

## SECTION 1983 CLAIM ACCRUAL UNDER *WALLACE V. KATO* AND THE NEED FOR EQUITABLE TOLLING

Rebecca Garibotto\*

### I. INTRODUCTION

The oft-cited decision *Heck v. Humphrey*<sup>1</sup> has led to years of misinterpretation and confusion regarding the time of accrual of certain 42 U.S.C. § 1983 claims.<sup>2</sup> The Court decreed, in pertinent part, that “in order to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a § 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal,” or that it would otherwise be invalidated.<sup>3</sup> The Court further stated that such a claim would not otherwise be cognizable under the statute, and that if the district court were to determine that “a judgment [on the § 1983 claim] in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence,” it must dismiss the case until the litigant can prove that the conviction has been so invalidated.<sup>4</sup> Although it was clear that the *Heck* bar would apply to a § 1983 claim where a valid conviction was

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<sup>1</sup> 512 U.S. 477 (1994).

<sup>2</sup> Section 1983 states:

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

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42 U.S.C. § 1983 (2006). Section 1983 claims vindicate constitutional rights; for example, individuals can bring § 1983 actions for false arrest, malicious prosecution, and selective enforcement.

<sup>3</sup> *Id.* at 486–87.

<sup>4</sup> *Id.* at 487.

already in existence at the time of filing, the prevailing view among the circuit courts was that the *Heck* bar would also apply to a § 1983 claim by a plaintiff whose criminal charges were still pending if success on the § 1983 claim would threaten the validity of a potential *future* conviction in the underlying criminal action.<sup>5</sup>

From this conclusion, it became a common perception among the circuit courts that a § 1983 claim did not accrue until the § 1983 litigant received a favorable outcome in his underlying criminal trial or in subsequent post-conviction proceedings.<sup>6</sup> In *Wallace v. Kato*, the Supreme Court intervened and clarified the meaning of *Heck*.<sup>7</sup> Applying the traditional rule that a claim accrues when the litigant has a “complete and present cause of action,”<sup>8</sup> the Court stated that the plaintiff, Andre Wallace, could have filed his § 1983 claim for false arrest and false imprisonment against his arresting officer as soon as the allegedly wrongful arrest occurred, thereby indicating that such a claim accrues at that time.<sup>9</sup> After clarifying the issue of claim accrual, the Court explained that the statute of limitations on a § 1983 claim for false imprisonment begins to run when the arrestee is bound over by a magistrate and held pursuant to legal process.<sup>10</sup>

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<sup>5</sup> See *Kucharski v. Leveille*, 526 F. Supp. 2d 768, 774 (E.D. Mich. 2007) (“[M]ost if not all circuits concluded that *Heck* [also] barred a section 1983 claim by a plaintiff with criminal charges pending against him if success in the 1983 suit would be inconsistent with a *future* conviction.” (emphasis added)); see also *Harvey v. Waldron*, 210 F.3d 1008, 1014 (9th Cir. 2000); *Shamaeizadeh v. Cunigan*, 182 F.3d 391, 396, 398 (6th Cir. 1999); *Covington v. City of New York*, 171 F.3d 117, 124 (2d Cir. 1999); *Beck v. City of Muskogee Police Dep’t*, 195 F.3d 553, 557 (10th Cir. 1999); *Uboh v. Reno*, 141 F.3d 1000, 1006–07 (11th Cir. 1998); *Washington v. Summerville*, 127 F.3d 552, 556 (7th Cir. 1997); *Smith v. Holtz*, 87 F.3d 108, 113 (3d Cir. 1996); *Schilling v. White*, 58 F.3d 1081, 1086 (6th Cir. 1995).

<sup>6</sup> See, e.g., *Gibson v. Superintendent of N.J. Dep’t of Law & Pub. Safety-Div. of State Police*, 411 F.3d 427, 447 (3d Cir. 2005) (“Under *Heck*, § 1983 claims for damages attributable to an unconstitutional conviction or sentence do not accrue until the conviction or sentence has been invalidated.”).

<sup>7</sup> 549 U.S. 384 (2007).

<sup>8</sup> *Id.* at 388 (citing *Bay Area Laundry & Dry Cleaning Pension Trust Fund v. Ferbar Corp.*, 522 U.S. 192, 201 (1997)).

<sup>9</sup> The Court explained that “[e]very confinement of the person is an imprisonment.” *Id.* at 388 (quoting MARTIN L. NEWELL, A TREATISE ON THE LAW OF MALICIOUS PROSECUTION, FALSE IMPRISONMENT, AND THE LEGAL PROCESS § 2, at 57 (Chicago, Callaghan and Company 1892) (internal quotation marks omitted)). “False arrest and false imprisonment overlap; the former is a species of the latter.” *Id.* Therefore, the Court refers to the two torts together as “false imprisonment.” *Id.* at 389.

<sup>10</sup> *Id.* The Court explained that “the statute of limitations begins to run when the alleged false imprisonment ends.” *Id.* at 389. “[T]hat is, the date petitioner became held pursuant to legal process,” *id.* at 393, as “the sort of unlawful detention remediable by the tort of false imprisonment is detention *without legal process*,” *id.* 389.

Overruling a decade's worth of misinterpretations of *Heck*, the *Wallace* Court characterized the notion that *Heck* could bar "an action which would impugn *an anticipated future conviction*" as a "bizarre extension of *Heck*" and declared that courts should no longer embrace such an interpretation.<sup>11</sup> Although the Supreme Court did provide some clarity through the *Wallace* decision, the lower courts continue to grapple with its application.<sup>12</sup> In effect, *Wallace* requires the immediate filing of § 1983 actions, exposing litigants to the possibility of having to litigate their criminal and civil trials simultaneously. Although the employment of a federal rule of equitable tolling in such circumstances would mitigate the harsh effects of the *Wallace* decision, the majority rejected the adoption of such a rule in this context.<sup>13</sup> Justice Breyer advocated in his dissenting opinion for equitable tolling of the statute of limitations on the § 1983 claim for the duration of the state criminal proceedings, including the criminal trial *and* the time during which the criminal defendant seeks an appeal from a conviction or other post-conviction relief.<sup>14</sup> The majority, however, refused to recognize a federal rule of equitable tolling, noting that the Court typically relies on state law when determining whether to toll a claim on a case-by-case basis.<sup>15</sup>

Part II of this comment will briefly explain the interplay between federal and state law with regard to § 1983 claims. Part III will explore the *Heck* decision and the lower courts' interpretation of the decision before the intervening *Wallace* decision. Part IV will provide an in-depth explanation of the *Wallace* case. This section will discuss Justice Breyer's dissenting opinion in *Wallace*, as well as the majority's rejection of it. Further, Part IV will argue that the Court should have adopted a federal rule of equitable tolling—as advocated for by Justice Breyer—so that the statute of limitations on § 1983 claims would be tolled for the duration of the litigant's underlying criminal trial, as well as for the time during which post-conviction relief is sought. This would prevent those with potentially meritorious § 1983 claims, who have either received favorable outcomes in their criminal trials or on appeal from their convictions, from being barred by the statute

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<sup>11</sup> *Id.* at 393.

<sup>12</sup> *See, e.g.,* *Dique v. N.J. State Police*, 603 F.3d 181 (3d Cir. 2010); *Cress v. City of Ventnor*, No. 08-1873, 2009 U.S. Dist. LEXIS 22172 (D.N.J. Mar. 18, 2009); *Telfair v. Tandy*, No. 08-731, 2008 U.S. Dist. LEXIS 83462 (D.N.J. Oct. 20, 2008); *Kucharski v. Leveille*, 526 F. Supp. 2d 768 (E.D. Mich. 2007).

<sup>13</sup> *Wallace*, 549 U.S. at 394.

<sup>14</sup> *Id.* at 404 (Breyer, J., dissenting).

<sup>15</sup> *Id.* at 394 (majority opinion).

of limitations. Part V will explore the effects of the *Wallace* Court's requirement that a § 1983 litigant file the civil claim within such a short period of time, including how the filing of the claim before institution of the criminal prosecution may effectively bind prosecutors' hands to proceed with the criminal charge in an effort to protect the police officers who have potentially violated the litigant's constitutional rights. This section will also discuss the implications of forcing the litigant to handle both causes of action—the underlying criminal trial and the § 1983 civil claim—simultaneously. Finally, this section will discuss *Wallace*'s “footnote four,” in which the Court identified, but declined to provide a remedy for, a possible injustice that could occur under the majority's holding and thus produce a “result surely not intended” by *Heck*.<sup>16</sup>

Finally, Part VI will present a separate argument exploring the inequities caused by this new interpretation of *Heck* against those criminal defendants who have relied on prior interpretations of the decision. This section will argue that, notwithstanding the earlier-presented argument that equitable tolling should be offered to a § 1983 litigant for the duration of his or her underlying criminal trial and any appeal therefrom, courts should offer equitable tolling on independent grounds due to reliance on pre-existing precedent and the confusion caused by a new interpretation of the governing law.

## II. SECTION 1983 AND THE STATUTE OF LIMITATIONS

To state a cause of action under § 1983, the claimant must allege (1) the violation of a right secured by the Constitution or laws of the United States and (2) that the alleged deprivation was caused by a person acting under the color of state law.<sup>17</sup> “Section 1983 does not create substantive rights. It, instead, provides a federal cause of action for the violation of a federal right.”<sup>18</sup> State law determines when a § 1983 claim accrues, provides the statute of limitations applicable to the § 1983 claim, and also determines whether the limitations period should be tolled, unless tolling is inconsistent with federal law.<sup>19</sup>

In the context of § 1983 claims—and specifically those for false imprisonment—the *Wallace* Court identified the most pertinent stat-

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<sup>16</sup> *Id.* at 395 n.4.

<sup>17</sup> *West v. Atkins*, 487 U.S. 42, 48 (1988); *see also* *Piecknick v. Pennsylvania*, 36 F.3d 1250, 1255–56 (3d Cir. 1994).

<sup>18</sup> *Dique v. N.J. State Police*, 603 F.3d 181, 185 (3d Cir. 2010) (citing *Okla. City v. Tuttle*, 471 U.S. 808, 816 (1985)).

<sup>19</sup> *Wilson v. Garcia*, 417 U.S. 261, 269 (1985); *Dique*, 603 F.3d at 185 (citing *Wallace*, 549 U.S. at 387).

ute of limitations to be that for personal-injury torts, the length of which is typically two to three years, depending on the state.<sup>20</sup> Federal law governs the issue of what *constitutes* accrual.<sup>21</sup> “Accrual is the occurrence of damages caused by a wrongful act—when a plaintiff has a complete and present cause of action, that is, when the plaintiff can file suit and obtain relief.”<sup>22</sup> The *Wallace* Court, noting that claim accrual does not depend on whether the extent of injury is fully known,<sup>23</sup> found resolution of the underlying criminal trial to be unnecessary in determining the validity of the § 1983 claim of false imprisonment.<sup>24</sup> Although Wallace’s claim of false imprisonment accrued immediately upon his arrest, the Court noted that the statute of limitations for false imprisonment claims is delayed and does not yet begin to run until the individual becomes held pursuant to legal process.<sup>25</sup>

### III. PRE-WALLACE INTERPRETATIONS OF *HECK V. HUMPHREY* AND § 1983 CLAIM ACCRUAL

In *Heck*, the Court triggered years of confusion with one statement: “[I]n order to recover damages for allegedly unconstitutional conviction or imprisonment, . . . a § 1983 plaintiff must prove that the conviction” has been invalidated.<sup>26</sup> In *Heck*, the Court was faced with a litigant who had already been convicted of voluntary manslaughter in state court, and whose appeal of that conviction was still pending.<sup>27</sup> In his § 1983 complaint, Heck alleged, among other things, that the investigation that led to his arrest was unlawful and that the police had knowingly destroyed exculpatory evidence.<sup>28</sup> Finding that Heck’s § 1983 claim raised issues that disputed the legality of his conviction and confinement, the district court dismissed the action.<sup>29</sup> On ap-

<sup>20</sup> *Wallace*, 549 U.S. at 389; *see also Dique*, 603 F.3d at 185 (“A section 1983 claim is characterized as a personal-injury claim and thus is governed by the applicable state’s statute of limitations for person-injury claims.”).

<sup>21</sup> *Wallace*, 549 U.S. at 388.

<sup>22</sup> *Dique*, 603 F.3d at 185 (quoting *Wallace*, 549 U.S. at 388) (internal quotation marks omitted).

<sup>23</sup> *Wallace*, 549 U.S. at 391.

<sup>24</sup> *Id.* at 397. The Court noted that only the tort of malicious prosecution, the focus of the *Heck* decision, actually requires as an element of the offense the favorable termination of criminal proceedings. *Id.* at 392.

<sup>25</sup> *Id.* at 389.

<sup>26</sup> *Heck v. Humphrey*, 512 U.S. 477, 486–87 (1994).

<sup>27</sup> *Id.* at 478–89.

<sup>28</sup> *Id.* at 479.

<sup>29</sup> *Id.*

peal, the Seventh Circuit affirmed the dismissal, as did the Supreme Court.<sup>30</sup> *Heck* stands for the principle that if a “judgment in favor of the plaintiff would necessarily imply the invalidity of his [existing] conviction or sentence[,] . . . the complaint must be dismissed unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated.”<sup>31</sup> At the heart of *Heck* was the fear that a convicted criminal defendant would use the § 1983 civil action to attack his existing conviction rather than exhaust his state remedies.<sup>32</sup>

Although the Court intended that *Heck* would apply only to situations in which the § 1983 litigant had a valid criminal judgment in existence at the time of filing, most circuit courts concluded that *Heck* would also bar a § 1983 claim brought by a plaintiff with pending criminal charges if a victory in the § 1983 suit would be inconsistent with a potential conviction not yet rendered.<sup>33</sup> The circuit courts collectively reached this conclusion even though the plaintiff in *Heck* had already been convicted, and the Court did not contemplate or address whether the possibility of a future conviction could also bar such a claim.<sup>34</sup> Thus began more than a decade’s worth of decisions grounded in the belief that *Heck* “concluded that proof of the illegality of a conviction is a necessary element of the § 1983 cause of action” and that “[u]nless that conviction has been reversed, there has been no injury of constitutional proportions, and thus no § 1983 suit may exist.”<sup>35</sup> This notion persisted until the Supreme Court intervened to clarify its holding in *Heck* with its decision in *Wallace*.

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<sup>30</sup> *Id.* at 479, 486.

<sup>31</sup> *Id.* at 487.

<sup>32</sup> See *Kennedy v. City of Villa Hills*, No. 07-122-DLB, 2008 U.S. Dist. LEXIS 17301, at \*5 (E.D. Ky. Mar. 6, 2008).

<sup>33</sup> *Kucharski v. Leveille*, 526 F. Supp. 2d 768, 774 (E.D. Mich. 2007). “Many civil right attorneys had [also] traditionally assumed that a civil rights claim for false arrest could not proceed unless the underlying criminal charges had been fully resolved in the claimant’s favor.” James B. Chanin, *James B. Chanin on Wallace v. Kato*, Dec. 14, 2007, 2008 EMERGING ISSUES ANALYSIS, at 1–2, available at LEXIS, 2008 Emerging Issues 1501.

<sup>34</sup> *Heck*, 512 U.S. at 478.

<sup>35</sup> *Schilling v. White*, 58 F.3d 1081, 1086 (6th Cir. 1995); see also e.g., *Harvey v. Waldron*, 210 F.3d 1008, 1014 (9th Cir. 2000) (“*Heck* applies to pending criminal charges, and that a claim, that if successful would necessarily imply the invalidity of a conviction in a pending criminal prosecution, does not accrue so long as the potential for a conviction in the pending criminal prosecution continues to exist.”); *Shamaeizadeh v. Cunigan*, 182 F.3d 391, 396, 398 (6th Cir. 1999) (“[T]he concerns of *Heck* apply pre-conviction as well as post-conviction,” which means that “a prisoner seeking to challenge an allegedly unconstitutional search and seizure in a § 1983 claim must show that a decision in his favor would not imply the invalidity of his outstanding conviction . . . [and] that a decision in his favor would not imply the invalid-

IV. ANALYZING *WALLACE V. KATO*

*Wallace* marked the Court's first elucidation of the *Heck* bar; it clarified that *Heck* was not intended to prevent a § 1983 claim by a plaintiff who had not yet been criminally convicted.<sup>36</sup> At the age of fifteen, Andre Wallace was arrested on murder charges in the state of Illinois in January 1994.<sup>37</sup> After a lengthy interrogation, he agreed to confess to the murder and thereafter signed an incriminating statement prepared by and at the request of state attorneys.<sup>38</sup> Before the murder trial, Wallace unsuccessfully attempted to suppress his statements, claiming that they were the product of an unlawful arrest.<sup>39</sup> In the ensuing trial, Wallace was convicted of the murder and sentenced to twenty-six years in prison.<sup>40</sup>

Wallace appealed the conviction, again contending that the incriminating statements were the fruit of an unlawful arrest.<sup>41</sup> In December 1998, the Appellate Court of Illinois found that the officers had violated Wallace's Fourth Amendment rights, holding that they had arrested him without probable cause.<sup>42</sup> The court further found that Wallace's presence at the police station prior to his formal arrest—during which time the interrogation at issue occurred—amounted to an involuntary, and thus illegal, seizure of his person.<sup>43</sup>

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ity of a *future* conviction." (emphasis added)); *Covington v. City of New York*, 171 F.3d 117, 124 (2d Cir. 1999) ("[I]f success on [a § 1983] claim would necessarily imply the invalidity of a conviction in a *pending* criminal prosecution, such a claim does not accrue so long as the *potential for a judgment* in the pending criminal prosecution continues to exist." (emphasis added) (quoting *Smith v. Holtz*, 87 F.3d 108, 113 (3d Cir. 1996)) (internal quotation marks omitted)); *Beck v. City of Muskogee Police Dep't*, 195 F.3d 553, 557 (10th Cir. 1999) ("*Heck* precludes § 1983 claims relating to pending charges when a judgment in favor of the plaintiff would necessarily imply the invalidity of any conviction or sentence that *might* result from prosecution of the pending charges. Such claims arise at the time the charges are dismissed." (emphasis added)); *Uboh v. Reno*, 141 F.3d 1000, 1006–07 (11th Cir. 1998); *Washington v. Summerville*, 127 F.3d 552, 556 (7th Cir. 1997) ("If success on these claims would have necessarily implied the invalidity of a potential conviction on the murder charge, then Washington's claims did not accrue until the day on which the murder charge was dismissed . . ."); *Smith*, 87 F.3d at 113 ("In terms of the conflicts which *Heck* sought to avoid, there is no difference between a conviction which is *outstanding* at the time the civil rights action is instituted and a *potential* conviction on a pending charge that may be entered at some point thereafter.").

<sup>36</sup> *Wallace v. Kato*, 549 U.S. 384 (2007).

<sup>37</sup> *Id.* at 386.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *People v. Wallace*, 701 N.E.2d 87, 89 (Ill. App. Ct. 1998).

<sup>42</sup> *Id.* at 94.

<sup>43</sup> *Id.*

This decision came nearly five years after Wallace's arrest.<sup>44</sup> Following another round of appeals and nearly three more years, the appellate court found, in August 2001, that the illegal seizure rendered Wallace's statements inadmissible in the criminal trial and therefore remanded the case for a new trial.<sup>45</sup> Unwilling to proceed to trial without the incriminating statements as evidence, the prosecutors decided to drop the murder charges against Wallace in April 2002.<sup>46</sup>

Within one year of the prosecution dropping the charges, Wallace instituted a § 1983 action against the City of Chicago and several of its officers, seeking damages resulting from his unlawful arrest.<sup>47</sup> Wallace brought the action in April 2003, nine years after the occurrence of the underlying events—the murder and his subsequent arrest.<sup>48</sup> Although Wallace filed his § 1983 claim within one year of the state criminal proceedings terminating in his favor, the district court found that his claim was time-barred because the applicable two-year statute of limitations for personal-injury torts had expired.<sup>49</sup> On appeal, the Seventh Circuit affirmed, agreeing with the district court that Wallace's claim accrued at the time of his arrest, not when his conviction was later invalidated.<sup>50</sup>

A. *The Majority Opinion*

The Supreme Court granted certiorari, seizing the opportunity to clear up the confusion over § 1983 claim accrual that resulted from *Heck*.<sup>51</sup> The Court noted that the Seventh Circuit's approach and the *Heck* approach would produce very different results.<sup>52</sup> On the one hand, "if the statute on [Wallace's] cause of action began to run at the time of his unlawful arrest, or even at the time he was ordered held by a magistrate, his § 1983 suit was plainly dilatory."<sup>53</sup> On the

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<sup>44</sup> See *id.* at 87.

<sup>45</sup> *Wallace*, 549 U.S. at 387.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Wallace*, 549 U.S. at 387.

<sup>52</sup> *Id.* at 387–88.

<sup>53</sup> *Id.* at 387. The statute of limitations *was* tolled in this case, but only for the amount of time that it took for Wallace to reach the age of majority: "two-plus years." *Id.* at 388. The Court ultimately concluded that Wallace's false imprisonment ended at the time "when legal process was initiated against him, and the statute would have begun to run from that date, but for its tolling by reason of [his] minority." *Id.* at 390.



other hand, if “the commencement date for running of the statute [wa]s governed by . . . *Heck v. Humphrey*, that date *may* [have been] the date on which [Wallace’s] conviction was vacated, in which case the § 1983 suit would have been timely filed.”<sup>54</sup> Recognizing this great disparity, the Court sought to elucidate the true meaning of *Heck* and adjudge Wallace’s case in accordance with it.

The Court opened its opinion by distinguishing between claim accrual and the commencement of the running of the statute of limitations.<sup>55</sup> In holding that a § 1983 claim for false imprisonment accrues at the time of arrest, it reiterated the well-established principle that a claim accrues when the litigant has a “complete and present cause of action.”<sup>56</sup> The Court then asserted that Wallace was entitled to, and thus could have, filed his § 1983 claim as soon as the wrongful arrest occurred.<sup>57</sup> Accordingly, the Court noted, the statute of limitations would typically begin to run at the time of accrual.<sup>58</sup> The Court acknowledged, however, that impracticalities may prevent a victim still imprisoned as a result of the unlawful arrest from bringing suit.<sup>59</sup> The commencement of the statute of limitations on a false imprisonment claim is thus somewhat delayed so as to compensate for this impediment until the victim becomes held pursuant to legal process—“when, for example, he is bound over by a magistrate or arraigned on charges.”<sup>60</sup> The Court, however, made it clear that this did not mean that Wallace could not have filed his § 1983 claim immediately upon his arrest, for although the statute of limitations had not begun to run at that time, Wallace had still been sufficiently injured by the arrest itself to bring suit.<sup>61</sup> Ultimately, the *Wallace* Court refused to embrace the argument that the statute of limitations on a false arrest claim begins to run only after a possible future conviction occurs and is invalidated.<sup>62</sup> The Court also rejected the notion that

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<sup>54</sup> *Id.* at 388.

<sup>55</sup> *Id.* at 388–89.

<sup>56</sup> *Id.* at 388 (quoting *Bay Area Laundry & Dry Cleaning Pension Trust Fund v. Ferbar Corp.*, 522 U.S. 192, 201 (1997)) (internal quotation marks omitted).

<sup>57</sup> *Wallace*, 549 U.S. at 388. The Court noted that Wallace had been held without legal process; the officers did not have a warrant for his arrest, nor did they have probable cause to justify his detention. *Id.* at 389.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* at 389.

<sup>61</sup> *Id.* at 390 n.3.

<sup>62</sup> *Id.* at 392.

the statute of limitations on the claim should be tolled until this hypothetical future conviction is set aside.<sup>63</sup>

Recognizing the pervasive misperception among the circuit courts regarding § 1983 claim accrual, the *Wallace* Court noted what had especially complicated the issue of accrual in *Heck* and most likely led to such confusion; the *Heck* Court had “analogized [Heck’s] suit to one for malicious prosecution, an element of which is the favorable termination of criminal proceedings.”<sup>64</sup> Although a criminal defendant cannot file a § 1983 claim of *malicious prosecution* until the underlying criminal proceedings have terminated in his favor, favorable termination is not an essential element of *all* personal-injury torts for which § 1983 can be invoked. After the Court asserted that false imprisonment ends once the victim is held pursuant to legal process, it sought to elucidate the distinction between malicious prosecution and false imprisonment.<sup>65</sup> The Court noted that once the arrestee becomes detained pursuant to legal process, any unlawful detention thereafter

forms part of the damages for the entirely distinct tort of malicious prosecution, which remedies detention accompanied, not by absence of legal process, but by *wrongful institution* of legal process. If there is a false arrest claim, damages for that claim cover the time of detention up until issuance of process or arraignment, but not more. From that point on, any damages recoverable must be based on a malicious prosecution claim . . . .<sup>66</sup>

The Court accordingly rejected Wallace’s argument that his false imprisonment did not end until he was released from custody when the state dropped the charges against him.<sup>67</sup> To obtain damages resulting from his detention spanning the time of his arraignment through his release from custody, Wallace would have had to bring an action for malicious prosecution. As noted earlier, favorable termination *is* an essential element of a malicious prosecution claim;<sup>68</sup> thus, his claim for injuries incurred during that period of detention would not have accrued until the state dropped the charges against him. Theoreti-

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<sup>63</sup> *Wallace*, 549 U.S. at 392–93.

<sup>64</sup> *Id.* at 392; see *Heck v. Humphrey*, 512 U.S. 477, 486 (1994) (“[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, just as it has always applied to actions for malicious prosecution.”).

<sup>65</sup> *Wallace*, 549 U.S. at 389–90.

<sup>66</sup> *Id.* at 390 (internal quotation marks and citations omitted).

<sup>67</sup> *Id.*

<sup>68</sup> See *supra* text accompanying note 64.

cally speaking, if Wallace had brought a § 1983 claim for malicious prosecution in addition to his claim for false imprisonment, his claim of malicious prosecution, whether meritorious or not, would have been timely filed; he instituted his § 1983 action within one year of the criminal proceedings terminating in his favor, which occurred when the prosecution dropped the charges against him in April 2002.<sup>69</sup> Because the governing statute of limitations in this case was two years, Wallace would have had until April 2004 to bring such an action.<sup>70</sup>

Prior to the *Wallace* Court's clear distinction between these two torts, lower courts mistakenly extended the malicious prosecution standard to other § 1983 claims—such as false arrest, false imprisonment, and selective enforcement—holding favorable termination to be a requirement of *Heck*, and construing *Heck* as barring a § 1983 claim, which, if resolved in the plaintiff's favor, would effectively impugn the validity of an anticipated *future* conviction.<sup>71</sup> Notwithstanding this pervasive interpretation of *Heck*, the *Wallace* Court quickly dismissed its validity and characterized such extensions of *Heck* as “bizarre.”<sup>72</sup>

In an action for false arrest it would require the plaintiff . . . to speculate about whether a prosecution will be brought, whether it will result in conviction, and whether the pending civil action will impugn that verdict . . . . And what if the plaintiff . . . guesses wrong, and the anticipated future conviction never occurs, because of acquittal or dismissal? Does that event . . . trigger accrual of the cause of action? Or what if prosecution never occurs—what will the trigger be then? We are not disposed to embrace this bizarre extension of *Heck*.<sup>73</sup>

Instead, the Court reinforced that *Heck*'s rule of deferred accrual applies only when an outstanding criminal judgment exists at the time of filing.<sup>74</sup> It further noted that, even if *Heck* were to apply to the date on which the statute of limitations began to run rather than to the date of accrual, at neither point in time was a criminal conviction in existence that Wallace's § 1983 action could potentially have im-

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<sup>69</sup> *Wallace*, 549 U.S. at 387.

<sup>70</sup> *Id.*

<sup>71</sup> See cases cited *supra* note 35; *supra* text accompanying notes 33–35.

<sup>72</sup> *Wallace*, 549 U.S. at 393.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

pugned.<sup>75</sup> Therefore, nothing about *Heck* should have barred Wallace's § 1983 suit at that time, or prevented him from filing it.

Through *Wallace*, the Court clarified years of misinterpretations of its prior decision and affirmed the Seventh Circuit's ruling that Wallace's § 1983 claim was barred by the statute of limitations because his unlawful-arrest claim accrued at the time that he was arrested. Wallace did not need to wait until the state obtained a conviction against him—which at the time of his arrest was only a possibility—and then again until that conviction was later set aside for his claim to accrue.<sup>76</sup>

Although the impracticalities that the majority claimed would result from preventing a delayed § 1983 accrual are not without merit,<sup>77</sup> these concerns do not justify the Court's refusal to implement equitable tolling on a § 1983 claim once a criminal proceeding is instituted against a § 1983 litigant. The Court did propose one potential remedy, suggesting that it would be within the district court's *discretion* to stay the § 1983 civil action in such a situation, pending the outcome of the state criminal proceedings.<sup>78</sup> The only situation in which *Heck* would require dismissal of the § 1983 claim would be when the plaintiff is convicted and the stayed civil action would question the validity of that conviction.<sup>79</sup> This procedural "safeguard," however, falls short of fully protecting the § 1983 plaintiff from having to litigate his civil claim and defend against his criminal charge simultaneously, as this power to stay is merely discretionary and may not always be effectuated. As Justice Breyer noted in his dissenting opinion, "In the absence of a stay, a litigant . . . would have . . . to divide his attention between criminal and civil cases with attendant risks of loss of time and energy as well as of inconsistent findings."<sup>80</sup> Having to divide his attention between the two cases would also impede the litigant's ability to defend himself in the best possible way in his criminal trial, the magnitude of which is exemplified by *Wallace* itself; Wallace was in custody and facing a twenty-six-year prison sentence throughout the duration of the state criminal proceedings, but, at the

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<sup>75</sup> *Id.*

<sup>76</sup> *Id.* at 390.

<sup>77</sup> *Id.* at 393.

<sup>78</sup> *Wallace*, 549 U.S. at 393–94 ("If a plaintiff files a false-arrest claim before he has been convicted . . . it is within the power of the district court . . . to stay the civil action until the criminal case or the likelihood of a criminal case is ended.").

<sup>79</sup> *Id.*

<sup>80</sup> *Id.* at 400 (Breyer, J., dissenting).

same time, the majority expected him to have also been litigating his § 1983 claim.<sup>81</sup>

*B. Justice Breyer's Dissent and the Court's Refusal to Adopt Equitable Tolling*

In his dissenting opinion, Justice Breyer characterized the majority's rule as one "that would require immediate filing, followed by an uncertain system of stays, dismissals, and possible refiling."<sup>82</sup> He instead argued that the implementation of equitable tolling in such § 1983 suits would offer a preferable result.<sup>83</sup> Courts have applied equitable tolling "[w]here a plaintiff because of disability, irremediable lack of information, or other circumstances beyond his control just cannot reasonably be expected to sue in time."<sup>84</sup> Justice Breyer thus advocated for the statute of limitations on the § 1983 claim to be equitably tolled for the duration of the criminal trial, and even for the time during which the litigant challenges his conviction on appeal.<sup>85</sup> The majority, however, was unmoved by the argument and refused to adopt a federal tolling rule to that effect.<sup>86</sup>

Justice Breyer argued that equitable tolling should apply "where a § 1983 plaintiff reasonably claims that the unlawful behavior of which he complains was, or will be, necessary to a criminal conviction."<sup>87</sup> Once that is established, the limitations period could be equitably tolled (1) from the time charges are brought until dismissal, acquittal, or conviction and (2) during the appeals process.<sup>88</sup> It is clear that Justice Breyer's proposed tolling rule would ensure a tight nexus between the § 1983 claim and the underlying criminal action. Of course, despite this tight nexus, courts will, at times, toll § 1983 claims even though the claims would not be barred under *Heck*.<sup>89</sup> While this approach is over-inclusive, this would be but a negligible consequence of adequately protecting the target class of § 1983 litigants whose claims *would* be barred by *Heck*. Further, the cost of over-inclusiveness is outweighed by the benefit that equitable tolling

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<sup>81</sup> *Id.* at 386 (majority opinion).

<sup>82</sup> *Id.* at 400 (Breyer, J., dissenting).

<sup>83</sup> *Id.*

<sup>84</sup> *Wallace*, 549 U.S. at 400 (Breyer, J., dissenting) (quoting *Miller v. Runyon*, 77 F.3d 189, 191 (7th Cir. 1996)) (internal quotation marks omitted).

<sup>85</sup> *Id.* at 401.

<sup>86</sup> *Id.* at 394 (majority opinion).

<sup>87</sup> *Id.* at 401 (Breyer, J., dissenting).

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

would prevent the possible § 1983 plaintiff, defendant, and even the federal court, from having to “speculate as to whether the claims are in any way barred until the state court has had the opportunity to consider the claims in the criminal context.”<sup>90</sup> This would also reduce the risk of inconsistent legal determinations. A state court could acquit the defendant, or overturn his conviction on appeal, after finding a constitutional violation that negates the validity of the charge or conviction, while the federal court, trying the § 1983 claim simultaneously, could find there to be no constitutional violation—or vice versa.<sup>91</sup>

Breyer further opined that if tolling were employed, plaintiffs would very rarely, if ever, choose to file a § 1983 claim while the criminal case is still pending or on-going in order to devote due diligence and attention to the criminal trial.<sup>92</sup> Even if they did choose to file at this time, Justice Breyer noted, the district court could, in those rare cases, stay the action if it chose or dismiss the claim without prejudice without fear that the statute of limitations would run by the conclusion of the criminal proceedings and leave the plaintiff without a remedy.<sup>93</sup> Perhaps the most important rationale behind the employment of equitable tolling under these circumstances is that it will “above all, assure a plaintiff who possesses a meritorious § 1983 claim that his pursuit of criminal remedies designed to free him from unlawful confinement will not compromise his later ability to obtain civil § 1983 redress as well.”<sup>94</sup> A harmed individual should not have to forgo the opportunity to pursue a claim of damages for a constitutional violation in order to rightfully devote full attention and resources to a criminal action in which he is fighting for freedom. A criminal defendant’s interest in freedom from unlawful confinement is necessarily paramount, and the import of this interest should not be diminished through the forced juggling of another proceeding. Nor should it preclude him from seeking other forms of relief for the suffered constitutional violation beyond release from unlawful custody. He should have the opportunity to litigate both actions fully and completely and should not have to choose one over the other or juggle both proceedings simultaneously, which would necessarily cause him to devote less time and attention to each proceeding.

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<sup>90</sup> *Wallace*, 549 U.S. at 403.

<sup>91</sup> *Id.* at 403.

<sup>92</sup> *Id.* at 404.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.* at 403.

The majority did recognize the difficulty a litigant would face in having to divide attention between the criminal and civil actions as a rationale for the employment of equitable tolling, though it identified this concern as the “only rationale for such a rule.”<sup>95</sup> Despite the validity of the litigant’s interest in primarily dedicating and focusing energy on the criminal proceedings, the Court commented that equitable tolling was not an appropriate tool to avoid the possibility of concurrent litigation.<sup>96</sup> It merely retorted, rather insensitively, “[W]hen has it been the law that a criminal defendant, or a potential criminal defendant, is absolved from all other responsibilities that the law would otherwise place upon him?”<sup>97</sup> Equitable tolling, however, would not *absolve* the defendant of his legal responsibilities; rather, it would give a defendant who has a meritorious constitutional claim and who does not deserve of a criminal conviction an adequate opportunity to vindicate his claim and obtain relief from the injury he suffered at the hands of state officials.

In rejecting Justice Breyer’s argument for equitable tolling, the Court relied on the fact that it generally refers to state law for the applicable tolling rules and thus declined to deviate from the norm and develop a federal tolling rule.<sup>98</sup> The disparity among the states’ tolling laws, however, warrants the implementation of a federal tolling statute because it is impractical to force a (potential) criminal defendant to file his civil § 1983 claim immediately and then manage both proceedings simultaneously.<sup>99</sup>

As discussed below, an additional reason for the majority’s rejection of Justice Breyer’s equitable tolling argument was the concern that equitable tolling would encourage the filing of meritless § 1983 claims by manipulative crafters of “conviction-impugning cause[s] of action.”<sup>100</sup> In reality, however, the majority’s refusal to adopt equitable tolling “means that large numbers of defendants will be sued im-

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<sup>95</sup> *Id.* at 396 (majority opinion).

<sup>96</sup> *Wallace*, 549 U.S. at 396.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.* at 394 (explaining that no Illinois cases had “provid[ed] tolling in even remotely comparable circumstances”).

<sup>99</sup> Although Justice Breyer recognized that “§ 1983 ordinarily borrows its limitations principles from state law,” he argued that “[i]f a given state court lacks the necessary tolling provision, . . . § 1983 . . . [should] permit[] the federal courts to devise and impose such principles.” *Id.* at 402 (Breyer, J., dissenting). Indeed, “[g]aps in federal civil rights acts should be filled by state law, as long as that law is not inconsistent with the federal law” and its “goals of uniformity and federalism.” *Id.* (citing *Hardin v. Straub*, 490 U.S. 536, 538–40 (1989)).

<sup>100</sup> *Wallace*, 549 U.S. at 395 (majority opinion).

mediately by all potential § 1983 plaintiffs with arguable *Heck* issues, no matter how meritless the claims.”<sup>101</sup> These plaintiffs’ sole motivation is the desire to preserve a potential § 1983 claim in case it becomes apparent during the state criminal proceedings that they were victims of a constitutional violation, rather than a sincere belief that they have suffered such a violation. Equitable tolling, however, would prevent the courts from being bombarded by these potentially unnecessary “protective filings,” as these criminal defendants—and *potential* § 1983 litigants—could rest assured, “secure in the knowledge that the suit,” if eventually worth pursuing, “could be timely filed at a later date.”<sup>102</sup>

Admittedly, a federal equitable tolling rule in this context would be most effective and practical if it were applied retrospectively. Otherwise, “it would not be known whether tolling is appropriate by reason of the *Heck* bar until it is established that the newly entered conviction would be impugned by the not-yet-filed, and thus utterly indeterminate, § 1983 claim.”<sup>103</sup> The majority, however, rejected the possibility of determining whether to employ tolling retrospectively, offering only the argument that defendants must be alerted in advance of the need to preserve evidence and other relevant materials beyond the normal limitations period in the event that tolling were to prolong the viability of the claim.<sup>104</sup> The Court observed that the retrospective extension of the limitations period by a plaintiff who has “craft[ed] a conviction-impugning cause of action” would frustrate this need.<sup>105</sup> Unfortunately, the majority took into consideration only the plaintiff who has designed or “crafted” a case to trigger the *Heck* bar and thus trigger this hypothetical federal tolling rule. What the Court seemingly failed to consider is the plaintiff with a potentially meritorious § 1983 claim who did not need to “craft[] a conviction-impugning cause of action” but instead had one due to the officers who violated his constitutional rights. The Court failed to consider the plaintiff who had received a favorable disposition in his criminal trial or won the appeal from his conviction because the state determined that he was the victim of a constitutional violation. The Court failed to consider the plaintiff who did not file his civil claim within the limitations period because he was acting in reliance on prior interpretations of *Heck* and was thus under the common misconception

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<sup>101</sup> *Id.* at 404 (Breyer, J., dissenting).

<sup>102</sup> *Id.* at 403, 404 (internal quotation marks and citations omitted).

<sup>103</sup> *Id.* at 394–95 (majority opinion).

<sup>104</sup> *Id.* at 395.

<sup>105</sup> *Id.*



that his claim would not accrue until the criminal proceedings had terminated in his favor. The Court failed to consider the plaintiff who did not timely file his civil claim because he was understandably and rightfully consumed with defending himself throughout the duration of the underlying criminal action.

#### V. THE EFFECTS OF THE *WALLACE* DECISION

The *Wallace* decision has placed criminal defendants who have potentially meritorious § 1983 claims at a disadvantage. *Wallace*'s requirement that criminal defendants file their § 1983 claims within a very short limitations period makes it difficult for such litigants to vindicate their rights. The applicable limitations period is likely to be much shorter than the amount of time it typically takes to fully litigate criminal charges in state court and thereafter seek post-conviction relief from the state if necessary. The terrible consequences of the *Wallace* decision would have been eliminated had the Court accepted Justice Breyer's proposal of a federal rule of equitable tolling. Should a criminal defense attorney now be obligated to inform his clients that they might have civil claims that they need to file right away?

Further, the limitations period should certainly be tolled for the time when the *Heck* bar is triggered to the time when the criminal defendant subsequently finds success on appeal from his conviction or through post-conviction relief. Such tolling is especially necessary in light of the inequities that would result from the type of situations contemplated in the fourth footnote of the majority opinion.<sup>106</sup> Failure to toll contravenes the intent behind the *Heck* decision, and even the intent of the *Wallace* majority.

##### A. *Wallace*'s Effect—Forcing Immediate Filing of § 1983 Claims

*Wallace* essentially requires a § 1983 litigant to file his civil claim *immediately* and perhaps even before institution of the criminal prosecution against him. To use the language of *Wallace*, there are “bizarre” results from forcing a person who *might* be prosecuted to initiate litigation within the two-year period of limitations.<sup>107</sup> Specifically, this process effectively binds prosecutors' hands to proceed with the criminal charge in an effort to protect the police officers who have potentially violated the litigant's constitutional rights. Another possi-

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<sup>106</sup> For a discussion of the circumstances contemplated in footnote four of the *Wallace* majority opinion, see *infra* Part V.B.

<sup>107</sup> *Wallace*, 549 U.S. at 393.

bility is that it may even encourage prosecutors to punish the litigant for his audacity, as one of the dangers of forcing the litigant to file his § 1983 claim immediately is that “[p]rosecutors and police could press for more severe sentences for those who dare to sue the police.”<sup>108</sup> This, too, would be a “result surely not intended”<sup>109</sup> by the *Wallace* Court.

Further, even if the § 1983 litigant does not file his civil claim before institution of the underlying criminal proceedings, the short statute of limitations period, coupled with the reality that criminal actions consume a significant amount of time<sup>110</sup> necessarily means that, under *Wallace*, “[c]lients with pending criminal charges [will] be forced to pursue civil actions at the same time [that] their criminal charges are pending.”<sup>111</sup> Some dangers likely to result from such a system include plea bargains contingent on the defendant surrendering his civil claim, as well as forced waiver of the defendant’s Fifth Amendment privilege against self-incrimination.<sup>112</sup> An individual who has suffered a constitutional violation should not have to choose between available remedies when he is entitled to both. Nor should he have to divide attention and resources between two proceedings, especially where his freedom is at stake in one of those proceedings.

As mentioned, the *Wallace* Court suggested a possible remedy to this problem, stating that when the plaintiff timely files his § 1983 claim, it would be within the district court’s discretion to stay the action pending the outcome of the underlying criminal proceeding.<sup>113</sup> The Court, however, did not mandate that district courts stay the action in such circumstances and did not suggest that the power to stay the action is anything more than discretionary.<sup>114</sup> In fact, lower courts have relied on this language in denying motions to stay a § 1983 claim pending the outcome of a criminal action.<sup>115</sup>

Although some courts have relied on this language from the *Wallace* opinion to grant motions to stay a civil action,<sup>116</sup> it remains

<sup>108</sup> Chanin, *supra* note 33, at 2.

<sup>109</sup> *Wallace*, 549 U.S. at 395 n.4.

<sup>110</sup> In *Wallace*, the state criminal proceedings spanned more than eight years.

<sup>111</sup> Chanin, *supra* note 33, at 2.

<sup>112</sup> *Id.*

<sup>113</sup> *Wallace*, 549 U.S. at 394–95.

<sup>114</sup> *Id.*

<sup>115</sup> See, e.g., *Cress v. City of Ventnor*, No. 08-1873, 2009 U.S. Dist. LEXIS 22172, at \*12–13 (D.N.J. Mar. 18, 2009) (rejecting the argument that *Wallace* requires courts to enter a stay and holding that this decision is within the courts’ discretion).

<sup>116</sup> See, e.g., *Telfair v. Tandy*, No. 08-731, 2008 U.S. Dist. LEXIS 83462, at \*18 (D.N.J. Oct. 20, 2008) (granting a motion to stay the § 1983 action alleging false ar-

problematic that the decision to stay is discretionary rather than mandatory. If the district courts decide not to exercise their power of abstention and stay the civil action pending resolution of the underlying criminal proceeding, a possibility of inconsistent judgments from the state and federal courts arises.<sup>117</sup> It is very likely that a defendant could be convicted in the underlying state criminal trial and yet be successful in federal court on his § 1983 claim upon a finding of a constitutional violation that, if found by the state court, would have prevented conviction. Such a result is nonsensical. It is better to allow the state courts to first deal with and dispose of the criminal action before the federal court entertains the § 1983 claim. As Justice Breyer pointed out in his dissent in *Wallace*, if the district court refuses to stay the §1983 action, the litigant will be forced to divide his attention between the two cases, compromising his efficacy and chances of success in both actions, and risking inconsistent findings.<sup>118</sup> It is further problematic that even when courts do opt to stay the civil action, “the stay may extend for years while post-conviction relief is sought” if the litigant is convicted on the underlying charges, which presents a less than ideal situation considering “the potential to clog the court[s]’ docket[s] with unresolvable cases.”<sup>119</sup> The more efficient approach is to mandate equitable tolling of a litigant’s § 1983 claim from the time when criminal charges are filed through acquittal or reversal of the conviction on appeal.

*B. Wallace’s Footnote Four and the “Result Surely Not Intended”*

In *Wallace*, the Court acknowledged that § 1983 actions sometimes accrue before the related criminal conviction—that is, before the *Heck* bar is triggered.<sup>120</sup> This, the Court noted, “raises the question whether, assuming that the *Heck* bar takes effect when the later conviction is obtained, the statute of limitations on the once valid cause of action is tolled as long as the *Heck* bar subsists.”<sup>121</sup> Using the case before it as an example, the Court noted that if Wallace’s conviction had “caused the statute of limitations on his (possibly) impugning but yet-to-be-filed cause of action to be tolled until the conviction

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rest in violation of the Fourth Amendment because the criminal proceedings were ongoing).

<sup>117</sup> See *Whitley v. Allegheny Cnty.*, No. 07-403, 2010 U.S. Dist. LEXIS 21262, at \*75 (W.D. Pa. Mar. 9, 2010) (citing *DiNicola v. DiPaolo*, 945 F. Supp. 848, 860–61 (W.D. Pa. 1996)).

<sup>118</sup> *Wallace*, 549 U.S. at 400 (Breyer, J., dissenting).

<sup>119</sup> *Telfair*, 2008 U.S. Dist. LEXIS 83462, at \*22, \*23.

<sup>120</sup> *Wallace*, 549 U.S. at 394.

<sup>121</sup> *Id.*

was set aside, his filing . . . would have been timely.”<sup>122</sup> Recognizing that state law provides the tolling rules, the Court first looked to see if Illinois had provided tolling in comparable circumstances.<sup>123</sup> The search, however, proved unfruitful.<sup>124</sup> The Court then rejected the adoption of a federal tolling rule.<sup>125</sup>

In footnote four of the decision, the Court commented that if a § 1983 plaintiff were to file suit upon his arrest and his suit were subsequently dismissed under *Heck* upon his conviction in the underlying criminal action, “the statute of limitations, absent tolling, would have run by the time he obtain[s] reversal of his conviction. If under those circumstances he were not allowed to refile his suit, *Heck* would produce immunity from § 1983 liability, a result surely not intended.”<sup>126</sup> Although the Court acknowledged that the statute of limitations should not run during this time period, it declined to address how such a situation should be handled. The Court was able to avoid this result since Wallace, the petitioner before the Court, had not timely filed his § 1983 claim. It was therefore unnecessary for the Court to decide the amount of time Wallace would have had to refile his § 1983 suit once the *Heck* bar was removed when his conviction was reversed.<sup>127</sup>

Despite the Court’s unwillingness to develop a federal tolling rule to take effect when there are criminal and civil proceedings taking place simultaneously that arise out of the same incident and involve the same parties, the statute of limitations should definitely be tolled for the time in which the *Heck* bar would take effect, regardless of whether the criminal defendant has yet filed his § 1983 claim. This means that the statute of limitations should be tolled in circumstances like those contemplated in footnote four—from the time that a § 1983 litigant who filed his claim upon arrest is convicted in his underlying criminal trial through the time during which the litigant appeals his conviction. The statute of limitations should also be tolled in a case like *Wallace* in which the criminal defendant has not yet filed his § 1983 claim, but tolling from the time of conviction through appeal would prevent the statute of limitations from expiring. In either scenario, equitable tolling for the duration of this time period would protect those with potentially meritorious § 1983 claims who found

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<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> *Wallace*, 549 U.S. at 395 n.4 (emphasis added).

<sup>127</sup> *Id.*

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success on appeal from their convictions from being barred by the statute of limitations.<sup>128</sup>

#### VI. ARGUING FOR EQUITABLE TOLLING DUE TO RELIANCE ON PRE-EXISTING PRECEDENT

Although the method for dealing with § 1983 claim accrual as announced by the *Wallace* Court was inconsistent with the then-predominately accepted practice of the circuit courts, the majority refused to adopt a federal rule of equitable tolling to alleviate the transition.<sup>129</sup> Perhaps most problematic about the *Wallace* decision is its retroactive application—that is, its application to § 1983 claims arising out of events that occurred before the Court decided the intervening *Wallace* decision.<sup>130</sup> Inequities result when a new legal rule is strictly applied against a plaintiff who understandably relied on prior interpretations of the law and acted in accordance with it. Courts should employ equitable tolling in its own right on the grounds that a litigant's reliance on pre-existing precedent, or misinterpretation of the law created by courts' confusion, should not prejudice a litigant with a potentially meritorious claim whose failure to comply with the law and file within the statute of limitations is not due to a lack of diligence on his part.

Recently, in *Dique v. New Jersey State Police*, the Third Circuit relied on *Wallace* in overruling its previous incorrect interpretations of *Heck*.<sup>131</sup> In that case, *Dique* had been arrested for possession of drugs in January 1990 and was ultimately convicted on such drug-related

<sup>128</sup> For an example of how a lower court has dealt with *Wallace*'s footnote four, see *Kucharski v. Leveille*, 526 F. Supp. 2d 768 (E.D. Mich. 2007). The court relied on the footnote's language in applying equitable tolling due to the plaintiff's reasonable reliance on the circuit's precedential interpretations of *Heck* that were ultimately overruled by *Wallace*. *Id.* at 775. The court found that the plaintiff reasonably believed that his § 1983 cause of action for illegal seizure did not accrue until his conviction was overturned because of preexisting precedent in the circuit. *Id.* The court thus held that equitable tolling should be applied to avoid a virtual § 1983 immunity—a “result surely not intended” by *Wallace*. *Id.* (quoting *Wallace*, 549 U.S. at 395 n.4).

<sup>129</sup> *Kucharski*, 526 F. Supp. 2d at 770.

<sup>130</sup> See *Hargroves v. City of New York*, 694 F. Supp. 2d 198, 211 n.10 (E.D.N.Y. 2010) (noting that *Wallace* applies retroactively); *Mallard v. Potenza*, No. 94-CV-223, 2007 U.S. Dist. LEXIS 86336, at \*10–11 (E.D.N.Y. Nov. 21, 2007) (holding that *Wallace* should be applied retroactively); cf. *Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749, 752 (1995) (holding that when the Court applies a new legal rule to the parties before it, other courts must apply the rule retroactively).

<sup>131</sup> 603 F.3d 181, 188 (3d Cir. 2010).

charges in June 1999.<sup>132</sup> In April of 2002, twelve years after his arrest and three years after his conviction, the court vacated Dique's conviction because "colorable issues of racial profiling existed at the time of the arrest," and he was released from prison.<sup>133</sup> Thereafter, Dique filed § 1983 claims for false arrest and selective-enforcement.<sup>134</sup> Initially, the district court dismissed Dique's claim, finding it to be time-barred.<sup>135</sup> Dique successfully appealed, however, in light of the Third Circuit's 2005 decision of *Gibson v. Superintendent of New Jersey Department of Law & Public Safety*, which had interpreted *Heck* to mean that a § 1983 claim does not accrue until a potential future conviction is reversed, expunged, or invalidated.<sup>136</sup> The Third Circuit therefore remanded the case and the district court ruled that Dique's claims survived.<sup>137</sup> During discovery on remand, the Supreme Court decided *Wallace* and the district court granted the officers' motions for summary judgment, ruling that Dique's claims were time-barred under *Wallace*.<sup>138</sup> The Third Circuit affirmed, finding that the Supreme Court's intervening decision required overruling of the court's previous opinion.<sup>139</sup>

*Dique* illuminates the inequities that result when *Wallace* is applied against a litigant who relied upon prior interpretations of *Heck* in refraining from filing his § 1983 claim until the criminal action terminated in his favor. The Third Circuit did not employ equitable tolling to preserve Dique's claim even though he relied on *Gibson* and other pre-*Wallace* interpretations of *Heck*.<sup>140</sup> Accordingly, Dique, whose convictions had already been overturned at the state-level due to the finding of a constitutional violation, was left without a remedy for such intrusion upon his rights.<sup>141</sup>

<sup>132</sup> *Id.* at 183. The nine-year gap occurred because he became a fugitive. *Id.* at 183 n.3.

<sup>133</sup> *Id.* at 184 (internal quotation marks omitted).

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> *Id.* (citing *Gibson v. Superintendent of N.J. Dep't of Law & Pub. Safety*, 411 F.3d 427 (3d Cir. 2005)).

<sup>137</sup> *Dique*, 603 F.3d at 184.

<sup>138</sup> *Id.*

<sup>139</sup> *Id.* at 188. "[A]n intervening Supreme Court decision is a sufficient basis for . . . overrul[ing] a prior panel's opinion." *Id.* at 187.

<sup>140</sup> *Id.*

<sup>141</sup> The statute of limitations was equitably tolled for some time in this case, though it was not due to the defendant's reliance on pre-existing precedent. Instead, the statute was tolled under the discovery rule, under which "the accrual of the claim [is] postponed until the injured party discovers, or by exercise of reasonable diligence and intelligence should have discovered, that he may have a basis for an

*Kucharski v. Leveille* presents another example of a criminal case that was ongoing at the time of the *Wallace* decision.<sup>142</sup> In March of 2001, William Kucharski, Sr. and William Kucharski, Jr. were both arrested in connection with a motor vehicle accident.<sup>143</sup> Both were convicted in state-court proceedings, but the appellate court ultimately reversed some of these convictions in 2004 after finding Fourth Amendment violations.<sup>144</sup> The convictions were reversed in September of 2004.<sup>145</sup> Within a year, Kucharski Sr. and Kucharski Jr. filed a § 1983 claim for the illegal seizure.<sup>146</sup> Initially, the district court rejected the officers' argument that the § 1983 claim, which was filed more than four years after the seizure in question, was barred by the statute of limitations.<sup>147</sup>

Shortly after this ruling, the court instructed both parties to file briefs commenting on *Wallace*'s effect on the statute of limitations issues in the case at hand.<sup>148</sup> After reviewing the briefs, the court granted summary judgment in the officers' favor, finding that under *Wallace* the plaintiffs' claims were barred by the statute of limitations.<sup>149</sup> Looking to the Supreme Court for guidance, the district court noted that "although the practice announced by the Supreme Court was somewhat at odds with the general understanding of *Heck*, the Court did not allow equitable tolling"; therefore the district court declined to apply the doctrine as well.<sup>150</sup>

In a motion for reconsideration, the Kucharskis argued for the employment of equitable tolling due to reliance on pre-*Wallace* precedent.<sup>151</sup> They waited to file the § 1983 claim until the state court convictions were overturned, believing that their § 1983 claim did not

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actionable claim." *Id.* at 185. This was applied to Dique's selective enforcement claim because it was not until 2001 that defense counsel became aware of 90,000 pages of documents that revealed a state-wide practice of selective enforcement based on race. *Id.* at 184. Despite this tolling, however, Dique still filed his § 1983 claim more than two years after this discovery. *Id.*

<sup>142</sup> 526 F. Supp. 2d 768 (E.D. Mich. 2007).

<sup>143</sup> *Id.* at 769. Kucharski, Jr. was arrested and taken to have his blood tested for alcohol; Kucharski Sr. was arrested for attempting to interfere with the arrest of his son. *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> Plaintiffs filed suit on September 26, 2005. *Id.*

<sup>147</sup> *Kucharski*, 526 F. Supp. 2d at 769.

<sup>148</sup> *Id.* at 770.

<sup>149</sup> *Id.*

<sup>150</sup> *Kucharski v. Leveille*, 478 F. Supp. 2d 928, 931 (E.D. Mich. 2007).

<sup>151</sup> *Id.*

accrue until then.<sup>152</sup> The presiding court noted that this belief was strongly supported by a long line of Sixth Circuit precedent, but that since “the *Wallace* Court did not allow equitable tolling to save the plaintiff’s claim in that case, [it] did not consider the possibility in the present matter.”<sup>153</sup> This is the exact danger that *Wallace*’s failure to mandate equitable tolling presents. Although state law *may* provide the remedy of equitable tolling to the plaintiff—as Michigan law ultimately did in *Kucharski*—the presiding court may fail to consider the remedy of equitable tolling since the Supreme Court did not mandate that such relief be granted.

Despite the *Kucharski* court’s initial failure to entertain then notion of equitable tolling, it conducted an extensive tolling analysis in deciding the plaintiffs’ motion for reconsideration.<sup>154</sup> As limitations periods and tolling rules are to be determined by the governing state’s law, the court referred to Michigan law and found that the state’s Supreme Court allowed tolling “when the plaintiff’s failure to comply with the statute [of limitations] is a result of the confusing state of the law.”<sup>155</sup> Thus, where the “[p]laintiff’s failure to comply with the applicable statute of limitations is the product of an understandable confusion about the legal nature of her claim, rather than a negligent failure to preserve her rights,” the doctrine of equitable tolling applies.<sup>156</sup> The Michigan Supreme Court was clear, however, that the use of such an equitable doctrine was limited to cases in which the courts themselves were responsible for the confusion.<sup>157</sup>

The *Kucharski* court recognized that a great inequity would result if it were to strictly apply *Wallace* to the case before it:

If the plaintiffs had filed their case immediately after the search on May 4, 2001, Sixth Circuit precedent would have required dismissal of the case as barred by *Heck*. Once the law changed, the plaintiffs’ convictions having been reversed on September 30, 2004, the plaintiffs would be barred by the statute of limitations under *Wallace*. This is “a result surely not intended.”<sup>158</sup>

The court was convinced that the plaintiffs had relied on Sixth Circuit precedent to their detriment and attributed the untimeliness of

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<sup>152</sup> *Id.*

<sup>153</sup> *Kucharski*, 526 F. Supp. 2d at 771.

<sup>154</sup> *Id.*

<sup>155</sup> *Id.*

<sup>156</sup> *Id.* at 772 (citing *Bryant v. Oakpointe Villa Nursing Ctr.*, 684 N.W.2d 864, 876 (Mich. 2004); *Ward v. Siano*, 730 N.W.2d 1, 2 (Mich. Ct. App. 2006)).

<sup>157</sup> *Id.*

<sup>158</sup> *Id.* at 775 (quoting *Wallace v. Kato*, 549 U.S. 384, 395 n.4 (2007)).



the plaintiffs' complaint to "an understandable confusion about the state of the law as to when their claim accrued," not to any failure on their part to diligently pursue their claims.<sup>159</sup> Their diligence was evidenced by the fact that the plaintiffs filed their § 1983 claims within one year of reversal of their convictions, which marked the time at which they had reasonably believed that the claims had accrued.<sup>160</sup> Accordingly, the court found that "this [was] the unusual case that fit[] neatly within the doctrine of equitable tolling."<sup>161</sup> The court also concluded that "Michigan law tolled the three-year statute of limitations while the plaintiffs' convictions were still viable, and filing this case within three years of the reversal of those convictions d[id] not result in a statute of limitations bar."<sup>162</sup> Thus, the plaintiffs were not denied the right to pursue a remedy for the Fourth Amendment violations that they had suffered—violations that the state appellate court already found.<sup>163</sup>

Offering equitable tolling in this context is crucial to the protection of those § 1983 plaintiffs whose claims are likely meritorious, considering that these are the plaintiffs who have received favorable outcomes in their criminal trials or on appeal from their convictions. Reliance on prior interpretations of *Heck*—especially when precedential in the governing circuit—does not justify stripping a litigant of his ability to receive a remedy for a constitutional violation, for which he has already suffered extensively while enduring lengthy and arduous state-court criminal proceedings. There should be an exception to barring a potentially meritorious claim where a litigant has been victimized by a change in, or new interpretation of, the governing law, especially where that litigant, while imprisoned, had little access to such information.

## VII. CONCLUSION

Equitable tolling, for which Justice Breyer advocated in his *Wallace* dissent, is the proper procedural safeguard to remedy the inequities that have resulted from the *Wallace* decision. *Wallace* poses serious practical problems because it introduces § 1983 litigants to the strong possibility that they will have to juggle their civil case alongside the criminal case against them in order to prevent the statute of limi-

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<sup>159</sup> *Kucharski*, 526 F. Supp. 2d at 775.

<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

<sup>162</sup> *Id.*

<sup>163</sup> *Id.* at 769.

tations from running out and leaving them without recourse. Such potential § 1983 litigants should be afforded the opportunity to completely immerse themselves in the underlying criminal proceedings, where their freedom is at stake, without being compelled to present an effective civil case at the same time and without fear that the statute of limitations will run out if they do not do so immediately. Tolling of the limitations period from the time that criminal proceedings are initiated against the plaintiff through acquittal, or in case of a conviction through the time appeal is pending, would most effectively protect the meritorious claims of potential § 1983 litigants. Although some states have rules that would allow for such tolling, the disparity among the states' tolling laws warrants the Supreme Court's intervention and implementation of a federal tolling statute to address this issue adequately.

Further, notwithstanding the argument that the limitations period should be tolled for the duration of the criminal proceeding and any subsequent appeal, courts should offer equitable tolling to § 1983 litigants who have reasonably relied to their detriment on prior interpretations of *Heck* and have untimely filed their civil claims solely because of this confusion. A criminal defendant should not lose the opportunity to seek relief for a constitutional violation where his failure to file within the applicable limitations period was due to no fault of his own but was instead the product of confusion caused by the courts.