the
Court discusses your specific complaint, illegal search, in a footnote:

For example, a suit for damages attributable to an allegedly unreasonable
search may lie even if the challenged search produced evidence that was
introduced in a state criminal trial resulting in the § 1983 plaintiff's still-
outstanding conviction. Because of doctrines like independent source and

    part:

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

    Id.

inevitable discovery, and especially harmless error, such a § 1983 action, even if successful, would not necessarily imply that the plaintiff's conviction was unlawful.3

Is your claim timely? It depends on which U.S. Circuit Court of Appeals governs your claim: some courts say that all illegal search claims accrue at the time of the search because no illegal search claim, by definition, "necessarily implies" the invalidity of the conviction;4 others say that the district court must determine whether success on the illegal search claim would imply the invalidity of the conviction.5 Of course, by starting the clock sooner, the statute of limitations expires sooner in the first group of courts, making otherwise justifiable § 1983 damages unavailable to many of those plaintiffs.6

The history of § 1983 supports the availability of damages for victims of unconstitutional conduct. This famous statute, Section 1 of the Ku Klux Klan Act of 1871,7 grew out of the Reconstruction-era effort to enforce the Fourteenth Amendment.8 The Supreme Court has identified the following three

3. Id. at 487 n.7 (citations omitted) (emphasis in original).
4. See, e.g., Beck v. City of Muskogee Police Dep't, 195 F.3d 553, 559 n.4 (10th Cir. 1999) (adopting general exception approach under which illegal search claims accrue at time of search); Copus v. City of Edgerton, 151 F.3d 646, 648 (7th Cir. 1998) (same); Datz v. Kilgore, 51 F.3d 252, 253 n.1 (11th Cir. 1995) (same).
5. See, e.g., Harvey v. Waldron, 210 F.3d 1008, 1015-16 (9th Cir. 2000) (requiring either favorable termination or demonstration that claim will not imply invalidity of conviction before allowing § 1983 illegal search claim to accrue); Shamaizadeh v. Cunigan, 182 F.3d 391, 399 (6th Cir. 1999) (same); Woods v. Candela, 47 F.3d 545, 546 (2d Cir. 1995) (same).
6. See, e.g., Beck, 195 F.3d at 558 (ruling Heck never barred plaintiff's illegal search claim, making that claim now stale under statute of limitations); Booker v. Ward, 94 F.3d 1052, 1057 (7th Cir. 1996) (dismissing claim for illegal search and seizure of evidence, on which state appellate court based its reversal of plaintiff's conviction, due to plaintiff's failure to bring civil case within two-year statute of limitations); Franklin v. Summers, No. 93-2939, 1994 U.S. App. LEXIS 29997, at *3 (7th Cir. Oct. 24, 1994) (dismissing illegal search claim of incarcerated plaintiff as time-barred).
8. U.S. Const. amend. XIV, § 1 provides:
   All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
   Id. One impetus for the legislation to enforce the Fourteenth Amendment was a message that President Grant sent to Congress:
   A condition of affairs now exists in some States of the Union rendering life and property insecure and the carrying of the mails and the collection of the revenue dangerous. The proof that such a condition of affairs exists in some localities is now before the Senate. That the power to correct these evils is beyond the control
purposes of this legislation: to override certain state laws, to provide a remedy when state law is inadequate, and to provide a federal remedy when state law is practically unavailable even if theoretically adequate. In *Monroe v. Pape*, the Court ruled that a plaintiff could state a claim for damages under § 1983 against local officials. In *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, the Court overcame the state-based limitations in the scope of § 1983 by creating an analogous remedy against federal officials.

of State authorities I do not doubt; that the power of the Executive of the United States, acting within the limits of existing laws, is sufficient for present emergencies is not clear. Therefore, I urgently recommend such legislation as in the judgment of Congress shall effectually secure life, liberty, and property, and the enforcement of law in all parts of the United States.


11. See *Monroe v. Pape*, 365 U.S. 167, 187 (1961) (ruling that plaintiffs stated cause of action against police officers), overruled on other grounds by Monell v. Dep't of Soc. Servs., 436 U.S. 658 (1978). In *Monroe*, six children and their parents sued under § 1983, alleging that thirteen Chicago police officers conducted an illegal search and illegally arrested one of the plaintiffs. Id. at 169. The defendants moved to dismiss on the grounds that the plaintiffs stated no cause of action under § 1983 or the United States Constitution. Id. at 170. The Court thoroughly examined the legislative history of the statute and concluded that the phrase "under color of" law encompassed state and local officials. Id. at 171-87. Accordingly, the Court ruled that the complaint stated a cause of action against the police officers. Id. at 187. The Court then determined that the statute did not create liability on the part of municipal corporations such as the City of Chicago. Id. Justice Harlan, joined by Justice Stewart, concurred and argued that the Court's decisions in *United States v. Classic*, 313 U.S. 299 (1941), and *Screws v. United States*, 325 U.S. 91 (1945), automatically controlled the interpretation of the "under color" phrase. *Monroe*, 365 U.S. at 192 (Harlan, J., concurring). Justice Frankfurter dissented, examining the legislative history for himself and concluding that § 1983 provided a remedy only when state law barred redress in state courts. Id. at 237 (Frankfurter, J., dissenting).


13. See *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 389 (1971) (holding that federal agent who violates Fourth Amendment while acting under color of law is liable for damages). In *Bivens*, the plaintiff alleged that federal narcotics agents searched his house and arrested him without probable cause or a warrant. Id. The government argued that plaintiff's appropriate remedy lay under state law, but the Court rejected this view as "unduly restrictive." Id. at 391. The Court stated that the remedy available for a Fourth Amendment violation did not depend on any substantive state law: "the Fourth Amendment operates as a limitation upon the exercise of federal power regardless of whether the State in whose jurisdiction that power is exercised would prohibit or penalize the identical act if engaged in by a private citizen." Id. at 392. The Court rejected the government's argument that the Fourth Amendment served only as a limitation on federal defenses to state suits. Id. at 394. The Court stated that the Fourth Amendment and state privacy or trespass laws would sometimes conflict, meaning that the Fourth Amendment implies an independent cause of action. Id. at 395. The Court determined that damages were an appropriate remedy for a Fourth Amendment violation. Id. at 397. Justice Harlan concurred in the judgment, noting that the
For the purposes of this Note, Bivens actions and § 1983 actions are analytically identical.14

The Court considers compensation via damages to be an important goal of § 1983 actions.15 Although the Forty-Second Congress may not have specifically addressed damages, the Court has stated that Congress must have contemplated the availability of damages when framing the § 1983 remedy.16 The Court has identified deterrence as a secondary purpose of the statute, but one that operates best through the imposition of damages.17 As with common-
law torts, punitive damages may be available to § 1983 plaintiffs who suffer willful or malicious violations of their constitutional rights, although the award of punitive damages is not itself a right, but merely a "discretionary moral judgment" by the jury. Damages for violations of the Fourth Amendment are included in this compensatory scheme—after all, the claim in Monroe, the granddaddy of § 1983 damages actions, alleged that officers illegally searched the plaintiffs' home.

Because searches in violation of the Fourth Amendment invariably occur in the course of criminal investigations, many victims will face prosecution as a result of the illegal search. One issue concurrently facing victims contemplating civil redress is the statute of limitations. State personal injury laws provide the relevant statutes of limitations for § 1983 claims. The question of when these claims accrue becomes important because these limitations periods generally offer a short window for filing a civil claim—a window in which a potential § 1983 plaintiff may be incarcerated.

In Heckscher v. Humphrey, the Supreme Court considered when § 1983 claims generally accrue. The Heckscher Court held that a prisoner who seeks damages for government actions which, if unlawful, would invalidate his conviction or sentence can state no cause of action under § 1983 unless and until he demonstrates that his conviction has been otherwise invalidated. Thus, the § 1983

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18. See Smith v. Wade, 461 U.S. 30, 56 (1983) (holding punitive damages may be available in § 1983 cases involving "reckless or callous indifference to the federally protected rights of others"). For examples of cases meriting punitive damages, see Melear v. Spears, 862 F.2d 1177, 1187 (5th Cir. 1989) (punitive damages appropriate against intoxicated officer who held suspect at gunpoint during warrantless search of apartment), and Specht v. Jensen, 832 F.2d 1516, 1525 (10th Cir. 1987) (punitive damages appropriate against officer who, during early-morning illegal search, threatened to take plaintiff to jail and refused to allow her to call her attorney).


21. See Wilson v. Garcia, 471 U.S. 261, 265-66 (1985) (ruling that state statute of limitations for personal injury actions governs § 1983 claims); Bd. of Regents v. Tomanio, 446 U.S. 478, 484 (1980) ("In § 1983 actions . . . a state statute of limitations and the coordinate tolling rules are more than a technical obstacle to be circumvented if possible. In most cases, they are binding rules of law.").


24. See Heckscher v. Humphrey, 512 U.S. 477, 486-87 (1994) (requiring that plaintiffs demonstrate favorable termination in order to state claim for damages for actions whose illegality would imply invalidity of conviction). In Heckscher, the Court determined whether an incarcerated plaintiff could challenge his conviction via a damages suit under § 1983. Id. Heckscher sought damages for alleged unconstitutional conduct on the part of prosecutors and police officials. Id. at 479. The
claim does not accrue until the plaintiff first achieves a favorable termination of the criminal proceedings. In footnote seven of the opinion, the Court offered a § 1983 action for damages from an illegal search as an illustrative example of a claim that might not imply the invalidity of a conviction. The U.S. Circuit Courts of Appeals are badly divided over the proper interpretation of this footnote, with one group holding that the footnote allows immediate accrual of all illegal search claims, and the opposing group requiring a case-by-case examination of the plaintiff’s claim before allowing accrual. This Note suggests that the Supreme Court should resolve this circuit split by

Court began its analysis by identifying the conflict between § 1983 and the federal habeas corpus statute, 28 U.S.C. § 2254, with the latter containing a state remedies exhaustion requirement. The Court noted its holding in Preiser v. Rodriguez, 411 U.S. 475 (1973), that Congress established habeas corpus as the exclusive remedy for state prisoners challenging the fact or length of their confinement, but determined that Preiser's holding directly addressed only § 1983 suits seeking injunctive relief. Heck, 512 U.S. at 481-82. Looking to common law for guidance, the Court determined that an action for malicious prosecution was the closest common-law analogue to Heck's suit. Id. at 484. The Court then discussed the element of malicious prosecution requiring termination of the underlying criminal proceeding in favor of the civil plaintiff (favorable termination). Id. The Court determined that this element was appropriate for § 1983 damages suits by prisoners because favorable termination would ensure that prisoners could not collaterally attack their convictions via civil actions. Id. at 484-86. Accordingly, the Court held that such § 1983 plaintiffs 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." Id. at 486-87. The Court directed district courts hearing such cases to determine "whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence." Id. at 487. Absent favorable termination, such a suit could not go forward, unless a plaintiff could demonstrate that a successful civil action would not effectively invalidate his conviction. Id.

Justice Thomas concurred, blaming the collision between the habeas statute and § 1983 on the Court's expansive application of both statutes. Id. at 491 (Thomas, J., concurring). Justice Souter, joined by Justices Blackmun, Stevens, and O'Connor, concurred in the judgment but disagreed with the court's malicious-prosecution analysis. Id. at 492 (Souter, J., concurring in judgment). Justice Souter questioned why the Court chose to incorporate the favorable-termination element of malicious prosecution while leaving behind other elements, such as probable cause. Id. at 494 (Souter, J., concurring in judgment). Justice Souter instead analyzed the case under Preiser to determine that Heck's suit could not proceed. Id. at 497-98 (Souter, J., concurring in judgment).

25. Id. at 486-87.

26. See id. at 487 n.7 (stating that illegal search claim would not necessarily imply invalidity of conviction).

27. See, e.g., Beck v. City of Muskogee Police Dep't, 195 F.3d 553, 559 n.4 (10th Cir. 1999) (adopting general exception approach); Copus v. City of Edgerton, 151 F.3d 646, 648 (7th Cir. 1998) (same); Datz v. Kilgore, 51 F.3d 252, 253 n.1 (11th Cir. 1995) (same); see infra Part IV.B (discussing general exception approach).

28. See, e.g., Harvey v. Waldron, 210 F.3d 1008, 1015-16 (9th Cir. 2000) (requiring favorable termination or demonstration that claim will not imply invalidity of conviction); Shamaezadeh v. Cunigan, 182 F.3d 391, 399 (6th Cir. 1999) (same); Woods v. Candela, 47 F.3d 545, 546 (2d Cir. 1995) (same); see infra Part IV.C (discussing case-by-case approach).
affirming the approach of the latter set of courts and holding that footnote seven still requires that courts examine a § 1983 illegal search claim on a case-by-case basis to determine the effect of that claim on the validity of the underlying conviction.

Part II of this Note emphasizes the importance of this issue by outlining the significant remedial role of damages in the context of Fourth Amendment violations, comparing and contrasting the damages remedy with the exclusionary rule. Part III of this Note analyzes the Heck opinion to discern the principles courts should use in interpreting footnote seven. Part IV of this Note examines decisions from both sides of the circuit split. Part IV then concludes that the courts requiring case-by-case determinations of accrual more directly conform to the Heck opinion.

II. The Necessity of a Damages Remedy for Fourth Amendment Violations

Judges and scholars have devoted much ink to the debate about which remedies are appropriate for Fourth Amendment violations. As seen in cases like Monroe and Bivens, one possible remedy is the provision of damages. Another traditional option is the exclusionary rule, by which courts refuse to admit evidence that officers seize illegally. The Court has long enforced the exclusionary rule against federal officials and extended the scope of the rule to encompass state prosecutions. The Court has made clear that the exclusionary rule is judicially created, rather than constitutionally mandated. The

29. See infra Part II (discussing advantages and disadvantages of exclusionary rule and damages).

30. See infra Part III (discussing opinions of Seventh Circuit, Supreme Court majority, and Supreme Court concurrence in Heck).

31. See infra Part IV (discussing circuit court cases interpreting footnote seven).


34. See Weeks v. United States, 232 U.S. 383, 398 (1914) (stating that introduction at trial of evidence that federal officers illegally seized was prejudicial error and violated constitutional rights of accused); Boyd v. United States, 116 U.S. 616, 630 (1886) (stating that Fourth Amendment protected "indefeasible right of personal security, personal liberty and private property, where that right has never been forfeited by his conviction of some public offence").

35. See Mapp, 367 U.S. at 657 (stating that introduction of illegally-seized evidence in state criminal trial offended Fourth Amendment).

36. See United States v. Calandra, 414 U.S. 338, 348 (1974) ("[T]he rule is a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved.").
exclusionary rule is thus a quasi-constitutional twist on the common-law remedy of restitution.\textsuperscript{37} Phrased in restitutionary language, the government must forfeit its unjustly obtained evidentiary prize in the underlying criminal proceeding.\textsuperscript{38}

There is no shortage of criticism of this evidentiary rule, which Chief Justice Burger once called "conceptually sterile and practically ineffective in accomplishing its stated objective."\textsuperscript{39} The most fervent critics of the exclusionary rule, such as Professor Akhil Amar, seek to completely replace the rule with a civil damages remedy\textsuperscript{40} or perhaps administratively-awarded damages.\textsuperscript{41} Professor Amar argues that the framers intended civil damages, rather than the exclusion of evidence, to be the remedy for a Fourth Amendment violation.\textsuperscript{42} Because officers suffer little or no personal loss from an adverse ruling at a suppression hearing, the deterrent effects of exclusion may be negligible at best.\textsuperscript{43} Exclusion is an all-or-nothing approach that disproportionately rewards the guiltiest defendants, those most likely to be convicted if the court admits the evidence, whereas damages are flexible.\textsuperscript{44} Furthermore, exclusion provides no remedy for the innocent victim of an illegal search that uncovers no evidence at all and therefore produces nothing for a court to exclude.

Defenders of the exclusionary rule characterize its oversimplicity as a virtue: it suffers from no problems of valuation; its penalty-free restitutionary remedy does not over deter legitimate police conduct.\textsuperscript{45} A damages remedy,

\textsuperscript{37} See Jeffrey Standen, The Exclusionary Rule and Damages: An Economic Comparison of Private Remedies for Unconstitutional Police Conduct, 2000 BYU L. REV. 1443, 1443 (identifying exclusionary rule as based on unjust enrichment).

\textsuperscript{38} See id. at 1444 (noting that consequence of exclusionary rule is that "prosecution . . . must proceed without the benefit of its ill-gotten gain"). In contrast, a damages remedy considers the victim’s loss, not the government’s gain. Id.


\textsuperscript{40} See Akhil Reed Amar, Fourth Amendment First Principles, 107 HARV. L. REV. 757, 759 (1994) (promoting role of civil juries and damages actions to regulate government conduct); id. at 812-16 (outlining proper role of compensatory, punitive, and presumed damages in remediying Fourth Amendment violations).

\textsuperscript{41} See Christopher Slobogin, Why Liberals Should Chuck the Exclusionary Rule, 1999 U. ILL. L. REV. 363, 405 (advocating establishment of administrative agency to assess Fourth Amendment claims).

\textsuperscript{42} See Amar, supra note 40, at 786 (stating that framers "clearly . . . presupposed" tort remedies).

\textsuperscript{43} See L. Timothy Perrin et al., If It's Broken, Fix It: Moving Beyond the Exclusionary Rule, 83 IOWA L. REV. 669, 734 (1998) (stating that primary conclusion from empirical study of police attitudes was "failure of the exclusionary rule to effectively deter police misconduct").

\textsuperscript{44} See Amar, supra note 40, at 798 ("Money is infinitely divisible; exclusion is clunky.").

\textsuperscript{45} See Jeffries, supra note 15, at 265 ("Nowhere is the fear of overdeterrence more plausible than in claims of illegal search and seizure."); William J. Stuntz, Warrants and Fourth
on the other hand, becomes difficult to value, particularly because the most likely injuries for the innocent plaintiff are emotional harms.\textsuperscript{46} Even with a reasonable civil claim, recovery of damages may be unlikely because juries will tend to believe police rather than a civil plaintiff potentially involved in criminal activity and because the officers themselves may be judgment-proof.\textsuperscript{47} Additionally, because police gain little personally from a "successful" and "clean" search, critics of damages allege that even an economically ideal amount of damages will overdeter police.\textsuperscript{48} Exclusion supporters further believe that a pure damages system with no exclusion remedy, allowing the government to pay damages in order to purchase the admission of illegally-obtained evidence, would taint the judicial system.\textsuperscript{49}

Because of the inherent problems with the exclusionary rule, especially the limitation of its remedy to those victims against whom the police actually recover evidence,\textsuperscript{50} I believe that some damages remedy is necessary to vindicate Fourth Amendment rights. Only damages adequately satisfy the concept of corrective justice embodied in the Constitution.\textsuperscript{51} To be sure, the current

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46. See Stuntz, \textit{supra} note 45, at 902 (examining difficulties in valuation).

47. See Perrin et al., \textit{supra} note 43, at 739-40 (stating that juries are likely to be unsympathetic to § 1983 plaintiffs and individual officers are unlikely to be able to pay judgment); Potter Stewart, \textit{The Road to Mapp v. Ohio and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search-and-Seizure Cases}, 83 COLUM. L. REV. 1365, 1387-88 (1983) (identifying practical difficulties with damages remedy). The judgment-proof nature of many officers is important because respondeat superior liability is unavailable under § 1983. Monell v. Dep't of Social Servs., 436 U.S. 658, 691 (1978).

48. See Jeffries, \textit{supra} note 15, at 267 ("This asymmetry in the availability of redress reinforces the incentives for government officers to protect themselves by doing less."); Stuntz, \textit{supra} note 45, at 903 (stating that potentially liable police "can simply choose to minimize searches and arrests, or at least to avoid them in all but clear cases").

49. See Tracey Maclin, \textit{When the Cure for the Fourth Amendment Is Worse Than the Disease}, 68 S. CAL. L. REV. 1, 69 (1994) (citing one attorney's description of goal of exclusionary rule as judicial integrity rather than regulation of police conduct).

50. See Jeffries, \textit{supra} note 15, at 284 ("There are many other reasons to search, including self-protection, destruction of contraband, maintenance of police authority, and simple harassment. A threat to suppress evidence that the police do not expect to find or intend to use is next to meaningless." (footnote omitted)).

51. See John C. Jeffries, Jr., \textit{Compensation for Constitutional Torts: Reflections on the Significance of Fault}, 88 MICH. L. REV. 82, 94 (1988) (noting that corrective justice is persuasive justification for awarding constitutional tort damages). Jeffries outlines the concept of corrective justice as follows:

\[ \text{Government wrongdoing that causes individual injury should be redressed by the award of damages . . . . The government has achieved a wrongful gain (some more effective or less costly implementation of government policy) by inflicting a wrongful loss. The award of damages from government to victim at once annuls the wrongful gain and rectifies the wrongful loss. The payment from wrongdoer to} \]
§ 1983 damages regime does not provide for recovery in all justifiable situations, due to obstacles like state sovereign immunity, municipal immunity from respondeat superior liability, and qualified immunity for law enforcement officers. I take no position on the question of how a damages regime should operate, be it civil or administrative, and I think that, for reasons of judicial integrity, courts should retain some form of the exclusionary rule. For the purpose of this Note, I simply submit that, no matter what form a damages remedy may take, courts should make damages as available as possible, but should do so while respecting competing judicial values such as consistency, finality, and federalism. One facet of this procedural operation is the basic question of when a constitutional damages claim accrues.

III. The Accrual of Damages Claims with Conviction Outstanding: Heck v. Humphrey

A. Background

In Heck v. Humphrey, the Supreme Court determined whether a prisoner may sue for damages under § 1983 for allegedly unconstitutional conduct relating to his conviction. An Indiana state court jury convicted Roy Heck victim retraces the moral relationship between them. To the extent possible, it undoes the wrong. The point is not merely that the loss is offset . . . , but that the loss is rectified by damages from the wrongdoer.

Id. (emphasis in original).

52. See Wilson v. Layne, 526 U.S. 603, 614 (1999) (stating that qualified immunity generally shields government officials performing discretionary functions from liability as long as their conduct "does not violate clearly established statutory or constitutional rights of which a reasonable person would have known" (quoting Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)); Will v. Mich. Dep’t of State Police, 491 U.S. 58, 67 (1989) (determining that Congress did not intend § 1983 to abolish state sovereign immunity); Monell v. Dep’t of Soc. Servs., 436 U.S. 658, 694 (1978) (holding municipality not liable for § 1983 damages unless it approved or adopted challenged custom or policy); Surell Brady, Arrests Without Prosecution and the Fourth Amendment, 59 MD. L. REV. 1, 72 (2000) (identifying immunity obstacles to § 1983 recovery); Jeffries, supra note 51, at 85-86 (stating that because some form of immunity usually is available for all government officials, "[o]nly in extreme or flagrant cases will damages likely be paid").

53. See Perrin et al., supra note 43, at 743-44 (proposing retention of exclusionary rule for evidence seized via willful or intentional police misconduct, with administrative damages remedy available for victims of reckless, negligent, or innocent police conduct); Alan Dalsass, Note, Options: An Alternative Perspective on Fourth Amendment Remedies, 50 RUTGERS L. REV. 2297, 2315-16 (1998) (advocating hybrid model incorporating damages and exclusion remedies); id. at 2299 ("While the exclusionary rule and liquidated damages are generally considered mutually exclusive, in actuality the application of one remedy method need not occur at the expense of the other.").

54. See Maclin, supra note 49, at 69 (offering judicial integrity as justification for exclusionary rule).

of the voluntary manslaughter of his wife. While serving his fifteen-year sentence, and while appealing his conviction, Heck filed suit in federal district court under § 1983. This suit, which named a prosecutor, an attorney, and a state police investigator as defendants, alleged misconduct during the criminal investigation, destruction of exculpatory evidence, and use of an illegal voice identification procedure at trial. Heck sought compensatory and punitive damages, but no injunctive relief, such as release from custody.

The district court dismissed the suit without prejudice on the grounds that the claim directly implicated the legality of Heck's conviction and confinement. While his civil appeal was pending, Heck's direct challenges to his conviction failed: The Indiana Supreme Court upheld his conviction, and a federal district court denied his first petition for a writ of habeas corpus due to unexhausted claims. The district court then denied a second habeas petition, and the Seventh Circuit affirmed.

B. Analysis Under Equitable Tolling: The Seventh Circuit

The Seventh Circuit affirmed the dismissal of Heck's § 1983 action. Chief Judge Richard Posner, writing for a unanimous three-judge panel, determined that Heck had failed to exhaust his state remedies against unlawful conviction. The court ruled that a prisoner seeking damages under § 1983 for allegedly unconstitutional conduct relating to his conviction is essentially challenging the legality of his conviction, regardless of whether he seeks damages or injunctive release from confinement. Moreover, the court concluded that such a suit is effectively a petition for a writ of habeas corpus, which requires state exhaustion.

58. Id. at 479.
59. Id.
60. Id.
63. See Heck v. Humphrey, 997 F.2d 355, 359 (7th Cir. 1993) (ruling that district court properly dismissed suit rather than staying it).
64. Id. at 357.
65. Id.
66. See id. ("[T]he plaintiff must exhaust his state remedies, on pain of dismissal if he fails to do so." (citing Viens v. Daniels, 871 F.2d 1328, 1332 (7th Cir. 1989); Scruggs v. Moeller, 870 F.2d 376, 379 (7th Cir. 1989); Hanson v. Heckel, 791 F.2d 93 (7th Cir. 1986) (per curiam))); see also 28 U.S.C. § 2254(b) (1994) (prohibiting grant of writ of habeas corpus
The more difficult question before the court was whether to stay or dismiss the civil action. A dismissal would leave Heck vulnerable to a statute of limitations defense if he refiled after completion of his sentence. The court noted decisions of several other circuits staying similar suits rather than dismissing them, but ultimately disagreed with the conclusions reached by those courts. The Seventh Circuit believed that the other courts gave "inadequate weight to the policy of the statute of limitations, which is to bar stale suits." The court suggested that plaintiffs later attempting to overcome a statute of limitations defense could seek equitable tolling, whereby "a person is not required to sue within the statutory period if he cannot in the circumstances reasonably be expected to do so." The court’s rationale for preferring equitable tolling to a stay was that

[r]ather than giving the plaintiff an automatic extension of indefinite duration, no matter how much his carelessness or sloth may have contributed to the delay in the prosecution of his claim, the doctrine of equitable tolling gives the plaintiff just so much extra time as he needs, despite all due diligence on his part, to file his claim . . . . There must be diligence, and the diligence must continue up to the time of suit – you cannot be diligent for a year, and then wait another year to sue.

Although this approach was justifiable from an equitable perspective, it suffered from a major shortcoming from a legal perspective: Indiana had not established an equitable tolling doctrine applicable to this set of facts, and state statutes of limitations and tolling provisions apply to § 1983 actions. Consulting Supreme Court precedent, the court determined that Congress "intended that 'gaps in federal civil rights acts should be filled by state law,' but only ‘as long as that law is not inconsistent with federal law’ and does not "unless it appears that the applicant has exhausted the remedies available in the courts of the State").

67. Heck, 997 F.2d at 357.
68. See id. (noting that plaintiff’s imprisonment did not toll applicable two-year Indiana statute of limitations (citing IND. CODE §§ 34-1-2-2, 34-1-67-1(6) (1986); Owens v. Okure, 488 U.S. 235 (1989); Bailey v. Faulkner, 765 F.2d 102 (7th Cir. 1985))).
69. Id. (citing Jewell v. County of Nassau, 917 F.2d 738 (2d Cir. 1990) (per curiam); Young v. Kenny, 907 F.2d 874, 878 (9th Cir. 1990); Offet v. Solem, 823 F.2d 1236, 1238 n.2 (8th Cir. 1987); Richardson v. Fleming, 651 F.2d 366, 373 (5th Cir. 1981)).
70. Id.
71. Id. (quoting Cent. States, S.E. & S.W. Areas Pension Fund v. Slotky, 956 F.2d 1369, 1376 (7th Cir. 1992) (internal quotations omitted)).
72. Id. (citation omitted).
73. See id. at 358 (stating court’s opinion that federal tolling doctrine would apply if Indiana refused to apply state doctrine in circumstances of present case, while noting general applicability of state statutes of limitations and tolling doctrines in § 1983 actions (citing Hardin v. Straub, 490 U.S. 536 (1989); Bd. of Regents v. Tomanio, 446 U.S. 478 (1980))).
defeat section 1983's 'chief goals of compensation and deterrence.' Accordingly, the court affirmed the dismissal of Heck's complaint. Ironically, the Supreme Court resolved the circuit split that this Seventh Circuit decision created, but the Supreme Court wound up creating another.

C. Analysis Under Common-Law Principles: The Majority Opinion

The Supreme Court began its analysis by considering the conflict between § 1983 and habeas corpus as prisoner remedies. Justice Scalia, writing for the Court, first rejected the notion that Preiser v. Rodriguez, which required prisoners challenging the fact or length of their confinement to exhaust state remedies, or Wolff v. McDonnell, which barred injunctive relief...
under *Preiser* but allowed a damages claim to proceed, controlled the instant case.\(^79\) The Court then determined that the relevant inquiry was not exhaustion, but whether Heck's claim was cognizable under § 1983.\(^80\) Looking to common-law torts for a guiding analogy, the Court found malicious prosecution to be most analytically appropriate.\(^81\) The Court then discussed the specific element of malicious prosecution that requires a plaintiff to prove prior termination of the criminal proceeding in his favor.\(^82\) This element avoids inconsistent results and limits the opportunity for collateral attack on a conviction, which the Court found consistent with its own precedents.\(^83\)

Accordingly, the Court held as follows:

\[
\text{[I]n order to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a § 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus.} \quad \text{84}
\]

The Court directed a district court hearing such a § 1983 case to determine whether a judgment in favor of the plaintiff would imply that his conviction or sentence was invalid.\(^85\) If so, then the district court should dismiss the action unless the plaintiff satisfies the favorable-termination element.\(^86\) If a judgment in favor of the plaintiff would not imply that his conviction or

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\(^{79}\) See Heck v. Humphrey, 512 U.S. 477, 481 (1994) (determining that *Preiser* did not cover instant case); id. at 482 (determining that *Wolff* did not cover instant case).

\(^{80}\) Id. at 483.

\(^{81}\) See id. at 484 (stating that malicious prosecution is closest analogue because it "permits damages for confinement imposed pursuant to legal process").

\(^{82}\) Id. at 484 (citing Carpenter v. Nutter, 59 P. 301 (1899); W. KEETON ET AL., PROSSER AND KEETON ON LAW OF TORTS 874 (5th ed. 1984)).

\(^{83}\) See id. at 484-85 ("This Court has long expressed similar concerns for finality and consistency and has generally declined to expand opportunities for collateral attack . . . ." (citations omitted)).

\(^{84}\) Id. at 486-87 (footnote omitted).

\(^{85}\) Id. at 487.

\(^{86}\) Id.
invalid, however, the Court would allow such an action to proceed. By holding that a § 1983 action does not even accrue until the favorable-termination element is satisfied, the Court avoided the pitfalls of the Seventh Circuit’s equitable tolling approach.

D. Analysis Under Preiser v. Rodriguez: Justice Souter’s Concurrence

Although the Supreme Court unanimously affirmed the dismissal of Heck’s suit, four Justices departed from Justice Scalia’s analysis. Justice Souter concurred in the judgment but disagreed with the majority’s reliance on common-law principles. He criticized the selective incorporation of one isolated element of malicious prosecution, pointing out that incorporating its other elements, such as the absence of probable cause, would severely limit a § 1983 plaintiff’s remedy for a constitutional tort. Additionally, Justice Souter saw no reason why malicious prosecution provides a closer common-law analogy than abuse of process, which also allows for damages for confinement but which does not contain a favorable-termination requirement. He noted that in malicious prosecution cases, courts historically disallowed the type of damages sought by Heck because a conviction constituted irrefutable evidence of probable cause at common law.

87. Id.
88. Compare id. at 489 ("Under our analysis the statute of limitations poses no difficulty while the state challenges are being pursued, since the § 1983 claim has not yet arisen.") with Heck v. Humphrey, 997 F.2d 355, 358 (7th Cir. 1993) (ruling equitable tolling necessary to avoid statute of limitations bar to prisoner suit filed after completion of sentence).
89. See Heck v. Humphrey, 512 U.S. 477, 491-503 (1994) (Souter, J., concurring in judgment); infra notes 90-99 and accompanying text (discussing Heck). Justice Thomas, a member of the majority, also concurred briefly. See id. at 490-91 (Thomas, J., concurring) (blaming Court’s expansion of both § 1983 and habeas corpus for creating conflicts necessitating resolution).
90. See id. at 492 (Souter, J., concurring in judgment) ("W)e have consistently refused to allow common-law analogies to displace statutory analysis, declining to import even well-settled common-law rules into § 1983 ‘if [the statute’s] history or purpose counsel against applying [such rules] in § 1983 actions.’” (quoting Wyatt v. Cole, 504 U.S. 158, 164 (1992)) (citations omitted) (second and third alterations in original)).
91. See id. at 494 (Souter, J., concurring in judgment) (stating that police or prosecutor with probable cause could defeat claim even of plaintiff whose conviction appellate court overturned as unconstitutional).
92. Id. at 495 (Souter, J., concurring in judgment). In a footnote, the majority responded to the abuse of process analogy: "Cognizable injury for abuse of process is limited to the harm caused by the misuse of process, and does not include harm (such as conviction and confinement) resulting from that process’s being carried through to its lawful conclusion." Id. at 486 n.5. Justice Souter responded in turn that because neither common-law tort exactly matches a § 1983 claim for damages for unlawful confinement or conviction, some cases may arise in which abuse of process provides a closer analogy than malicious prosecution. Id. at 495 n.2 (Souter, J., concurring in judgment).
93. Id. at 495-96 (Souter, J., concurring in judgment).
Justice Souter preferred to analyze the case under Preiser, which subordinated the breadth of § 1983 to the specificity of the federal habeas corpus statute. Although Preiser considered injunctive relief, Justice Souter saw no reason why Preiser's holding should not extend to a damages claim for unlawful conviction or confinement. Under his Preiser analysis, Justice Souter concluded that "the statutory scheme must be read as precluding such [collateral] attacks" via § 1983.

Despite the difference in analysis, Justice Souter ultimately agreed with imposing the favorable-termination requirement on state prisoners as a means of encouraging habeas petitions before seeking damages. However, in a view that now commands a majority of the Court, he refused to apply the favorable-termination requirement to § 1983 plaintiffs who were not incarcerated at the time of the civil action, such as those fined, those who served relatively short sentences, or those who faultlessly failed to discover a constitutional violation until after completing a sentence. The main effect of Justice Souter's concurrence was "not [to] cast doubt on the ability of an individual unaffected by the habeas statute to take advantage of the broad reach of § 1983." Despite some analytical appeal in the malicious prosecution context, however, the concurrence provides no answer to the illegal search question because habeas corpus is not an available vehicle to redress Fourth Amendment violations.

94. See id. at 497 (Souter, J., concurring in judgment) ("We are not, however, in any such strait, for our enquiry in this case may follow the interpretive methodology employed in [Preiser] . . . ." (citations omitted)).

95. See id. at 498 (Souter, J., concurring in judgment) ("[M]ounting damages against the defendant-officials for unlawful confinement . . . would, practically, compel the State to release the prisoner.").

96. Id. (Souter, J., concurring in judgment).

97. Id. (Souter, J., concurring in judgment); see id. at 499 (Souter, J., concurring in judgment) ("It may be that the Court's analysis takes it no further than I would go, and that any objection I may have to the Court's opinion is to style, not substance.").

98. See id. at 500 (Souter, J., concurring in judgment) ("[T]he result would be to deny any federal forum for claiming a deprivation of federal rights to those who cannot first obtain a favorable state ruling . . . [because] individuals not 'in custody' cannot invoke federal habeas jurisdiction . . . ."). Five Justices have now explicitly supported Justice Souter's refusal to apply the favorable-termination requirement to § 1983 plaintiffs who are no longer incarcerated, with Justice Ginsburg, a member of the Heck majority, now endorsing Justice Souter's view. See Spencer v. Kemna, 523 U.S. 1, 18-21 (1998) (Souter, J., concurring) (joined by O'Connor, Ginsburg, and Breyer, J.J.) (rejecting plaintiff's argument that Heck would bar relief without favorable termination and therefore that habeas claim could not be moot); id. at 21-22 (Ginsburg, J., concurring) (same); id. at 25 n.8 (Stevens, J., dissenting) (agreeing with Justice Souter's rationale).


100. See Stone v. Powell, 428 U.S. 465, 482 (1976) (stating that Constitution does not require availability of habeas to remedy introduction of illegally-seized evidence as long as criminal defendant has adequate opportunity to argue for exclusion in state proceedings).
IV. Footnote Seven and § 1983 Damages for Illegal Search and Seizure

The Court's ruling in Heck denied the accrual of a § 1983 claim for damages that would imply the invalidity of the plaintiff's conviction or sentence. In footnote seven of its opinion, the Court provided an example of a claim that might not imply the invalidity of the underlying conviction or sentence and that, consequently, would not require favorable termination:

For example, a suit for damages attributable to an allegedly unreasonable search may lie even if the challenged search produced evidence that was introduced in a state criminal trial resulting in the § 1983 plaintiff's still-outstanding conviction. Because of doctrines like independent source and inevitable discovery, and especially harmless error, such a § 1983 action, even if successful, would not necessarily imply that the plaintiff's conviction was unlawful. In order to recover compensatory damages, however, the § 1983 plaintiff must prove not only that the search was unlawful, but that it caused him actual, compensable injury, which, we hold today, does not encompass the "injury" of being convicted and imprisoned (until his conviction has been overturned).

Although useful as an illustration, the Court's example ultimately spawned a marked split among the U.S. Circuit Courts of Appeals. On one hand, the Seventh, Eighth, Tenth, and Eleventh Circuits have held that footnote

102. Id. at 487 n.7 (citations omitted) (emphasis in original).
103. See Copus v. City of Edgerton, 151 F.3d 646, 648 (7th Cir. 1998) (advocating general exception approach).
105. See Beck v. City of Muskogee Police Dep't, 195 F.3d 553, 559 n.4 (10th Cir. 1999) (advocating general exception approach).
106. See Datz v. Kilgore, 51 F.3d 252, 253 n.1 (11th Cir. 1995) (per curiam) (adopting general exception approach). Datz sued police officers for damages, alleging an illegal search despite the state criminal trial court's determination that either Datz consented to the search in question or the police officers had probable cause to conduct the search. Id. at 253. The court's opinion granted Heck only a passing footnote in concluding that illegal search claims always could proceed: "Heck v. Humphrey is no bar to Datz' civil action because, even if the pertinent search did violate the Federal Constitution, Datz' conviction might still be valid considering such doctrines as inevitable discovery, independent source, and harmless error." Id. at 253 n.1 (citation omitted). No Eleventh Circuit appellate cases challenge Datz, although one magistrate judge has departed from the general exception. See Duncan v. Smith, No. 97-0129-P-S, 1997 U.S. Dist. LEXIS 9756, at *5 (S.D. Ala. Apr. 7, 1997) (Steele, Mag. J.) (determining that plaintiff's § 1983 Fourth Amendment claims implicated outstanding conviction); Day v. Keaney, No. 96-0156-CB-S, 1996 U.S. Dist. LEXIS 6082, at *12 (S.D. Ala. Apr. 3, 1996) (Steele, Mag. J.) (determining that no evidence beyond that which plaintiff challenged in § 1983 action supported plaintiff's conviction).
seven exempts illegal search and seizure damages claims from Heck's favorable-termination requirement. Conversely, the Second, Sixth, and Ninth Circuits have held that no such exception exists and that these types of § 1983 claims do not accrue unless success in the civil action would not undermine the validity of the criminal conviction. The Fifth Circuit appears to side with the Second, Sixth, and Ninth Circuits, but the Fourth Circuit leans toward a modified interpretation of the general exception. The Third Circuit has reached inconsistent results on this question among its district courts, and even among different chambers in the Eastern District of Pennsylvania.

110. Courts also consistently have applied Heck to Bivens actions. See Williams v. Hill, 74 F.3d 1339, 1340 (D.C. Cir. 1996) ("The rationale of Heck applies equally to claims against federal officials in Bivens actions.").
111. See Salts v. Moore, 107 F. Supp. 2d 732, 737 (N.D. Miss. 2000) (undertaking individualized determination), Mackey v. Dickson, 47 F.3d 744, 746 (5th Cir. 1995) (deciding record was insufficient to determine whether civil suit would imply invalidity of potential conviction).
112. See Brooks v. City of Winston-Salem, 85 F.3d 178, 183 (4th Cir. 1996) (reading Heck as not altering general rule that warrantless arrest claim accrues at time of arrest).
113. The Third Circuit itself has not applied footnote seven in this context. See Montgomery v. De Simone, 159 F.3d 120, 126 n.5 (3d Cir. 1998) (stating that Heck did not contemplate claims of false arrest and false imprisonment).
114. Compare Donahue v. Gavin, No. 98-1602, 1999 U.S. Dist. LEXIS 2760, at *17 (E.D. Pa. Mar. 12, 1999) (stating that plaintiff can bring Fourth Amendment claim immediately) with Dunyan v. Paoloca, No. 91-2095, 1998 U.S. Dist. LEXIS 9892, at *9 (E.D. Pa. July 7, 1998) (requiring that plaintiff show favorable termination before civil claim can proceed). One Eastern District of Pennsylvania judge plainly denied the general exception rationale: "The Supreme Court in Heck did not categorically exempt unreasonable search claims from the invalidation requirement. The Court noted that such a claim 'may lie' and posited circumstances in which the success of such a claim would not necessarily impugn a plaintiff's conviction." Shelton v. Macey, 883 F. Supp. 1047, 1050 (E.D. Pa. 1995). That district judge did not believe the Heck opinion left any room for doubt, calling its mandate to district courts "exact and unequivocal." Id. Some other Third Circuit district court decisions follow the individualized approach. See Dunyan, 1998 U.S. Dist. LEXIS 9892, at *8-*9 (concluding plaintiff's claims, including unlawful search, to be not cognizable because each was "closely connected with his arrest, trial, and conviction"). In contrast, other Third Circuit district court decisions have adopted the general exception approach. One court explicitly adopted the Seventh Circuit's precedents: "Like the Seventh Circuit, I read [footnote seven's] language to hold that a claim based on an unlawful search or seizure may be brought immediately, since a violation of the Fourth Amendment does not necessarily impugn the validity of a conviction." Donahue, 1999 U.S. Dist. LEXIS 2760, at *17 (citing Gonzalez v. Entress, 133 F.3d 551, 553 (7th Cir. 1998); Simpson v. Rowan, 73 F.3d 134, 136 (7th Cir. 1995); Datz v. Kilgore, 51 F.3d 252, 253 n.1 (11th Cir. 1995)); see also Donahue, 1999 U.S. Dist LEXIS 2760, at *18-*19 (stating that claim for illegal search and seizure accrues
Neither the First and District of Columbia Circuits nor their district courts have meaningfully addressed the question. The Supreme Court declined to reverse at least two decisions that support the individualized approach in the context of illegal search claims, but the Court also denied certiorari to a case that applied the general exception approach to an analogous false arrest claim.

A. Rome and Avignon: The Footnote Seven Schism


115. See Scott v. Wellesley Police Dep't, No. 98-1280, 1998 U.S. App. LEXIS 26092, at *2-*3 (1st Cir. Sept. 24, 1998) (declining to discuss application of Heck to plaintiff's claims). The court acknowledged but did not address Heck, instead jumping to the merits to affirm the trial court's dismissal of plaintiff's illegal search and seizure § 1983 claims: "to the extent they are not [already] barred under Heck v. Humphrey, plaintiff's claims each fail on the merits." Id. at *2; see also Johnson v. D.C. Metro. Police Dep't, No. 97-0094, 1999 U.S. Dist. LEXIS 18857, at *1-*2 (D.D.C. Nov. 30, 1999) (stating that court previously considered and rejected defense that plaintiff's illegal search claim was Heck-barred, but not stating whether court based that decision on general exception or individualized approach); Alcott v. Baars, 896 F. Supp. 1, 7 (D.D.C. 1995) (ruling that plaintiff's claims Heck-barred except illegal search claim against single defendant whose actions were unrelated to those of all other defendants).

116. I will use the terms "case-by-case determination" and "individualized approach" interchangeably to describe the approach of the Second, Fifth, Sixth, and Ninth Circuits.


118. From 1378 to 1431, the Catholic Church divided into competing pro-French and pro-Italian factions, with dueling popes holding court at Avignon and Rome, plus a third faction's brief rule from Pisa from 1409 to 1415. See BARBARA TUCHMAN, A DISTANT MIRROR: THE CALAMITOUS 14TH CENTURY 320-339 (1978) (outlining origins of papal schism). Among many unfortunate spiritual consequences, the schism resulted in each pope excommunicating the followers of his rival. Id. See generally MARZI GH, THE THREE POPES (1969) (discussing rival papal factions and ultimate reunification).
and seizure claims and thus embrace a general exception read footnote seven quite literally: a hypothetical illegal search does not necessarily (or to an absolute certainty) imply the invalidity of a conviction; therefore, all such claims can proceed.119 The ironic (or, cynically, results-oriented) outcome of this approach is that because these courts allow immediate accrual of damages claims, they also wind up dismissing otherwise meritorious § 1983 claims on statute of limitations grounds at a much earlier date.120 Courts that oppose a generalized exception read footnote seven within the overall context of the Heck opinion: a claim should not proceed if the plaintiff can use the civil action as a vehicle for collateral attack against an outstanding conviction.

In order to analyze these competing approaches appropriately, one must first appreciate the following principles that the Heck opinion advances: consistency, finality, and federalism. The majority explicitly relied on the first two principles as justification for the favorable termination requirement, having "long expressed similar concerns for finality and consistency and [having] generally declined to expand opportunities for collateral attack."121 The Supreme Court’s overarching concern is collateral attack of criminal convictions via civil action.122

Furthermore, implicit in the Court’s concern that collateral attacks undermine consistency and finality is a healthy respect for federalism.123 The Court has evinced a particular deference to states in the area of criminal law, especially in the context of pending criminal proceedings.124 An example of this

119. See Copus v. City of Edgerton, 151 F.3d 646, 649 (7th Cir. 1998) ("[W]hat we need to know under Heck [is] that we cannot say with certainty that success on Copus’ § 1983 claim ‘necessarily’ would impugn the validity of his conviction.”).

120. See, e.g., Beck v. City of Muskogee Police Dep’t, 195 F.3d 553, 558 (10th Cir. 1999) (ruling Heck never barred plaintiff’s illegal search claim, making that claim stale under statute of limitations); Booker, 94 F.3d at 1057 (dismissing claim for illegal search and seizure of evidence, on which state appellate court based its reversal of plaintiff’s conviction, due to plaintiff’s failure to bring civil case within two-year statute of limitations); Franklin v. Summers, 1994 U.S. App. LEXIS 299997, at *3 (7th Cir. Oct. 24, 1994) (dismissing illegal search claim of incarcerated plaintiff as time-barred).


122. See id. at 486 ("[T]he hoary principle that civil tort actions are not appropriate vehicles for challenging the validity of outstanding criminal judgments applies to § 1983 damages actions that necessarily require the plaintiff to prove the unlawfulness of his conviction or confinement . . . .").

123. Of course, federalism is only a relevant concern in § 1983 actions, not Bivens actions. See Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 397 (1971) (ruling that plaintiff was entitled to claim damages from federal agents who violated his Fourth Amendment rights).

124. See Younger v. Harris, 401 U.S. 37, 41 (1971) (noting "national policy forbidding federal courts to stay or enjoin pending state court proceedings except under special circumstances").
deference appears in *Younger v. Harris*,125 in which the Court held that federal courts ordinarily could not enjoin a state prosecution even under what may be a facially unconstitutional law.126 The Court also has deferred to state courts when interpreting § 1983 claims,127 albeit to a lesser extent when dealing with damages.128 The Court's *Heck* requirement that a § 1983 plaintiff either show favorable termination or show that his suit does not imply the invalidity of his conviction is entirely consistent with the *Younger* notion of "Our Federalism."129

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126. *See Younger v. Harris*, 401 U.S. 37, 54 (1971) (refusing to enjoin state prosecution). In *Younger*, Harris faced charges of violating the California Criminal Syndicalism Act. *Id.* at 38. Harris sought an injunction in federal court against Younger, the district attorney, to prevent the prosecution on the grounds that the law suppressed Harris's free speech and free press rights. *Id.* at 39. The federal district court found that it possessed jurisdiction and granted the injunction, ruling that the state law was void for vagueness. *Id.* at 40. Examining precedent, the Court stated that plaintiffs seeking to enjoin state prosecutions must show not only irreparable injury, the general standard for injunctions, but also must show that the irreparable injury is "both great and immediate," beyond the mere expense of defending the criminal charges. *Id.* at 46. The Court noted that Harris would have an adequate opportunity to raise his constitutional claims during his criminal defense, and that Harris suggested no bad faith on the part of the prosecutor. *Id.* at 49. The Court stated that the "chilling effect" that Harris claimed was insufficient to justify federal interference in the execution of state laws via a facial challenge to a statute. *Id.* at 51. The Court held that "the possible unconstitutionality of a statute 'on its face' does not in itself justify an injunction against good-faith attempts to enforce it, and . . . Harris has failed to make any showing of bad faith, harassment, or any other unusual circumstance that would call for equitable relief." *Id.* at 54. Justice Brennan, joined by Justices White and Marshall, concurred in the result, noting that the other appellees, who did not face prosecution, had no live controversy against the state of California. *Id.* at 57-58 (Brennan, J., concurring). Justice Douglas dissented, arguing that federal intervention was permissible "where for any reason the state statute being enforced is unconstitutional on its face." *Id.* at 59 (Douglas, J., dissenting).
128. *See Deakins v. Monaghan*, 484 U.S. 193, 202 (1988) ("[E]ven if the *Younger* doctrine requires abstention here, the District Court has no discretion to dismiss rather than to stay claims for monetary relief that cannot be redressed in the state proceeding.")
129. *Younger*, 401 U.S. at 44. The *Younger* Court described this principle as follows: [T]he notion of "comity," that is, a proper respect for state functions, [is] a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways. This, perhaps for lack of a better and clearer way to describe it, is referred to by many as "Our Federalism," and one familiar with the profound debates that ushered our Federal Constitution into existence is bound to respect those who remain loyal to the ideals and dreams of "Our Federalism." The concept does not mean blind deference to "States' Rights" any more than it means centralization of control over every important issue in our National Government and its courts . . . . What the concept does represent is a system in which there is sensitivity to the legitimate interests of both State and National Governments, and
Despite the limitations that these structural concerns impose, however, the Heck opinion does have some advantages for the § 1983 plaintiff. By initially denying accrual to a claim that would imply the invalidity of the plaintiff’s conviction, the Court allows the plaintiff to focus properly on contesting the criminal charges at trial or on appeal—in other words, securing his freedom before securing his expenses.\(^{130}\) Assuming that this opportunity makes the litigant at least marginally more likely to gain some form of favorable termination, the § 1983 plaintiff then may point to the favorable decision on the illegality of the government action,\(^{131}\) which often leaves solely immunity issues for the parties to litigate.\(^{132}\) Of course, this situation presents a double-edged sword, as an unfavorable state ruling on suppression also could have a preclusive effect.\(^{133}\) Although a challenge via habeas corpus, which does not give preclusive effect to state court decisions,\(^{134}\) could rescue the § 1983 claim, habeas usually is not available as a remedy to Fourth Amendment claimants.\(^{135}\) In sum, at least on its face, Heck gives an incarcerated or

in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States.

\(\text{Id.}\)

\(^{130}\) See Shamaeizadeh v. Cunigan, 182 F.3d 391, 399 (6th Cir. 1999) (stating that to force § 1983 plaintiff to contest civil and criminal claims simultaneously would "misdirect" criminal defendants).


\(^{132}\) See Heck v. Humphrey, 512 U.S. 477, 480 n.2 (1994) (noting state law determines res judicata effect of state court decisions in § 1983 actions (citation omitted)). But see id. at 488 ("While we have no occasion to rule on the matter at this time, it is at least plain that preclusion will not necessarily be an automatic, or even a permissible, effect."); Woods v. Candela, 921 F. Supp. 1140, 1143-44 (S.D.N.Y. 1996) (ruling collateral estoppel on issue of illegality of search to be inappropriate because state appellate court reversed plaintiff’s conviction on basis of stricter New York search and seizure protections rather than Fourth Amendment, which was basis for § 1983 claim).

\(^{133}\) See Simmons v. O’Brien, 77 F.3d 1093, 1095 (6th Cir. 1996) (holding issue preclusion barred plaintiff’s claims because they were argued and decided at state suppression hearing); cf. Datz v. Kilgore, 51 F.3d 252, 253 (11th Cir. 1995) (dismissing claim due to Rooker-Feldman doctrine, by which parties may not litigate "federal issues that are raised in state proceedings and [are] inextricably intertwined with the state court’s judgment" (internal quotations omitted)).

\(^{134}\) See Preiser v. Rodriguez, 411 U.S. 475, 497 (1973) ("[A] state prisoner . . . who has been denied relief in the state courts is not precluded from seeking habeas relief on the same claims in federal court.").

\(^{135}\) See Stone v. Powell, 428 U.S. 465, 482 (1976) ("[W]here the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, the Constitution does not
potentially incarcerated § 1983 plaintiff the incentive and ability to focus on his challenge of his conviction via direct appeal or via habeas corpus, when available, before proceeding in civil court. As we shall see, however, not all courts promote these values in the adjudication of footnote seven claims.

B. Courts Permitting Accrual of Damages Suits for Illegal Search and Seizure

1. Seventh Circuit: Rigid Reading of "Necessarily"

The Seventh Circuit’s prolific body of footnote seven appellate cases staunchly supports the general exception interpretation of footnote seven even beyond the search-and-seizure context.\(^{136}\) Copus v. City of Edgerton\(^{137}\) is an illustrative search and seizure case.\(^{138}\) In Copus, the plaintiff, after a conviction based on federal weapons charges, sued the local police officers who located the weapons in a search while responding to a domestic disturbance at the plaintiff’s house.\(^{139}\) The court admitted the ambiguity of footnote seven:

At first blush this footnote in Heck is a bit unclear. On the one hand, it could mean that some Fourth Amendment claims brought under § 1983 would not necessarily be barred if the record revealed the tainted evidence used against the plaintiff at the criminal trial would have been admitted anyway (e.g., under a theory of inevitable discovery). In that case the district court pre-

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\(^{136}\) See, e.g., Blanck v. Hobson, No. 98-2993, 2000 U.S. App. LEXIS 11093, at *8 (7th Cir. Feb. 24, 2000) (stating that footnote seven exempts unreasonable search and seizure claim from Heck requirements); Copus v. City of Edgerton, 151 F.3d 646, 648 (7th Cir. 1998) (same); Franklin v. Summers, No. 93-2939, 1994 U.S. App. LEXIS 29997, at *2 (7th Cir. Oct. 24, 1994) (stating that Fourth Amendment claims do not impugn validity of conviction); cf. Gonzales v. Entress, 133 F.3d 551, 553 (7th Cir. 1998) (stating that footnote seven exempts unlawful arrest claim); Antonelli v. Foster, 104 F.3d 899, 901 (7th Cir. 1997) (stating that footnote seven does not exempt unlawful post-arrest detention claim, unlike unreasonable search and seizure claim); Booker v. Ward, 94 F.3d 1052, 1056 (7th Cir. 1996) (same); Simpson v. Rowan, 73 F.3d 134, 136 (7th Cir. 1996) (stating that footnote seven exempts unlawful arrest claim).

\(^{137}\) 151 F.3d 646 (7th Cir. 1998).

\(^{138}\) See Copus v. City of Edgerton, 151 F.3d 646, 647 (7th Cir. 1998) (describing Copus’s § 1983 claims). In Copus, police seized numerous illegal weapons in plaintiff’s residence during an investigation of a domestic disturbance. Id. at 647. After conviction on federal weapons charges, Copus sued the investigating police officers under § 1983 for an illegal search. Id. The district court dismissed Copus’s claim as necessarily calling into question his conviction. Id. at 647-48. The Seventh Circuit reversed, ruling that footnote seven generally exempts Fourth Amendment claims from Heck’s requirements. Id. at 648-49. The court affirmed the district court’s dismissal of Copus’s probation officer from the civil suit, ruling that parole and probation officers enjoyed absolute immunity for filing an arrest warrant as long as they do not gather the evidence on which the warrant is based. Id. at 649-50.

\(^{139}\) Id. at 647.
sumably would have to determine whether the record supported such a theory. On the other hand, the footnote might mean that Fourth Amendment claims for unlawful searches or arrests do not necessarily imply a conviction is invalid, so in all cases these claims can go forward.\footnote{140}

The court chose the latter reading.\footnote{141} The court then extracted hypothetical situations from the facts in the record to justify allowing Copus’s suit to proceed: the police may have discovered the weapons in the later search to which Copus consented, or in the search that Copus’s wife invited police to undertake, or the government also may have convicted Copus based on evidence seized legally in the days after the illegal search.\footnote{142} According to the court, nothing beyond this speculation was necessary: "For our purposes, it is enough that these possibilities exist, for they tell us what we need to know under \textit{Heck} – that we cannot say with certainty that success on Copus'[s] § 1983 claim 'necessarily' would impugn the validity of his conviction."\footnote{143}

The focus on the word "necessarily" forms the basis of the Seventh Circuit’s vast footnote seven jurisprudence. The Seventh Circuit would allow immediate accrual of a § 1983 illegal search action even when the record clearly demonstrated that the prosecutor possessed no other incriminating evidence aside from that which police illegally seized and a judge ultimately excluded.\footnote{144} The Seventh Circuit has referred to unlawful searches, warrantless arrests, and excessive force as "official misconduct unrelated to legal process,\footnote{145} a category of conduct in which "the unlawfulness of the plaintiff's being confined pursuant to legal process [is not] an implicit or explicit ingredient of [the plaintiff's] case.\footnote{146} Claims that fall within this category accrue at the time of the unconstitutional conduct because valid and invalid arrests

\begin{itemize}
\item \footnote{140} \textit{Id.} at 648.
\item \footnote{141} \textit{Id.}
\item \footnote{142} \textit{Id.} at 649.
\item \footnote{143} \textit{Id.}
\item \footnote{144} \textit{Cf.} Booker v. Ward, 94 F.3d 1052, 1056 (7th Cir. 1996) (stating that "a wrongful arrest claim, like a number of other Fourth Amendment claims, does not inevitably undermine a conviction"). The court went on to explain:

Although in this case the Illinois Appellate Court's conclusion that Booker's confession was the inadmissible product of an unlawful arrest ultimately resulted in the dismissal of murder charges against Booker, in many cases, the prosecutor will have other witnesses or other evidence that will support a retrial. As it happens, here the prosecutor did not have such other evidence to produce against Booker. But there is nothing necessary or inevitable about that result.

\textit{Id.}
\item \footnote{145} Antonelli v. Foster, 104 F.3d 899, 901 (7th Cir. 1997).
\item \footnote{146} \textit{Id. But see} Snodderly v. R.U.F.F. Drug Enforcement Task Force, 239 F.3d 892 (7th Cir. 2001) (stating that claims of false arrest pursuant to warrant can imply invalidity of conviction, unlike claims of false warrantless arrest).
\end{itemize}
do not directly correlate with valid and invalid convictions.\textsuperscript{147} The Seventh Circuit views \textit{Heck} as only applicable to cases directly involving unlawful confinement.\textsuperscript{148}

2. Tenth Circuit: Footnote Seven Merely Limits Damages

In \textit{Beck v. City of Muskogee Police Department},\textsuperscript{149} the Tenth Circuit adopted the general exception approach.\textsuperscript{150} The \textit{Beck} court determined that Beck's illegal search claim accrued at the time of the search, and thus the statute of limitations barred the plaintiff from proceeding on the claim.\textsuperscript{151} The court relied on Seventh Circuit opinions and ruled that \textit{Heck} did not affect the timing of such claims.\textsuperscript{152} The court took issue with the Sixth Circuit's initial

\textsuperscript{147} See \textit{Franklin v. Summers}, No. 93-2939, 1994 U.S. App. LEXIS 29997, at *2 (7th Cir. Oct. 24, 1994) ("An arrest without probable cause may be followed by a valid conviction; a proper arrest may lead to an invalid conviction. Thus it is not necessary to have a conviction set aside to pursue a claim under the fourth amendment." (citations omitted)). This conceptualization of false arrests is not shared universally. See \textit{Puerta v. United States}, No. 99-56172, 2001 WL 115021, at *1 (9th Cir. Feb. 5, 2001) (stating that \textit{Heck} barred plaintiff's false arrest claim because it implied invalidity of conviction); \textit{Covington v. City of New York}, 171 F.3d 117, 123 (2d Cir. 1999) ("[I]n a case where the only evidence for conviction was obtained pursuant to an arrest, recovery in a civil case based on false arrest would necessarily impugn any conviction resulting from the use of that evidence.").

\textsuperscript{148} See \textit{Antonelli}, 104 F.3d at 901 (stating that \textit{Heck} is inapplicable to cases of "official misconduct unrelated to legal process").

\textsuperscript{149} 195 F.3d 553 (10th Cir. 1999).

\textsuperscript{150} See \textit{Beck v. City of Muskogee Police Dep't}, 195 F.3d 553, 558 (10th Cir. 1999) (ruling that \textit{Heck} did not affect accrual of plaintiff's claims). In \textit{Beck}, prosecutors dismissed rape charges against the plaintiff, but based on the victim's testimony, the state revoked Beck's probation and accelerated his sentence on a previous conviction. \textit{Id.} at 556. While incarcerated, Beck filed a pro se § 1983 action against the police department. \textit{Id.} The court of appeals disagreed with the district court's determination that \textit{Heck} barred all of plaintiff's claims such that the statute of limitations had not yet begun to run. \textit{Id.} at 557. Citing footnote seven, the court ruled that Beck's false arrest and illegal search claims accrued at the time of the arrest. \textit{Id.} at 558. Accordingly, the statute of limitations on those claims had expired. \textit{Id.} at 559. The court remanded Beck's case to determine when another of Beck's claims, relating to the alleged destruction of exculpatory evidence, actually accrued. \textit{Id.} The court ruled that Beck's malicious prosecution claim related to the rape charge could proceed, but the malicious prosecution claims related to the probation revocation could not. \textit{Id.} at 560. The court finally ruled that Oklahoma's statute of limitations barred Beck's state-law claims. \textit{Id.} at 560-61.

\textsuperscript{151} See \textit{id.} at 558 (determining that statute of limitations barred illegal search and seizure and false arrest claims).

\textsuperscript{152} See \textit{id.} ("\textit{Heck} does not affect the time these claims arose because ultimate success on them would not necessarily question the validity of a conviction resulting from the rape charge or his probation revocation." (citing \textit{Simpson v. Rowan}, 73 F.3d 134, 136 (7th Cir. 1995))); \textit{id.} at 558 n.3 (disputing Sixth Circuit's interpretation of footnote seven (citing \textit{Gonzalez v. Entress}, 133 F.3d 551, 553-54 (7th Cir. 1998))). But see \textit{Brown v. Fettke}, 2001 WL 237302, at *2 (10th Cir. Mar. 9, 2001) (stating plaintiff's only possible constitutional injury was from police entry into his house, which would imply invalidity of conviction).
interpretation of footnote seven, namely, that the final sentence of the footnote\textsuperscript{3} undercuts earlier language in the footnote that suggested a general exception.\textsuperscript{154}

We do not agree that this statement undercuts the Court's earlier explanation in this same footnote that success on a claim for an unreasonable search would not necessarily imply the unlawfulness of the conviction. We read the Court's latter statement as only limiting the damages a plaintiff may recover in such a case – the damages cannot include those for being convicted and imprisoned, at least not until the conviction has been overturned.\textsuperscript{155}

The Tenth Circuit did allow Beck's other malicious-prosecution-style claims to proceed because they did not accrue under \textit{Heck} until Beck demonstrated favorable termination.\textsuperscript{156}

3. \textit{Eighth Circuit: Footnote Seven and the Fifth Amendment}

Courts have analyzed footnote seven to decide claims that fall outside of the Fourth Amendment. In \textit{Simmons v. O'Brien},\textsuperscript{157} the Eighth Circuit analogized footnote seven's discussion of search claims to a § 1983 suit in which Simmons sought damages for a coerced confession.\textsuperscript{158} Simmons alleged that

\begin{itemize}
  \item \textbf{153.} See \textit{Heck} v. \textit{Humphrey}, 512 U.S. 477, 487 n.7 (1994) ("In order to recover compensatory damages, however, the § 1983 plaintiff must prove not only that the search was unlawful, but that it caused him actual, compensable injury, which, we hold today, does not encompass the ‘injury’ of being convicted and imprisoned (until his conviction has been overturned)." (emphasis in original)).
  \item \textbf{154.} See \textit{id.} ("[S]uch a § 1983 action, even if successful, would not necessarily imply that the plaintiff’s conviction was unlawful.").
  \item \textbf{155.} \textit{Beck}, 195 F.3d at 558 n.3; see also \textit{Schilling} v. \textit{White}, 58 F.3d 1081, 1086 (6th Cir. 1995) (refusing to interpret footnote seven as creating general Fourth Amendment exception); \textit{infra} notes 184-93 and accompanying text (discussing \textit{Schilling}).
  \item \textbf{156.} See \textit{Beck}, 195 F.3d at 560 (ruling statute of limitations did not bar Beck’s claims related to rape charge).
  \item \textbf{157.} \textit{Schilling}, 77 F.3d 1093 (8th Cir. 1996).
  \item \textbf{158.} See \textit{Simmons} v. \textit{O'Brien}, 77 F.3d 1093, 1095 (8th Cir. 1996) (holding that Simmons's claim had accrued). In \textit{Simmons}, police arrested plaintiff for the murder of his girlfriend's mother and the theft of her car. \textit{Id.} at 1094. After his conviction, Simmons alleged that the police coerced his confession through use of excessive force and racial slurs:
    
    Specifically, Simmons contends that he was choked several times, kicked in the stomach, and punched in the face; that pins were continually stuck in his hands until he confessed; and that, when he would not confess, one officer threatened to "take this nigger somewhere in (sic) kill him." Further, Simmons maintains that the police repeatedly referred to him as "nigger" and that they told him they were trying to coerce his confession solely because he is an African-American.
    
    \textit{Id.} The trial court granted summary judgment on the grounds that \textit{Heck} barred the civil suit until Simmons won a habeas petition. \textit{Id.} The Eighth Circuit examined \textit{Heck}, including footnote seven, and determined that the "reasoning should be extended to Fifth Amendment claims
police illegally obtained his murder confession through the use of excessive force and racial intimidation.\textsuperscript{159} The trial court dismissed his civil suit as \textit{Heck}-barred unless and until Simmons later successfully won a habeas petition.\textsuperscript{160} On appeal, the Eighth Circuit examined footnote seven of \textit{Heck} and determined that harmless error analysis applied to Fifth Amendment confession challenges as well as to Fourth Amendment evidence challenges.\textsuperscript{161} On the grounds that even an involuntary confession possibly might be admitted at trial under these circumstances, the court ruled that Simmons’s claim had accrued because it would not necessarily imply the invalidity of his conviction.\textsuperscript{162} The Eighth Circuit utilized footnote seven to create a generalized exception for Fifth Amendment coercion claims, so it is no surprise that the court found an identical exception for seizure claims in later cases.\textsuperscript{163} 

challenging the voluntariness of confessions.” \textit{Id.} at 1095. The court quoted from \textit{Arizona v. Fulminante}, 499 U.S. 279, 310 (1991), in which the Supreme Court determined that harmless error analysis applied to Fifth Amendment coerced confession challenges in much the same way as Fourth Amendment violations. \textit{Simmons}, 77 F.3d at 1095. The Eighth Circuit then stated, in the fashion of a general exception to \textit{Heck}, that Simmons’s claims had accrued because harmless error analysis might apply to the confession. \textit{Id.} However, the court then determined that Simmons already litigated the excessive force and racial slurs claims in the state proceedings and thus was collaterally estopped from litigating those same claims if he received a "full and fair hearing" on those claims. \textit{Id.} at 1095-96. Examining the record, the court determined that issue preclusion did estop Simmons’s § 1983 action. \textit{Id.} at 1096-97.

\textsuperscript{159} See \textit{id.} at 1094 (outlining specific allegations against police).

\textsuperscript{160} \textit{id.}

\textsuperscript{161} \textit{See id.} at 1095 (stating that evidentiary impact of involuntary confession is indistinguishable from that of illegally seized evidence (quoting \textit{Arizona v. Fulminante}, 499 U.S. 279, 310 (1991))).

\textsuperscript{162} \textit{id.}

\textsuperscript{163} \textit{See Whitmore v. Harrington}, 204 F.3d 784, 784-85 (8th Cir. 2000) (determining successful “unlawful-investigative-stop” claim would not necessarily imply invalidity of unspecified conviction); \textit{Moore v. Sims}, 200 F.3d 1170, 1171-72 (8th Cir. 2000) (determining successful unlawful seizure claim would not necessarily imply invalidity of drug possession conviction). Admittedly, these two cases are “seizure” cases in the personal detention sense and not in the obtaining evidence sense with which this Note is primarily concerned. However, given the general thrust of these cases, there should be little doubt about how the Eighth Circuit would rule on a true illegal-search-and-seizure claim. Curiously, though, one district court ruled that \textit{Heck} barred a plaintiff’s unlawful search suit. \textit{See Rice v. Barnes}, 966 F. Supp. 890, 897 (W.D. Mo. 1997) (ruling that permitting claim alleging officer lied to judge to obtain search warrant “would constitute an impermissible collateral attack on Plaintiff’s conviction under \textit{Heck} because the Plaintiff has failed to place any evidence before the Court that his guilty plea to the charge of Sale of a Controlled Substance has been reversed or otherwise called into question”). The \textit{Rice} court did not cite Simmons’s footnote seven analysis, but instead cited a district court case from the Second Circuit, which has taken the restrictive approach to footnote seven. \textit{See id.} (ordering dismissal of claim of allegedly invalid search warrant (citing \textit{Berman v. Turecki}, 885 F. Supp. 528, 532 (S.D.N.Y. 1995))). This appears to be merely an anomaly, and the district court decision did precede the two appellate decisions closely on point.
In sum, the logic of the Simmons decision is identical to the Seventh Circuit's analysis of footnote seven as applied to illegal search claims—the mere hypothetical possibility of one of the footnote seven exceptions allows for claim accrual. I take no issue with the Eighth Circuit's treatment of an involuntary confession claim as analytically similar to a Fourth Amendment claim. Consequently, once a court adopts the general exception approach, extension of the scope of the exception to include § 1983 claims under the Fifth Amendment is analytically consistent. To paraphrase Bugs Bunny, however, that first step in the analysis is a lulu.

4. Ruminations on a General Exception

The general exception approach does have certain merits: First, the approach is consistent with the historical, pre-Heck understanding that common-law claims such as false arrest and illegal search accrue at the time of the illegal conduct. Second, the general exception approach may advance judicial economy—courts need only glance at the particular style of the claims at issue, and do not have to examine the record to determine whether the particular plaintiff's claims will invalidate his conviction. Furthermore, with the limitations period beginning and ending earlier, conceivably fewer plaintiffs will be eligible to pursue these § 1983 claims. However, the "race to the courthouse" that the general exception approach generates will negate much of this judicial economy.

The problem with the general exception approach is that it does not adequately account for the values implicit in the Heck opinion. The Supreme Court indicated its desire to avoid "parallel litigation" due to a "strong judicial policy against the creation of two conflicting resolutions arising out of the same or identical transaction." A party who simultaneously must litigate the validity of illegal search claim because "it is enough that these possibilities [of an exception in footnote seven] exist".

164. See Copus v. City of Edgerton, 151 F.3d 646, 649 (7th Cir. 1998) (allowing accrual of illegal search claim because "it is enough that these possibilities [of an exception in footnote seven] exist").


of a search in a state suppression hearing while instituting a federal civil rights suit regarding that same search potentially violates the Court's principles of consistency and finality.\textsuperscript{168} The general exception also ignores federalism because this approach allows the plaintiff to file a federal civil collateral challenge to a state ruling, although abstention may limit this result.\textsuperscript{169} Finally, subsequent to \textit{Heck}, a majority of the Court expanded the availability of § 1983 damages by withdrawing the application of \textit{Heck}'s requirements to plaintiffs who already have completed their sentences. This modification would be nothing more than a hollow promise if the statute of limitations barred the claims of this new class of eligible plaintiffs.\textsuperscript{170} Admittedly, however, the federalism and finality concerns of the \textit{Heck} Court are the most important.

Curiously, at least one court that followed the general exception approach recognized this great potential for federal-state tension, but that court addressed the problem by staying, rather than dismissing, the § 1983 action of a plaintiff whose criminal appeals were pending.\textsuperscript{171} Applying \textit{Younger} and its progeny literally, this was a justifiable result.\textsuperscript{172} Yet the result begs the question: if a court must stay a civil suit anyway to avoid tension with a state criminal proceeding, then why force a § 1983 plaintiff to file early under a rule of immediate accrual? By reading the entire \textit{Heck} opinion rather than extracting one word ("necessarily") from a footnote, courts could reach the same practical result (initial refusal to hear the § 1983 action absent favorable termination or a plaintiff's demonstration that one of the footnote seven exceptions applies) and preserve the same values (consistency, finality, and

\begin{enumerate}
\item[168.] \textit{See id.} at 485 (expressing "concerns for finality and consistency").
\item[169.] \textit{See id.} at 487 n.8 (noting abstention as potential additional bar to accrual even of claim not implying invalidity of conviction or sentence). The Court explained:

\begin{quote}
[I]f a state criminal defendant brings a federal civil-rights lawsuit during the pendency of his criminal trial, appeal, or state habeas action, abstention may be an appropriate response to the parallel state-court proceedings. Moreover, we do not decide whether abstention might be appropriate in cases where a state prisoner brings a § 1983 damages suit raising an issue that also could be grounds for relief in a state-court challenge to his conviction or sentence.
\end{quote}

\textit{Id.} (citations omitted).
\item[170.] \textit{See Spencer v. Kemna}, 523 U.S. 1, 18-21 (1998) (Souter, J., concurring) (joined by O'Connor, Ginsburg, & Breyer, J.J.) (rejecting plaintiff's argument that \textit{Heck} would bar relief without favorable termination and therefore habeas claim could not be moot); \textit{id.} at 21-22 (Ginsburg, J., concurring) (same); \textit{id.} at 25 n.8 (Stevens, J., dissenting) (agreeing with Justice Souter's rationale).
\item[171.] \textit{See Simpson v. Rowan}, 73 F.3d 134, 139 (7th Cir. 1995) (determining that plaintiff's claim accrued under \textit{Heck}, but ordering \textit{Younger} stay of plaintiff's damages claim while criminal appeal was pending).
\item[172.] \textit{See Deakins v. Monaghan}, 484 U.S. 193, 202 (1988) (stating that court abstaining on \textit{Younger} grounds should stay rather than dismiss damages action when damages are unavailable as remedy in state criminal proceedings).
\end{enumerate}
avoidance of federal-state tension), without prematurely eliminating from consideration on statute of limitations grounds a group of plaintiffs with meritorious § 1983 claims. Recognizing this, one circuit modified the general exception to at least partially account for these problems.

5. Fourth Circuit: Rebuttable Presumption of a General Exception

The Fourth Circuit has not directly addressed the illegal search issue, but one analogous decision points to a modified general exception approach. In Brooks v. City of Winston-Salem, the Fourth Circuit examined Heck to consider the accrual of a similar claim, false arrest. The court did not frame its opinion in the absolute language of a general exception; however, the court [did] not read Heck as altering the general rule that a § 1983 claim seeking damages for an allegedly unconstitutional warrantless arrest accrues when the plaintiff knows or should know of the injury—except in the limited circumstances, not present here, when a § 1983 plaintiff’s success on a claim that a warrantless arrest was not supported by probable cause necessarily would implicate the validity of the plaintiff's conviction or sentence.

District courts in the Fourth Circuit have dealt with the specific illegal search issue in different ways. One pre-Brooks decision followed the general exception approach. Another post-Brooks decision, affirmed by the Fourth Circuit, denied accrual to a claim filed concurrently with criminal proceedings because of the connection between the search and the prosecution. Although the Fourth Circuit has not directly addressed the illegal search issue,

173. See Shamaeizadeh v. Cunigan, 182 F.3d 391, 399 (6th Cir. 1999) (stating that requiring plaintiffs to file civil actions from which courts would have to abstain "misdirect[s] the criminal defendant").
174. 85 F.3d 178 (4th Cir. 1996).
175. See Brooks v. City of Winston-Salem, 85 F.3d 178, 182-83 (4th Cir. 1996) (determining that § 1983 claim for damages for warrantless arrest accrues at time of injury). In Brooks, prosecutors dismissed charges of kidnapping and rape against the plaintiff. Id. at 180. Brooks sued a police officer for various constitutional violations and sued the city for inadequate training and supervision. Id. The court determined that Brooks knew or should have known of his injury on the day of the allegedly warrantless arrest, and thus the statute of limitations had run on Brooks’s claims. Id. at 182. To the extent that Brooks alleged an arrest pursuant to a warrant unsupported by probable cause, the court determined that such a claim was not time-barred. Id. at 183. The court then ruled that Brooks’s allegations were sufficient to state a claim for legal process issued without probable cause. Id. The court concluded that Brooks failed to state a claim for his continued detention after a magistrate's determination of probable cause. Id. at 184.
176. Id. at 183.
178. See Bear v. Wydra, 48 F. Supp. 2d 516, 519 (W.D.N.C. 1999) ("Plaintiffs’ claims necessarily would implicate the validity of the pending criminal proceedings against them and therefore are not ripe for review."). aff’d, 194 F.3d 1303 (4th Cir. 1999) (unpublished table decision).
the *Brooks* opinion suggests that neither district court decision squares exactly with the likely appellate outcome.\(^{179}\)

The approach that the *Brooks* decision suggests lies somewhere between the competing approaches of the two groups of circuit courts. The Fourth Circuit acknowledged the possibility that some claims within the illegal search category could imply the invalidity of the underlying conviction, an idea that the Seventh Circuit rejects.\(^{180}\) A separate footnote in the *Heck* opinion acknowledged at least this much, positing the example of a false arrest claim that, although perhaps theoretically unrelated to a conviction for resisting arrest, still would practically undermine that conviction.\(^{181}\) Instead of requiring a showing of favorable termination or other case-by-case determination before accrual, however, the *Brooks* language shifts the presumption in favor of immediate accrual.\(^{182}\) In acknowledging that at least some Fourth Amendment claims could imply the invalidity of a conviction, the Fourth Circuit's approach is less objectionable than the pure general exception approach. Still, because the *Brooks* opinion shifts the presumption in favor of immediate accrual, thereby imposing on civil defendants the burden of proving that the civil suit would collaterally attack the conviction, even this tamer general exception approach threatens the consistency, finality, and federalism values that the *Heck* opinion trumpets.\(^{183}\)

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**C. Courts Denying Accrual of Damages Suits for Illegal Search and Seizure**

1. **The Sixth Circuit: "The Seventh Circuit Misreads Heck"**\(^{184}\)

The Sixth Circuit first addressed § 1983 claims for Fourth Amendment violations in *Schilling v. White*.\(^{185}\) Schilling challenged a post-traffic-accident...
search of his car and person that led to a subsequent conviction for driving under the influence of drugs. The federal district court dismissed Schilling's § 1983 suit without prejudice until a court of competent jurisdiction set aside the conviction. Extensive Sixth Circuit precedent exempted Fourth Amendment damages claims from the normal state exhaustion requirement. The Sixth Circuit, however, ruled that the exception did not survive Heck. The appellate court strongly disagreed with the Seventh Circuit's reading of a categorical exception into footnote seven. Under the Sixth Circuit's interpretation, "[t]he fact that a Fourth Amendment violation may not necessarily cause an illegal conviction does not lessen the requirement that a plaintiff show that a conviction was invalid as an element of constitutional injury." The court stated that the Supreme Court explicitly foreclosed [the general exception] line of reasoning in Heck, when it concluded that because an illegal seizure does not automatically render a conviction invalid, an illegal seizure does not alone create an injury compensable under § 1983 . . . . The language of Heck plainly

the influence. Id. at 1082-83. The court outlined various precedents, most notably Feaster v. Miksch, 846 F.2d 21, 23 (6th Cir. 1988), which exempted Fourth Amendment damages claims from normal habeas corpus exhaustion requirements. Schilling, 58 F.3d at 1085. In light of Heck, however, the court determined that the Feaster exception was no longer good law. Id. The court recognized the Seventh Circuit's adoption of the footnote seven exception in Franklin v. Summers, No. 93-2939, 1994 WL 5854802, at *1 (7th Cir. Oct. 24, 1994) ("Claims under the fourth amendment do not impeach the validity of a conviction.") (emphasis added), but determined that "[t]he Seventh Circuit misreads Heck." Schilling, 58 F.3d at 1086. Examining footnote seven for itself, the court concluded that the Supreme Court's language "plainly refutes" the idea that Fourth Amendment claims are exempt categorically from Heck. Id. The court also rejected Schilling's claim that the dismissal of his claim deprived him of a right to a federal forum on the grounds that, under Heck, Schilling had no legitimate legal claim requiring such a forum. Id. at 1087.

See id. at 1082-83 (outlining factual background of case).

Id. at 1083.


See id. (holding that "any exception is no longer good law"); id. at 1086 ("Put simply, the common-law-based rationale in Heck completely undercuts the reasoning reflected in [earlier Sixth Circuit precedents], and eliminates the exceptions carved out in those decisions.").

See id. at 1086 ("The Seventh Circuit misreads Heck.").

Id. (emphasis in original). Notably, the Schilling determination that "Heck applies as much to prisoners in custody . . . as to persons no longer incarcerated" is no longer good law. See Spencer v. Kemna, 523 U.S. 1, 19 (1998) (Souter, J., concurring) (stating that "Heck did not hold that a released prisoner in Spencer's circumstances is out of court on a § 1983 claim") (discussed supra note 98).
refutes the argument that Fourth Amendment claims are exempted from the requirement that a conviction must be set aside as a precondition for this type of § 1983 suit.192

The Sixth Circuit dismissed Schilling's action because he failed to show the invalidation of his conviction.193

The Sixth Circuit extended Schilling in Shamaeizadeh v. Cunigan.194 In this case, police conducted three warrantless searches of Shamaeizadeh's home and found evidence of marijuana cultivation in the basement apartment that he rented to others.195 In Schilling, the court had dismissed the plaintiff's case for failure to demonstrate the invalidity of his conviction.196 In contrast, the Cunigan court decided when the statute of limitations began to run for a plaintiff who was initially prosecuted but never convicted.197 The court determined that a § 1983 action that would imply the invalidity of a future conviction did

192. Schilling v. White, 58 F.3d 1081, 1086 (6th Cir. 1995) (citation omitted).
193. Id. at 1087; see id. at 1087 n.5 (noting that if Schilling later were to have his conviction invalidated, he might then file § 1983 action).
194. 182 F.3d 391 (6th Cir. 1999), cert. denied, 528 U.S. 1021 (1999). In Cunigan, police responded to a burglary call, which Shamaeizadeh's live-in girlfriend placed, and conducted a warrantless search of the house. Id. at 393. After detecting the smell of marijuana emanating from the house, the police conducted two warrantless searches of the entire house, ultimately finding 393 marijuana plants in the basement apartment that Shamaeizadeh rented to others. Id. The district court found that exigent circumstances justified the first search, but excluded the evidence from the second and third searches. Id. The trial judge then ruled that without the redacted evidence, the police affidavit did not support issuance of a search warrant for both levels of the house. Id. The Sixth Circuit affirmed. Id.; see United States v. Shamaeizadeh, 80 F.3d 1131, 1138-39 (6th Cir. 1996) (affirming denial of search warrant). After the government dismissed the charges, Shamaeizadeh sued for damages under § 1983, but the district court dismissed his action as untimely under Kentucky's one-year statute of limitations. Cunigan, 182 F.3d at 394; see KY. REV. STAT. ANN. § 413.140 (Michie 2000) (one-year statute of limitations for personal injuries). On appeal, the Sixth Circuit ruled that Heck barred accrual of § 1983 claims related to potential convictions, as well as actual ones, meaning that a plaintiff must demonstrate that a successful civil suit will not invalidate any future conviction, in addition to present convictions. Cunigan, 182 F.3d at 398. Because Shamaeizadeh's potential for conviction depended largely upon the seized evidence, the court ruled that the statute of limitations on his § 1983 claim did not begin to run until the state dismissed the charges. Id. at 398-99. The court rejected the idea that the statute of limitations should begin to run at the time of the search, with federal courts then staying the § 1983 claim until the conclusion of the criminal proceeding, on the grounds that such a ruling would "misdirect" the criminal defendant away from pursuing a viable defense to the charges against him. Id. at 399. Accordingly, the court held that Shamaeizadeh filed a timely § 1983 claim. Id.
195. See Cunigan, 182 F.3d at 393 (stating police seized 393 marijuana plants as well as marijuana-growing equipment).
196. See Schilling, 58 F.3d at 1087 (dismissing § 1983 action for failure to demonstrate invalidity of underlying conviction).
197. See Cunigan, 182 F.3d at 396 ("Neither Heck nor Schilling definitively resolves the issue before us.").
not accrue until the charges against the plaintiff were dismissed.198 The court then examined the record and stated that, prior to the conclusion of the criminal case, no civil court could have decided whether the civil action would have determined that invalidity.199 If the criminal court ruled the search lawful and then convicted Shamaizadeh based on that evidence, Shamaizadeh would have no cause of action.200 If the criminal court ruled the search unlawful but admitted the evidence based on an exclusionary exception, then Shamaizadeh could not seek damages related to the criminal proceeding.201 Either way, the court concluded, disposition of the criminal case was necessary before Shamaizadeh could seek damages related to his conviction, so the date of the dismissal of the criminal charges served as the starting point for the statute of limitations period.202 Accordingly, the court ruled that Shamaizadeh filed a timely § 1983 action.203

The Sixth Circuit ruled in at least one case that two plaintiffs' § 1983 suit for illegal search and seizure accrued at the time of the search and could proceed even while the plaintiffs were incarcerated.204 Because the allegedly illegally-seized evidence was never the subject of criminal charges, the court determined that the claim was distinct from Schilling and would not collaterally challenge the plaintiffs' criminal proceedings.205 This is entirely consistent with Schilling and Cunigan, however, in that the court required each plaintiff to demonstrate that the civil claim would not overturn an actually or potentially outstanding valid conviction.

Furthermore, this more recent ruling probably comports more closely than Schilling with the proper reading of footnote seven. Consider the following hypothetical: Police spot a poorly disguised moonshine still in plain view in a neighborhood park. They immediately search the nearest house without a warrant and find a closet full of incriminating Mason jars. They also find the female homeowner engaging in what arguably constitutes sexual relations with a young intern from her office. (The police report, quickly obtained by the

198. See id. at 397 (adopting Shamaizadeh's argument that Heck and Schilling applied equally to injuries suffered without conviction).
199. See id. at 398 (stating that district court could not have determined whether claim would imply invalidity of conviction while criminal proceedings still pending).
200. Id.
201. Id.
202. Id. at 398-99.
203. See id. at 399 (reversing and remanding case to trial court).
204. See Brindley v. Best, 192 F.3d 525, 530 (6th Cir. 1999) ("[T]his issue was never actually litigated in the state court criminal proceedings and therefore the plaintiffs were not collaterally estopped from challenging the seizures in federal court.").
205. See id. at 531 ("The defendants' reliance on Heck is misplaced because . . . the alleged unlawful seizures in this case would not invalidate the plaintiffs' convictions.").
press, is quite thorough in its description of these circumstances.) A judge excludes the mason jars for lack of probable cause, but the jury finds the woman guilty of the relevant charges based on the still and testimony from the mechanic at the local radiator repair shop. The woman’s husband of several years is not too concerned about the moonshine and the conviction, as he himself descends from a long line of "white lightning" purveyors. He is significantly more concerned about the presence of the strapping young intern—he subsequently divorces his wife and subjects her to financial ruin in addition to the media’s public humiliation. The wife should have a viable claim against the police for at least those damages, which stem from the illegal search but are unrelated to the conviction.206 Under Schilling, the wife arguably would have no claim as long as her conviction remained valid, even though the exclusion of the evidence makes it impossible for the civil suit to collaterally attack the conviction.207 In light of the later Sixth Circuit interpretations, the court would examine the wife’s claim, determine that a successful suit would not imply the invalidity of the conviction (because the evidence from the search never appeared at trial), and would allow the claim to proceed, but would not do so on any general exception basis.208

2. Second Circuit: First to Advocate Case-by-Case Determination

In Woods v. Candela,209 the Second Circuit became the first circuit court to advance the individualized approach to footnote seven.210 Evidence ob-

206. See Heck v. Humphrey, 512 U.S. 477, 487 (1994) ("[I]f the district court determines that the plaintiff’s action, even if successful, will not demonstrate the invalidity of any outstanding criminal judgment against the plaintiff, the action should be allowed to proceed, in the absence of some other bar to the suit." (footnotes omitted)).

207. See Schilling v. White, 58 F.3d 1081, 1086 (6th Cir. 1995) (stating that no constitutional injury exists until conviction is reversed).

208. See Brindley, 192 F.3d at 530-31 (determining that facts of plaintiff’s § 1983 claim would not imply invalidity of conviction).

209. 47 F.3d 545 (2d Cir. 1995).

tained in a search of Woods's car formed the basis for his conviction of first-degree robbery. A state appellate court overturned Woods's conviction on the grounds that the trooper conducted an illegal search of Woods's vehicle. The district court initially dismissed Woods's § 1983 claim on statute of limitations grounds, and the Second Circuit affirmed. On remand from the Supreme Court for reconsideration in light of Heck, the Second Circuit determined that Woods had filed a timely suit because the § 1983 illegal search claim directly implicated Woods's conviction. Because the state appellate court reversed the conviction on the grounds that the officer had a lack of probable cause to detain Woods and search his vehicle and because Woods's § 1983 claim alleged the exact same basis for civil recovery, the Second Circuit ruled that Woods's civil claim, if filed earlier, would have implied the invalidity of his conviction. The court's decision certainly was true to the principles of Heck: to allow the immediate accrual of Woods's suit, regarding the very evidence on which he was convicted, would contradict the Court's "hoary principle that civil tort actions are not appropriate vehicles for challenging the validity of outstanding criminal judgments."

The Second Circuit has instructed district courts to make the "inherently factual" determination of whether one of the doctrines identified in footnote seven applies to evidence in a plaintiff's criminal case before dismissing a § 1983 claim as premature. This is precisely what the Heck decision mandates. For example, the Second Circuit reversed a district court's sua sponte dismissal of a § 1983 claim for damages from an illegal search and

Circuit ruled that the state appellate court's reversal of the conviction on the grounds that the search was illegal meant that a § 1983 suit necessarily would have implied the invalidity of the conviction. Woods V, 47 F.3d at 546. Accordingly, in light of Heck, the court determined that Woods's cause of action did not accrue until the dismissal of his conviction. Id.

211. Woods VI, 921 F. Supp. at 1143.
212. Id.
216. See Woods V, 47 F.3d at 546 (ruling that plaintiff's § 1983 claims did not accrue before date of appellate reversal of conviction).
217. Id.
220. See Bourdon v. Vaceo, No. 99-0261, 2000 U.S. App. LEXIS 11014, at *4 (2d Cir. May 17, 2000) ("[H]is claims based on an alleged unreasonable search and seizure may not implicate the invalidity of his conviction because there may be independent sources of evidence against him or harmless error in admitting evidence obtained in that search.").
221. Heck, 512 U.S. 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 . . . .").
seizure as *Heck*-barred. District courts in the Second Circuit follow this individualized approach.

3. Ninth Circuit: Examining Heck's Objectives

In one of the more recent and thorough footnote seven appellate decisions, *Harvey v. Waldron*, the Ninth Circuit addressed the issue for the first time. A Montana Department of Revenue investigator and three Billings City Police Department detectives entered William Harvey's antique business, which was not yet open to the public, without a search warrant or invitation. They seized numerous antique gaming devices that were no longer used for gambling and charged Harvey with possession of illegal gaming devices. The prosecutor dismissed the charges against Harvey, but not until after donating the machines to the city without notice to Harvey, who then sought damages under § 1983. The viability of Harvey's claims depended on when his cause of action accrued: if *Heck* would have barred his suit while the criminal charges were pending, then Harvey would have filed a timely claim under the statute of limitations; if *Heck* would have allowed the suit to proceed.

222. *See Bourdon*, 2000 U.S. App. LEXIS 11014, at *4-*5 ("[T]he district court improperly dismissed the claims against the police officers at this stage in the litigation.").

223. *See Dockery v. Tucker*, No. 97-CV-3584 (ARR), 2000 U.S. Dist. LEXIS 14908, at *28 (E.D.N.Y. Oct. 13, 2000) (allowing Fourth Amendment claim to proceed because "the trial court's apparent ruling that the search was made pursuant to a valid warrant and thus satisfied the Fourth Amendment was not necessary to plaintiff's conviction").

224. 210 F.3d 1008 (9th Cir. 2000).

225. *Harvey v. Waldron*, 210 F.3d 1008, 1014 (9th Cir. 2000) (noting that issue was of first impression in circuit). In *Harvey*, an antique-store owner sued a Montana revenue agent and three Billings police detectives under § 1983 for unlawfully seizing approximately twenty-five antique gaming machines that were no longer used for gambling. *Id.* at 1010. Although the county dismissed the charges against Harvey, the county previously had given away the devices. *Id.* at 1011. The district court dismissed Harvey's claims on the grounds that the statute of limitations had run. *Id.* at 1012. Examining the situation in light of *Heck*, the Ninth Circuit first stated that *Heck* applied to "potential" convictions as well as "actual" ones. *Id.* at 1013-14. The court then examined Harvey's search and seizure claim in light of footnote seven, reviewing the competing rationales identified by the split circuits. *Id.* at 1015. Siding with the Second and Sixth Circuits, the Ninth Circuit held that footnote seven did not create a generalized exception for illegal search and seizure damages suits and that such suits concerning seized evidence that was essential to the underlying criminal prosecution did not accrue until favorable termination. *Id.* at 1014-16. Accordingly, Harvey's suit was not time-barred. *Id.* at 1016. For similar reasons, the court also ruled that Harvey's claim for sale of property without due process was not time-barred. *Id.* The Ninth Circuit previously acknowledged *Heck* when adjudicating the viability of an illegal search claim under § 1983, but decided the case on non-*Heck* grounds. *See Trimble v. City of Santa Rosa*, 49 F.3d 583, 585 (9th Cir. 1995) (determining claim was time-barred).

226. *Harvey*, 210 F.3d at 1010.

227. *Id.*

228. *Id.* at 1011, 1013.
ceed, then the statute of limitations would have run already on Harvey’s damages claim.\textsuperscript{229}

The Ninth Circuit examined the circuit court split over footnote seven and refused to read the footnote as creating a general exception for illegal search and seizure claims,\textsuperscript{230} thus agreeing with the interpretation of the Second and Sixth Circuits:

Such a holding will avoid the potential for inconsistent determinations on the legality of a search and seizure in the civil and criminal cases and will therefore fulfill the \textit{Heck} Court’s objectives of preserving consistency and finality, and preventing “a collateral attack on [a] conviction through the vehicle of a civil suit.”\textsuperscript{231}

Because the seized gaming devices constituted an essential element of the charged crime, possession of illegal gaming devices, the court determined that a successful $\textsection\ 1983$ action that had been filed while the charges were pending would have implicated the validity of the prosecution, making the civil action not cognizable under \textit{Heck}.\textsuperscript{232} District courts in the Ninth Circuit have followed the Harvey approach.\textsuperscript{233}

4. Fifth Circuit: Appearing to Support an Individualized Approach

The Fifth Circuit has not resolved many footnote seven issues, owing at least in part to a doctrine in the circuit whereby courts determine immunity questions before ruling on \textit{Heck} accrual issues.\textsuperscript{234} However, in \textit{Mackey v. Dickson},\textsuperscript{235} the court ordered a case-by-case determination similar to that of the Second Circuit.\textsuperscript{236} Mackey had been incarcerated pursuant to an indict-

\begin{footnotes}
\item[229] Id.
\item[230] Id. at 1015.
\item[231] Id. (quoting \textit{Heck} v. Humphrey, 512 U.S. 477, 484-85 (1994)) (alteration in original).
\item[232] Id. at 1015-16; see \textit{Heck} v. Humphrey, 512 U.S. 477, 487 (1994) (requiring favorable termination for any claim that would imply invalidity of conviction or sentence).
\item[235] 47 F.3d 744 (5th Cir. 1995).
\item[236] \textit{See} \textit{Mackey v. Dickson}, 47 F.3d 744, 746 (5th Cir. 1995) (per curiam) (stating that question of whether suit was $\textit{Heck}$-barred was "premature"). In \textit{Mackey}, the plaintiff sought
ment, and his criminal trial had not yet commenced. The court decided that the record was insufficient to determine whether a successful civil suit would imply the invalidity of a potential conviction. If prosecutors introduced no evidence from the illegal search at his trial, then the illegal search would not be inconsistent with his conviction. If, however, the criminal jury convicted Mackey based on evidence from the illegal search, then the damages claim would directly challenge the validity of that conviction.

The circuit court ordered the district court to stay the civil suit until the criminal proceedings concluded. Although the court ordered the stay on Heck grounds, the result appears identical to that in which a court grants accrual under Heck but orders a stay on abstention grounds. This is inconsistent with Heck — either the claim has accrued or it has not, and the burden should lie with the plaintiff to demonstrate accrual. Rather than staying the suit, the court should have remanded for an immediate determination of the question.

In light of Mackey, one district court examined the circuit split and determined that the Fifth Circuit sided more closely with the Second, Sixth, and Ninth Circuits. The court noted the "individualized approach" undertaken in Mackey and examined the record to determine whether the evidence obtained in the allegedly illegal search formed the basis for the plaintiff's conviction. Concluding that prosecutors subsequently used the evidence in the criminal proceedings, the court dismissed the plaintiff's § 1983 claim for failure to show favorable termination. Much like this district court, other circuit courts have relied on Mackey as persuasive authority supporting a case-

damages for an allegedly unlawful search and seizure. See id. at 745. The court examined Heck, then stated that it could not yet determine whether Mackey's claim would imply the invalidity of his conviction. See id. at 746. The court ordered the district court to stay the civil proceedings until the conclusion of the pending criminal case. See id.

237. See id. at 746 (stating that Mackey apparently was confined pursuant to indictment).
238. Id.
239. Id.
240. Id.
241. See id. (ordering stay until conclusion of criminal proceedings because "until that time it may be difficult to determine the relation, if any, between the [civil and criminal cases]").
242. See Simpson v. Rowan, 73 F.3d 134, 139 (7th Cir. 1995) (ordering stay of plaintiff's Fourth Amendment claims until conclusion of state criminal appeals).
245. Id.
246. See id. at 738 ("Salts' success in his claims against the Defendants would necessarily draw into question the validity of his conviction or sentence.").
by-case determination in footnote seven cases. At the very least, one cannot read the Fifth Circuit as supporting a general exception approach.

5. The Case-by-Case Determination: Promoting the Principles of Heck

As the decisions from the Second, Fifth, Sixth, and Ninth Circuits demonstrate, the individualized approach is a superior interpretation of footnote seven. First, consider once again the disputed language of the footnote:

For example, a suit for damages attributable to an allegedly unreasonable search may lie even if the challenged search produced evidence that was introduced in a state criminal trial resulting in the § 1983 plaintiff's still-outstanding conviction. Because of doctrines like independent source and inevitable discovery, and especially harmless error, such a § 1983 action, even if successful, would not necessarily imply that the plaintiff's conviction was unlawful.

The first sentence utilizes permissive language ("may") rather than an absolute term ("shall"). With the ambiguity of the second sentence, one can at least argue that the phrase "such a § 1983 action" only describes illegal search claims that feature one of the listed doctrines, not all illegal search claims. Admittedly, an argument based solely on the text of the footnote does not point to either camp very clearly. When read in the context of the overall Heck opinion, though, the individualized approach becomes the more appropriate one.

The general exception does not allow for the possibility that success on a § 1983 illegal search claim could implicate an underlying conviction. The individualized approach recognizes that such a categorical analysis is theoretically cognizable but impractical. If a state appellate court reverses a conviction because an invalid search produced the evidence on which the conviction was based, then surely a § 1983 damages suit questioning that same search would just as strongly implicate the conviction. If we take seriously the

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247. See Harvey v. Waldron, 210 F.3d 1008, 1015 (9th Cir. 2000) (citing Mackey v. Dickson, 47 F.3d 744, 746 (5th Cir. 1995), as supporting interpretations of Second and Sixth Circuits); Shamaeizadeh v. Cunigan, 182 F.3d 391, 395 (6th Cir. 1999) (same).

248. See Mackey v. Dickson, 47 F.3d 744, 746 (5th Cir. 1995) (stating that accrual of claim would depend on relationship between plaintiff's civil and criminal actions).

249. Heck, 512 U.S. at 487 n.7 (first and second emphasis added, third emphasis in original) (citations omitted).

250. See Copus v. City of Edgerton, 151 F.3d 646, 648 (7th Cir. 1998) ("Fourth Amendment claims for unlawful searches or arrests do not necessarily imply a conviction is invalid, so in all cases these claims can go forward."); cf. Brooks v. City of Winston-Salem, 85 F.3d 178, 183 (4th Cir. 1996) (identifying "general rule" of immediate accrual, but acknowledging "limited circumstances" in which civil claim would imply invalidity of criminal conviction).

251. See Harvey v. Waldron, 210 F.3d 1008, 1015-16 (9th Cir. 2000) (stating that evidence from unlawful search was essential element of criminal charges against plaintiff); Shamaeizadeh
values of consistency, finality, and federalism that the Heck decision promotes, then a case-by-case determination errs appropriately on the side of these values. It is axiomatic that an unaccrued § 1983 claim has no possibility of aggravating federal-state tension by interfering in the state criminal process.

Furthermore, the individualized approach promotes these values without unduly sacrificing a plaintiff's ability to seek redress via § 1983 for a Fourth Amendment violation. As noted previously, the general exception rule may seem more plaintiff-friendly by allowing immediate accrual of § 1983 illegal search claims, but the dark consequence is that plaintiffs in these courts face expiration of the statute of limitations when the litigants more properly should focus on defending themselves against the underlying criminal charges.

The Sixth Circuit rightfully criticized this tug-of-war on criminal defendants:

To require a defendant in a criminal proceeding to file a civil action raising any potential § 1983 claims within one year of any alleged illegal searches or other alleged violations of constitutional rights, claims which the federal court must then abrogate from resolving until the disposition of the criminal proceedings, would misdirect the criminal defendant. Surely, just as a convicted prisoner must first seek relief through habeas corpus before his § 1983 action can accrue, so too should the defendant in a criminal proceeding focus on his primary mode of relief—mounting a viable defense to the charges against him—before turning to a civil claim under § 1983.

Under the individualized approach, only one particular type of § 1983 plaintiff needs to worry about concurrently filing his § 1983 action: one with a reason to know (likely due to a ruling at a state pre-trial suppression hearing).

v. Cunigan, 182 F.3d 391, 393 (6th Cir. 1999) (stating that affidavit did not support probable cause for issuance of search warrant once court redacted information obtained through earlier illegal search); Woods v. Candela, 47 F.3d 545, 546 (2d Cir. 1995) (stating that plaintiff’s § 1983 claims rested on same grounds as criminal appeal and thus would have implied invalidity of conviction).


253. See Harvey, 210 F.3d at 1015 (stating that approach of Second and Sixth Circuits "will ... fulfill the Heck Court’s objectives of preserving consistency and finality, and preventing "a collateral attack on [a] conviction through the vehicle of a civil suit" (alteration in original) (citation omitted)).

254. See, e.g., Beck v. City of Muskogee Police Dep’t, 195 F.3d 553, 558 (10th Cir. 1999) (ruling that Heck never barred plaintiff’s illegal search claim, making that claim now stale under statute of limitations); Booker v. Ward, 94 F.3d 1052, 1057 (7th Cir. 1996) (dismissing claim for illegally obtained confession, on which state appellate court based its reversal of plaintiff’s conviction, due to plaintiff’s failure to bring civil case within two-year statute of limitations); Franklin v. Summers, 1994 U.S. App. LEXIS 29997, at *3 (7th Cir. Oct. 24, 1994) (dismissing illegal search claim of incarcerated plaintiff as time-barred).

255. Shamaeizadeh, 182 F.3d at 399.
either that a footnote seven doctrine like inevitable discovery, independent source, or harmless error applies to his case, or that the court will suppress the evidence seized from the illegal search but still will proceed to trial based on other evidence.\textsuperscript{256} Any other plaintiff can, indeed must, challenge the search via the criminal trial and appellate process before seeking the federal damages remedy.\textsuperscript{257}

The contrast is clear: The courts utilizing the individualized approach preserve the § 1983 actions of plaintiffs who abide by Heck’s values.\textsuperscript{258} When a general exception court dismisses the § 1983 claim of a plaintiff who pursues his criminal remedies before filing the civil claim, the court effectively punishes that plaintiff for respecting consistency, finality, and federalism.\textsuperscript{259} This result of the general exception approach is hardly desirable given the important remedial role of § 1983 damages in compensating victims of Fourth Amendment violations and in regulating police conduct.\textsuperscript{260}

\section*{V. Conclusion}

In § 1983, Congress has provided a federal remedy for constitutional torts.\textsuperscript{261} Victims of unconstitutional conduct, including Fourth Amendment violations, can and should be able to recover damages.\textsuperscript{262} The Supreme Court’s decision in \textit{Heck v. Humphrey} generally has denied accrual to § 1983

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256. \textit{See} Brindley v. Best, 192 F.3d 525, 530-31 (6th Cir. 1999) (allowing for accrual of plaintiffs’ claim because prosecutors never introduced evidence from illegal search at trial); Mackey v. Dickson, 47 F.3d 744, 746 (5th Cir. 1995) ("If Mackey is tried and convicted and in his contested criminal case no evidence is presented resulting directly or indirectly from any of his arrests, it is difficult to see how any illegality in any of his arrests could be inconsistent with his conviction.").

257. \textit{See} Shamaeizadeh, 182 F.3d at 399 (determining that claim did not accrue until charges against plaintiff were dismissed).

258. \textit{See} Harvey v. Waldron, 210 F.3d 1008, 1016 (9th Cir. 2000) (ruling that claim not Heck-barred); Shamaeizadeh v. Cunigan, 182 F.3d 391, 399 (6th Cir. 1999) (same); Woods v. Candela, 47 F.3d 545, 546 (2d Cir. 1995) (same).

259. \textit{See}, e.g., \textit{Beck}, 195 F.3d at 558 (ruling that \textit{Heck} never barred plaintiff’s illegal search claim, making that claim now stale under statute of limitations); \textit{Booker}, 94 F.3d at 1057 (dismissing claim for illegally obtained confession, on which state appellate court based its reversal of plaintiff’s conviction, due to plaintiff’s failure to bring civil case within two-year statute of limitations); \textit{Franklin}, 1994 U.S. App. LEXIS 29997, at *3 (dismissing illegal search claim of incarcerated plaintiff as time-barred).

260. \textit{See supra} Part II (discussing importance of damages remedy for Fourth Amendment violations).


262. \textit{See} Monroe v. Pape, 365 U.S. 167, 187 (1961) (concluding that plaintiff stated cause of action against police for damages from Fourth Amendment violation); \textit{see also supra} Part II (discussing importance of damages remedy for Fourth Amendment violations).
claims that implicate the validity of the underlying convictions. In so doing, the Court clearly expressed its desire to account for values of consistency and finality, plus the corollary value of federalism, in § 1983 actions. The counter-example the Court provided in footnote seven, offering an illegal search claim as one that might not imply the invalidity of the conviction, makes perfect sense as an illustration: cases involving the doctrines of inevitable discovery, independent source, or harmless error remove the connection between the conviction and the legality of the search.

The circuit courts have adopted two competing approaches to the application of this footnote. The general exception approach exempts all Fourth Amendment § 1983 claims from Heck's requirements; the individualized approach requires § 1983 plaintiffs either to show favorable termination or to show that civil success would not imply the invalidity of the conviction. The latter approach better promotes the Heck values of consistency, finality, and federalism and rewards § 1983 plaintiffs who focus on the criminal process and refrain from simultaneous collateral attacks. The Supreme Court has allowed this issue to develop among the circuits by denying certiorari to earlier appeals. Due to the important constitutional right at stake, the time has come for the Court to grant certiorari and resolve the split in favor of the approach of the Second, Fifth, Sixth, and Ninth Circuits, which requires a case-by-case determination of whether a specific § 1983 illegal search claim would imply the invalidity of the underlying conviction.

264. See id. at 485 (expressing Court's concerns of consistency, finality, and avoiding collateral attack).
265. See id. at 487 n.7 (stating that § 1983 illegal search claims involving evidence admitted under independent source, inevitable discovery, or harmless error doctrines would not imply invalidity of conviction).
266. See supra Part IV.B (discussing courts utilizing general exception approach).
267. See supra Part IV.C (discussing courts utilizing individualized approach).
268. See supra Part IV.C.5 (discussing superiority of case-by-case determination).