[Mississippi College Law Review](https://dc.law.mc.edu/lawreview)

Volume 29
Issue 3 *Vol. 29 Iss. 3*

Article 4

2010

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Custom Citation
29 Miss. C. L. Rev. 529 (2010)

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Heck, Excessive Force, and the Fifth Circuit

G. Todd Butler and Nicholas F. Morisani***

I. Introduction

Every year, thousands of individuals with criminal convictions choose 42 U.S.C. § 1983 as a vehicle for bringing lawsuits against police officers.[1] Their vehicle, however, often hits a bump in the road: *Heck v. Humphrey*.[2] The rule from *Heck* is that claims for monetary damages calling into question the lawfulness of a criminal conviction are not cognizable under § 1983.[3]

In the large majority of cases, *Heck*'s applicability is straightforward. To take a simple example, assume an individual is arrested and convicted of drug possession but subsequently files a § 1983 suit for false arrest. Such an action plainly constitutes a collateral attack on the prior drug conviction and is accordingly barred under *Heck*.[4]

But a more thorny issue arises if the allegation is excessive force. Although the circuit courts of appeal are in agreement that excessive force claims are not categorically forbidden, it is less clear how *Heck* applies in different factual scenarios. While each of the circuit courts of appeal analyze the specific factual context in which the § 1983 claims of excessive force are brought, the analysis from a majority of circuits demonstrates a more limited application of *Heck*. The Fifth Circuit's analysis, however, has led to a more expansive application of *Heck*. This difference in the extent of *Heck's* application is the focus of this Article.

II. The Supreme Court's Decision in *Heck*

Heck was issued during the Supreme Court's 1994 Term. The petitioner was convicted for the voluntary manslaughter of his wife, and while a criminal appeal was pending, he filed a § 1983 action alleging the police and county prosecutors unlawfully destroyed evidence that was "exculpatory in nature and could have proved [his] innocence."[5] Certiorari was granted to the Seventh Circuit to decide "whether a state prisoner may challenge the constitutionality of his conviction in a suit for damages under 42 U.S.C. § 1983."[6]

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1. *See generally* Hon. Jon O. Newman, *Pro Se Prisoner Litigation: Looking for Needles in Haystacks*, 62 Brook L. Rev. 519 (1996).
2. 512 U.S. 477 (1994).
3. *Id.* at 487.
4. *Id.* at 484.
5. *Id.* at 478–79.
6. *Id.* at 478.

In a splintered 5-4 ruling, the Court answered the question by fashioning the now-famous "favorable termination" rule. Speaking through Justice Scalia, the Court wrote:

> [I]n order to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a § 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus, 28 U.S.C. § 2254. A claim for damages bearing that relationship to a conviction or sentence that has *not* been so invalidated is not cognizable under § 1983.[7]

The stated rationale underlying the favorable termination requirement is avoidance of "the possibility of the claimant succeeding in the tort action after having been convicted in the underlying criminal prosecution, in contravention of a strong judicial policy against the creation of two conflicting resolutions arising out of the same or identical transaction."[8]

Notably, *Heck* expressly barred not only claims for "unconstitutional conviction or imprisonment" but also claims for "*other harm caused by actions whose unlawfulness would render a conviction or sentence invalid.*"[9] An important question after *Heck* was whether excessive force claims fell within the category of "other harms" the Court intended to preclude?

III. POST-*HECK* EXCESSIVE FORCE DECISIONS

Heck plainly does not apply in a certain category of excessive force cases. For example, consider the case where an individual is caught red-handed with drugs on his person, complies with orders of arresting officers, and later is convicted of the possession offense. Just because the officers lawfully arrested the individual does not mean the officers had the right to use more force than necessary in executing the arrest. In order for *Heck* to apply, a civil suit must call into question the lawfulness of the conviction. In our example, nothing about a civil suit for damages would undermine the validity of the conviction on the possession charge.

Other cases are not so simple. Consider the same example described above, except this time, assume the drug possessor refused to comply with the instructions of the arresting officers. If the events result in the individual being charged and convicted of resisting arrest, does *Heck* bar a suit against the officers for excessive force?

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7. *Id.* at 486 (emphasis in original).
8. *Id.* at 484.
9. *Id.* at 486 (emphasis added).

One of the first post-*Heck* cases to consider the issue occurred in a Mississippi federal district court.[10] In *Simpson v. City of Pickens*, the § 1983 plaintiff was arrested and convicted of public drunkenness, disorderly conduct, and resisting arrest.[11] He later brought an excessive force action, and the defendants sought to dismiss the claim under *Heck*.[12] Judge Barbour rejected the request, explaining that the resisting arrest conviction would "not necessarily bar a claim for use of excessive force under the Fourth and Fourteenth Amendments."[13] In his view, it was possible for the resisting arrest conviction "to coexist with a finding that the police used excessive force to subdue him."[14]

The Third Circuit subsequently cited Judge Barbour's opinion with approval in *Nelson v. Jashurek*.[15] There a pro se plaintiff alleged that, during the course of his arrest, he disobeyed officers' orders to freeze and instead ran away.[16] After he was caught, he said the officers "beat him with a flashlight and used excessive and malicious force to subdue him."[17] The Third Circuit ruled that, even though the plaintiff's resisting arrest conviction had not been overturned, *Heck* did not bar the claim:

> [W]e believe that the Supreme Court intended to demonstrate that a civil suit for an unreasonable seizure predicated on a false arrest would be barred so long as a conviction for resisting the same arrest remained unimpaired. But this case is different because [plaintiff] does not charge that [the officers] falsely arrested him. Instead, [plaintiff] charges that [the officers] effectuated a lawful arrest in an unlawful manner. Accordingly, . . . we do not see why a judgment in his favor would throw the validity of his conviction into doubt.[18]

Similarly indicating a more limited application of *Heck* is a case from the First Circuit.[19] *Thore v. Howe* involved a defendant who pled guilty to several charges, including assault and battery with a dangerous weapon on three police officers.[20] In subduing the defendant, one of the officers shot the defendant in the neck.[21] After pleading guilty to the assault charge, the defendant brought a § 1983 action claiming he was not guilty of assault at all and that the officer used excessive force in shooting him.[22]

10. Simpson v. City of Pickens, 887 F. Supp. 126 (S.D. Miss. 1995).
11. *Id.* at 128.
12. *Id.* at 129.
13. *Id.*
14. *Id.*
15. 109 F.3d 142 (3d Cir. 1997).
16. *Id.* at 144.
17. *Id.*
18. *Id.* at 145–46.
19. Thore v. Howe, 466 F.3d 173 (1st Cir. 2006).
20. *Id.* at 175.
21. *Id.*
22. *Id.*

While not determining whether the excessive force claim was *Heck*-barred due to a lack of relevant facts in the record, the court made clear that the excessive force claim was not automatically barred:

> A § 1983 excessive force claim brought against a police officer that arises out of the officer's use of force during an arrest does not necessarily call into question the validity of an underlying state conviction and so is not barred by *Heck*. *See, e.g., VanGilder v. Baker*, 435 F.3d 689, 692 (7th Cir. 2006).
> Even the fact that defendant was convicted of assault on a police officer does not, under *Heck*, as a matter of law necessarily bar a § 1983 claim of excessive force. *See Smithart v. Towery*, 79 F.3d 951, 952–53 (9th Cir.1996) . . . .[23]

Based on this interpretation of *Heck*, the court stated that the defendant's claim that he was not guilty of assault was plainly barred by *Heck*.[24] With regard to the excessive force claim, however, the court made clear that a closer analysis of relevant facts was required before a determination could be made as to whether the excessive force claim was so factually related to the conviction as to be *Heck*-barred.[25] Those facts were not contained in the record, so the court passed on the relatedness determination and eventually affirmed the district court's finding that the defendant was judicially estopped from denying facts he admitted to in his plea colloquy.[26]

Demonstrating yet again a limited application of *Heck* is the Tenth Circuit's decision in *Martinez v. City of Albuquerque*.[27] There the § 1983 plaintiff attempted to flee from police after he solicited for prostitution an undercover officer.[28] The plaintiff briefly sped away from the scene but later came to stop, locked his vehicle, rolled down his window, and placed his hands on the steering wheel.[29] When an officer reached into the window to unlock the vehicle, the plaintiff attempted to roll up the window but was struck in the face by another officer.[30] The plaintiff was then removed from the car and placed under arrest.[31] These events resulted in a conviction of resisting arrest under New Mexico law, but the plaintiff later brought a § 1983 action claiming the police used excessive force in making the arrest.[32]

Finding the § 1983 claims predicated on excessive force were not *Heck*-barred, the court first pointed out that the determination of whether

23. *Id.*
24. *Id.* at 180.
25. *Id.*
26. *Id.* at 185–87.
27. 184 F.3d 1123 (10th Cir. 1999).
28. *Id.* at 1124.
29. *Id.*
30. *Id.*
31. *Id.*
32. *Id.*

Heck applies requires courts to carefully compare the facts of the case with *Heck* and to analyze the extent to which the § 1983 action challenges the lawfulness of the conviction.[33] So long as the § 1983 action did not require a plaintiff convicted of resisting arrest to negate an element of that arrest's lawfulness, a claim for excessive force would not be barred by *Heck*.[34] To that end, the statutory definition upon which the resisting arrest offense was based had to be analyzed.

The portion of the New Mexico statute under which the plaintiff was convicted defined resisting arrest as

> intentionally fleeing, attempting to evade or evading an officer of this state when the person committing the act of fleeing, attempting to evade or evasion has knowledge that the officer is attempting to apprehend or arrest him;
>
> * * *
>
> resisting or abusing any . . . peace officer in the lawful discharge of his duties.[35]

The court pointed out that, under this definition, the question of whether the plaintiff resisted arrest under these definitions was separate and distinct from the question of whether the officers exercised excessive force in effectuating the arrest.[36] Consequently, the plaintiff was permitted to pursue the excessive force claims, illustrating the importance of the statutory definition of the offense for which the § 1983 plaintiff has previously been convicted.[37]

While *Martinez* and the cases discussed above find that resisting arrest convictions do not bar § 1983 suits premised on claims of excessive force, the analysis in those cases does not reveal the lengths to which courts will sometimes go to find that *Heck* does not apply. A Ninth Circuit en banc decision, though, provides a more revealing analysis.[38] In *Smith v. City of Hemet*, a plaintiff brought suit following his conviction under California law "for willfully resisting, delaying, or obstructing a peace officer in the performance of his duties."[39] It was held that *Heck* did not bar plaintiff's claim under § 1983 that the arresting officers utilized excessive and unnecessary force.[40]

The en banc court placed particular significance on the fact that, although the plaintiff pled guilty to resisting the officers, it was unable to

33. *Id.* at 1125.
34. *Id.*
35. *Id.* at 1126.
36. *Id.* at 1126–27.
37. *Id.* at 1127.
38. 394 F.3d 689 (9th Cir. 2005).
39. *Id.* at 693.
40. *Id.*

determine the factual basis underlying the plaintiff's plea.[41] The court theorized that it was possible that the officers could have used excessive force either before plaintiff started resisting or after.[42] Consequently, a damage suit would not "*necessarily* imply or demonstrate that the plaintiff's earlier conviction was invalid."[43] The *Hemet* majority thus demonstrates that even a hypothetical factual scenario may be posited and accepted so as to narrow the application of the *Heck*-bar.

In dissent, Judge Silverman criticized the majority for "missing the forest for the trees."[44] He was of the opinion that the many different ways the plaintiff might have violated the resistance statute was irrelevant.[45] For him, because California law mandated that "a conviction for resisting arrest establishes that the force used to effect the arrest was not excessive[,]" civil recovery should have been impossible.[46] The only way the claim should have survived, in his view, was if the plaintiff had alleged the officers assaulted him after the arrest was effectuated.[47]

A recent case dealt with an excessive force plaintiff who did just that.[48] In *Evans v. Poskon*, a plaintiff convicted of resisting arrest maintained that he actually complied with officers' demands, yet was beaten both during and after the effectuation of his arrest.[49] In particular, a picture was painted of police bursting in his home, tackling him, pinning him to the floor, and then slamming his face in the ground.[50] He said that although he was eventually handcuffed, officers continued to kick and hit him in the ribs, face, and neck.[51] According to him, he never resisted during the whole ordeal and even went so far as to yell, "Hey! I said I'm not resisting!"[52]

In the district court, Judge David Hamilton, who now serves on the Seventh Circuit Court of Appeals, granted summary judgment to the officers. Hamilton noted that the plaintiff was "master of his ground" and that his "allegations, sworn statements, and proposed expert testimony present[ed] facts that [were] inconsistent with and necessarily imply the invalidity of his criminal conviction for resisting law enforcement."[53] In essence, Hamilton considered the plaintiff's theory of the case as a whole rather than looking to each and every detail alleged.

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41. *Id.* at 698–99.
42. *Id.* at 699.
43. *Id.*
44. *Id.* at 707 (Silverman, J., dissenting).
45. *Id.*
46. *Id.*
47. *Id.* at 710.
48. *See* Evans v. Poskon, 603 F.3d 362 (7th Cir. 2010).
49. *Id.* at 363.
50. Evans v. Poskon, No. 1:07-cv-592-DFH-JMS, 2009 WL 2351741, slip op. at *3 (S.D. Ind. July 28, 2009), *rev'd*, 603 F.3d 362 (7th Cir. 2010).
51. *Id.* at *5.
52. Complaint at 10, Evans v. Poskon, No. 1:07-cv-592-DFH-JMS, 2007 WL 1550463 (S.D. Ind. May 25, 2007).
53. Evans, 2009 WL 2351741, at *6.

On appeal, that approach was rejected and the case reversed. Through Judge Easterbrook, the court reduced the plaintiff's complaint to three separate allegations: "(1) that he did not resist being taken into custody; (2) that the police used excessive force to effect custody; and (3) that the police beat him severely even after reducing him to custody."[54] It was then explained that although proposition (1) was incompatible with the resisting arrest conviction and thus barred under *Heck*, "propositions (2) and (3) are entirely consistent with a conviction for resisting arrest."[55] Ruling that those aspects of the suit could proceed, Judge Easterbrook noted that the plaintiff did not assert propositions (2) and (3) in such a way as to make those propositions contingent upon the court's acceptance of proposition (1).[56] It was further noted that the plaintiff was not required to adopt the defendant's version of the facts leading to the resisting arrest conviction in order to contest the degree of force used by the defendants, and thus the plaintiff was allowed to proceed with propositions (2) and (3).[57]

The primary difference between the district and circuit court opinions in *Evans* stems from the respective courts' treatments of the plaintiff's complaint. The circuit court closely analyzed the plaintiff's complaint; gleaned three separate propositions from the complaint; and found that, though the first proposition was *Heck*-barred, the remaining two propositions were not. By contrast, the district court took a broader view of the complaint, emphasized the connection between the facts relied upon by the plaintiff and the facts supporting the resisting arrest conviction, and liberally applied *Heck* to find that this factual connection compelled the failure of the plaintiff's excessive force claim.

Taking *Poskon* and the other cases discussed above together, it is apparent that in the majority of circuits it is not overly difficult for plaintiffs to get past summary judgment on a § 1983 claim for excessive force, despite a resisting arrest conviction. These circuits generally apply the same analysis to narrow the application of *Heck*; namely, they take the conviction and the excessive force claim and closely analyze the facts to determine whether there is any way the excessive force claim can survive. This common approach is particularly evident in *Hemet* and *Poskon*. Interestingly enough, the expansive versus narrow application of *Heck* found in the district and circuit court opinions in *Poskon* serves as a microcosm of the differences in the application of *Heck* between the majority of United States circuit courts and the Fifth Circuit.

IV. Fifth Circuit Decisions

Two notable post-*Heck* decisions in the Fifth Circuit involved underlying aggravated assault convictions under Texas law, not resisting arrest convictions. In Texas, a conviction for aggravated assault requires proof that

54. *Poskon*, 603 F.3d at 364.
55. *Id.*
56. *Id.*
57. *Id.*

the perpetrator caused "serious bodily injury."[58] Texas law also provides that any person can use force up to and including deadly force "to protect himself against the other's use or attempted use of unlawful deadly force."[59] In both *Sappington v. Bartee* and *Hainze v. Richards*,[60] the court reasoned that the defendant–officers were justified in using force up to and including deadly force to resist the assault and effect the arrest.[61] Accordingly, it was held that any amount of force utilized could not have been excessive, and thus *Heck* barred the plaintiffs' claims as a matter of law.[62]

Similar reasoning was employed by a three-judge panel in *Hudson v. Hughes*.[63] There, a § 1983 plaintiff who had been convicted under Louisiana law for battery on an officer alleged "he was brutally beaten during his arrest, that excessive force was used, and that these acts were unconstitutional."[64] It was held that *Heck* barred his excessive force claim because it called the validity of his conviction into question:

> Hudson was arrested and convicted of battery of an officer. In Louisiana, self-defense is a justification defense to the crime of battery of an officer. To make out a justification defense, the criminal defendant charged with battery of an officer must show that his use of force against an officer was both reasonable and necessary to prevent a forcible offense against himself. Because self-defense is a justification defense to the crime of battery of an officer, Hudson's claim that [defendants] used excessive force while apprehending him, if proved, necessarily would imply the invalidity of his arrest and conviction for battery of an officer. This is true because the question whether the police applied reasonable force in arresting him depends in part on the degree of his resistance, which in turn will place in issue whether his resistance (the basis of his conviction for assaulting a police officer) was justified, which, if it were, necessarily undermines that conviction. We conclude therefore that to the extent that Hudson seeks to recover from [defendants] for the defendants' alleged use of excessive force during his arrest, his section 1983 action may not proceed.[65]

Sappington, *Hainze*, and *Hudson* underscore that, in the Fifth Circuit, *Heck*'s applicability often turns both on the state law charge and any pertinent defense to that charge. In *Sappington* and *Hainze*, the focal point was

58. Sappington v. Bartee, 195 F.3d 234, 237 (5th Cir. 1999).
59. *Id.*
60. 207 F.3d 795 (5th Cir. 2000).
61. *Id.* at 800–01; *Sappington*, 195 F.3d at 237.
62. *Hainze*, 207 F.3d at 798; *Sappington*, 195 F.3d at 237.
63. 98 F.3d 868 (5th Cir.1996).
64. *Id.* at 871.
65. *Id.* at 873.

on whether the officers were justified in using force because of the plaintiff's resistance. *Hudson*, alternatively, featured analysis centering on whether the plaintiff's resistance was an appropriate response to the officers' alleged exertion of force.

Building on the cases already discussed, the Fifth Circuit carved out another factual context for *Heck* in *Arnold v. Town of Slaughter*.[66] *Arnold* was an unpublished decision in which the plaintiff had been convicted under Louisiana law for resisting arrest.[67] The Louisiana statute provides that "[r]esisting an officer is the intentional interference with, opposition or resistance to, or obstruction of an individual acting in his official capacity and authorized by law to make a lawful arrest . . . ."[68] The court acknowledged that the factual basis for the state court conviction was that the plaintiff had resisted "by being hostile and threatening and by initiating confrontation."[69]

Of particular importance was the plaintiff's theory of the case. In his complaint, the plaintiff alleged that, while walking in his home, police officers slammed his head into the ground and broke his neck by placing him in a chokehold.[70] At his deposition, the plaintiff "testified that he never attempted to strike any of the officers, never threatened any of them[,] and, in fact, never resisted their attempts to arrest him."[71] The Court summarized the plaintiff's position as follows: "Arnold's claims are not that the police used excessive force after he stopped resisting arrest or even that the officers used excessive and unreasonable force to stop his resistance. Instead, Arnold claims that he did nothing wrong, but was viciously attacked for no reason."[72]

Ultimately, the court applied *Heck* after concluding that the plaintiff's § 1983 suit "squarely challenge[d] the factual determination that underlies his conviction for resisting an officer[,]" and it thus would effectively establish that the "criminal conviction lacks any basis."[73] To date, *Arnold* has been cited twenty-seven times in other opinions. It also is noteworthy that *Arnold*'s reasoning was quoted with approval in the Fifth Circuit's published opinion in *DeLeon v. City of Corpus Christi*.[74]

V. Conclusion

Plainly, there is little consistency among the circuits with respect to *Heck*'s applicability in excessive force cases. Most circuits seem to give § 1983 plaintiffs the benefit of the doubt, dismissing excessive force claims only if they can theorize no set of facts on which the plaintiff could make

66. 100 F. App'x 321, 324–25 (5th Cir. 2004).
67. *Id.* at 322.
68. *Id.* at 323.
69. *Id.* at 324.
70. *Id.*
71. *Id.*
72. *Id.*
73. *Id.* at 325.
74. 488 F.3d 649 (5th Cir. 2007).

out a claim for relief. Their focus is on *Heck*'s language that the subsequent civil suit must "necessarily undermine the validity of the prior conviction." Alternatively, the Fifth Circuit seems to read the word necessarily differently. The court refuses to dream up all possible scenarios in which the plaintiff could sustain a claim; instead, the plaintiff is held to his or her word, with the court looking at what is alleged in the complaint and at what has been testified to in depositions. Until the Supreme Court intervenes and takes up an excessive force case where there is an outstanding resisting arrest conviction, the difference in opinion will remain unresolved.