A Deal with the Devil: Reevaluating Plea Bargains Offered to the Wrongfully Convicted*

Innocent defendants end up in prison at alarming rates, and once convicted, it becomes next to impossible for them to get out. Even equipped with exonerating evidence, defendants face an uncertain, often decades-long quest for freedom. In some cases, though, an alternative path has emerged: prosecutors pressure the wrongfully convicted to make an Alford or no contest plea in lieu of exoneration. Although this allows for their release, it carries grave consequences: their name is never cleared, and significantly, under Heck v. Humphrey, *they can never pursue a civil rights claim for their wrongful imprisonment because their conviction was not "favorably terminated."*

These plea deals are a menace to wrongful conviction claims, as this Recent Development explores through the Ninth Circuit case, Taylor v. County of Pima. *Yet there is no wonder why prosecutors make them.* Heck *incentivizes these pleas as a way for municipalities to avoid civil liability for otherwise valid claims, and current ethical rules leave the door wide open to the practice, even though prosecutorial biases in this area are well established. Ultimately, this Recent Development argues that the use of these pleas should be dissuaded in two ways: first, through expansion of prosecutors' ethical duties in actual innocence claims, and second, through courts' reexamination of* Heck*'s favorable-termination requirements for civil rights suits.*

INTRODUCTION

Wrongful convictions in the United States have stolen at least 24,000 years from innocent defendants.[1] Yet that number includes only those formally exonerated in the criminal justice system—the real number undoubtedly sits higher.[2] Many innocent defendants released from prison are never formally exonerated. Rather, more and more prosecutors across the country are using plea deals as a workaround for dealing with claims of actual innocence.[3]

1. *Exonerations in the United States Map*, NAT'L REGISTRY EXONERATIONS, https://www.law.umich.edu/special/exoneration/Pages/Exonerations-in-the-United-States-Map.aspx [https://perma.cc/S68Y-2ZMR] (last updated Apr. 13, 2021).

2. *See* Jon B. Gould & Richard A. Leo, *One Hundred Years Later: Wrongful Convictions After a Century of Research*, 100 J. CRIM. L. & CRIMINOLOGY 825, 832 (2010) (explaining that most studies estimate the rate of wrongful convictions to be around three to five percent).

3. *See infra* Section II.B.

The consequences of this practice are extraordinary, as starkly demonstrated in *Taylor v. County of Pima*,[4] a 2019 case from the Ninth Circuit. In 1970, sixteen-year-old Louis Taylor was charged with felony murder for starting a fire that killed twenty-eight people.[5] The evidence presented against him was nonsensical: he helped put out the fire, he was Black, and "'black boys' like to set fires."[6] Yet it was enough for an all-White jury to convict him.[7] Taylor maintained his innocence for decades before evidence finally surfaced to support his claims, and he filed a post-conviction petition for release in 2012.[8]

Although the prosecutor initially refused to budge on the case, they did have one trick up their sleeves: on the right terms, they would agree to Taylor's release. The prosecutor would dismiss Taylor's conviction if Taylor pled nolo contendere—or no contest—to new, identical charges for the same crime. Then the prosecutor would agree to a sentence of time served for the new charges so that Taylor could go free.[9]

On its face, this deal seemed liberating, but it would prove to be a deal with the devil. The cost was enormous. In the law's eyes, Taylor would remain a convicted murderer of twenty-eight people, which meant he would face restrictions on jobs and housing and would forego any compensation for the forty-two years he spent wrongfully behind bars.[10] But faced with the prospect of freedom from a prison cell, Taylor, then fifty-nine years old, accepted.[11]

He was released from prison and subsequently sued Pima County for his wrongful conviction.[12] But the district court held that he could not seek damages for any prison time.[13] On appeal, the Ninth Circuit agreed, holding that under the Supreme Court case, *Heck v. Humphrey*,[14] he was barred from seeking compensation for his time in prison because it was still supported by a lawful conviction.[15] Although the prosecutor dismissed his original charges, Taylor had accepted a plea deal to new charges for the same offenses.[16] The new conviction was now the "legal cause" of his incarceration, so he could not receive

4. 913 F.3d 930 (9th Cir. 2019).

5. *Id.* at 932.

6. *Id.* at 939 (Schroeder, J., dissenting).

7. Maura Dolan, *After Four Decades, a Wrongful-Conviction Case with Racial Overtones Still Reverberates*, L.A. TIMES (Jan. 17, 2019, 5:00 PM), https://www.latimes.com/nation/la-na-arizona-arson-wrongful-conviction-20190117-story.html [https://perma.cc/8MZL-65QE (dark archive)].

8. *Taylor*, 913 F.3d at 932.

9. *Id.*

10. *See* Dolan, *supra* note 7.

11. *Taylor*, 913 F.3d at 932.

12. Taylor v. County of Pima, No. CV-15-00152, 2017 WL 6550590, at *2–3 (D. Ariz. Mar. 16, 2017), *aff'd*, 913 F.3d 930.

13. *Id.* at *10.

14. 512 U.S. 477 (1994).

15. *Taylor*, 913 F.3d at 936.

16. *Id.* at 932.

compensation for a technically lawful conviction. As a result, Taylor was left with no legal recourse for four decades of wrongful imprisonment because he accepted that plea deal.

This case appears patently unjust, yet it is not an outlier. Across the country, prosecutors have offered similar devil's deals.[17] Wrongful convictions place prosecutors at an ethical crossroads: help vacate a conviction and potentially invite civil liability for the original prosecution or offer a plea deal that preserves the prosecutor's track record and avoids liability. The law, and the lack of any ethical repercussions,[18] funnels prosecutors down this dubious second path.

This Recent Development argues that while prosecutors' ethical rules should be sharpened to prevent these inherently unfair deals, courts can also effectively dissuade their use by reshaping their analysis of *Heck*. *Heck* requires a civil rights plaintiff to show that their previous conviction was terminated favorably, or else they cannot pursue damages based on that conviction.[19] Thus far, courts have found plea bargains like Taylor's not to be "favorable terminations."[20] But this Recent Development argues that if the underlying facts of the plea deal indicate the defendant's innocence, the defendant should be allowed to pursue damages for their wrongful conviction.

This Recent Development proceeds in three parts. Part I discusses the rights to compensation for the wrongfully convicted and how Supreme Court case law affects those rights. Part II examines the facts and holding of *Taylor* and similar plea deals made in other cases and why the wrongfully convicted accept those deals. Lastly, Part III examines the ethical duties of prosecutors faced with wrongful convictions and suggests a legal pathway to combat the use of these deals under *Heck*'s own framework.

I. WHAT THE *HECK*?

When the wrongfully convicted are exonerated, many can seek compensation for their time in prison through wrongful conviction compensatory laws.[21] But the recovery from these funds may not be very high,[22]

17. *See infra* Part II.

18. *See infra* Section III.A (discussing the limitations of Rule 3.8 of the Model Rules of Professional Responsibility). Although the Model Rules of Professional Responsibility require prosecutors to remedy wrongful convictions, they leave prosecutors with enormous discretion on what reasonable efforts they must actually make, leaving their actual duties quite thin. *See infra* Section III.A.

19. *Heck*, 512 U.S. at 486–87.

20. *See infra* Section I.A.

21. *Compensating the Wrongfully Convicted*, INNOCENCE PROJECT, https://www.innocenceproject.org/compensating-wrongly-convicted/ [https://perma.cc/3TEK-KZTZ].

22. Jeffrey S. Gutman, *An Empirical Reexamination of State Statutory Compensation for the Wrongly Convicted*, 82 MO. L. REV. 369, 402–03 (2017) (explaining the various ways that states place caps on

or the funds may even run out.[23] In some fifteen states, the funds do not exist at all.[24] Further, defendants like Taylor may be barred from even applying for these funds because they were never officially pardoned or formally exonerated.[25] Exoneration generally means that a convicted person was later "declared to be factually innocent by a government official or agency with the authority to make that declaration."[26] It is a slow process—the average exoneration occurs nearly eleven years after a conviction.[27] Rather than wait to be formally exonerated, Taylor and many others make no contest pleas,[28] which means they receive a conviction and accept some sort of punishment, but the plea cannot be used against them as an admission of liability in a related civil trial.[29]

Another potential avenue to compensation is a civil rights claim against a government official under 42 U.S.C. § 1983.[30] Under § 1983, a person can sue a government official who violated their constitutional rights and receive monetary damages.[31] Originally enacted during Reconstruction to combat civil rights abuses in southern states,[32] § 1983 remains one of the most powerful tools with which a person can vindicate their constitutional rights, and it arises

compensation, including one exoneree who received just over $8,600 per year for twenty-three years in prison).

23. *See* Stephanie Clifford, *Wrongly Convicted, They Had To Choose: Freedom or Restitution*, N.Y. TIMES, https://www.nytimes.com/2019/09/30/us/wrongful-convictions-civil-lawsuits.html [https://perma.cc/9YTR-TJJP (dark archive)] (Mar. 5, 2021).

24. INNOCENCE PROJECT, *supra* note 21. These states, including Arizona where Louis Taylor was convicted, have no compensatory laws that require payment to the wrongfully convicted. *Id.* One professor explains how odd this compensation discrepancy is when compared to other legal claims: "You just sort of expect that, because we pay people when they get burned with a cup of hot coffee from McDonalds or get hit over the head with a police baton. How come [exonerees] aren't getting any money?" Louise Radnofsky, *Compensating the Wrongfully Convicted*, AM. PROSPECT (July 24, 2007), https://prospect.org/article/compensating-wrongly-convicted/ [https://perma.cc/4FU4-HZ49].

25. *See* Meghan Keneally, *Will the State Pay You for a Wrongful Conviction? Depends on the State.*, ABC NEWS (Apr. 17, 2019, 5:31 AM), https://abcnews.go.com/US/state-pay-wrongful-conviction-depends-state/story?id=62436623 [https://perma.cc/TV8G-ZQZ7].

26. *Glossary*, NAT'L REGISTRY EXONERATIONS, https://www.law.umich.edu/special/exoneration/Pages/glossary.aspx [https://perma.cc/8WUH-SVHX].

27. Maitreya Badami, *Why Do Exonerations Take So Long?*, SANTA CLARA U. SCH. L. (Nov. 7, 2016), https://law.scu.edu/experiential/northern-california-innocence-project/why-do-exonerations-take-so-long [https://perma.cc/2QAX-AQYD] (describing the painstaking process of post-conviction information gathering, investigation, and litigation).

28. FED. R. CRIM. P. 11(a)(3).

29. 29 AM. JUR. 2D *Evidence* § 517 (2020).

30. 42 U.S.C. § 1983.

31. *Id.*

32. An Act to Enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for Other Purposes, ch. 22, § 1, 17 Stat. 13, 13 (1871) (codified as amended at 42 U.S.C. § 1983); *see also* Briscoe v. LaHue, 460 U.S. 325, 337–38 (1983).

frequently in police misconduct actions.[33] But this potential remedy faces a significant hurdle in *Heck*. This part will explain how *Heck* has become a bar to plaintiffs like Taylor.

A. Heck v. Humphrey

In *Heck*, a prison inmate filed a § 1983 claim against prosecutors for destroying evidence that could have prevented his conviction.[34] He only requested monetary damages for relief, however, instead of release from custody.[35] At the same time, he had an ongoing appeal before the Indiana Supreme Court for the same conviction for which he was serving time.[36] Thus, *Heck* raised the question of whether the § 1983 claim for a civil rights violation could be pled while a criminal appeal was ongoing.[37]

The Supreme Court held that the prisoner's claims were barred. And in doing so, it fashioned a new rule for § 1983 claims based on wrongful convictions. First, the Court analogized the prisoner's civil rights claim to a common-law claim for malicious prosecution.[38] At common law, a key element of such claims is successful termination of the prior criminal proceeding in favor of the accused.[39] The Court decided that a similar approach, therefore, should be taken in a § 1983 claim. Thus, to recover damages for wrongful imprisonment, a § 1983 plaintiff must show the conviction at issue was overturned or invalidated in some way.[40]

The *Heck* rule stems from concerns over consistency, finality, and federalism.[41] Without it, § 1983 plaintiffs would be allowed to collaterally attack outstanding criminal judgments with the potential for "two conflicting

33. *See* Matthew V. Hess, *Good Cop-Bad Cop: Reassessing the Legal Remedies for Police Misconduct*, 1993 UTAH L. REV. 149, 156–57 (1993) (identifying various kinds of actions, such as excessive force or false arrest, that may be brought against police officers under § 1983).

34. Heck v. Humphrey, 512 U.S. 477, 479 (1994).

35. *Id.*

36. *Id.* at 478–79.

37. *Id.* at 489.

38. *Id.* at 484. Before diving into its malicious prosecution analysis, the Court examined the difference between § 1983 claims and federal habeas corpus petitions. *Id.* at 480–81. The two are the "most fertile sources of federal-court prisoner litigation," *id.* at 480, but they differ in terms of remedies and claim exhaustion: habeas corpus can overturn a conviction as a remedy whereas § 1983 cannot, and federal habeas corpus requires exhaustion of all state claims whereas § 1983 does not. *See id.* at 480–81. Here, the prisoner had not exhausted all state claims before filing his § 1983 claim for monetary damages, but as explained above, that was not an express bar. *See id.* at 481.

39. *See id.* at 484; *see also* McDonough v. Smith, 139 S. Ct. 2149, 2156–57 (2019). Examples of successful termination would be "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." *Heck*, 512 U.S. at 487.

40. *Heck*, 512 U.S. at 486–87.

41. *Id.* at 484–85.

resolutions arising out of the same or identical transaction."[42] In other words, a plaintiff could be convicted of a crime in state court, only for a federal court to find that state officials had violated the plaintiff's rights in securing that conviction and award damages to the plaintiff. The state criminal conviction and federal civil judgment would sit parallel in clear tension with each other, creating "unnecessary friction between the federal and state court systems."[43]

Accordingly, the appropriate question after *Heck* is whether a § 1983 claim *implies the invalidity of a state court judgment*; if so, the claim must be dismissed.[44] This is often referred to as the favorable-termination requirement.[45] In *Heck*, the prisoner's claims were based on a still-valid conviction—after all, he was still serving time for it. Thus, his claim was dismissed because the underlying criminal conviction was still valid and had not been favorably terminated.[46] He could not pursue a claim that would collaterally attack a valid conviction.

B. *What Hell Hath* Heck *Wrought?*

The fallout of *Heck* has been heavily debated by courts and scholars.[47] Two issues are implicated in the context of wrongful convictions: (1) whether *Heck* applies to plaintiffs not in prison who no longer have habeas rights,[48] and (2) how strictly *Heck*'s favorable-termination requirement operates. Circuits—and Supreme Court Justices—are split as to both issues.

Four years after *Heck*, in *Spencer v. Kemna*,[49] five Justices agreed that *Heck* only applied to claims filed by current prisoners.[50] The reasoning was straightforward: individuals no longer in custody cannot file habeas corpus claims, leaving them with only § 1983 as a vehicle to sue state officials for violating their constitutional rights.[51] Some individuals, for example, may have terms of imprisonment too short to seek habeas relief; others may only pay fines

42. *Id.* (citation omitted).

43. *McDonough*, 139 S. Ct. at 2157 (quoting Preiser v. Rodriguez, 411 U.S. 475, 490 (1973)).

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

45. *See* Powers v. Hamilton Cnty. Pub. Def. Comm'n, 501 F.3d 592, 600 (6th Cir. 2007).

46. *Heck*, 512 U.S. at 490.

47. *See, e.g.*, Note, *Defining the Reach of* Heck v. Humphrey*: Should the Favorable Termination Rule Apply to Individuals Who Lack Access to Habeas Corpus?*, 121 HARV. L. REV. 868, 889 (2008) (questioning the favorable-termination rule for nonprisoners, particularly in light of tightening habeas corpus jurisprudence).

48. *See* Mark R. Davis, *Habeas Corpus and Prisoners' Rights*, 35 WASH. & LEE L. REV. 564, 565 n.8 (1978) (stating that habeas corpus provides a legal forum for only prisoners, not for those released from custody).

49. 523 U.S. 1 (1998).

50. *Id.* at 21 (Souter, J., concurring) ("[A] former prisoner, no longer 'in custody,' may bring a § 1983 action establishing the unconstitutionality of a conviction or confinement without being bound to satisfy a favorable-termination requirement that it would be impossible as a matter of law for him to satisfy."); *id.* at 25 n.8 (Stevens, J., dissenting).

51. *Id.* at 20 (Souter, J., concurring); *Heck*, 512 U.S. at 500 (Souter, J., concurring).

and thus possess no chance to seek relief at all.[52] If *Heck*'s favorable-termination requirement applied to nonprisoners who had no opportunity to seek habeas relief, then § 1983 would be entirely cut off as an available remedy to them, no matter the merits of their claims.

Yet the five Justices in *Spencer* did not constitute the majority opinion in the case, but rather, a four-Justice concurrence and single-Justice dissent did.[53] Because of that result, many circuits continue to apply *Heck* indiscriminately toward § 1983 claims brought by prisoners and nonprisoners alike.[54] The Ninth Circuit, of course, is among them.[55]

This Recent Development focuses its attention on the second of the *Heck* questions, assuming that the favorable-termination rule applies to prisoners and nonprisoners alike and asking instead where the boundary lines lie for the *Heck* rule. What does it mean to have a prior state court conviction favorably terminated such that a civil rights claim can be brought upon those facts? A complete exoneration obviously makes the cut. And *Heck*, for its part, described four outcomes that would be favorable terminations of a conviction: "revers[al] on direct appeal, expun[ction] by executive order, [declaration of invalidity] by a state tribunal[,] . . . or [a conviction] called into question by a federal court's issuance of a writ of habeas corpus."[56]

One circuit examines the issue a bit more expansively, at least for convictions "declared invalid by a state tribunal."[57] In *Geness v. Cox*,[58] the Third Circuit held that favorable termination requires a fact-based inquiry and can be established "by showing that the [criminal] proceeding ended in *any manner* 'that indicates the innocence of the accused.'"[59] Accordingly, in the Third Circuit, courts must look at the underlying facts and particular circumstances of a deal that terminated a state court conviction, rather than just the four corners of the deal.[60] In practice, this has opened the door to more civil rights

52. *Spencer*, 523 U.S. at 21 n.* (Souter, J., concurring).

53. *Id.* at 18, 21–22.

54. *See* Deemer v. Beard, 557 F. App'x 162, 166 (3d Cir. 2014) (holding that *Heck* imposed a universal favorable-termination requirement on all § 1983 plaintiffs attacking the validity of their conviction or sentence); *see also* Figueroa v. Rivera, 147 F.3d 77, 81 (1st Cir. 1998); Randell v. Johnson, 227 F.3d 300, 301 (5th Cir. 2000) (per curiam); Entzi v. Redmann, 485 F.3d 998, 1003 (8th Cir. 2007). *But see* Cohen v. Longshore, 621 F.3d 1311, 1315–17 (10th Cir. 2010) (holding that a § 1983 plaintiff who has no habeas remedy—in other words, a nonprisoner—is not barred by *Heck*); Wilson v. Johnson, 535 F.3d 262, 267–68 (4th Cir. 2008); Powers v. Hamilton Cnty. Pub. Def. Comm'n, 501 F.3d 592, 603 (6th Cir. 2007); Harden v. Pataki, 320 F.3d 1289, 1298–99 (11th Cir. 2003).

55. *See* Taylor v. County of Pima, 913 F.3d 930, 936 (9th Cir. 2019).

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

57. *Id.* at 487.

58. 902 F.3d 344 (3d Cir. 2018).

59. *Id.* at 356 (emphasis added) (quoting Kossler v. Crisanti, 564 F.3d 181, 187 (3d Cir. 2009)).

60. *Id.*

actions than in other circuits[61] but not yet to claims like Taylor's based on plea deals where the defendant still pleads no contest to identical charges.

Importantly, *Geness* dealt with a nolle prosequi ("nol pros") order,[62] which is "an entry on the record by the prosecutor declaring that he will not prosecute" the defendant, subsequently approved by the judge.[63] In other words, the prosecution simply abandons its charges, and everyone goes home. Under the Third Circuit's more expansive *Heck* analysis, the court found that a nol pros order "for 'insufficient evidence' unquestionably provides 'an indication that the accused is actually innocent of the crimes charged.'"[64] Thus, the nol pros order was a favorable termination of the plaintiff's prior conviction, and he could therefore move onto the merits of his § 1983 claim.[65]

For the Ninth Circuit, however, the *Heck* analysis is simpler: *Heck* is a roadblock with no way around it for plaintiffs like Taylor, who accept plea deals rather than wait to be fully exonerated.[66] Whether a prisoner or not, *Heck* applies, and a plea deal like Taylor's no contest deal is not considered a favorable termination of a state court conviction. End of story, so says the Ninth Circuit.

Because of that, prosecutors in the Ninth Circuit—and jurisdictions like it—are subject to a perverse incentive. Under *Heck*, they can employ plea deals as a way to dispense of meritorious claims of innocence and, as an extra bargain, avoid any future lawsuits. *Heck* creates an open invitation for prosecutors to create agreements that toe ethical lines: essentially, the prisoner's freedom in exchange for their right to sue. This gives what the prisoner wants most immediately: freedom. But importantly to the prosecutor, it preserves their winning case record,[67] prevents further scrutiny of government misconduct, and

61. *See, e.g.*, Thomas v. City of Philadelphia, No. 17-4196, 2019 WL 4039575, at *8, *12 (E.D. Pa. Aug. 27, 2019) (reviewing the underlying facts of a nol pros order and finding it was "indicative of plaintiff's innocence," such that *Heck* was not a bar).

62. *Id.*

63. WAYNE R. LAFAVE, JEROLD H. ISRAEL, NANCY J. KING & ORIN S. KERR, CRIMINAL PROCEDURE § 13.3(c) (4th ed. 2020).

64. *Geness*, 902 F.3d at 356 (quoting Hilfirty v. Shipman, 91 F.3d 573, 580 (3d Cir. 1996)).

65. *Id.*

66. *See* Taylor v. County of Pima, 913 F.3d 930, 936 (9th Cir. 2019).

67. A prosecutor's responsibilities often conflict with one another. While prosecutors must be zealous advocates, they must also serve as ministers of justice who owe ethical duties toward criminal defendants. *See* Barbara O'Brien, *A Recipe for Bias: An Empirical Look at the Interplay Between Institutional Incentives and Bounded Rationality in Prosecutorial Decision Making*, 74 MO. L. REV. 999, 1001 (2009). Yet many factors incentivize them to lean further into their adversarial role and develop a conviction psychology:

> High conviction rates bolster re-election campaigns and funding requests. They also help an individual prosecutor advance within the office; indeed, winning is considered such a reliable indicator of work quality that some offices require a prosecutor to file a report explaining why a trial ended in acquittal, imposing no such requirement for convictions.

insulates the entire jurisdiction from liability.[68] As explained in the next part, that bargain is hard to refuse, no matter the clear costs.

II. PLEA BARGAINING WITH THE WRONGFULLY CONVICTED

Heck has proven to be a harsh barrier to defendants released from prison through "creative" plea bargaining by prosecutors. This part analyzes the prevalence of these plea bargains and other similar release-dismissal agreements, focusing on two cases out of the Ninth Circuit, before digging into the underlying consequences.

A. Taylor v. County of Pima

As identified earlier, *Taylor* highlights the impact of questionable plea bargains offered to the wrongfully convicted. In December of 1970, a massive fire broke out at Pioneer Hotel in Tucson, Arizona.[69] Sixteen-year-old Louis Taylor was at that hotel attending a Christmas party.[70] Rather than flee for his safety, he joined the rescue effort and helped hotel guests escape the blazing flames for several hours.[71] After the ordeal, a police officer confronted Taylor, took him to the police station, and interrogated him for six hours about the fire.[72] Taylor denied any involvement,[73] yet he was arrested that morning and charged with trespassing.[74] Ultimately, twenty-eight people died, and he faced life in prison for felony murder.[75]

What evidence did the prosecutor rely on to arrest him? One, Taylor was Black. And two, a police officer heard a White man explain that when the fire began, he heard, "two [Black] boys with bushy hair were fighting."[76] Taylor

Id. at 1110. It is no wonder, then, that in one prosecutor's words, "It was just a matter of winning. I just had to win. A lot of prosecutors are into that." MARK BAKER, D.A.: PROSECUTORS IN THEIR OWN WORDS 47 (1999).

68. Megan Rose & ProPublica, *The Deal Prosecutors Offer When They Have No Cards Left To Play*, ATLANTIC (Sept. 7, 2017), https://www.theatlantic.com/politics/archive/2017/09/what-does-an-innocent-man-have-to-do-to-go-free-plead-guilty/539001/ [https://perma.cc/G9Y2-RYTV].

69. Lauren Castle, *Plea Deals Are Catch-22 for Those Like Tucson Man Who Claims Wrongful Conviction*, AZCENTRAL, https://www.azcentral.com/story/news/local/arizona/2019/03/25/plea-deals-people-who-claim-wrongful-conviction-tucson-louis-taylor-pioneer-hotel-fire-alford-plea/3167744002/ [https://perma.cc/28TE-9YB7] (Mar. 25, 2019, 7:04 PM).

70. *Id.*

71. *Id.*

72. *See* Richard Ruelas, *After 42 Years, Freedom*, AZCENTRAL, https://www.azcentral.com/story/news/local/arizona/2017/07/14/after-42-years-freedom/481079001/ [https://perma.cc/ET3U-K8DV (dark archive)] (July 14, 2017, 3:36 PM).

73. *Id.*

74. *Id.*

75. *See* Dolan, *supra* note 7.

76. *See* Castle, *supra* note 69.

maintained his innocence throughout,[77] but ultimately, an all-White jury convicted him of twenty-eight counts of murder.[78]

Taylor spent decades in prison before evidence surfaced indicating the fire was almost certainly an accident, not arson.[79] Taylor filed a new petition for post-conviction relief.[80] Even the prosecutor conceded that the county would not be able to win a second trial,[81] but they made no effort toward revisiting the facts that would exonerate Taylor.

Instead, the prosecutor offered Taylor a plea deal that would vacate his original murder conviction but require him to plead no contest to new murder charges with a sentence of time served.[82] These "new charges" were for the original fire but did not create any double jeopardy concerns because Taylor had never been acquitted.[83] But most importantly, the dismissal of old charges and introduction of new charges allowed the prosecutor to modify the actual sentence. Taylor agreed, and he was released from prison.[84]

Immediately, however, Taylor faced the deal's repercussions.[85] Despite having spent his entire adult life in prison, he was thrown into the world with little help to get on his feet and no close family ties.[86] Convicted felons are ineligible for food stamps, public housing assistance, or social security benefits.[87] Unsurprisingly, few employers are interested in hiring a convicted murderer. And convicted felons in Arizona lose their voting rights permanently unless a judge restores them.[88] Upon his release, Taylor struggled with basic life

77. *See* Taylor v. County of Pima, 913 F.3d 930, 939 (9th Cir. 2019) (Schroeder, J., dissenting).

78. Dolan, *supra* note 7.

79. *See Taylor*, 913 F.3d at 939.

80. *Id.* at 932.

81. *See* Press Release, Barbara LaWall, Pima Cnty. Att'y, Pima Cnty. Att'y's Off., Pima County Attorney Releases Decision on Louis Taylor 10 (Apr. 1, 2013), https://www.yumpu.com/en/document/read/37243610/pima-county-attorney-releases-decision-on-louis-taylor [https://perma.cc/3PH7-MJYY].

82. *Id.*

83. *See* Ashe v. Swenson, 397 U.S. 436, 447 (1970) (holding that the Fifth Amendment's Double Jeopardy Clause prevents prosecution of a person for the same crime of which they have already been acquitted).

84. *Taylor*, 913 F.3d at 932.

85. Carmen Duarte & Curt Prendergast, *Louis Taylor, 4 Years After Freedom from Pioneer Hotel Fire Case, Accused of Armed Robbery*, SADDLEBAG NOTES, https://saddlebagnotes.com/news/local/louis-taylor-years-after-freedom-from-pioneer-hotel-fire-case/article_93843f70-e86b-50d8-b55a-f619fe1a8456.html [https://perma.cc/78GK-UPKM] (Aug. 15, 2019).

86. Kimberly Matas, *Year of Freedom After 4 Decades Behind Bars Difficult for Louis Taylor*, ARIZ. DAILY STAR, https://tucson.com/news/blogs/police-beat/year-of-freedom-after-4-decades-behind-bars-difficult-for-louis-taylor/article_595cb493-574d-5d50-a3de-06e3d1741ce4.html [https://perma.cc/4NC7-BX58] (Jan. 18, 2019).

87. 21 U.S.C. § 862a(a); 42 U.S.C. § 13661(c).

88. ARIZ. REV. STAT. ANN. § 13-905 (Westlaw through legis. effective Apr. 20, 2021 of the 1st Reg. Sess. of the 55th Leg. (2021)).

necessities, like "keeping a job, managing money, [and] finding a place to live."[89] And it is likely that external obstacles were not the only ones Taylor faced. Many persons that are wrongfully convicted also experience psycho-emotional conditions such as depression, anxiety, and post-traumatic stress disorder.[90]

It seems almost preordained that Taylor would end up in trouble again—and he did, facing charges for armed robbery four years after his release.[91] To get his life back on track, he sued the County of Pima under § 1983 for constitutional violations that led to his wrongful imprisonment: prosecuting him on the basis of race, withholding exculpatory evidence, and suborning perjury from key witnesses.[92] But the trial court held that *Heck* barred his claim.[93]

In a fractured opinion, the Ninth Circuit agreed.[94] The court explained that *Heck* barred civil rights claims that necessarily implied the invalidity of a state court judgment.[95] Here, Taylor was arguing that he wrongfully spent forty-two years in prison due to the County of Pima's constitutional violations.[96] Even though Taylor's original conviction was overturned in 2016, the court explained that his time in prison was now legally supported by his new conviction to which he pled no contest.[97] In other words, he could not seek damages for the forty-two years in prison because those years constituted time served for his newer, still lawful 2016 conviction. And under *Heck*, he could not seek damages stemming from a lawful conviction. Recognizing the sheer injustice of it all, the court solemnly ended its opinion by explaining it took "no pleasure in reaching this unfortunate result."[98] Judge Schroeder dissented, declaring, "In my view, our law is not that unjust" before explaining that *Heck* did not prevent Taylor's claim.[99] Yet even with the miscarriage of justice in

89. Matas, *supra* note 86.

90. Heather Weigand, *Rebuilding a Life: The Wrongfully Convicted and Exonerated*, 18 B.U. PUB. INT. L.J. 427, 428 (2009). *The American Prospect* interviewed an exonerated inmate who described his time in prison. "'You're dead but you're still alive,' he said. The violence of prison was terrifying; the hundreds of new personalities to contend with overwhelming; the lack of control over any aspect of his life dehumanizing. Being innocent only compounded his nightmare." Radnofsky, *supra* note 24.

91. Megan Cassidy, *Louis Taylor, Freed After 42 Years in Prison for Deadly Tucson Hotel Fire, Arrested Again*, AZCENTRAL (July 14, 2017, 8:10 PM), https://www.azcentral.com/story/news/local/arizona/2017/07/15/louis-taylor-armed-robbery-arrest-tucson-hotel-fire-prison-freed/481258001/ [http://perma.cc/GH6Z-CZYH].

92. Taylor v. County of Pima, No. CV-15-00152, 2017 WL 6550590, at *1–2 (D. Ariz. Mar. 16, 2017), *aff'd*, 913 F.3d 930 (9th Cir. 2019).

93. *Id.* at *6.

94. Taylor v. County of Pima, 913 F.3d 930, 939 (9th Cir. 2019) (Graber, J., concurring).

95. *Id.* at 935–36 (majority opinion).

96. *Id.* at 935.

97. *Id.* at 935–36.

98. *Id.* at 936.

99. *Id.* at 939 (Schroeder, J., dissenting).

cases like *Taylor*, these deals persist across the country in varying forms, as seen in the next section.[100]

B. *The Fairbanks Four and Other Similar Cases*

A year after deciding *Taylor*, the Ninth Circuit faced a similar claim. In *Roberts v. City of Fairbanks*,[101] four Native Alaskan men known as the "Fairbanks Four" sued the City of Fairbanks for constitutional violations that led to their wrongful convictions.[102] Like *Taylor*, they had been convicted of murder as teenagers after being subjected to a racially motivated prosecution that proceeded on dubious evidentiary grounds.[103] After twenty years in prison and many failed appeals, the men had gathered strong evidence of their innocence.[104] But like *Taylor*, the prosecutor offered a shadowy deal rather than submit to real justice:[105] if the men gave up any compensation claims, the prosecutor would outright dismiss their convictions.[106] The men accepted this release-dismissal agreement but subsequently sued the city, arguing that the deal was void as against public policy.[107]

Unlike *Taylor*, however, the Ninth Circuit held that *Heck* ultimately did *not* bar the claims of the Fairbanks Four because the release-dismissal agreement differed from Taylor's no contest plea.[108] The court explained that while Taylor still had a valid conviction on the books, the Fairbanks Four's convictions had been wholly dismissed under the agreement.[109] Yet despite this important victory, the men still face a challenging path to justice because the release-dismissal agreement contained a clause that they could not later sue for civil damages.[110]

These deals, either designed as plea bargains or release-dismissal agreements, have shown up around the country. The "West Memphis Three," who were themselves the subjects of heavy media attention and several

100. *See infra* Section II.B.

101. 947 F.3d 1191 (9th Cir. 2020), *cert. denied*, No. 20-711, 2021 WL 850629 (U.S. Mar. 8, 2021).

102. *Id.* at 1195–96.

103. *Id.* at 1193–95.

104. *Id.* at 1193–94. During a five-week evidentiary hearing over whether to reopen the men's cases, one witness confessed to committing the murder with three other men, and the sole eyewitness recanted his original testimony and testified that he had been coerced by police officers to lie and identify the Fairbanks Four as the attackers. *Id.* at 1194.

105. *Id.* at 1195.

106. *Id.*

107. *Id.* at 1195, 1205 n.16.

108. *Id.* at 1199. In theory, this release-dismissal agreement varies from Taylor's no contest deal (the latter is a form of a guilty plea while the former is not); however, in practice they operate much the same, as examined later in this Recent Development, *infra* Part III.

109. *Id.*

110. Recently, the trial court denied a motion to dismiss the men's claims, holding that, at the early evidentiary stage, it was plausible that the agreements not to sue were unenforceable. Roberts v. City of Fairbanks, No. 17-cv-0034, 2020 WL 5848661, at *7 (D. Alaska Oct. 1, 2020).

documentaries,[111] ultimately agreed to Alford pleas[112]—largely similar to no contest pleas—after eighteen years in prison for a triple murder.[113] At the time of their pleas, DNA evidence had surfaced that supported their claims of innocence, and the men were scheduled for a hearing just months away where a judge would potentially grant them a new trial.[114] But just like the defendants in *Taylor* and *Roberts*, rather than waiting to see if normal legal mechanisms would finally work in their favor, the West Memphis Three took the "seemingly contradictory deal."[115] And just like Taylor's, the deal allowed the judge to vacate their original convictions, accept pleas for new ones, and sentence the men to time served.[116] It gave the men a way out of prison but, once again, left all the collateral consequences of a murder conviction.

There is no data examining the prevalence of these deals nationwide, but several studies have noted their use in specific contexts or jurisdictions. In 2017, ProPublica identified ten cases over nineteen years in which defendants in the city and county of Baltimore alone had accepted Alford pleas or time-served deals despite viable innocence claims.[117] The Death Penalty Information Center identified more than twenty-five men originally sentenced to death—all of whom had strong innocence claims—who had their convictions overturned and subsequently pled guilty or no contest rather than face a new trial.[118]

C. *Why the Wrongfully Convicted Accept These Deals*

For the average person, it can be difficult to understand the rationale for taking a plea deal like this. If innocent, why ever plead guilty in the first place? Why not wait out the court's procedures and be exonerated? If exculpatory

111. Dave Itzkoff, *A Continuing Murder Mystery Keeps Its Grip on Filmmakers*, N.Y. TIMES (May 7, 2014), https://www.nytimes.com/2014/05/08/movies/west-memphis-three-inspire-yet-another-film-devils-knot.html [https://perma.cc/5YWT-YGZW (dark archive)] (discussing the *Paradise Lost* series and other films that documented the "runaway prosecution" of the West Memphis Three).

112. An Alford plea allows a defendant to plead guilty while maintaining their innocence. North Carolina v. Alford, 400 U.S. 25, 37–38 (1970). These are often described interchangeably with no contest pleas. The main difference is that an Alford plea allows a defendant to maintain their innocence while pleading guilty, whereas with a no contest plea, a defendant neither admits nor contests the charges against them. *Id.*

113. Campbell Robertson, *Deal Frees 'West Memphis Three' in Arkansas*, N.Y. TIMES (Aug. 19, 2011), https://www.nytimes.com/2011/08/20/us/20arkansas.html [https://perma.cc/9KG2-6W6Z (dark archive)].

114. *Id.*

115. *Id.*

116. *Id.*

117. Megan Rose, *What Does an Innocent Man Have To Do To Go Free? Plead Guilty.*, PROPUBLICA (Sept. 7, 2017, 8:00 AM), https://www.propublica.org/article/what-does-an-innocent-man-have-to-do-alford-plea-guilty [https://perma.cc/FQ9X-4MXQ].

118. *Partial Innocence — Sentence Reduced*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/policy-issues/innocence/partial-innocence [https://perma.cc/Y38G-D3JC].

evidence is discovered, what incentive is there to take a deal attached to a bevy of collateral consequences?

First, it is important to note the pervasiveness of plea bargaining itself in our justice system. Between ninety-four and ninety-seven percent of criminal defendants in state and federal systems accept plea deals, not accounting for the actual guilt of any of those defendants.[119] Justice Scalia once deemed it a "necessary evil" of our criminal justice system.[120] And despite an extreme imbalance of bargaining power between prosecutors and defendants,[121] courts take a "laissez-faire approach" to plea bargaining,[122] leaving prosecutors with an enormous amount of discretion.[123]

To understand why Taylor accepted his plea deal, his perspective is key. He was innocent, yet that was not enough at the time of trial. A jury *still* convicted him. And everything after—his appeals and his pleas for justice—all fell on deaf ears. This engenders a deep mistrust of the system. "[S]uch a defendant, having seen the criminal justice system in operation, 'up close and personal' so to speak, would be reluctant to 'roll the dice' at a retrial."[124]

Crucially, Taylor made his decision from behind prison walls with no guarantee he would ever be free. His decision fits squarely into the findings of

119. Missouri v. Frye, 566 U.S. 134, 143 (2012). Indeed, one study showed that "more than half of the study participants were willing to forgo an opportunity to argue their innocence in court and instead falsely condemned themselves in return for a perceived benefit." Lucian E. Dervan & Vanessa A. Edkins, *The Innocent Defendant's Dilemma: An Innovative Empirical Study of Plea Bargaining's Innocence Problem*, 103 J. CRIM. L. & CRIMINOLOGY 1, 48 (2013).

120. Lafler v. Cooper, 132 S. Ct. 1376, 1397 (2012) (Scalia, J., dissenting).

121. *See* Russell M. Gold, Carissa Byrne Hessick & F. Andrew Hessick, *Civilizing Criminal Settlements*, 97 B.U. L. REV. 1607, 1615–16 (2017) (describing the "overwhelming leverage" that prosecutors have to obtain guilty pleas from criminal defendants).

122. *See* Stephanos Bibas, *Regulating the Plea-Bargaining Market: From Caveat Emptor to Consumer Protection*, 99 CALIF. L. REV. 1117, 1121, 1125, 1152 (2011) (tracing the Supreme Court's laissez-faire approach to plea bargaining and recommending borrowing from consumer protection law to better regulate the process).

123. *See* United States v. Ruiz, 536 U.S. 622, 633 (2002); Russell D. Covey, *Plea-Bargaining Law After* Lafler *and* Frye, 51 DUQ. L. REV. 595, 599 (2013); Clark Neily, *Prisons Are Packed Because Prosecutors Are Coercing Plea Deals. And, Yes, It's Totally Legal.*, NBC NEWS (Aug. 8, 2019, 7:33 PM), https://www.nbcnews.com/think/opinion/prisons-are-packed-because-prosecutors-are-coercing-plea-deals-yes-ncna1034201 [https://perma.cc/7EBS-QJYX]. Additionally, if a defendant claims that their attorney failed to adequately explain the consequences of a plea deal, they face a high bar. Under the deferential test created in *Strickland v. Washington*, 466 U.S. 668 (1984), "[c]ourts rarely reverse convictions for ineffective assistance of counsel, even if the defendant's lawyer was asleep, drunk, unprepared, or unknowledgeable." Stephanos Bibas, *The Psychology of Hindsight and After-the-Fact Review of Ineffective Assistance of Counsel*, 2004 UTAH L. REV. 1, 1, 4; *see also* Padilla v. Kentucky, 559 U.S. 356, 374 (2010) (holding that an attorney's failure to tell a defendant that they may be deported after pleading guilty was constitutionally deficient but that defendant must still prove actual prejudice).

124. John H. Blume & Rebecca K. Helm, *The Unexonerated: Factually Innocent Defendants Who Plead Guilty*, 100 CORNELL L. REV. 157, 175–76 (2014).

numerous psychological studies on guilty pleas.[125] A 2018 study by Professor Lucian Dervan is particularly prescient. First, it shows the "innocence phenomenon"—that defendants plead guilty for a variety of reasons, many of which have nothing to do with guilt or innocence.[126] Second, knowledge of the collateral consequences of a plea does not alter decision-making because of temporal discounting; "later consequences have less impact on decisionmaking than immediate ones."[127] Lastly, and unsurprisingly, "pretrial detention significantly influence[s] plea decisions."[128]

All of these factors were present for Taylor. He spent his entire adult life in a hostile environment with harsh rules and often horrific conditions.[129] Anyone would want to finally be free and likely at whatever cost.

Kerry Max Cook faced a similar dilemma to Taylor's. Cook spent twenty-two years in prison, including half of that time on death row, for the rape and murder of a young woman.[130] But his conviction was overturned numerous times because of official misconduct.[131] Eventually, facing the prospect of a fourth trial and the death penalty, Cook agreed to make an Alford plea.[132] Two months after his plea, DNA evidence surfaced showing he was innocent.[133] He says the deal granted him his freedom, "but neither his dignity nor peace of mind": "I don't have any rights left. It's a very very traumatic ordeal. So, you know, was it worth it? Sometimes when I'm holding my son I can say yes. Sometimes, when I'm by myself, I say no. They won."[134]

125. *See, e.g.*, Vanessa A. Edkins & Lucian E. Dervan, *Freedom Now or a Future Later: Pitting the Lasting Implications of Collateral Consequences Against Pretrial Detention in Decisions To Plead Guilty*, 24 PSYCH. PUB. POL'Y & L. 204, 205 (2018).

126. Lucian E. Dervan, Class v. United States*: Bargained Justice and a System of Efficiencies*, 2017 CATO SUP. CT. REV. 113, 134.

127. *Id.*

128. *Id.*

129. *See* Matt Ford, *The Everyday Brutality of America's Prisons*, NEW REPUBLIC (Apr. 5, 2019), https://newrepublic.com/article/153473/everyday-brutality-americas-prisons [http://perma.cc/8D24-EML8].

130. *The Plea: Kerry Max Cook*, PBS: FRONTLINE (June 17, 2004), https://www.pbs.org/wgbh/pages/frontline/shows/plea/four/cook.html [http://perma.cc/A94T-M5FF]. Cook's previous convictions were overturned on appeal before he was offered this Alford plea, which differs from Taylor's situation where he had to agree to the prosecutor's plea deal before his original charges were dismissed. *Id.* Nonetheless, Cook's case is used an example of the coercive nature of Alford pleas offered to those who have already spent years in prison and potentially face a lifetime more, even when they recognize there may be powerful exonerating evidence on their side.

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

III. MOVING FORWARD: WHAT THE *HECK* DO WE DO NOW?

Plea deals offered to the wrongfully convicted raise significant ethical concerns. They place a prisoner, already horrifically wronged by the criminal justice system, in a position to finally achieve immediate freedom, but at a less-immediate financial and emotional cost. And while courts do not consider plea deals to be inherently coercive,[135] there is a strong argument to apply that label in cases like this. So, what can be done?

The most straightforward path would be clarification from the Supreme Court that *Heck* does not apply to nonprisoners like Taylor. But it could take some time before the Court clarifies the issue—after all, it refused to grant certiorari in *Taylor*[136]—and there is a fair question whether the current makeup of the Court would even agree that *Heck* only applies to prisoners.[137]

This Recent Development focuses on two other options. First, these deals—either through no contest pleas, Alford pleas, or release-dismissal agreements—seemingly violate a prosecutor's ethical duties. But the Model Rules of Professional Conduct,[138] the only real accountability system in place as adopted in various jurisdictions, ultimately require little of prosecutors in these situations. When violations of these rules occur, it remains unlikely that a prosecutor will face any real repercussions. Accordingly, these areas are ripe for improvement, which the section below addresses, but they have limited immediate utility to cases like *Taylor*.

The other option would be for courts to expand their recognition of what constitutes a favorable termination under *Heck*. As long as the *Heck* incentives resonate with prosecutors, they will continue to offer plea deals to the wrongfully convicted. This part first discusses a prosecutor's ethical duties and then makes a legal argument to expand *Heck*'s framework.

135. *See* Bordenkircher v. Hayes, 434 U.S. 357, 364–65 (1978) (holding that it was constitutional for the prosecution to use the threat of a life sentence in order to convince a defendant to accept a five-year plea deal for forging an eighty-eight-dollar check).

136. Taylor v. County of Pima, 913 F.3d 930 (9th Cir. 2019), *cert. denied*, 140 S. Ct. 2508 (2020).

137. Notably, the five Justices in *Spencer* who agreed that *Heck* only applied to prisoners included the more moderate to liberal wing of the Court: Justices Souter, O'Connor, Ginsberg, Breyer, and Stevens. *See* Spencer v. Kemna, 523 U.S. 1, 18, 22 (1998). Even if the Court decided that *Heck* does not apply to nonprisoners, it might create some caveats to that distinction in line with several circuits. The Fourth Circuit, for example, has held that *Heck* does not apply to nonprisoners seeking damages for past confinement who "could not, as a practical matter, seek habeas relief" prior to their release. Wilson v. Johnson, 535 F.3d 262, 268 (4th Cir. 2008). This unmistakably relies on Justice Souter's rationale, but it is unclear whether someone like Taylor, who spent decades in prison for his first conviction, would meet such a test—one might argue he had substantial time to seek habeas relief prior to his release.

138. MODEL RULES OF PRO. CONDUCT (AM. BAR ASS'N 2020).

A. *Bolstering a Prosecutor's Ethical Duties*

Prosecutors are bound by the Model Rules of Professional Conduct in performing their duties[139]—including plea-bargaining with defendants—yet those rules grant significant discretion. Rule 3.8 contemplates the special responsibilities of a prosecutor, including the possibility of encountering an innocent defendant.[140] In such situations, Rule 3.8 sets a high standard before the prosecutor is ever required to affirmatively act: "When a prosecutor knows of *clear and convincing evidence* establishing that a defendant in the prosecutor's jurisdiction was convicted of an offense that the defendant did not commit, the prosecutor shall seek to remedy the conviction."[141]

Clear and convincing is a high bar,[142] particularly in light of the cognitive biases that play into a prosecutor's analysis of innocence claims.[143] Scholars have researched the conviction psychology that often pervades prosecutorial offices and renders them into "an environment where convictions are prized above all and the minister of justice concept becomes a myth."[144] This mindset only becomes more entrenched the deeper into a case a prosecutor goes, creating a potent challenge toward innocence claims arriving years after a conviction.[145]

Furthermore, once the clear and convincing bar is met, the rules only make suggestions as to what "remedying" a conviction may look like. They identify potential options as "disclosure of the evidence to the defendant, requesting that the court appoint counsel for an unrepresented indigent defendant and, where appropriate, notifying the court that the prosecutor has knowledge that the defendant did not commit the offense of which the defendant was convicted."[146] Beyond those suggestions, many jurisdictions have created conviction review units, which report directly to a district attorney and are designed to run independently, thus avoiding some of the conflicts of interest mentioned earlier.[147]

139. MODEL RULES OF PRO. CONDUCT r. 3.8.

140. MODEL RULES OF PRO. CONDUCT r. 3.8(h).

141. *Id.* (emphasis added).

142. It seems like an especially high bar when considering that a prosecutor's duties once they face clear and convincing evidence remain quite small. *See* MODEL RULES OF PRO. CONDUCT r. 3.8(h) cmt. 8.

143. Daniel S. Medwed, *The Zeal Deal: Prosecutorial Resistance to Post-Conviction Claims of Innocence*, 84 B.U. L. REV. 125, 138 (2004).

144. *Id.* at 137; *see also supra* note 67 (discussing the structural incentives that push prosecutors toward pursuing higher conviction rates).

145. Medwed, *supra* note 143, at 137.

146. MODEL RULES OF PRO. CONDUCT r. 3.8 cmt. 8.

147. *See generally* JOHN HOLLWAY, CONVICTION REVIEW UNITS: A NATIONAL PERSPECTIVE (2016) (providing an overview of conviction review units with empirical data and recommendations for best practices).

Unfortunately, however, in many prosecutors' offices around the country, post-conviction review is performed by the original prosecutor.[148] While perhaps most efficient—that prosecutor has the most insight into the case—it undermines the underlying goal of innocence review.[149] As discussed earlier, the original prosecutor is weighed down with various cognitive and professional biases that are likely to make them resistant toward innocence claims raised in their own case.[150] Accordingly, many scholars emphasize the importance of independent attorneys for the initial case review.[151]

Additionally problematic is how little Rule 3.8 actually requires. In light of the weak responsibilities imposed by Rule 3.8, Professor Dana Carver Boehm recommends a tiered-review scheme for prosecutors to employ, based on the strength of the exonerating evidence.[152] Initial claims of innocence should be treated under normal office protocols, but as the evidentiary weight increases, so should prosecutorial responsibilities, such as an actual investigation.[153] At the final stages of her proposed review, a "reasonable likelihood of innocence" would require prosecutors to drop any opposition to an innocence claim, while the discovery of "clear and convincing evidence" would require prosecutors to affirmatively support exoneration.[154]

But even implementing more stringent and better-defined standards may not be enough. Few convictions are overturned because of prosecutorial misconduct, and disciplinary bodies similarly fail to hold prosecutors accountable: in a study of 326 Illinois convictions that were overturned on appeal between 1977 and 1999 because of prosecutorial misconduct, only two prosecutors received sanctions and only one lost his job.[155]

For its part, the American Bar Association's House of Delegates recently adopted a standard directed at the precise issue here. Under a 2017 resolution, a prosecutor should not condition relief for a wrongful conviction upon "an Alford plea, a guilty plea, or a no contest plea by the defendant to the original or any other charge."[156] Further, if a prosecutor believes that they can support new charges with evidence, they must pursue those charges and begin new plea negotiations *after* the prior conviction has been vacated and the defendant released.[157] This is an important start toward a solution and remedies some of

148. Dana Carver Boehm, *The New Prosecutor's Dilemma: Prosecutorial Ethics and the Evaluation of Actual Innocence*, 2014 UTAH L. REV. 613, 653.

149. *Id.*

150. *Id.*

151. *Id.* at 654–55.

152. *Id.* at 656–57.

153. *Id.* at 618.

154. *Id.*

155. Medwed, *supra* note 143, at 173.

156. ABA Comm. on Crim. Just., Resol. 112B, at 1 (2017).

157. *Id.*

the improper bargaining power, but a clear caveat remains: the proposal is not binding on any prosecutors unless their jurisdiction adopts it.

B. *Reexamining "Favorable Termination"*

Another approach would be for courts to tackle *Heck* directly. While ethical rules might not fully stem the tide of plea deals offered to the wrongfully convicted, a reenvisioning of *Heck*'s favorable-termination requirement could counter it and force prosecutors to reevaluate how they respond to wrongful-conviction claims. And, if nothing else, it would at least allow a civil remedy to move forward in cases like *Taylor*.

Heck requires that a state conviction be "favorably terminated" before a § 1983 plaintiff can sue for any underlying constitutional violations associated with that conviction. While the Supreme Court has specifically identified several types of favorable terminations in *Heck*,[158] the outer limits of that list are unclear. But perhaps Taylor's no contest plea—as analyzed within the specific context of his case—hits just within that outer limit.

To get there, one has to take a page out of the Third Circuit's playbook. Favorable termination cannot be analyzed through an overtly mechanical approach, but rather a fact-intensive inquiry that examines the underlying circumstances of the plea deal at issue.[159] Chiefly, courts should ask if the termination of the state court conviction indicates the innocence of the accused.[160] And here is where plea deals taken by the wrongfully convicted may stand out from the rest: in Taylor's case, he was *still* convicted and had served decades in prison before the prosecutor offered the plea.

The prosecutor's decision to offer that deal, therefore, implies at least some belief of innocence by the prosecutor. Otherwise, why would they offer the deal? Why would they revisit a forty-two-year-old case and free a convicted murderer from prison? The same issue arose in *Roberts*, where the prosecution suddenly agreed to release four "murderers" twenty years after their original conviction.[161] Why? Those men possessed strong claims of innocence that suddenly rendered their imprisonment quite problematic, to say the least.

Digging further into the inquiry, a court should explore the purpose of the deal and the underlying circumstances. After all, the usual incentives for the prosecutor to offer a plea deal were not implicated here: Taylor was already in prison with a conviction for life. What could the prosecutor stand to gain? Here, the only rationales for offering the plea could be (1) a lack of evidence to proceed with a new trial if ordered or (2) the *Heck* incentive—to avoid future liability

158. Heck v. Humphrey, 512 U.S. 477, 486–87 (1994).

159. Geness v. Cox, 902 F.3d 344, 356 (3d Cir. 2018).

160. *Id.*

161. Roberts v. City of Fairbanks, 947 F.3d 1191, 1195 (9th Cir. 2020), *cert. denied*, No. 20-711, 2021 WL 850629 (U.S. Mar. 8, 2021).

in a civil suit if Taylor was exonerated and freed from prison.[162] Underlying both rationales is one theme: the prosecution believed that Taylor was likely innocent (in other words, there was either no evidence to prosecute him *because he was innocent*, or he probably had a meritorious civil rights claim *because he was innocent*). In fact, the prosecutor in *Taylor* outright admitted that they were offering the deal because—with the new evidence available—Taylor would be guaranteed a new trial that the government could not win.[163]

Concessions like that should be critical to determining whether a favorable termination of a criminal conviction occurred. Indeed, when addressing whether a nol pros order constituted a favorable termination in *Geness*, the Third Circuit examined more than just the order itself and actually dug into the prosecutor's remarks during the criminal case.[164] The court discovered that the prosecutor had stated that they would be "unable to prove the case" and that there were facts that made it "impossible for the [government] to prove the case beyond a reasonable doubt."[165] This was critical; this context led the court to find that the dismissal order indeed amounted to a favorable termination.

Recently, the Supreme Court signaled that it may support a more contextual approach as argued here. In light of a prosecutor's "broad discretion over such matters as the terms on which pleas will be offered or whether charges will be dropped," the Court noted in *McDonough v. Smith*[166] that a more "context-specific" approach may be necessary to understand what constitutes a favorable termination.[167] And in March of 2021, the Court granted certiorari on a petition that asks whether the favorable-termination rule requires a § 1983 plaintiff to show that the criminal proceedings ended in a way that is "not inconsistent" with their innocence.[168] Although the case involves some

162. *See supra* Part I. Professor John Hollway, an expert on wrongful convictions, similarly argues there are only two reasons for offering a plea after a conviction: "If you don't believe in your case, but you also don't dismiss it, what are you really doing? You're either trying to preserve your stats or protecting yourself against civil liability." Alan Feuer, *After 28 Years in Prison, a Rare Plea Deal Frees a Connecticut Man*, N.Y. TIMES (Nov. 23, 2017), https://www.nytimes.com/2017/11/23/nyregion/rare-alford-plea-wrongful-conviction-rape-connecticut.html [https://perma.cc/V79E-T89L (dark archive)].

163. The prosecutor admitted that based on new evidence, Taylor would be guaranteed a new trial and that the prosecutor would not be able to win. *See* Press Release, Barbara LaWall, *supra* note 81.

164. *Geness*, 902 F.3d at 356.

165. *Id.*

166. 139 S. Ct. 2149 (2019).

167. *Id.* at 2161 n.10. The Court declined to address the issue further, however, because McDonough had been acquitted, which was "unquestionably a favorable termination." *Id.*

168. Thompson v. Clark, 794 F. Appx. 140 (2d Cir. 2020), *cert. granted*, No. 20-659, 2021 WL 850622 (U.S. Mar. 8, 2021); Petition for Writ of Certiorari, at i, Thompson v. Clark, No. 20-659, 2021 WL 850622 (U.S. Mar. 8, 2021). On the same day, the Court declined to grant certiorari in *Roberts*, discussed *supra* Section II.B, which held that a release-dismissal agreement constituted a favorable termination. Roberts v. City of Fairbanks, 947 F.3d 1191 (9th Cir. 2020), *cert. denied*, No. 20-711, 2021 WL 850629 (U.S. Mar. 8, 2021).

important distinctions from *Taylor* and does not address plea deals,[169] it could seemingly open the door to a more context-specific approach by courts.

The context was everything in *Taylor*. The timing, the evidence, and the prosecutor's own statements indicated a finding of innocence. Yet prosecutors should not—and ethically cannot—make plea deals with people they believe are innocent.[170] Thus, a "plea deal" like the one in *Taylor* no longer even seems to be the appropriate term. Instead, the deal offered to Taylor should be seen as a mere variant of the release-dismissal agreement examined in the *Roberts* case—which, importantly, was considered a favorable termination by the Ninth Circuit. A release-dismissal agreement is an agreement between a defendant and prosecutor that dismisses criminal charges in exchange for a release of liability to the prosecuting authority. And like the agreement in *Roberts*, Taylor's plea was a similar exchange of liability for freedom.

In *Town of Newton v. Rumery*,[171] the Supreme Court explained that release-dismissal agreements, while not per se unenforceable, must nonetheless further a legitimate prosecutorial goal or public interest.[172] While the *Rumery* plurality agreed that weeding out marginal or frivolous suits could be in the public interest,[173] evidence has shown that prosecutors do not use the practice to eliminate frivolous cases; instead, "[t]he agreement[s are] often invoked to accommodate and to routinely protect police and municipalities."[174] Bartering with life sentences purely to avoid meritorious civil rights claims is not a legitimate prosecutorial goal.[175] Once Taylor's plea deal is understood as a

169. In *Thompson*, the petitioner was arrested for obstruction of justice, but prosecutors dismissed his case before trial "in the interests of justice." Petition for Writ of Certiorari, *supra* note 168, at 4–5. He filed a malicious prosecution claim, but the district court held that the prosecutors' dismissal was not a favorable termination, and the Second Circuit affirmed. *Thompson*, 794 F. Appx. at 141–42. In his petition, Thompson argues that while most circuits, including his own, require that a criminal proceeding end in a manner that "affirmatively indicates" one's innocence, the correct test should be in a manner "not inconsistent with a plaintiff's innocence." Petition for Writ of Certiorari, *supra* note 168, at 16–17 (quoting Laskar v. Hurd, 972 F.3d 1278, 1289 (11th Cir. 2020)). The latter approach was recently adopted by the Eleventh Circuit. *See* Laskar v. Hurd, 972 F.3d 1278, 1283, 1289 (11th Cir. 2020) (holding that a proceeding was favorably terminated when a prosecutor dismissed charges because the criminal conduct occurred outside the statute of limitations).

170. *See* MODEL RULES OF PRO. CONDUCT r. 3.8(a) (AM. BAR ASS'N 2020) (stating that prosecutors must "refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause").

171. 480 U.S. 386 (1987).

172. *See id.* at 397.

173. *See id.* at 395–96.

174. Seth F. Kreimer, *Releases, Redress, and Police Misconduct: Reflections on Agreements To Waive Civil Rights Actions in Exchange for Dismissal of Criminal Charges*, 136 U. PA. L. REV. 851, 881 (1988).

175. *See Rumery*, 480 U.S. at 394 (noting that release-dismissal agreements would create concerns if they "tempt[ed] prosecutors to trump up charges in reaction to a defendant's civil rights claim, suppress[ed] evidence of police misconduct, and [left] unremedied deprivations of constitutional rights"); *id.* at 400 (O'Connor, J., concurring) (warning that the "coercive power of criminal process may be twisted to serve the end of suppressing complaints against official abuse, to the detriment not

cloaked version of a release-dismissal agreement, *Rumery*'s public interest requirements for release-dismissal agreements should be imported over to the plea-bargaining context to prevent the government from avoiding liability for civil rights violations.

To reiterate, the deal offered to Taylor furthered no legitimate prosecutorial goals or public interests. While a prosecutor might argue the deal saved the government from expending time and money on a second trial with uncertain prospects, that cannot be considered a legitimate goal in this context. After all, the prosecutor bluntly admitted that if Taylor were granted a new trial, "the state of the evidence is such that the State would be unable to proceed with a retrial, and the convictions would not stand."[176] Saving time and money cannot outweigh a prosecutor's ethical duty to only pursue charges supported by probable cause.[177]

Now, to be fair, not all blame can be placed on prosecutors for these agreements. Plea deals, after all, must be approved by a judge, who has the power to reject them.[178] Certainly, judges should exercise that power more liberally in cases like *Taylor*. But on a lesser note, a judge during hearings might also lay the groundwork for a defendant to later pursue a civil rights claim. Faced with a defendant pleading no contest after potentially exonerating evidence has surfaced, a judge should ask on the record whether the prosecution could proceed with a new trial and what evidence it has to support its charges.[179] Therefore, a defendant like Taylor, later confronted with a *Heck* favorable-termination defense, could demonstrate the necessary implication of innocence veiled within the plea deal.

This contextual approach to favorable terminations is not without valid criticism. For one, broadening our understanding of favorable terminations would likely increase a trial court's workload when examining § 1983 claims and risks becoming overinclusive. No longer could a court take a quick glance at a docket sheet to determine the disposition of a criminal conviction. Workload concerns are certainly easy to set aside in a law review article but much more potent for attorneys and courts operating at the ground level.

Nonetheless, the approach above does not open Pandora's box to a never-ending analysis of all plea deals. This Recent Development focuses on cases at

only of the victim of such abuse, but also of society as a whole"); *id.* at 415 (Stevens, J., dissenting) (recognizing the conflict of interest faced by a prosecutor who is concerned with both criminal justice and civil liability).

176. *See* Press Release, Barbara LaWall, *supra* note 81.

177. If the prosecutor believed Taylor was guilty, one might argue that it is not in the public interest to allow a convicted murderer of twenty-eight people back on the streets.

178. FED. R. CRIM. P. 11(c)(5).

179. *See* Jessica S. Henry, *When the Wrongly Convicted Plead Guilty for Freedom*, MEDIUM (Oct. 28, 2019), https://medium.com/@jhenryjustice/when-the-wrongly-convicted-plead-guilty-for-freedom-a5909021489c [https://perma.cc/39SU-KV6C].

the extremes—where prosecutors prematurely offer plea deals even while convictions still stand or where defendants have already served considerable time in prison. These defendants possess new exonerating evidence, not simply stale arguments from old appeals. And their cases stand out because of the necessary implications addressed above: the plea deals were offered only because of serious innocence and civil liability issues. The subversion of normal process warrants a closer look by courts to assess whether those deals constitute a favorable termination.

Additionally, one could argue that allowing these civil rights claims to go forward does nothing to solve *Heck*'s underlying concerns of consistency and finality. Yet those concerns already appear bludgeoned by the plea agreements themselves. Plea deals like Taylor's operate on contradictory fictions: the deal vacates one conviction, creates a wholly identical one, and yet allows a prisoner to go free. For the public, this looks like an exoneration in all but name: the defendant is free, and the government admits it could not have won a conviction.[180] To then bar a civil suit to preserve the finality of that "conviction" seems hollow. And the strong policy reasons for allowing that civil suit to proceed weigh much more heavily.

It would also be fair to question whether courts should be in a position to substitute their subjective opinion of a case—that it was favorably terminated—for the actual written limits of the plea deal, which does not indicate that. While the facts in the cases discussed above are egregious and clear cut, certainly there may be closer calls. Nonetheless, courts must take steps into these factual gray areas to provide a check against prosecutorial malfeasance. In too many cases prosecutors are leveraging the state's current custodial power over a prisoner to obtain a deal that later cuts off that prisoner's constitutional rights. The American Bar Association has already denounced such tactics.[181] But without further judicial scrutiny, those tactics may continue to go unchecked. Thus, courts should make greater efforts to question these deals when initially made in criminal cases and scrutinize them closely when later raised in civil claims.

Ultimately, a no contest deal like Taylor's must be considered a favorable termination of the original conviction because when all the facts are considered, the deal indicates the accused's innocence and resembles a release-dismissal agreement rather than a typical plea.[182] Those agreements must be made voluntarily and not contravene public policy, which cannot be shown in cases like *Taylor*. Accordingly, with the *Heck* termination requirement met,

180. Of course, I do not mean to limit this contextual approach solely to cases where prosecutors openly admit they could not win a new trial. While those statements are relevant and should urge a finding of a favorable termination, such a limitation would render this rule obsolete for most defendants with less candid prosecutors.

181. *See supra* notes 156–57 and accompanying text.

182. *See* Geness v. Cox, 902 F.3d 344, 356 (3d Cir. 2018).

defendants like Taylor should be allowed to proceed toward vindicating their civil rights and receiving financial compensation through a § 1983 claim.

CONCLUSION

Until *Heck*'s incentives are removed, prosecutors will continue to make unethical deals with the wrongfully convicted. Taylor suffered a trove of injustices before he was offered a deal that was simply too good to let go. Yet that deal threw him into society with nothing and removed one of the few tools he had to vindicate his rights—a § 1983 claim for monetary damages.[183] Although plea deals offered to Taylor and those like him arguably conflict with a prosecutor's ethical duties, it is unclear how ethical rules alone can curb their use. Rather, courts need to view favorable termination not in a vacuum but with a full understanding of the facts and motivations that prompt a plea deal. Only then, once over the *Heck* bar, can cases like Taylor's be fairly adjudicated and prosecutors be dissuaded from offering the wrongfully convicted a deal with the devil.

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183. This does not come close to repairing all the damage, but allowing a § 1983 claim to move forward would potentially acknowledge a person's mistreatment, provide compensation, and prevent similar abuses by the same jurisdiction.

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