THE EMERGENCE OF DIVERGENCE: THE FEDERAL COURT'S STRUGGLE TO APPLY *HECK V. HUMPHREY* TO § 1983 CLAIMS FOR ILLEGAL SEARCHES

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INTRODUCTION

Section 1983[1] claims arising from an alleged illegal search or seizure of property have afforded scores of convicted criminals the opportunity to attack their convictions collaterally through a civil suit for damages. Meanwhile, other criminals, despite equally meritorious § 1983 illegal search claims, have found the federal courthouse doors in their jurisdictions closed. The federal courts have failed to consistently apply federal law in an area where litigation is commonplace, as evidenced by the U.S. Supreme Court's recent remark that § 1983 claims are one of the "most fertile sources of federal-court prisoner litigation."[2]

In light of the frequency of § 1983 claims for an alleged unreasonable search or seizure of property, the question that has divided the United States Circuit Courts of Appeals is the following: can a person pursue a § 1983 claim arising from an alleged illegal search and seizure while the criminal case is still pending or before the criminal conviction has been invalidated or reversed in some way? Stated another way, is a § 1983 claimant unequivocally barred from bringing a civil suit for damages arising from an alleged unreasonable search before the criminal proceeding has been resolved in such a way that demonstrates the invalidity of the search? This issue has yielded a federal circuit court split[3] and is the subject of this Note.

Neither the text of § 1983 nor the statutory history is particularly helpful in resolving the technical enigma of when a civil suit is proper in light of a previous conviction. Section 1983 reads in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws,

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1. "Section 1983" is widely used by lawyers and throughout this Note as shorthand for the civil rights statute codified as 42 U.S.C. § 1983 (Supp. V 1999). *See infra* text accompanying notes 4-6.

2. Heck v. Humphrey, 512 U.S. 477, 480 (1994).

3. Harvey v. Waldron, 210 F.3d 1008, 1015 (9th Cir. 2000) (noting the Second and Sixth Circuits disagree with the Seventh, Eighth, Tenth, and Eleventh Circuits regarding the propriety of bringing a § 1983 claim for an alleged illegal search before the original conviction has been invalidated); Salts v. Moore, 107 F. Supp. 2d 732, 737 (N.D. Miss. 2000) (referencing the current circuit split), *appeal dismissed by* 250 F. 3d 741 (5th Cir. 2001).

> shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .[4]

Section 1983 was originally drafted as part of the Civil Rights Act of 1871, in the wake of the Civil War, in an effort by Congress to provide a civil remedy for minorities and their supporters who were victimized by state actors under the control of the Ku Klux Klan.[5] Section 1983 created a means for all United States citizens, irrespective of race, to recover damages if claimant can prove that a state actor violated her constitutional rights by failing or refusing to enforce state law.[6]

This Note will explain and analyze the two divergent schools of thought that have polarized the federal circuit courts. Part I will introduce the reader to *Heck v. Humphrey*,[7] a 1994 Supreme Court case that set out to resolve when § 1983 claims can be appropriately brought, but ironically spawned the current circuit split. Part II of the Note will discuss in detail the case law that represents the current dichotomy among the federal courts. Part III will turn to a comparative analysis of the two positions, including the strengths and weaknesses of each. Part IV of the Note will offer the writer's opinion as to which circuit position is preferable and which circuit position more accurately adheres to the language of *Heck v. Humphrey*. Finally, the conclusion will provide some final thoughts regarding the need for resolution of the current circuit split to restore the consistent and uniform application of federal law to § 1983 illegal search claims.

The discussion in this Note regarding § 1983 claims is confined to civil actions for damages arising from an alleged illegal search or seizure of *property*. This Note is not intended to provide an analysis of other § 1983 claims, including claims for malicious prosecution, false arrest, excessive force, etc. Federal cases regarding these § 1983 actions have been included only if they shed some light on a circuit's position pertaining to illegal search claims.

It is imperative to understand from the outset the factual circumstances that precipitate a § 1983 claim for an alleged illegal search. The following hypothetical example is illustrative of the typical fact pattern. Jerry is a suspected drug dealer who is stopped and frisked by the police on a street corner after the police receive a tip that Jerry is selling drugs. The police search of Jerry yields fifteen grams of cocaine and an illegal firearm in his coat pocket that is subsequently seized. At the criminal hearing following Jerry's arrest, Jerry seeks to have the drugs and handgun suppressed on the grounds that the police conducted an illegal search and seizure. However, the trial court judge rules the evidence admissible and Jerry is convicted of possession both of narcotics and an illegal handgun. Following Jerry's conviction, which resulted largely from the

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4. 42 U.S.C. § 1983.

5. *See* Eric J. Savoy, Heck v. Humphrey: *What Should State Prisoners Use When Seeking Damages from State Officials . . . Section 1983 or Federal Habeas Corpus?*, 22 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 109, 111 (1996).

6. *Id.* 111-12.

7. 512 U.S. 477 (1994).

determination that the drugs and handgun were admissible evidence, Jerry brings a civil action for damages pursuant to § 1983, alleging that the police officers violated his Fourth Amendment constitutional right to be free from unreasonable searches and seizures.

Under the current status of the law, Jerry's ability to go forward with his civil claim for damages is contingent on the federal court in which Jerry brings the claim. In the Seventh, Eighth, Tenth, and Eleventh Circuits Jerry would likely be able to proceed with his civil claim for damages under § 1983 notwithstanding the facts that the criminal court ruled the evidence was admissible and that Jerry's conviction has not been overturned.[8] Conversely, the Second, Fifth, Sixth, and Ninth Circuits would likely bar the claim from proceeding unless and until the criminal convictions (or admissibility of the drugs and handgun) had been reversed.[9] The respective circuit court positions will be discussed in significantly greater detail in Part II of this Note.

I. THE ORIGIN OF THE DEBATE: *HECK V. HUMPHREY*

The Supreme Court, in its 1994 decision *Heck v. Humphrey*,[10] dealt extensively with a criminal's ability to bring a § 1983 claim prior to the reversal of the criminal conviction. In *Heck*, the petitioner Roy Heck was convicted and sentenced to fifteen years of incarceration for voluntary manslaughter of his wife.[11] While Heck's appeal from his criminal conviction was pending, he filed a § 1983 suit for damages that alleged the county prosecutors and a police investigator conducted an "arbitrary investigation" that included the illegal destruction of evidence that "was exculpatory in nature and could have proved [petitioner's] innocence."[12] Both the federal district court and the Seventh Circuit Court of Appeals dismissed Heck's § 1983 complaint because the suit was perceived as a collateral challenge in a civil proceeding to the legality of Heck's criminal conviction.[13] Following the Supreme Court's grant of certiorari,

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8. *See* Beck v. City of Muskogee Police Dep't, 195 F.3d 553 (10th Cir. 1999); Copus v. City of Edgerton, 151 F.3d 646 (7th Cir. 1998); Simmons v. O'Brien, 77 F.3d 1093 (8th Cir. 1996); Datz v. Kilgore, 51 F.3d 252 (11th Cir. 1995) (per curiam).

9. *See* Harvey v. Waldron, 210 F.3d 1008 (9th Cir. 2000); Schilling v. White, 58 F.3d 1081 (6th Cir. 1995); Mackey v. Dickson, 47 F.3d 744 (5th Cir. 1995) (per curiam); Woods v. Candela, 47 F.3d 545 (2d Cir. 1995) (per curiam).

10. 512 U.S. 477 (1994).

11. *Id.* at 478.

12. *Id.* at 479 (internal quotation marks omitted) (alteration by court).

13. *See id.* at 479-80. The Seventh Circuit affirmed the district court's dismissal of the § 1983 claim, stating:

> If, regardless of the relief sought, the plaintiff is challenging the legality of his conviction, so that if he won his case the state would be obliged to release him even if he hadn't sought that relief, the suit is classified as an application for habeas corpus and the plaintiff must exhaust his state remedies, on pain of dismissal if he fails to do so.

Heck v. Humphrey, 997 F.2d 355, 357 (7th Cir. 1993), *cert. granted*, 510 U.S. 1068 (1994), *aff'd*

the Court was equally as clear as the Seventh Circuit had been in its condemnation of the use of a civil suit to collaterally attack a criminal conviction.[14] The Court held in unequivocal terms that

> in order to recover damages for allegedly unconstitutional conviction or imprisonment . . . 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 . . . . A claim for damages bearing that relationship to a conviction or sentence that has *not* been so invalidated is not cognizable under § 1983.[15]

The Court, however, left the decision to the district court to determine if the plaintiff's § 1983 claim would impugn the validity of the previous criminal conviction:

> [T]he district court must consider whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence; if it would, the complaint must be dismissed unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated. But if the district court determines that the plaintiff's action, even if successful, will *not* demonstrate the invalidity of any outstanding criminal judgment against the plaintiff, the action should be allowed to proceed . . . .[16]

The holding of *Heck* seemed straightforward: a § 1983 claim cannot be pursued prior to a favorable termination of the conviction if a trial court judge determined it would imply the invalidity of the criminal conviction.[17] However, the Supreme Court went beyond the unambiguous holding to point out that not all § 1983 claims are subject to the favorable termination requirement. In footnote seven of the opinion, the Court cited an example of a § 1983 claim that could go forward because the claim did not "necessarily imply the invalidity" of the criminal conviction:

> [A] suit for damages attributable to an allegedly unreasonable search may lie even if the challenged search produced evidence that was

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512 U.S. 477 (1994).

14. *See Heck*, 512 U.S. at 484-87.

15. *Id.* at 486-87 (footnote and citation omitted). The requirement that a conviction or sentence must be shown to have 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," *id.* at 487, has been appropriately labeled by Justice Souter as the "favorable termination" requirement and will be referred to as such throughout this Note. *See id.* at 492 (Souter, J., concurring).

16. *Id.* at 487.

17. *See id.*

> introduced in a state criminal trial resulting in the § 1983 plaintiff's still-outstanding conviction. Because of doctrines like independent source and inevitable discovery . . . such a § 1983 action, even if successful, would not *necessarily* imply that the plaintiff's conviction was unlawful.[18]

Footnote seven of the *Heck* opinion is responsible for the current rift in the circuit courts.[19] The Seventh, Eighth, Tenth, and Eleventh Circuits have taken the position that "footnote seven creates a general exception" for § 1983 illegal search and seizure claims to the general rule articulated in *Heck* that § 1983 claims are barred if the trial court determines it is a collateral attack on the criminal conviction.[20] Whereas other § 1983 causes of action like excessive force or malicious prosecution are prohibited under *Heck*, absent a showing the claim will not impugn the validity of the criminal conviction, a § 1983 claim for an alleged illegal search can go forward regardless of the status of the criminal conviction because it will not necessarily imply its invalidity.

While the Seventh, Eighth, Tenth, and Eleventh Circuits read footnote seven as a blanket *exception*, the Second, Fifth, Sixth, and Ninth Circuits read footnote seven as merely an *example* of a § 1983 claim that would be allowed to proceed within the framework of the analysis set forth in *Heck*.[21] To the latter circuit courts, footnote seven does not alter the usual *Heck* requirements that determine whether a § 1983 claim for an alleged illegal search and seizure can proceed.[22] A claim for an alleged illegal search, like any other § 1983 action, must show that it does not undermine the validity of the prior criminal conviction or the claimant will be prohibited from bringing the claim.[23] Thus, footnote seven, according to the Second, Fifth, Sixth, and Ninth Circuit Courts, is merely illustrative of a § 1983 claim that could go forward despite the fact that the criminal conviction has not been reversed or invalidated in any way.[24]

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18. *Id.* at 487 n.7.

19. Salts v. Moore, 107 F. Supp. 2d 732, 737 (N.D. Miss. 2000) (noting the current circuit split regarding the interpretation of footnote seven of the *Heck* opinion), *appeal dismissed by* 250 F.3d 741 (5th Cir. 2001).

20. Harvey v. Waldron, 210 F.3d 1008, 1015 (9th Cir. 2000); *see also* Beck v. City of Muskogee Police Dep't, 195 F.3d 553 (10th Cir. 1999); Copus v. City of Edgerton, 151 F.3d 646 (7th Cir. 1998); Simmons v. O'Brien, 77 F.3d 1093 (8th Cir. 1996); Datz v. Kilgore, 51 F.3d 252 (11th Cir. 1995) (per curiam).

21. *See Harvey*, 210 F.3d at 1015; *accord* Schilling v. White, 58 F.3d 1081 (6th Cir. 1995); Mackey v. Dickson, 47 F.3d 744 (5th Cir. 1995) (per curiam); Woods v. Candela, 47 F.3d 545 (2d Cir. 1995) (per curiam).

22. *See Harvey*, 210 F.3d at 1015.

23. *See id.*

24. For the sake of reading ease and simplicity, the Seventh, Eighth, Tenth, and Eleventh Circuits' position will be referred to as the "Exception position" for the duration of the Note. The Second, Fifth, Sixth, and Ninth Circuits' position will be labeled the "Example position."

II. POST-*HECK* ANALYSIS AND RULINGS IN THE FEDERAL COURTS

As the foregoing suggests, the federal circuit courts disagree as to the proper application of the *Heck* holding to § 1983 claims for illegal searches and seizures. Although most of the federal circuit courts have used language indicative of a tendency to vacillate between the two poles of § 1983 jurisprudence, two different points of view have emerged among the circuit courts, which are labeled herein the Exception and Example positions respectively.[25] The respective positions of the individual circuit courts within the Exception and Example positions will now be outlined in detail.[26]

A. Exception Position Held by the Seventh, Eighth, Tenth, and Eleventh Circuits

The Seventh Circuit, through extensive analysis of *Heck*'s impact on § 1983 illegal search claims, has championed the Exception position more vigorously than any of the other circuit courts. The leading Seventh Circuit case of *Copus v. City of Edgerton*[27] is indicative of the circuit's belief that footnote seven of the *Heck* opinion created a blanket exception for § 1983 illegal search and seizure claims from the favorable termination requirement.[28] In *Copus*, the plaintiff had been convicted of possession of various illegal weapons after the police searched his home without a warrant in response to a domestic dispute.[29] While serving time for his weapons offenses and without reversal of his criminal conviction, Copus filed a § 1983 claim for damages arising from the alleged illegal search

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25. The federal D.C., First, Third, and Fourth Circuits' positions are absent from the following discussion because these circuits have not extensively discussed the applicability of *Heck v. Humphrey* to § 1983 illegal search claims. However, both the First and Fourth Circuits, while primarily deciding § 1983 litigation for claims other than for an illegal search, have intimated that they lean toward the Example position held by the Second, Fifth, Sixth, and Ninth Circuits. *See* Scott v. Wellesley Police Dep't, No. 98-1280, 1998 WL 1085778, at *1 (1st Cir. Sept. 24, 1998) (per curiam) (stating, with respect to several § 1983 illegal search claims, that "to the extent they are not barred under *Heck v. Humphrey*, plaintiff's claims each fail on the merits") (citation omitted); Brooks v. City of Winston-Salem, No. 95-6546, 1996 WL 531299, at *2 (4th Cir. Aug. 15, 1996) (per curiam) (recognizing, without expressly including illegal search claims, that § 1983 claims under *Heck* generally require a favorable termination of the criminal conviction before proceeding); Wright v. Oliver, 85 F.3d 178, 182-83 (4th Cir. 1996) (holding that the § 1983 claim for an alleged warrantless arrest could have proceeded immediately without affecting the validity of the conviction); Calero-Colon v. Betancourt-Lebron, 68 F.3d 1, 4 (1st Cir. 1995) (holding that the plaintiff's § 1983 claims did not accrue until the criminal trial ended in acquittal); Snyder v. City of Alexandria, 870 F. Supp. 672, 685-88 (E.D. Va. 1994) (discussing *Heck* and applying the Example position by analyzing each of plaintiff's § 1983 claims and determining which, if any, of the claims necessarily implied the invalidity of the plaintiff's conviction).

26. Because of the substantial quantity of § 1983 claims brought in the federal courts, the following cases are intended to be illustrative of each circuit's position rather than exhaustive.

27. 151 F.3d 646 (7th Cir. 1998).

28. *See id.* at 648-49.

29. *Id.* at 647.

of his home and subsequent seizure of his weapons.[30] Following the dismissal by the district court of Copus's claim under *Heck*, the Seventh Circuit agreed to hear Copus's appeal and decide "whether the district court correctly concluded that a judgment in favor of Copus in his civil suit alleging an unlawful search and seizure under the Fourth Amendment necessarily would imply the invalidity of his confinement."[31] The Seventh Circuit reversed the district court by concluding that "*Heck* does not bar a claim such as Copus" because "Fourth Amendment claims for unlawful searches or arrests do not necessarily imply a conviction is invalid, so *in all cases* these claims can go forward."[32]

The Seventh Circuit's rationale for the *Copus* holding was simply that "a search can be unlawful but the conviction entirely proper, or the reverse," and thus that a search, even if it produces admissible evidence used to convict, is not necessarily legal.[33] Because it was *possible* that Copus's conviction could be valid while the search that produced the damning evidence was conducted illegally, *Heck* did not mandate the dismissal of Copus's claim because success on his Section 1983 claim did not "necessarily . . . impugn the validity of his conviction."[34]

Other Seventh Circuit decisions have consistently held that a § 1983 claim for an alleged illegal search is not barred by *Heck*'s favorable termination requirement. In *Perez v. Sifel*,[35] the plaintiff was incarcerated at a correctional facility when he filed a § 1983 claim against several police officers alleging, among several civil rights violations, that an illegal search was conducted.[36] The court held that "[t]he claims relating to an illegal search and an improper arrest may not be barred [by *Heck*], as neither claim would *necessarily* undermine the validity of the conviction."[37] Similarly, in the 1995 case *Simpson v. Rowan*,[38] the

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30. *Id.*

31. *Id.* at 647-48.

32. *Id.* (emphasis added).

33. *Id.* at 649 (quoting Gonzalez v. Entress, 133 F.3d 551, 554 (7th Cir. 1998)).

34. *Id.*

35. 57 F.3d 503 (7th Cir. 1995) (per curiam).

36. *Id.* at 504-05.

37. *Id.* at 505. Despite this holding, however, the Seventh Circuit remanded the case to the trial court to determine if the illegal search claim would in fact impugn the validity of the conviction. *Id.* This minor aberration from the Exception position, which the Seventh Circuit has generally championed, was irrefutably corrected by the *Copus* holding that "in all cases these [§ 1983 claims for an illegal search] can go forward." 151 F.3d at 648; *see also* McClain v. U.S. Dep't of Justice, 17 Fed. Appx. 471, 473-74 (7th Cir. 2001) (noting "it is well-settled that Fourth Amendment claims of wrongful search . . . may succeed without undermining a conviction and thus are not implicated by *Heck*); Blanck v. Hobson, No. 98-2993, 2000 WL 637544, at *3 (7th Cir. May 16, 2000) (stating that "a damages action for an illegal search would not necessarily imply the invalidity of a conviction"); Apampa v. Layng, 157 F.3d 1103, 1105 (7th Cir. 1998) ("The fact that some evidence used in a trial is tainted by illegality does not necessarily undermine the conviction . . . .").

38. 73 F.3d 134 (7th Cir. 1995).

plaintiff, who was convicted for felony murder and sentenced to death, brought a § 1983 claim for damages alleging an illegal search and arrest.[39] In response to the district court's dismissal of the case, the Seventh Circuit reiterated that "Simpson's claims relating to an illegal search . . . are not barred by *Heck*" because "a conviction generally need not be set aside in order for a plaintiff to pursue a § 1983 claim under the Fourth Amendment."[40]

Like the Seventh Circuit, the Eighth Circuit has construed *Heck*'s footnote seven as providing a general exception for § 1983 illegal search and seizure claims. In *Simmons v. O'Brien*,[41] a plaintiff brought a § 1983 claim following his state conviction for second-degree murder and first-degree burglary.[42] The § 1983 claim asserted an alleged coerced confession rather than an illegal search.[43] Nevertheless, the court found the Fifth Amendment claim tantamount to the illegal search exception established in *Heck* and thus the claim could be brought prior to the reversal of the plaintiff's conviction.[44]

The Eighth Circuit again indicated its affiliation with the Exception position in *Moore v. Sims*.[45] The plaintiff in *Moore* had been convicted of possession of a controlled substance when he sought relief pursuant to § 1983 for an alleged illegal seizure.[46] Immediately after quoting footnote seven from the *Heck* opinion, the court found that Moore's claim could proceed without violating *Heck*: "If Moore successfully demonstrates that his initial seizure and detention by officers was without probable cause, such a result does not necessarily imply the invalidity of his drug-possession conviction. We therefore reverse the dismissal of this claim."[47] Although both *Simmons* and *Moore* involved § 1983 claims for alleged constitutional violations other than an illegal search, both cases expressly used *Heck*'s reference to illegal search claims as a springboard for their rationale that the § 1983 claims before the court were not barred by *Heck*.[48] Consequently, it is a safe assumption that the Eighth Circuit has adopted the Exception position for § 1983 illegal search claims and will expressly do so when given the opportunity.[49]

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39. *Id.* at 135.

40. *Id.* at 136.

41. 77 F.3d 1093 (8th Cir. 1996).

42. *Id.* at 1094.

43. *Id.*

44. *See id.* at 1095 (stating that "in terms of effect on trial, there was no qualitative distinction between the admission at trial of illegally seized evidence and the admission of involuntary confessions").

45. 200 F.3d 1170 (8th Cir. 2000) (per curiam).

46. *Id.* at 1170-71.

47. *Id.* at 1171-72.

48. *See id.*; Simmons, 77 F.3d at 1095.

49. *See* Whitmore v. Harrington, 204 F.3d 784, 784-85 (8th Cir. 2000) (per curiam) (holding, in a *Bivens* action brought against federal agents for an alleged unlawful stop that, "[i]f Whitmore were to succeed on this claim, it would not necessarily imply the invalidity of his later drug convictions."); Harvey v. Waldron, 210 F.3d 1008, 1015 (9th Cir. 2000) (stating that the Eighth

Like the Seventh Circuit, the Tenth Circuit has clearly embraced the Exception position by holding that § 1983 claims for an illegal search can proceed absent a favorable termination of the prior conviction. In *Beck v. City of Muskogee Police Dep't*,[50] an incarcerated plaintiff brought several § 1983 claims against the Muskogee Police Department, including a claim for an unreasonable search.[51] The court held that while many of the § 1983 claims were premature because *Heck*'s favorable termination requirement had not been met, the claim for an illegal search was different because "*Heck* applies only to those claims that would necessarily imply the invalidity of any conviction."[52] Likewise, in *Cotner v. Fugate*,[53] the court ruled that the plaintiff's § 1983 claims for illegal search and seizures could be brought notwithstanding the fact that Cotner's conviction had not been reversed: "[W]e agree with Cotner that his claims, if proved, would not necessarily demonstrate the invalidity of his convictions and sentence . . . ."[54]

The Eleventh Circuit was the final circuit to adopt the Exception position. In *Datz v. Kilgore*,[55] a plaintiff, Datz, was convicted for possessing a firearm as a felon after the police conducted a search of Datz' car and found a rifle.[56] In response to Datz' § 1983 claim for damages stemming from the alleged illegal search, the court stated, "*Heck v. Humphrey* is no bar to Datz' civil action because, even if the pertinent search did violate the Federal Constitution, Datz' conviction might still be valid . . . ."[57]

The Eleventh Circuit in *Datz*, like the Seventh, Eighth, and Tenth Circuits, appears to hold that because a § 1983 claim for an illegal search will not

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Circuit, among others, has "held that footnote seven creates a general exception to *Heck* for § 1983 Fourth Amendment unreasonable search and seizure claims"). *But see* Rice v. Barnes, 966 F. Supp. 890, 897 (W.D. Mo. 1997) (holding a § 1983 suit alleging the invalidity of a search warrant must be dismissed because it constituted an "impermissible collateral attack on Plaintiff's conviction").

50. 195 F.3d 553 (10th Cir. 1999).

51. *Id.* at 555-58.

52. *Id.* at 557-58. The court ultimately held the illegal search claim was barred by the applicable statute of limitations. *Id.* at 558.

53. No. 95-5256, 1996 WL 422046 (10th Cir. July 29, 1996).

54. *Id.* at *1. *But see* Bonner v. Flowers, No. 95-6196, 1996 WL 1820, at *1-2 (10th Cir. Jan. 3, 1996) (holding that a search and seizure of property that occurred after an investigative stop of the plaintiff's vehicle could *not* proceed prior to the favorable termination of the plaintiff's conviction because if the stop of the vehicle was found unlawful and damages were awarded, the conviction would have been undermined).

55. 51 F.3d 252 (11th Cir. 1995) (per curiam).

56. *Id.* at 253.

57. *Id.* at 253 n.1 (citation omitted). Despite the court's statement that the illegal search claim by Datz could proceed, the court found that Datz' claim attacking events preceding his state conviction was barred by the *Rooker-Feldman* doctrine. *Id.* at 253-54. The *Rooker-Feldman* doctrine holds that federal courts "may not decide federal issues that are raised in state proceedings and 'inextricably intertwined' with the state court judgment." *Id.* at 253 (quoting Staley v. Ledbetter, 837 F.2d 1016, 1018 (11th Cir. 1988)).

invariably and consistently undermine the previous criminal conviction, the claim can go forward. These circuits interpret literally the phrase "necessarily imply the invalidity of [a] conviction" contained in *Heck*. Thus, § 1983 illegal search claims can proceed absent a favorable termination because it is *possible* that the conviction would have occurred without the search and seizure or that the evidence seized could have been legally obtained at a later date as footnote seven of *Heck* suggests.[58]

B. Example Position Held by the Second, Fifth, Sixth, and Ninth Circuits

As stated previously, the Second, Fifth, Sixth, and Ninth Circuits interpret *Heck*'s footnote seven as an *example* of a § 1983 claim that may or may not undermine a previous conviction and thus must be determined on a case-by-case basis.[59] Consequently, a § 1983 claim for an illegal search is subject to the equivalent scrutiny that other § 1983 causes of action receive, namely, a plaintiff must demonstrate that success on the illegal search claim will not "imply the invalidity" of the previous conviction.[60] These circuits insist that the Supreme Court intended footnote seven to be illustrative, not dispositive. Thus, § 1983 claims based on an illegal search may proceed prior to the favorable termination of a conviction only if the plaintiff can show that the civil suit will not serve as a collateral attack on the previous conviction.[61]

The Second Circuit, although lacking a comprehensive or extended discussion, did have occasion to discuss when it was appropriate to bring a § 1983 illegal search claim in the 1995 case, *Woods v. Candela*.[62] The plaintiff in *Woods* alleged in a § 1983 action that a police officer violated his Fourth Amendment rights when the officer detained the plaintiff and searched his vehicle without reasonable suspicion.[63] Because over three years had expired between the initial arrest of the plaintiff and the filing of the § 1983 action, the State of New York claimed that the applicable statute of limitations had expired.[64] The court disagreed, however, and stated that the § 1983 illegal search claim

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58. *See* Heck v. Humphrey, 512 U.S. 477, 487 n.7 (1994).

59. *See* Harvey v. Waldron, 210 F.3d 1008, 1015 (9th Cir. 2000); Schilling v. White, 58 F.3d 1081 (6th Cir. 1995); Mackey v. Dickson, 47 F.3d 744 (5th Cir. 1995) (per curiam); Woods v. Candela, 47 F.3d 545 (2d Cir. 1995) (per curiam).

60. *Heck*, 512 U.S. at 487.

61. It is important to note that the Exception and Example positions will sometimes yield the same result despite their different approaches to a § 1983 claim for an alleged illegal search. For example, if a court following the Example position holds that a particular § 1983 illegal search claim will not imply the invalidity of the previous conviction, the plaintiff will be allowed to proceed just as if the plaintiff had brought the case in a court that adheres to the Exception position. *See, e.g.*, Perry v. Wellington, No. 98-4215, 1999 WL 1045170, at *1 (6th Cir. Nov. 9, 1999); Braxton v. Scott, 905 F. Supp. 455, 458 (N.D. Ohio 1995).

62. 47 F.3d 545.

63. *Id.* at 546.

64. *See id.*

"could not have been raised prior to the Appellate Division's reversal of his conviction" because the claim would "necessarily imply that his conviction was unlawful."[65] The *Woods* holding indicates that the Second Circuit adheres to the Example position because § 1983 claims for an illegal search are subject to *Heck*'s favorable termination requirement.[66]

Like the Second Circuit, the Fifth Circuit has had few opportunities to discuss extensively the appropriateness of filing a § 1983 illegal search claim prior to the favorable termination of the plaintiff's conviction. However, the Fifth Circuit in *Mackey v. Dickson*[67] did clearly articulate that the Fifth Circuit adheres to the Example position.[68] In *Mackey*, a plaintiff brought a § 1983 claim for an alleged illegal search and seizure while his criminal case for delivery of cocaine was still pending.[69] After the court admitted that "[t]he record does not clearly reflect that a successful attack on Mackey's arrests will implicate the validity of his confinement," it concluded: "[t]he court may—indeed should—stay proceedings in the section 1983 case until the pending criminal case has run its course, as until that time it may be difficult to determine the relation, if any, between the two."[70] The *Mackey* case demonstrated that the Fifth Circuit read *Heck* to require a determination of whether the § 1983 illegal search claim would undermine the validity of the previous conviction.[71] Absent a favorable termination, the ability of a plaintiff to pursue damages in a § 1983 suit is contingent on this question. Unlike the Exception position, the Fifth Circuit does not read footnote seven of *Heck* to provide a blanket exception for illegal search claims brought under § 1983.[72]

Without question, the Sixth Circuit is the strongest advocate of the Example position among the Second, Fifth, and Ninth Circuit adherents. Just a few months after the *Heck* decision was rendered, the Sixth Circuit established its affiliation

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65. *Id.*

66. *See id.; see also* Bourdon v. Vacco, No. 99-0261, 2000 WL 637081, at *1 (2d Cir. May 17, 2000) (recognizing that a § 1983 illegal search claim might not impugn the validity of a conviction, but that a determination "is inherently a factual one" (quoting Covington v. City of New York, 171 F.3d 117, 122 (2d Cir. 1999))); Covington, 171 F.3d at 122 (construing *Woods* as representing the Second Circuit's contention that whether a § 1983 claim can be brought must be decided on a case-by-case basis contingent on the particular facts before the court).

67. 47 F.3d 744 (5th Cir. 1995) (per curiam).

68. *See id.* at 746.

69. *Id.* at 745-46.

70. *Id.* at 746.

71. *See id.*

72. *See id.*; *see also* Hudson v. Hughes, 98 F.3d 868, 872 (5th Cir. 1996) (applying the now-familiar test that, absent a favorable termination of the previous conviction, "Hudson's section 1983 action may be entertained . . . only if the court determines that holding in Hudson's favor will not necessarily call into question the validity of his convictions"); Salts v. Moore, 107 F. Supp. 2d 732, 737-38 (N.D. Miss. 2000) (dismissing plaintiff's § 1983 illegal search claim because the plaintiff failed to demonstrate that his conviction had been invalidated), *appeal dismissed by* 250 F.3d 741 (5th Cir. 2001).

with the Example position in *Schilling v. White*.[73] The plaintiff in *Schilling* brought a § 1983 claim alleging that an illegal search occurred when two police officers searched his vehicle following a car accident.[74] The Sixth Circuit expressly rejected the Seventh Circuit stance (Exception position) that a claim of an illegal search is exempt from the *Heck* rule that the previous conviction must have been reversed before a § 1983 claim can proceed. The court stated:

> [T]he Seventh Circuit continues to allow a Fourth Amendment exception to this [favorable termination] rule. . . . The Seventh Circuit misreads *Heck*. The fact that a Fourth Amendment violation may not necessarily *cause* an illegal conviction does not lessen the requirement that a plaintiff show that a conviction was invalid as an element of *constitutional injury*.[75]

Thus, the Sixth Circuit would require a judicial determination in each § 1983 illegal search case regarding whether the asserted claim, if not previously reversed, would serve as a collateral attack on the criminal conviction by undermining its validity.[76]

In *Shamaeizadeh v. Cunigan*,[77] the Sixth Circuit again addressed the polarization in the federal circuit courts regarding § 1983 illegal search claims. The plaintiff in *Shamaeizadeh* was arrested for violations of federal drug laws when a warrantless search of his home revealed marijuana plants and equipment used to make marijuana cigarettes.[78] After the district court ruled that the search of Shamaeizadeh's home was unconstitutional, Shamaeizadeh brought a § 1983 illegal search claim against the police officers who conducted the search, but he did so over one year after the initial search was conducted.[79] The court held that the one-year statute of limitations did not bar Shamaeizadeh's suit because "his cause of action under § 1983 did not accrue until the charges against him were dismissed."[80]

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73. 58 F.3d 1081 (6th Cir. 1995).

74. *Id.* at 1082-83.

75. *Id.* at 1086.

76. *See e.g.*, Perry v. Wellington, No. 98-4215, 1999 WL 1045170, at *1 (6th Cir. Nov. 9, 1999) (allowing a § 1983 illegal search claim to proceed prior to a favorable termination of plaintiff's conviction because the claim was based on the manner in which the search was conducted and thus "would not imply the invalidity of his conviction"); Brindley v. Best, 192 F.3d 525, 530-31 (6th Cir. 1999) (holding that a § 1983 illegal search claim could proceed prior to reversal of the plaintiff's conviction without implicating its validity because the evidence obtained during the search was not used to convict the plaintiff); Walker v. Minton, No. 98-6627, 1999 WL 503476, at *2 (6th Cir. July 7, 1999) (holding that "to the extent that Walker sought economic damages for the alleged unlawful . . . search and ultimate convictions, the district court properly dismissed his § 1983 action because he did not show that his convictions had been set aside").

77. 182 F.3d 391 (6th Cir. 1999).

78. *Id.* at 393.

79. *Id.* at 393-94.

80. *Id.* at 397.

More important than the ultimate holding, however, was the Sixth Circuit's recognition that the federal circuit courts had adopted two divergent schools of thought on § 1983 illegal search claims: "Certain courts read this language to create a general exception to the doctrine of *Heck* for Fourth Amendment unreasonable-search claims brought against state officials under § 1983."[81] The court then took issue with the Exception position and concluded, "This court read the footnote in *Heck* as *clearly rejecting* the conclusion that a general exception to the requirement that a conviction be set aside exists for Fourth Amendment claims under § 1983."[82] Thus, the Sixth Circuit unequivocally holds that § 1983 illegal search claims are held to the same favorable termination standard articulated in *Heck* as other § 1983 claims.[83]

Of the circuits adopting the Example position, the Ninth Circuit was the last to do so. It was not until the 2000 case *Harvey v. Waldron*[84] that the court expressly embraced the Example position.[85] In *Harvey*, the plaintiff brought a § 1983 action against numerous police officers, prosecutors, and Montana Department of Revenue employees, alleging that the defendants had violated his civil rights by conducting illegal searches leading to the subsequent illegal seizure of his property.[86] The charges against the plaintiff had been dismissed two and one-half years prior to the filing of the § 1983 claim, but the alleged illegal search took place nine years prior to the filing of the claim.[87] The Ninth Circuit held that the claim was filed within the three year statute of limitations because "a § 1983 action alleging [an] illegal search and seizure of evidence upon which criminal charges are based does *not accrue until the criminal charges have*

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81. *Id.* at 395.

82. *Id.* at 396 (emphasis added); *see also* Bell v. Raby, No. 99-72917, 2000 WL 356354, at *6 (E.D. Mich. Feb. 28, 2000) ("the Sixth Circuit . . . has emphatically rejected" that *Heck* creates a general exception to the favorable termination requirement for § 1983 illegal search claims).

83. *See* Braxton v. Scott, 905 F. Supp. 455, 458 (N.D. Ohio 1995) (stating that *Schilling* and *Heck* both stand for the proposition "that fourth amendment claims are to be treated *no differently* than any other § 1983 claims which are related to convictions" (emphasis added)).

84. 210 F.3d 1008 (9th Cir. 2000).

85. *See* Schwartz v. City of Phoenix, 83 F. Supp. 2d 1102, 1104 n.2 (Ariz. 2000). Although the Ninth Circuit did not expressly adopt the Example position until the 2000 *Harvey* decision, the court did discuss § 1983 illegal search claims in light of *Heck* on several occasions before *Harvey*. *See* Housley v. United States, No. 97-15831, 1998 WL 476473 at *1 (9th Cir. July 28, 1998) (dismissing plaintiff's § 1983 claims, including an illegal search claim, because the injuries alleged related to the conviction and thus could not lie until a favorable termination had occurred); Pierce v. Mallon, No. 99-55454, 1996 WL 285711, at *1 (9th Cir. May 29, 1996) (dismissing § 1983 illegal search claim under *Heck* because evidence obtained during the search led to the defendant's conviction); Trimble v. City of Santa Rosa, 49 F.3d 583, 585-86 (9th Cir. 1995) (per curiam) (dismissing § 1983 illegal search claim for failure to file the claim within the one-year statute of limitations).

86. *Harvey*, 210 F.3d at 1010-11 & n.3.

87. *See id.* at 1010-11.

been dismissed or the conviction has been overturned."[88] Stated another way, a § 1983 illegal search claim does not enjoy a blanket exception under *Heck* to the favorable termination requirement.[89] If the *Heck* rule did not apply, the illegal search claim would have been barred by the applicable three-year statute of limitations because the claim could have been brought immediately after the search occurred.[90]

In sum, the Second, Fifth, Sixth, and Ninth Circuits subscribe to the Example position and therefore treat § 1983 illegal search claims no differently than other § 1983 claims. A district court must determine if success on the illegal search claim undermines the validity of the previous criminal conviction. If not, the claim can proceed. If so, the claim is barred unless and until the plaintiff proves he has procured a favorable termination of the previous conviction.[91]

C. The § 1983 Plaintiff at the Mercy of Geography

Having presented the individual positions of the respective circuit courts, it is necessary to understand when the Exception and Example positions will yield decisively different results for plaintiffs claiming that searches violated their Fourth Amendment rights. With the current disparate treatment of § 1983 illegal search claims among the circuit courts, a plaintiff domiciled in Indiana (Seventh Circuit) may be allowed to bring a claim immediately while a plaintiff residing a mile away in Ohio (Sixth Circuit) would be prohibited despite identical fact patterns. If a convicted criminal seeks to assert a § 1983 illegal search claim prior to the favorable termination of the criminal conviction, the criminal's ability to proceed will depend on his location. Circuits that adhere to the Exception position will allow the claim to proceed irrespective of the status of the conviction.[92] Meanwhile, circuit courts following the Example position will only allow the claim to proceed prior to a favorable termination if the district court determines that the illegal search claim will not undermine the validity of the conviction.[93]

A second and less obvious situation where the outcome of a § 1983 illegal

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88. *Id.* at 1015 (emphasis added).

89. *See* Harned v. Landahl, 88 F. Supp. 2d 1118, 1121 n.2 (E.D. Cal. 2000) ("[U]nder *Heck*, in order to recover damages under § 1983 for an alleged unconstitutional search the unlawfulness of which would render a conviction invalid, a plaintiff must prove that the conviction has been invalidated, either at the trial or appellate level.").

90. *See Harvey*, 210 F.3d at 1012-13; *see also* Guerrero v. Gates, 110 F. Supp. 2d 1287, 1290-91 (C.D. Cal. 2000) (holding the statute of limitations for plaintiff's § 1983 illegal search claim began to run when the plaintiff was no longer in custody, because while in custody, a favorable judgment would have implied that the plaintiff's conviction was invalid).

91. *See Harvey*, 210 F.3d at 1015; Shamaeizadeh v. Cunigan, 182 F.3d 391, 394-95 (6th Cir. 1999); Schilling v. White, 58 F.3d 1081, 1086 (6th Cir. 1995); Mackey v. Dickson, 47 F.3d 744, 746 (5th Cir. 1995) (per curiam); Woods v. Candela, 47 F.3d 545, 546 (2d Cir. 1995) (per curiam).

92. *See, e.g.*, Copus v. City of Edgerton, 151 F.3d 646, 647-48 (7th Cir. 1998).

93. *See, e.g.*, *Schilling*, 58 F.3d at 1086.

search claim is contingent on the philosophy adopted by the circuit court is where the statute of limitations is an issue. The circuits that have construed *Heck*'s footnote seven to provide an exception to the favorable termination requirement for § 1983 illegal search claims start the statute of limitations "clock" on the date the alleged illegal search occurred.[94] Such a statute of limitations stance logically follows from the Exception position that holds "in all cases these [§ 1983 illegal search] claims can go forward."[95] Consequently, because an illegal search claim can be advanced immediately irrespective of the status of the criminal conviction, a plaintiff must be mindful of the statute of limitations for § 1983 actions within the particular state in which the alleged violation occurred.[96]

In stark contrast to the Exception position, Example position courts posit that the statute of limitations does not begin until the conviction has been reversed or invalidated in some way.[97] Because the Second, Fifth, Sixth, and Ninth Circuits have construed *Heck* to require a favorable termination before a § 1983 illegal search claim can be asserted (unless the claim will not imply the invalidity of the conviction), these circuits necessarily hold that the statute of limitations "clock" does not begin to run until a plaintiff is eligible to bring the claim.

The inconsistency between the Exception and Example positions on the statute of limitations issue leads to an unfortunate disparity in treatment between similarly situated plaintiffs. Justiciability of a § 1983 claim is contingent on the plaintiff's zip code rather than the magnitude of the constitutional injury.

III. EXCEPTION AND EXAMPLE POSITIONS ANALYZED

A. Advantages of the Exception Position Over the Example Position

The Exception position, despite being sharply criticized by proponents of the Example position, has several compelling strengths that in some cases might make the Exception position preferable. First, the Exception position as articulated by the Seventh Circuit is consistent and simple to apply because "in all cases these claims [§ 1983 claims for an illegal search] can go forward."[98] As

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94. *See, e.g.*, Beck v. City of Muskogee Police Dep't., 195 F.3d 553, 558 (10th Cir. 1999); Gonzalez v. Entress, 133 F.3d 551, 554 (7th Cir. 1998); Woodward v. Paige, No. 96-3202, 1997 WL 31548, at *3 (10th Cir. Jan. 27, 1997); Perez v. Sifel, 57 F.3d 503, 505 (7th Cir. 1995) (per curiam).

95. *Copus*, 151 F.3d at 648.

96. *See* Trimble v. City of Santa Rosa, 49 F.3d 583, 585 (9th Cir. 1995) (per curiam) ("The statute of limitations for section 1983 actions is determined by state law.").

97. *See, e.g.*, Harvey v. Waldron, 210 F.3d 1008, 1014 (9th Cir. 2000); Shamaeizadeh v. Cunigan, 182 F.3d 391, 396 (6th Cir. 1999); Covington v. City of New York, 171 F.3d 117, 123 (2d Cir. 1999); *Schilling*, 58 F.3d at 1087 n.5; Woods v. Candela, 47 F.3d 545, 546 (2d Cir. 1995) (per curiam). *But see* Triestman v. Probst, 897 F. Supp. 48, 50 (N.D. N.Y. 1995) (holding, without reference to *Heck v. Humphrey*, that the statute of limitations for a plaintiff's § 1983 illegal search claim began to run on the date the illegal search occurred).

98. *Copus*, 151 F.3d at 648.

a result of this clear mandate, judicial resources may be preserved. Courts that adhere to the Exception position do not need to ascertain on a case-by-case basis whether a § 1983 unreasonable search claim can go forward, as required by the Example position.[99] The Exception position avoids involved legal arguments that consume valuable judicial time by simply stating that irrespective of the particular circumstances of the case, a § 1983 illegal search claim can proceed prior to the favorable termination of the previous conviction.[100]

A sampling of statistical data helps illustrate the point that judicial economy is a necessary concern for federal courts. Federal district courts have been faced with managing judicial dockets that saw 251,511 new civil cases filed in the twelve months preceding June 30, 1999, and 263,049 new civil cases filed in the twelve months preceding June 30, 2000.[101] For the same twelve-month time period, the Circuit Courts of Appeals endured the filing of 54,816 new criminal and civil appeals in 1998-99 and 54,642 new criminal and civil appeals in 1999-2000.[102] The burgeoning case loads in federal district courts has led to a backlog of litigation. In the twelve months preceding June 30, 2000, for example, a jury trial in federal district court took a median of *20.4 months* from the date of filing to resolution, with the Second Circuit requiring a median time of nearly *twenty-seven months*.[103] In light of the fact that a plaintiff seeking a jury trial in federal district court must wait over a year and one-half on average for resolution, it is self-evident that the Exception position's streamlined approach is a compelling argument on its behalf. While the Exception position decisively allows all § 1983 illegal search claims to proceed prior to a favorable termination, the Example position inundates an already overburdened federal judiciary with additional hearings to determine if a claim may be brought.[104]

A second argument in favor of the Exception position focuses not on the simplicity of the Exception position, but rather on its recognition of the complexities that surround the admissibility of evidence in criminal proceedings. Exception position adherents correctly recognize that the admissibility of evidence in a criminal case is fundamentally different from holding that the

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99. *See* Pierce v. Mallon, No. 99-55454, 1996 WL 285711, at *1 (9th Cir. May 29, 1996).

100. *See Copus*, 151 F.3d at 648-49.

101. ADMIN. OFFICE OF THE U.S. COURTS, Statistical Tables for the Federal Judiciary: June 30, 2000, at 22 tbl.C (2000).

102. *Id.* at 7 tbl.B.

103. *Id.* at 40 tbl.C5.

104. It is certainly true that, at first blush, the Exception position is more efficient than the Example position. However, it is important to note that the Exception position always allows the § 1983 illegal search claim to proceed while the extra hearing in the Example position courts may prohibit many § 1983 claims from proceeding on the merits. Thus, the additional time spent by Example position courts to determine if the § 1983 illegal search claim impugns the validity of the criminal conviction, rather than exacerbating the problem of an overwhelmed judiciary, could potentially be *less* of a burden on the federal judiciary than always allowing the claim to proceed. *See infra* Part IV.A.

evidence was obtained legally.[105] Stated another way, police occasionally obtain evidence that can survive a motion to suppress and is therefore admissible, but nevertheless violate the criminal defendant's civil rights. For example, police could search a home pursuant to a validly executed search warrant and find narcotics, but in the process ransack the home by intentionally breaking expensive antique china dishes belonging to the homeowner to "teach the homeowner a lesson." If the narcotics were submitted as evidence and used to convict the homeowner of drug possession, the Example position would likely prohibit the homeowner from seeking damages via a § 1983 illegal search claim unless and until the criminal conviction was favorably terminated.[106] Although common sense dictates that the narcotics should be admissible in the subsequent criminal proceeding against the homeowner, it is equally obvious that the criminal defendant should be entitled to seek damages for what was essentially a legal search that was conducted illegally. The Exception position would allow the homeowner who was convicted of narcotics possession to seek damages nevertheless under a § 1983 illegal search cause of action for pecuniary losses associated with the irresponsible destruction of his antique china.[107]

Heck v. Humphrey[108] itself in footnote seven provides further situations where evidence may be illegally obtained and yet be admissible.[109] The Court cites doctrines like "independent source,"[110] "inevitable discovery,"[111] and "harmless error"[112] that all allow for illegally obtained evidence to be used to

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105. *Copus*, 151 F.3d at 648 (noting that "tainted evidence . . . [could] have been admitted anyway (e.g., under a theory of inevitable discovery)).

106. *See* Schilling v. White, 58 F.3d 1081, 1086 (6th Cir. 1995). The Sixth Circuit stated the unyielding proposition that "[u]nless that conviction has been reversed, there has been no injury of constitutional proportions, and thus no § 1983 suit may exist." *Id.* Thus, in the above hypothetical, the homeowner would have no § 1983 remedy. However, other Example position decisions from the Sixth Circuit appear to permit a case-by-case determination. *See* Brindley v. Best, 192 F.3d 525, 530-31 (6th Cir. 1999).

107. *See Copus*, 151 F.3d at 649 ("The point is that it is possible for an individual to be properly convicted though . . . his home [is] unlawfully searched. The remedy . . . is a civil action under § 1983 . . . .)

108. 512 U.S. 477 (1994).

109. *See id.* at 487 n.7.

110. *Black's Law Dictionary* describes the doctrine of independent source as dictating that "evidence obtained by illegal means may nonetheless be admissible if that evidence is also obtained by legal means unrelated to the original illegal conduct." BLACK'S LAW DICTIONARY 774 (7th ed. 1999).

111. The doctrine of inevitable discovery holds that "evidence obtained by illegal means may nonetheless be admissible if the prosecution can show that the evidence would eventually have been legally obtained anyway." *Id.* at 780.

112. Harmless error is defined as "an error that does not affect a party's substantive rights or the case's outcome." *Id.* at 563. For an example of when harmless error is invoked in an Exception jurisdiction to allow a plaintiff to proceed with a § 1983 claim prior to a favorable termination, see *Simmons v. O'Brien*, 77 F.3d 1093, 1094-95 (8th Cir. 1996).

convict a criminal defendant.[113] It is very plausible that when one of the foregoing doctrines is asserted by a prosecutor in an attempt to make illegally obtained evidence admissible, an action for damages could be warranted for the manner in which the evidence was obtained. The Example position offers no § 1983 remedy for the criminal defendant in such cases because the evidence was used to convict the defendant and thus cannot be attacked collaterally through a civil action prior to a favorable termination.[114] By contrast, the Exception position is unconcerned with either the admissibility of the evidence in the criminal case or the status of the conviction of the § 1983 plaintiff. Rather, the Exception position focuses on the *legality* of the search and the existence of legitimate compensable injuries as a result of the search.[115]

B. Advantages of the Example Position Over the Exception Position

Several arguments exist in support of the proposition that the Example position is preferable to the Exception position. First, and perhaps most compelling, is that the Example position avoids the appearance of inconsistent verdicts by refusing to award damages in a civil case for a search that yielded admissible evidence in a criminal proceeding. Several courts adopting the Example position have stated their concern that the Exception position creates an image to the public of inconsistent verdicts between the civil and criminal court systems.[116] The Exception position invites legal challenges that appear patently inconsistent to the public because a convict is able to seek damages stemming from a search that yielded evidence that led to the criminal's conviction. Although legal scholars may understand the subtle but important differences between admissible evidence and legally obtained evidence, the distinction may be lost on the average citizen who may not understand how evidence declared by a criminal judge as admissible against a defendant can simultaneously provide the criminal with a financial windfall in a civil court. Although the law need not be constrained by those who fail to fully understand its complexities, the judiciary's legitimacy is derived from the amount of respect and confidence it commands from the general public. Consequently, the Example position's ability to perpetuate the appearance of consistency between the civil and criminal courts

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113. *Heck*, 512 U.S. at 487 n.7.

114. *See, e.g.*, Shamaeizadeh v. Cunigan, 182 F.3d 391, 396 (6th Cir. 1999); Schilling v. White, 58 F.3d 1081, 1086 (6th Cir. 1995).

115. *Cf.* Apampa v. Layng, 157 F.3d 1103, 1105 (7th Cir. 1998) ("The fact that some evidence used in a trial is tainted by illegality does not necessarily undermine the conviction . . . .").

116. *See, e.g.*, Harvey v. Waldron, 210 F.3d 1008, 1015 (9th Cir. 2000) (stating that embracing the Example position "will avoid the potential for inconsistent determinations on the legality of a search and seizure in the civil and criminal cases and will therefore fulfill the *Heck* Court's objectives of preserving consistency and finality"); *Shamaeizadeh*, 182 F.3d at 397-98 (stating that if the Exception position were followed "there would be a potential for inconsistent determinations in the civil and criminal cases and the criminal defendant would be able to collaterally attack the prosecution in a civil suit").

is a key reason why four circuits have adopted it.[117]

A second advantage the Example position holds over the Exception position is that the Example position avoids the duplicative nature of the Exception position with respect to litigating virtually the same issue twice. The Exception position forces civil courts to adjudicate claims for damages after a criminal court has already ruled on the legality and admissibility of the evidence obtained during a search and seizure.[118] In cases where the subsequent civil claim is clearly frivolous, the Example position offers courts an escape route to dispose of a case short of a procedural mechanism like summary judgment or a Rule 12(b)(6) Motion to Dismiss.[119] In effect, the Example position, while acknowledging that civil claims for damages are different from criminal admissibility of the evidence, allows civil courts the option to respect the decision of the criminal court regarding the legality of the search and seizure of property. In situations where a criminal judge has determined that a search was conducted in congruence with the mandates of the Fourth Amendment, the Example position affords a civil judge the option of refusing to hear a claim that would collaterally attack the previous determination.[120] By contrast, the Exception position guarantees that a civil case can be brought to challenge the legality of a search even in the face of a convincingly prudent and lopsided decision by a criminal judge that the search was lawful.[121] In such cases, the Example position offers a means to avoid

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117. *See, e.g.*, *Harvey*, 210 F.3d at 1015; *Shamaeizadeh*, 182 F.3d at 397-98. In fairness to the Exception position, however, "consistency" can also be compromised by the Example position. As previously discussed under the advantages of the Exception position, the Example position may leave some would-be § 1983 plaintiffs without a remedy for a constitutional violation suffered at the hands of overzealous police merely because the evidence seized was used to produce a conviction. A court's refusal to provide a remedy to a party whose constitutional rights have been trampled does a disservice to the promotion of "consistency" and justice; perhaps as much of a disservice as allowing collateral attacks in civil court on evidence used to obtain a criminal conviction.

118. Some federal courts have even held that a plaintiff's attempt to obtain money damages for an alleged illegal search, after a criminal court in a suppression hearing found that the evidence was obtained legally, constituted relitigation of the same claim and therefore was barred by the doctrine of collateral estoppel. *See, e.g.*, Scott v. Sutker-Dermer, 6 F. App. 448, 449-50 (7th Cir. 2001); Cornett v. Longois, 871 F. Supp. 918, 923 (E.D. Tex. 1994).

119. Although courts adhering to the Exception position can dismiss frivolous claims prior to a trial on the merits, significant legal expense will be incurred by a state before the claim can be dismissed, even if only briefs for a motion to dismiss are necessary to defeat the claim. Conversely, the Example position provides the state with a more expeditious way to dispose of § 1983 illegal search claims before the claim is even acknowledged as justiciable.

120. *See* Bell v. Raby, No. 99-72917, 2000 WL 356354, at *6 (E.D. Mich. Feb. 28, 2000).

121. The thoughtful critic at this point would be correct to point out that § 1983 illegal search claims that offer little or no chance of recovery are generally unlikely to be pursued. Plaintiffs are generally unwilling to waste money on litigation doomed to failure, and lawyers, for ethical reasons, are generally hesitant to take cases that are patently frivolous. However, plaintiffs who are incarcerated and proceed pro se have little to lose by filing a frivolous claim. In such cases the

duplicative litigation and respect the decision of criminal tribunals.

The third strength of the Example position is that it allows courts to be more precise and fact-sensitive in their analysis of whether a § 1983 illegal search claim can proceed. Whereas the Exception position provides a blanket rule that allows all § 1983 illegal search claims to go forward in all cases,[122] circuits that adhere to the Example position are able to evaluate claims on a case-by-case basis and issue a ruling that is contingent on the particular facts and circumstances of the case.[123] As a general proposition, a case-specific method will allow courts to determine *better* which § 1983 illegal search claims are deserving of being adjudicated on the merits than will a blanket rule that offers uniformity and simplicity, but little precision. The Example position arguably will act as a judicial filter to preclude collateral attacks that will "demonstrate the invalidity of any outstanding criminal judgment" while maintaining the flexibility that is necessary to allow meritorious § 1983 unlawful search claims to proceed.[124]

IV. CHAMPIONING THE EXAMPLE POSITION

A. The Example Position Arguments Are More Persuasive

The aforementioned arguments in favor of the Example position are more compelling than those for the Exception position, and therefore the Example position is the preferable means to adjudicate § 1983 illegal search claims.

Taken as a whole, the Example position promotes judicial economy and efficiency to a greater extent than the Exception position. Although the Example position forces courts to conduct a hearing regarding whether a § 1983 illegal search claim will undermine the validity of the criminal conviction,[125] the Exception position forces courts to try the whole case.[126] Obviously, a hearing that disposes of a claim, by comparison to a trial, significantly reduces the amount of time and judicial energy that must be devoted to a § 1983 illegal search claim. Moreover, the Exception position allows a plaintiff to relitigate virtually the same legal issues that were decided in a previous criminal hearing, all at taxpayers' expense. The Example position, however, will only allow a § 1983

Example position intrinsically offers what the Exception position intentionally refuses—a procedural means to uphold criminal court determinations regarding the legality of a search and thereby disposing of frivolous cases from the outset.

122. *See* Copus v. City of Edgerton, 151 F.3d 646, 648-49 (7th Cir. 1998).

123. *See, e.g.*, Brindley v. Best, 192 F.3d 525, 530-31 (6th Cir. 1999) (holding that *Heck* did not bar a § 1983 unlawful search claim because in the instant case the evidence was not used in the criminal proceeding against the defendant).

124. Heck v. Humphrey, 512 U.S. 477, 487 (1994).

125. *See* Shamaeizadeh v. Cunigan, 182 F.3d 391, 396 (6th Cir. 1999) ("[I]f a district court, *after an independent review*, determined that a § 1983 cause of action would not imply the invalidity of an outstanding conviction, the § 1983 action could proceed." (emphasis added)).

126. *See Copus*, 151 F.3d at 648 (stating that "in all cases" a § 1983 illegal search claim can go forward).

illegal search claim to go forward if the district court determines it will not collaterally attack the criminal conviction.[127] Consequently, the Example position allows courts to dispose of illegal search claims after only a hearing rather than a full-blown trial.

A second reason why the Example position is preferable to the Exception position is that the Example position is more consistent and fair. The Example position is more likely to prohibit a convict from seeking to benefit financially from the same set of facts that resulted in his incarceration. Even if the plaintiff is ultimately unsuccessful, it is unacceptable to allow a convicted criminal to seek compensation for a search that was determined by a criminal court to be legal. In rare situations where the evidence was deemed admissible despite it being illegally obtained, the Example position permits a district court to determine that the particular § 1983 illegal search claim at bar can proceed.[128] Moreover, the Example position is more fair and precise than the Exception position because the Example position requires a case-by-case analysis of whether the plaintiff's situation warrants a deviation from the *Heck* rule. Thus, the Example position allows courts to treat all § 1983 illegal search claimants fairly and consistently. A plaintiff's § 1983 claim is justiciable only where a plaintiff can demonstrate either that his civil suit will not be a collateral attack on his previous conviction or that the previous criminal proceeding has been favorably determined.[129]

The most compelling argument in favor of the Exception position is that evidence can be admissible in a criminal case because the search was warranted and yet the search itself was conducted in a manner that violated the defendant's Fourth Amendment rights. The hypothetical posed in Part III.A in which police intentionally destroyed the defendant's antique china illustrates an example of a claim that should be allowed to proceed despite the fact that the plaintiff had not received a favorable termination of his criminal conviction. However, the Example position, while not automatically permitting the § 1983 illegal search claim to proceed as the Exception position does, would nonetheless also allow this claim to be litigated. The Example position requires a district court to determine that the § 1983 illegal search claim will not undermine the validity of the criminal conviction.[130] In the previous hypothetical, the § 1983 claim challenges *how* the narcotics were obtained, not whether the criminal conviction or the search itself was valid. A district court adhering to the Example position would have little difficultly holding that the plaintiff's claim could go forward because it is not a collateral attack on the criminal conviction, but rather on the manner in which the search was conducted.

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127. *See Shamaeizadeh*, 182 F.3d at 396.

128. *See id.* A § 1983 illegal search claim would actually be consistent with the criminal conviction because the judge at the suppression hearing determined that the evidence was illegally obtained, but that an exception to the suppression of evidence doctrine allowed the evidence to be admitted.

129. *See id.*; Schilling v. White, 58 F.3d 1081, 1086 (6th Cir. 1995).

130. *See, e.g.*, *Shamaeizadeh*, 182 F.3d at 396; *Schilling*, 58 F.3d at 1086.

B. The Example Position More Accurately Applies Heck v. Humphrey

Justice Robert Jackson once admitted in a 1953 Supreme Court case, "We [the Supreme Court] are not final because we are infallible, but we are infallible only because we are final."[131] In light of Justice Jackson's astute insight, it is necessary to investigate whether the Example or Exception position more closely adheres to the language of the *Heck* opinion. Because the current circuit court split exists due to varying interpretations of the *Heck* decision by the respective circuit courts, it is inherently difficult to assess whether the Example or the Exception position is more consistent with *Heck*. However, the Example position deviates less from the Supreme Court stance regarding when § 1983 illegal search claims can be pursued.

The Supreme Court in *Heck*[132] expressly stated the Court's concern with allowing civil actions to serve as a collateral attack on a criminal conviction: "This Court has long expressed . . . concerns for finality and consistency and has generally declined to expand opportunities for collateral attack."[133] The Court continued, "[W]hen a state prisoner seeks damages in a § 1983 suit, the district court must consider whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence . . . ."[134] Notably absent from the previous quote by the Supreme Court is any blanket exception carved out in the holding for § 1983 claims brought pursuant to an illegal search. If § 1983 illegal search claims were intended to be exempted from the black-letter holding of *Heck* as the Exception position adherents maintain, it is unusual that the Court failed to so state.

Moreover, even footnote seven of the *Heck* opinion, which is the sole source of the Exception position's stance, provides permissive language that is more plausibly construed as consistent with the Example position. Footnote seven states in pertinent part that "a suit for damages attributable to an allegedly unreasonable search *may* lie even if the challenged search produced evidence that was introduced in a state criminal trial resulting in . . . conviction."[135] The Court's use of the word "may" rather than "will" or "shall" is an important choice of language because it is evidence that the Supreme Court acknowledged only the *possibility* that § 1983 illegal search claims will not necessarily impugn the validity of the previous conviction. However, the Exception position's stance that "in all cases" § 1983 illegal search claims can go forward goes beyond the logical parameters of the word "may" and essentially interprets "may" as analogous to "in all cases."[136] While such a textual construction would be warranted had the word "will" or "shall" been used, the use of the word "may" directly contradicts the idea that a blanket exception was intended. The Example

131. Brown v. Allen, 344 U.S. 443, 540 (1953) (Jackson, J., concurring).

132. 512 U.S. 477 (1994).

133. *Id.* at 484-85 (citations omitted).

134. *Id.* at 487.

135. *Id.* at 487 n.7 (emphasis added).

136. Copus v. City of Edgerton, 151 F.3d 646, 648 (7th Cir. 1998).

position, on the other hand, acknowledges that § 1983 illegal search claims may sometimes be exempted from *Heck*'s preclusive effect but leaves the decision to a district court.[137] Stated simply, the word "may" more fittingly creates an example than a "general exception."[138]

C. "Necessarily" Resolving the Circuit Split

The Supreme Court must do more than declare that district courts must determine on a case-by-case basis (as the Example position holds) whether a § 1983 illegal search claim can proceed. District courts within the Seventh, Eighth, Tenth, and Eleventh Circuits that currently allow § 1983 illegal search claims to proceed irrespective of the failure to meet the favorable termination requirement would still allow these claims to be brought because the district court would simply hold in every case that the claims are not a collateral attack on the previous conviction. Consequently, merely forcing the Exception adherents to conduct a district court determination for each individual § 1983 illegal search claim would not alter the current rule that § 1983 illegal search claims can go forward "in all cases."[139] It is readily apparent, then, that to bridge the chasm that separates the Exception and Example positions, the Supreme Court must go further than merely mandating a case-by-case approach.

The current circuit court split emanates in part from differing interpretations of the Supreme Court's use of the word "necessarily" in *Heck*.[140] The Court stated:

> [W]hen a state prisoner seeks damages in a § 1983 suit, the district court must consider whether a judgment in favor of the plaintiff would *necessarily* imply the invalidity of his conviction or sentence; if it would, the complaint must be dismissed unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated.[141]

The Exception adherents interpret "necessarily" to mean that a § 1983 claim must *always, in every situation* undermine the validity of a criminal conviction for the claim to be barred by *Heck*.[142] For example, a successful § 1983 suit for an

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137. *See* Mackey v. Dickson, 47 F.3d 744, 746 (5th Cir. 1995) (per curiam).

138. Harvey v. Waldron, 210 F.3d 1008, 1015 (9th Cir. 2000).

139. *Copus*, 151 F.3d at 648.

140. *Heck*, 512 U.S. at 487.

141. *Id.* (emphasis added).

142. *Cf. Copus*, 151 F.3d at 648. The Seventh Circuit discussed its interpretation of "necessarily":

> We need not speculate concerning which claims under § 1983 would *not* "necessarily" imply the invalidity of a civil plaintiff's underlying conviction because the Supreme Court has answered this question. In *Heck*, the Court dropped a footnote to describe the type of action which, "even if successful, will *not* demonstrate the invalidity of any outstanding criminal judgment . . . [namely] a suit for damages attributable to an allegedly unreasonable search . . . ."

unreasonable seizure brought after the plaintiff was arrested and convicted for the crime of resisting arrest would "necessarily" invalidate the conviction because one of the elements of the crime of resisting arrest is that the police officer was conducting a legal arrest.[143] Thus, if a plaintiff's § 1983 claim can only be successful if it negates one of the elements of the crime that led to the plaintiff's conviction, the Exception courts would hold that the claim is barred by *Heck* because in all cases the claim would challenge the conviction. However, in the case of § 1983 illegal search claims, *Heck* does not prohibit any of the claims from being brought because there are situations in which the unreasonable search claim will not "necessarily imply the invalidity" of the conviction.[144]

The Example position adherents utilize a narrower view of the Supreme Court's use of the word "necessarily" by conducting a case-by-case analysis.[145] The Second, Fifth, Sixth, and Ninth Circuits have held that if the § 1983 claim will impugn the validity of the conviction *in the instant case*, then the claim cannot proceed because it "necessarily" implies the invalidity of the conviction.[146] With respect to § 1983 illegal search claims, the Example position mandates that some claims are barred pursuant to *Heck* while others are not because the "necessarily" requirement is applicable to only the case before the court at the time.[147] Therefore, there is a need for a district court determination regarding the justiciability of the § 1983 illegal search claim.

In summary, the Exception and the Example positions differ in their treatment of § 1983 illegal search claims because of the manner in which the respective circuits construe the definition of "necessarily." The Exception position holds that *Heck* precludes a § 1983 claim only when in all feasible cases

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Id. (quoting *Heck*, 512 U.S. at 487 n.7).

143. *Heck*, 512 U.S. at 487 n.6; James v. York County Police Dep't, 167 F. Supp. 2d 719, 721 (M.D. Pa. 2001).

144. *See* Apampa v. Layng, 157 F.3d 1103, 1105 (7th Cir. 1998) ("The fact that some evidence used in a trial is tainted by illegality does not *necessarily* undermine the conviction . . . ." (emphasis added)).

145. *See* Schilling v. White, 58 F.3d 1081, 1086 (6th Cir. 1995). While criticizing the Seventh Circuit's application of *Heck*, the Sixth Circuit in *Schilling* remarked, "The fact that a Fourth Amendment violation may not *necessarily cause* an illegal conviction does not lessen the requirement that a plaintiff show that a conviction was invalid as an element of *constitutional injury*." *Id.* (emphasis added). This passage reflects the Sixth Circuit's rejection of the Exception position's interpretation of "necessarily" as meaning in all cases the claim must undermine a conviction.

146. *E.g.*, Mackey v. Dickson, 47 F.3d 744, 746 (5th Cir. 1995) (per curiam). *Shamaeizadeh v. Cunigan*, 182 F.3d 391 (6th Cir. 1999) summarized the *Mackey* court as holding that "Fourth Amendment claims could be brought under § 1983 notwithstanding a valid conviction, but only once the district court has made an independent determination that success on the § 1983 claim would not demonstrate the invalidity of the conviction." *Id.* at 395.

147. *See Shamaeizadeh*, 182 F.3d at 396; Covington v. City of New York, 171 F.3d 117, 123 (2d Cir. 1999) (remanding the case to the trial court to determine if, pursuant to the facts of this particular case, the § 1983 claims asserted would invalidate the conviction if successful).

the claim must undermine the validity of the conviction.[148] Because § 1983 illegal search claims do not always collaterally attack the previous conviction, these claims do not satisfy the "necessarily" language of *Heck* that bars most § 1983 claims. Conversely, the Example position adjudicates § 1983 illegal search claims on a case-by-case basis and thus construes "necessarily" to mean that *Heck* prohibits a § 1983 claim if, in that particular case, the claim impugns the validity of the previous conviction.[149]

The Example position's interpretation of the *Heck* opinion, and "necessarily" in particular, is preferable to the Exception position for virtually all of the same reasons as discussed in Part IV.A. of this Note.[150] Adjudicating § 1983 illegal search claims on an individual basis with a sensitivity towards the particular fact pattern of the case grants the Example position the precision to determine when a claim will "necessarily imply the invalidity" of the conviction.[151] While the Exception position adherents are correct to insist that not all § 1983 illegal search claims "necessarily" threaten the validity of a previous criminal conviction,[152] certainly, given the right set of circumstances, some claims inevitably will serve as a collateral attack. Therefore, a judicial determination in each case is warranted. Neither a blanket prohibition nor an automatic ability to proceed with the § 1983 claim does justice to the vast differences that will appear among various § 1983 illegal search claims.

CONCLUSION

The Example position offers the preferable method of adjudicating § 1983 illegal search claims. The Example position preserves precious judicial resources, while enabling federal judges to reach a fair and reasonable result, because hearings are conducted in every § 1983 illegal search case to ensure the claim is not a collateral attack on a previous criminal conviction.

The Supreme Court will not successfully resolve the current circuit split by merely declaring the Example position as the preferable position. However, the divergent means of adjudication between the Example and Exception positions can be resolved by the Supreme Court in a simple, even novel, way. The source of the circuit court dispute emanates from different meanings assigned to the word "necessarily" as it is used in the *Heck* decision.[153] The substantial differences in treatment of § 1983 illegal search claims among circuits that adhere to the Example and Exception positions can be resolved with a simple, but thorough, Supreme Court clarification of its use of "necessarily" in *Heck*. No monumental change in substantive law or judicial restructuring is necessary to

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148. *See* Apampa, 157 F.3d at 1105; Copus v. City of Edgerton, 151 F.3d 646, 648 (7th Cir. 1998).

149. *See Schilling*, 58 F.3d at 1086; *Mackey*, 47 F.3d at 746.

150. *See supra* Part IV.A.

151. 512 U.S. 477, 487 (1994).

152. *See Apampa*, 157 F.3d at 1105; *Copus*, 151 F.3d at 648.

153. *Heck*, 512 U.S. at 487.

provide all § 1983 litigants, irrespective of the circuit, a consistent and meaningful means of adjudicating their claim.

In a nation where federal law is the supreme law of the land pursuant to the wishes of our Founding Fathers,[154] it is the federal judiciary's profound responsibility to apply federal law in an impartial and judicious manner. When federal substantive law varies from circuit to circuit, such consistent application is impossible and serves to undermine the legitimacy and integrity of the legal process. It is unacceptable for plaintiffs in the federal system to have the viability of their § 1983 illegal search claims decided by geography rather than the merits of the case. Because uneven application of the law invariably makes for bad law, the Exception and Example positions must be reconciled through a carefully crafted Supreme Court decision. Uniformity of § 1983 illegal search law must be restored to the federal judiciary.

154. *See* U.S. CONST. art. VI, cl. 2. This provision is known informally by constitutional scholars as the "Supremacy Clause."