

"Taking the Fifth" Beyond Trial: § 1983 Claims for Pre-Trial Use of Coerced Statements Affirms One's Right Against Self-Incrimination

Paulo C. Alves

Follow this and additional works at: <https://scholarship.law.stjohns.edu/jcred>

This Notes and Comments is brought to you for free and open access by the Journals at St. John's Law Scholarship Repository. It has been accepted for inclusion in Journal of Civil Rights and Economic Development by an authorized editor of St. John's Law Scholarship Repository. For more information, please contact selbyc@stjohns.edu.

NOTES AND COMMENTS

“TAKING THE FIFTH” BEYOND TRIAL: § 1983 CLAIMS FOR PRE-TRIAL USE OF COERCED STATEMENTS AFFIRMS ONE’S RIGHT AGAINST SELF- INCRIMINATION

PAULO C. ALVES

Imagine a fourteen year-old boy, John, is pulled from his ninth grade class by a detective wanting to question him regarding the molestation of a three year-old girl.¹ The alleged victim accused John of the crime during a police interview after her mother contacted the detective about the possible sexual assault. The detective brings John into a room. He then explains that he simply wants to speak with John, but first he must read John his *Miranda* rights and John may sign a waiver form if he understands his rights and agrees to speak to the detective. John consents to the meeting, nods after the *Miranda* reading, and signs the waiver. No one notifies his parents of the interrogation. During the interrogation, the detective attempts to get a confession from John. John repeatedly denies ever touching the victim. A few hours pass and the detective tries a “blame the victim”² technique, a permissible interrogation method. Still, John does not confess and continues to deny any involvement. Finally, the detective advises John that a confession will result in a more lenient sentence, with counseling as the maximum punishment; while a denial of involvement will result in a harsher sentence, with jail time as the minimum punishment. John then admits to molesting the young victim and signs a statement

¹ See *Stoot v. City of Everett*, 582 F.3d 910 (9th Cir. 2009).

² See *id.* at 915. The officer employed the interview technique of blaming the victim. *Id.* First, the officer began painting a picture that suggested the victim was to blame for the events. *Id.* Specifically, the officer told the suspect that the victim initiated the contacts and was sexually aggressive. *Id.* Then the officer suggested that the suspect’s actions, or alleged actions, would have been a normal reaction in that situation. *Id.* In this case, the officer told the suspect that it was a normal reaction to respond to the victim once the victim initiated the sexual encounter. *Id.*

memorializing his confession. The detective returns John to his class and leaves with the statement.

Shortly after the interrogation, the prosecutor files an Information charging John with first-degree molestation. The Affidavit of Probable Cause filed with the Information relies in large part on John's confession. At a pretrial hearing, the court finds that the charge is based on probable cause, and releases John on his own recognizance conditioned on adult supervision. However, at an evidentiary hearing to determine the admissibility of the confession, the court holds that John did not understand his rights and the detective coerced him into confessing when he suggested that a confession would result in leniency. Thus, the statement would not be admissible at trial, and the court grants John's motion to dismiss the charges against him. He is free to go.

After the charges are dismissed, John's family brings a civil suit under 42 U.S.C. § 1983 against the detective for violating John's Fifth Amendment constitutional right against self-incrimination by coercing him to confess. Once a coerced statement is used in a criminal case, a Fifth Amendment violation exists.³ Naturally, the civil suit could only succeed if the detective violated John's Fifth Amendment constitutional right against self-incrimination. Despite the use of John's statement to file charges and set bail, his charges were dismissed before reaching an actual trial. John and his family argue that a section 1983 claim exists since the state relied on his coerced statement in filing charges and other pre-trial proceedings. John believes that his statement was used in a criminal case, triggering a cause of action for a Fifth Amendment violation. The detective argues that a claim does not exist because a Fifth Amendment violation never occurred since the statements were never used at trial, were excluded before trial, and in fact, the matter never reached the trial phase. Thus, the detective argues, there was no use of the statement in a criminal case.

The circuit courts are split on the issue of whether the use of a statement in a criminal case requires an actual criminal trial in order to constitute a Fifth Amendment violation for section 1983 purposes.⁴ This Note explains the opposing circuits' interpretations and attempts to settle the conflict. Part I provides background on the Fifth Amendment, through a discussion

³ U.S. CONST. amend. V ("No person shall be . . . compelled in any criminal case to be a witness against himself . . .").

⁴ See *infra* Part II (discussing the split interpretations amongst the circuits); see also *Stoot*, 582 F.3d at 925 (holding that a criminal case, for purposes of a Fifth Amendment violation, does not require the use of a coerced statement in an actual trial, a Probable Cause hearing for the filing of charges, or a bail hearing, will suffice); *Renda v. King*, 347 F.3d 550 (3d Cir. 2003) (requiring the use of a coerced statement in an actual criminal trial before a violation of the Fifth Amendment exists).

of *Miranda v. Arizona*,⁵ and section 1983 claims. In addition, this section will discuss the elements of a section 1983 civil action. Part II analyzes the circuit split regarding the use of a statement in a criminal case. This section identifies the two interpretations through case law from various circuits. The cases address section 1983 claims for Fifth Amendment self-incrimination violations in the wake of the Supreme Court's refusal to define the phrase "use in a criminal case" in *Chavez v. Martinez*.⁶ Part III argues that the better solution is the broader interpretation that includes pre-trial proceedings, beginning with the filing of charges, in a criminal case. This section first argues that the tort principles, namely proximate causation, of a section 1983 claim, call for a broader rule. Second, this Note discusses the Fifth Amendment's policy of protecting innocent people, and that a broader rule better serves this goal since relying on a coerced statement in pre-trial proceedings present significant harms to an individual. Third, this Note argues that the purpose of deterring police misconduct and coercive tactics is ignored by the narrow rule, and that a broader rule would successfully deter excessive violations. Finally, this section discusses the inadequacies of relying on a due process claim and the exclusionary rule, and the need for more remedial coverage in order to affirm the value of the right against self-incrimination. This Note concludes with the view that a broader rule, which does not require trial for a violation, will allow civil claims to impose liability at the filing of charges, and thus, allow the Fifth Amendment to hold its appropriate value.

I. THE FIFTH AMENDMENT AND § 1983

The Fifth Amendment's self-incrimination clause states that "no person shall . . . be compelled in any criminal case to be a witness against himself."⁷ The importance of this clause is evident by the Supreme Court's creation of the prophylactic *Miranda* warnings, which are intended to protect a person's Fifth Amendment rights.⁸ Only after a person is fully apprised of his right to remain silent and understands the warnings, can he

⁵ 384 U.S. 436 (1966).

⁶ 538 U.S. 760 (2003).

⁷ U.S. CONST. amend. V.

⁸ *Miranda*, 384 U.S. at 468. "The Fifth Amendment privilege is so fundamental to our system of constitutional rule and the expedient of giving an adequate warning as to the availability of the privilege so simple, we will not pause to inquire in individual cases whether the defendant was aware of his rights without a warning being given." *Id.* The court held that the warnings were required regardless of factors relating to an individual's knowledge. *Id.* The important aspect was that the individual "knows he is free to exercise the privilege at that point in time." *Id.* at 469.

waive his right against self-incrimination.⁹ Further illustrating the importance of the clause and the need for protection, the Supreme Court stated that if a conviction is in any way based on an involuntary confession, then a defendant's constitutional rights have been violated "even if there is ample evidence aside from confession to support [the] conviction."¹⁰ Thus, it is clear that both a coerced confession and a confession obtained without apprising an individual of his privilege, if used in a criminal case, are violations of a defendant's constitutional rights.

Title 42 U.S.C. § 1983 states that "[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . causes to be subjected, any citizen . . . to the deprivation of any rights, [or] privileges . . . secured by the Constitution . . . shall be liable to the party injured in an action at law . . ."¹¹ Enacted in 1871, it was designed to provide remedies for violations of rights by those acting under color of law.¹² Under section 1983, a plaintiff can seek damages for constitutional violations according to traditional tort principles after demonstrating that a right has been violated.¹³ Thus, a plaintiff must establish that damages occurred and that the official actually and proximately caused the injury.¹⁴ A causal connection must be established where the actor "set[] in motion a series of events that the defendants knew or reasonably should have known would cause others to deprive the plaintiff of his constitutional rights."¹⁵ Thus, a defendant in a section 1983 claim is "responsible for the natural and foreseeable consequences of their actions."¹⁶ Although section 1983 does not provide any substantive rights, it is a mechanism for vindicating rights that are established elsewhere, like the Constitution and the Bill of Rights.¹⁷

In *Chavez v. Martinez*,¹⁸ the Supreme Court touched upon the issue of when a claim exists for a Fifth Amendment violation. After exposure to

⁹ See *id.* at 469; see also *Colorado v. Spring*, 479 U.S. 564, 571 (1987).

¹⁰ *Miranda*, 383 U.S. at 464 n.33 (emphasis added) (emphasizing that even if the conviction would stand without the use of an involuntary confession, the mere existence of a coerced confession in the case, regardless of its effect, is a violation of the defendant's Fifth Amendment privilege).

¹¹ 42 U.S.C. § 1983 (2011).

¹² See *Adickes v. S.H. Kress*, 398 U.S. 144, 183 (1970); see also DAVIE W. LEE, 2009 HANDBOOK OF SECTION 1983 LITIGATION, at 3 (2009).

¹³ See *Cummings v. Connell*, 402 F.3d 936, 942 (9th Cir. 2005); see also LEE, *supra* note 12, at 3.

¹⁴ See *Grieverson v. Anderson*, 538 F.3d 763, 775 (7th Cir. 2008); see also LEE, *supra* note 12, at 9.

¹⁵ LEE, *supra* note 12, at 10.

¹⁶ *Id.* at 11.

¹⁷ See *Cmtys. for Equity v. Mich. High Sch. Athletic Ass'n*, 459 F.3d 676, 680 (6th Cir. 2006); see also LEE, *supra* note 12, at 3.

¹⁸ 538 U.S. 760 (2003).

relentless coercive interrogation while he lay, in extreme pain, on a hospital bed with bullet wounds to his face, the plaintiff brought a civil claim under section 1983 for violation of his right against self-incrimination.¹⁹ The plaintiff was never prosecuted for the acts associated with his statement, and charges were never filed against him.²⁰ The Court determined that a claim would only exist if a violation occurred, and that question depended on whether the statement was used in a criminal case.²¹ However, since the plaintiff never had charges filed against him, and it was clear no criminal case existed, the Court refused to decide the issue of whether a criminal case required an actual trial, or whether pre-trial in-court proceedings sufficed.²² Although the Court explained that a claim would exist upon a violation, it did not determine the exact point at which a violation occurs and a viable claim exists.²³ Since *Chavez*, the Circuits have been split as to whether a trial is required before the self-incrimination clause is violated.²⁴ Thus, while it is clear that coercion alone does not violate the Fifth Amendment unless the statements are used in a criminal case,²⁵ it is unclear what constitutes use in a criminal case, and as a result, at what point a plaintiff has a viable civil rights claim.

II. THE CIRCUIT SPLIT

A. The Broader View – Pretrial Proceedings Included

a. The Ninth, Second, and Seventh Circuits

In *Stoot v. City of Everett*,²⁶ the Ninth Circuit stated that a criminal trial is not required to constitute a statement's use in a criminal case.²⁷ In *Stoot*, the plaintiff, a fourteen year-old boy, was accused of sexually abusing a four year-old girl.²⁸ Based on accusations by the alleged victim, the detective investigating the case, went to the Stoot's school, had him pulled

¹⁹ *Id.* at 763–64.

²⁰ *Id.* at 764.

²¹ *Id.* at 766.

²² *Id.* at 766–67.

²³ *Id.* at 766.

²⁴ See *infra* Part II (discussing the split among various Circuits).

²⁵ See LEE, *supra* note 12, at 239 (describing how in *Chavez* a claim did not exist because a violation does not exist absent use of a coerced statement against the declarant in a criminal case, but noting that extremely coercive tactics may be actionable under the Fourteenth Amendment's due process clause, regardless of the statement's use in a criminal case).

²⁶ 582 F.3d 910 (9th Cir. 2009).

²⁷ *Id.* at 917.

²⁸ *Id.* at 912–13.

out of class, and interrogated him without contacting his parents.²⁹ Stoot alleged that being threatened with heightened punishment if he failed to confess, coupled with the physically imposing nature of the detective, he confessed to sexually abusing the young girl.³⁰ Based on those allegations, Stoot had all charges dropped against him after his confession was deemed coerced and inadmissible during a pre-trial hearing.³¹ After the dismissal of the criminal case, Stoot brought a civil lawsuit under section 1983 for violation of his Fifth Amendment right against self-incrimination.³² The court held that an actual criminal trial is not required for Fifth Amendment rights to be violated, and a “coerced statement has been ‘used’ in a criminal case when it has been relied upon to file formal charges . . . to determine judicially that the prosecution may proceed, and to determine pretrial custody status.”³³ Although *Chavez* left the issue undecided,³⁴ the Ninth Circuit reasoned that the *Chavez* Court paved the road toward a broad rule that extended beyond an actual trial, by hinting that a “‘criminal case’ at the very least requires the initiation of legal proceedings.”³⁵ Thus, the Ninth Circuit concluded that *Stoot* fell “within the gray area created by *Chavez*,” because the declarant in *Stoot*, unlike the declarant in *Chavez*, made statements that were relied upon by the prosecutor in charging him with a crime.³⁶

Stoot was charged with child molestation based on a confession that was later deemed coerced and inadmissible.³⁷ As a result, the court dismissed all charges prior to trial.³⁸ However, pretrial proceedings had already occurred, including filing charges and holding a bail hearing.³⁹ The prosecution largely relied on the coerced confession in both hearings, and specifically filed an Affidavit in Support of the Information, which was used to formally charge Stoot.⁴⁰ After the dismissal of all charges, Stoot filed a section 1983 civil claim against the detective responsible for the

²⁹ *Id.* at 914.

³⁰ *Id.* at 915–16.

³¹ *Id.* at 916.

³² *Stoot v. City of Everett*, 582 F.3d 910, 912 (9th Cir. 2009).

³³ *Id.* at 925.

³⁴ *Chavez v. Martinez*, 538 U.S. 760, 767 (2003). The Court did not decide the issue of when a criminal case actually begins for purposes of the Fifth Amendment, because *Martinez* was never charged. *Id.* Thus, it was clear that a criminal case did not begin at that stage. *Id.*

³⁵ *Stoot*, 582 F.3d at 923 (quoting *Chavez*, 538 U.S. at 766).

³⁶ *Id.* at 923.

³⁷ *Id.* at 917.

³⁸ *Id.*

³⁹ *Id.* at 912, 923.

⁴⁰ *Id.* at 925 n.14.

interrogation, claiming a Fifth Amendment violation of his right against self-incrimination.⁴¹ Each party argued opposite sides of the “use in a criminal case” issue, with the detective arguing that no use occurred since charges were dismissed pre-trial, and Stoot arguing that use occurred once the statements were introduced at the pre-trial hearings.⁴²

The Ninth, Second, and Seventh Circuits have each held that use of a statement in a pre-trial proceeding constitutes “use in a criminal case” for purposes of the Fifth Amendment.⁴³ The Ninth Circuit reasoned that “reliance” on statements to initiate criminal proceedings begins the process of making a defendant a witness against himself.⁴⁴ This is “precisely the burden precluded by the Fifth Amendment.”⁴⁵ Similarly, the Seventh Circuit emphasized that when charges are filed *because* of the statements, the statements have effectively been introduced as evidence of probable cause of guilt.⁴⁶ The criminal case not only began because of the coerced statement, but the defendant has been “compelled” to be a witness against himself in a criminal case.⁴⁷ In *Higazy v. Templeton*, the Second Circuit noted that “case” is defined as a general term for a question contested before a court.⁴⁸ Thus, the court reasoned that defining a criminal case to not include a bail hearing is contrary to common sense.⁴⁹ A bail hearing is an initial proceeding on a criminal complaint, and just as the Fifth Amendment applies to sentencing proceedings after trial, it should also apply to the hearings before trial.⁵⁰

The nature of bail hearings, and their status under the Sixth Amendment, also led the Second Circuit to conclude that pre-trial proceedings fall within a criminal case for purposes of the Fifth Amendment.⁵¹ In *Higazy*, the plaintiff, a citizen of Egypt and an engineering student at Polytechnic Institute in Brooklyn, was staying in a hotel across the street from the World Trade Center in New York City.⁵² He was one of the people

⁴¹ *Stoot v. City of Everett*, 582 F.3d 910, 912 (9th Cir. 2009).

⁴² *Id.* at 919, 922.

⁴³ *See id.* at 925; *see also Sornberger v. City of Knoxville*, 434 F.3d 1006, 1028 (7th Cir. 2006); and *Higazy v. Templeton*, 505 F.3d 161, 173 n.15 (2d Cir. 2007).

⁴⁴ *See Stoot*, 582 F.3d at 925; *see also Bradley v. Flannery*, No. CV-F-11-0942, 2011 U.S. Dist. LEXIS 114706, at *11 (E.D. Cal. Oct. 4, 2011).

⁴⁵ *Stoot*, 582 F.3d at 925.

⁴⁶ *See Sornberger*, 434 F.3d at 1026–27; *see also Kunz v. City of Chicago*, No. 01-C-1753, 2006 U.S. Dist. LEXIS 41897, *11 (N.D. Ill. June 22, 2006).

⁴⁷ *See Sornberger*, 434 F.3d at 1027.

⁴⁸ *Higazy*, 505 F.3d at 172 (quoting BLACK’S LAW DICTIONARY 215 (6th ed. 1990)).

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.* at 172–73.

⁵² *Id.* at 164.

evacuated during the September 11, 2001 terrorist attacks.⁵³ After the attacks, security personnel at the hotel did inventory checks on the possessions of their guests in order to attempt to return all possessions left behind by their patrons during the evacuation.⁵⁴ When the plaintiff returned to pick up his belongings, he was met by Federal Bureau of Investigation officials and questioned about an air to ground radio and Koran found together in his safe.⁵⁵ The plaintiff denied owning the radio or ever seeing one of that kind.⁵⁶ After further interrogation, details of which are under seal and part of a redacted portion of the opinion, the plaintiff admitted to stealing the radio from the Egyptian military for eavesdropping purposes.⁵⁷ After a bail hearing resulted in the plaintiff being detained without bail, he was released when a hotel patron, who was a pilot, claimed the radio as his lost property.⁵⁸

The plaintiff subsequently filed a civil lawsuit for violation of his Fifth Amendment right against self-incrimination.⁵⁹ The court noted that bail hearings “are frequently hotly contested and require a court’s careful consideration of a host of facts about the defendant and the crimes charged.”⁶⁰ Bail hearings are not a benign proceeding with minimal effects on a defendant’s liberty, but rather “bail hearings determine whether a defendant will be allowed to retain, or forced to surrender, his liberty during the pendency of his criminal case.”⁶¹ In addition, within a Sixth Amendment context, the court noted that a bail hearing is “a critical stage of the . . . criminal process at which the accused is as much entitled to such aid (of counsel) . . . as at the trial itself.”⁶² Thus, part of the court’s reasoning was that because a defendant’s liberty is as much at stake as in the trial itself, and because other constitutional provisions treat bail hearings as part of the criminal case, the Fifth Amendment should also include these proceedings in its definition of “criminal case.”

The Ninth Circuit addressed the concerns of the *Chavez* concurrence of unlimited liability if the Fifth Amendment does not require an actual trial.⁶³

⁵³ *Id.*

⁵⁴ *Higazy v. Templeton*, 505 F.3d 161, 164 (2d Cir. 2007).

⁵⁵ *Id.* at 164–65.

⁵⁶ *Id.* at 165.

⁵⁷ *Id.* at 166.

⁵⁸ *Id.* at 167.

⁵⁹ *Id.* at 168.

⁶⁰ *Higazy v. Templeton*, 505 F.3d 161, 173 (2d Cir. 2007) (quoting *United States v. Abuhamra*, 389 F.3d 309, 323–24 (2d Cir. 2004)).

⁶¹ *Id.* (quoting *Abuhamra*, 389 F.3d at 323–24).

⁶² *Id.* at 172 (quoting *Coleman v. Alabama*, 399 U.S. 1, 9–10 (1970)).

⁶³ *Stoot v. City of Everett*, 582 F.3d 910, 925 n.15 (9th Cir. 2009).

The Ninth Circuit formulated a rule that the Fifth Amendment is implicated only when incriminating statements are “used” to initiate or prove a charge.⁶⁴ According to *Stoot*, this rule properly addressed concerns for unlimited liability, and “provide[d] a sensible ‘stopping place’” for the application of section 1983.⁶⁵

b. § 1983’s Relationship to Fifth Amendment Violations

In each decision, the courts were faced with the issue of a Fifth Amendment violation in the context of a section 1983 claim against the officers who conducted the allegedly coerced interrogations. Thus, the courts analyzed the section 1983 claim by specifically addressing the proximate causation element of the claims.⁶⁶

The Ninth and Second Circuits both held that the use of the coerced statements against the defendants was a “reasonably foreseeable consequence” of the officers’ decisions to interrogate the defendants and file a police report.⁶⁷ Under these circumstances, a valid section 1983 claim existed once the statements were relied on for filing charges and a bail hearing.⁶⁸ The officer in *Stoot* interrogated the criminal defendant and gave the confession to prosecutors.⁶⁹ The court noted that without evidence that the officer attempted to prevent use of the statements, or that he never turned over the statements to begin with, subsequent uses were reasonably foreseeable by the officer.⁷⁰ However, pursuant to tort causation principles, the courts then had to analyze whether a superseding cause cut off the chain of causation from the officer’s conduct.⁷¹ Without a superseding cause, the interrogator’s conduct would be the proximate cause of the statement’s use in a criminal case, thus attaching liability to the officer under section 1983 for a Fifth Amendment violation.

The Ninth and Second Circuits dismissed the argument that prosecutors’ decisions to file charges in reliance on the statements were superseding

⁶⁴ *Stoot*, 582 F.3d at 925.

⁶⁵ *Id.*

⁶⁶ *See id.* at 926. Section 1983 claims for Fifth Amendment violations follow traditional tort principles. *Murray v. Earle*, 405 F.3d 278, 291 (5th Cir. 2005). In order for the plaintiff to prevail, the plaintiff must prove proximate causation of damages. *Id.* In addition, as in a torts claim, the plaintiff may have to overcome assertions that superseding causes cut off the defendant from the chain of causation. *Id.*

⁶⁷ *See Stoot*, 582 F.3d at 926; *see also Higazy v. Templeton*, 505 F.3d 161, 175 (2d Cir. 2007).

⁶⁸ *See Stoot*, 582 F.3d at 926; *see also Sornberger v. City of Knoxville*, 434 F.3d 1006, 1025–26 (7th Cir. 2006).

⁶⁹ *Stoot*, 582 F.3d at 912.

⁷⁰ *Id.* at 926.

⁷¹ *See id.*

causes that cut off the chain of causation from the officers that obtained the coerced statements.⁷² The *Stoot* court went so far as to state a rule that generally the actor that coerces the statement is the party responsible for the Fifth Amendment violation.⁷³ Although the *Higazy* court noted that a subsequent participant that uses independent judgment may be a superseding cause,⁷⁴ the court determined that it was not convinced that the chain of causation should be broken when the original actor could reasonably foresee that a party exercising independent judgment would cause a deprivation of a right.⁷⁵ The court acknowledged that an independent decision could be a superseding cause, but should not be if the independent decision was reasonably foreseeable to the original wrongdoer. Therefore, the Second Circuit held that section 1983 defendants were liable when they could have reasonably foreseen that their “misconduct [would] contribute to an ‘independent’ decision that results in a deprivation of liberty.”⁷⁶ Likewise, the Ninth Circuit reasoned that an officer coercing statements could reasonably foresee that the conduct may “ripen” into a Fifth Amendment violation regardless of whether the officer knew that a trial was not required for “use in a criminal case.”⁷⁷ There was no reason why an officer, after turning over a confession, should believe that the prosecutor would not use them in a criminal case.⁷⁸

⁷² See *id.*; see also *Higazy*, 505 F.3d at 177.

⁷³ *Stoot*, 582 F.3d at 927.

⁷⁴ See *Higazy*, 505 F.3d at 176–77 (citing *Townes v. City of New York*, 176 F.3d 138 (2d Cir. 1999) (stating that when a judge acts on independent judgment, the judge is a superseding cause, cutting off liability from the original actor)).

⁷⁵ See *id.* at 176 (quoting *Zahrey v. Coffey*, 221 F.3d 342, 344 (2d Cir. 2000)).

⁷⁶ *Id.* at 177 (quoting *Zahrey*, 221 F.3d at 352 (noting that an officer that coerced statements from a defendant could reasonably foresee that the conduct would lead to an independent decision by the prosecution to rely on the statements in filing charges, which would lead to a deprivation of rights)).

⁷⁷ *Stoot*, 582 F.3d at 927.

⁷⁸ See *id.*

B. The Narrower View – The Trial Requirement

a. The Third, Fourth,⁷⁹ and Fifth⁸⁰ Circuits

In *Renda v. King*,⁸¹ the plaintiff had been a criminal defendant charged with giving a false statement to an officer.⁸² The plaintiff accused her husband of physically abusing her.⁸³ During the investigation, the police interviewed the plaintiff but failed to read her *Miranda* warnings before she gave them a written statement.⁸⁴ The plaintiff did not mention a prior accusation in the statement, and when asked why, she admitted to the officers that she had lied in her previous accusations against her husband.⁸⁵ Even though the plaintiff argued that she was threatened into stating that her previous accusation was a lie, she was still charged with giving false reports to law enforcement and was detained on \$10,000 bail.⁸⁶ The Court of Common Pleas subsequently dismissed the charges because the officer failed to provide *Miranda* warnings before interrogating her, and the plaintiff subsequently filed a civil suit.⁸⁷ In declining to extend section 1983 liability to the officer, the Third Circuit held that “[i]t is the use of coerced statements during a *criminal trial*, and not in obtaining an *indictment*, that violates the Constitution.”⁸⁸

The Court relied on its prior decision in *Giuffre v. Bissell*⁸⁹ in stating that “violations of the prophylactic *Miranda* procedures do not amount to violations of the constitution itself . . . [because] the Fifth Amendment is the right not to be compelled to be a witness against oneself in a criminal prosecution, whereas . . . *Miranda* is merely a procedural safeguard, and

⁷⁹ *Burrell v. Virginia*, 395 F.3d 508 (4th Cir. 2005). The plaintiff brought a section 1983 claim for a Fifth Amendment violation after being issued a summons for refusing to divulge to an officer whether he had insurance, while at the scene of an automobile accident. He asserted his Fifth Amendment right against self-incrimination. The court decided that a criminal case had not occurred since no in-court proceeding took place. However, the court did emphasize that absent trial action, the defendant could not assert a valid claim. Thus, it appears that the court in *Burrell* requires a trial before a Fifth Amendment violation is recognized for section 1983 purposes.

⁸⁰ *Murray v. Earle*, 405 F.3d 278 (5th Cir. 2005). Here the criminal defendant was convicted in court, but had the conviction overturned after her confession was deemed improperly admitted. The subsequent section 1983 claim led the court to determine that although pre-trial conduct, in this case the interrogation, could lead to a violation, the violation occurs “only at trial.” *Id.* at 285.

⁸¹ 347 F.3d 550 (3d Cir. 2003).

⁸² *Id.* at 553.

⁸³ *Id.* at 552.

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.* at 553.

⁸⁷ *Renda v. King*, 347 F.3d 550, 553 (3d Cir. 2003).

⁸⁸ *Id.* at 559 (emphasis added).

⁸⁹ 31 F.3d 1241 (3d Cir. 1994).

not a substantive right.”⁹⁰ Coupling *Giuffre* with the refusal to define what constitutes a criminal case in *Chavez*, the Court reasoned that they were compelled, despite acknowledging that using the statements to develop probable cause constituted “use[] in a criminal case in one sense,”⁹¹ to hold that a criminal trial is a requirement for a Fifth Amendment violation.⁹² The court framed the issue as an attempt to recover under section 1983 for a violation of *Miranda* safeguards, which is a violation that does not extend to a constitutional right until the statements compel the declarant to act as a witness against herself in a trial.⁹³

b. Section 1983 Proximate Causation Requirement

In *Murray v. Earle*, the Fifth Circuit addressed the section 1983 claim by analyzing the proximate cause element. Here, the court determined that “an official who provides accurate information to a neutral intermediary, such as a trial judge, cannot ‘cause’ a subsequent Fifth Amendment violation”⁹⁴ Although the court did not address the issue directly, by holding that the trial judge’s decision to admit the evidence was a superseding cause of the Fifth Amendment violation, it appears that the court accepted that the violation was a natural consequence of the interrogation.⁹⁵ The court expressed the violation as arising solely from the trial judge’s decision to admit the statements, supporting its view that use in a criminal case begins with use in an actual trial.⁹⁶ Although not

⁹⁰ *Renda*, 347 F.3d at 557 (citing *Giuffre*, 347 F.3d at 1256).

⁹¹ *Id.* at 559.

⁹² *Id.*

⁹³ *Id.* at 557. The opinion titles their discussion as “Miranda Claim,” and asserts that the safeguards are procedural and do not expand the scope of the constitutional right itself. *Id.* In discussing *Chavez*, the Court noted that six Justices agreed that mere interrogation without *Miranda* warnings cannot, on their own, amount to a Fifth Amendment violation. *Id.* at 558. The Court noted, but did not further analyze, the factual difference between *Chavez* and the case at hand; specifically that the declarant in *Chavez* did not have charges filed against him, while the declarant here did. *Id.* Despite this difference, the Court emphasized the similar issue at hand, and framed the controversy as a *Miranda* claim, despite the fact that in the current case, unlike in *Chavez*, charges were filed in reliance on the statements. *Id.* The court, using this reasoning, arrived at the conclusion that trial was necessary.

⁹⁴ *Murray v. Earle*, 405 F.3d 278, 293 (5th Cir. 2005). Note that a prosecutor is not mentioned, rather, neutrality appears to be the key factor.

⁹⁵ *See id.* at 290–91. The court actually addresses the superseding cause argument first, and determines that since the judge broke the chain of causation as an independent intermediary, the reasonably foreseeable consequence issue did not need to be decided. *See id.* at 289–90.

⁹⁶ *Id.* In accord with its determination that use in a criminal case requires a trial, the court addresses the point at which use in a trial is triggered. *Id.* Part of the court’s argument relies on the vast array of Circuit decisions that accept both sides of the superseding cause argument in relation to other constitutional rights. *Id.* In doing so, the court identifies the opposing view that an officer is liable when the independent decision was reasonably foreseeable, however, it also identifies various cases that treat the independent decision as a superseding cause, breaking the chain of causation. *Id.* The purpose of this comparison was to demonstrate that the law was unsettled, thus adding another obstacle to liability,

necessary for charges to be filed, the trial judge's decision to admit the evidence was necessary for the statement's use in the actual trial.

III. RESOLUTION IN FAVOR OF THE BROADER VIEW

The broader interpretation of "use in a criminal case," utilized by the Second, Seventh, and Ninth Circuits, is the better interpretation and should be adopted as the correct definition when dealing with potential Fifth Amendment violations in a section 1983 context. Including pretrial proceedings, such as probable cause hearings for the filing of charges and bail hearings, within the definition of a "criminal case," makes more sense when viewing Fifth Amendment violations through the lens of section 1983 claims. First, the proximate causation element of a section 1983 claim supports the broader interpretation. Second, the Fifth Amendment's policy of protecting innocent people is better served under a broader rule. Third, deterrence of Fifth Amendment violations is more effective without a requirement that a statement be used in an actual trial. Part of deterring constitutional violations is accomplished by addressing violations; and without a broader rule, many violations, some deliberate, would remain unaddressed. Fourth, even with due process claims as remedies for coercive tactics, without the broader rule there is a gap where an individual's rights remain unprotected and the *Miranda* protections are rendered useless.

A. Proximate Cause in Section 1983

A section 1983 claim that addresses a constitutional violation of the Fifth Amendment utilizes traditional tort principles.⁹⁷ The fact that claims under this section are governed by these principles means that a plaintiff must, as part of his case, establish that the defendant's actions were the but-for cause and proximate cause of the constitutional violation.⁹⁸ Thus, unless there are superseding causes, a defendant will be liable for a Fifth Amendment violation if he reasonably could have foreseen the use of coerced statements when he decided to interrogate the plaintiff.⁹⁹ Under

since the court explains that it was not established that pre-trial interrogations could cause liability against an officer for a Fifth violation at trial. The court then settles the law by stating that it cannot cause liability once a neutral intermediary breaks the chain of causation.

⁹⁷ See *Higazy v. Templeton*, 505 F.3d 161, 181 (2d Cir. 2007); see also Joel Flaxman, *Proximate Cause in Constitutional Torts: Holding Interrogators Liable for Fifth Amendment Violations at Trial*, 105 MICH. L. REV. 1551, 1552 (2007).

⁹⁸ See *Higazy*, 505 F.3d at 181; see also Flaxman, *supra* note 97, at 1552–53.

⁹⁹ *Stoot v. City of Everett*, 582 F.3d, 910, 926 (9th Cir. 2009) (holding that a jury could have

this principle, section 1983 imposes liability on anyone who causes a violation, not just the actor who actually commits the violation.¹⁰⁰ As a result, because reliance on a coerced statement to file charges against a suspect is a natural consequence of obtaining that coerced statement, it is logical to attach liability to the actor who set those foreseeable events in motion.¹⁰¹

If the officer could reasonably foresee that a subsequent actor would rely on a coerced statement to file charges, that subsequent actor's decision to rely on the statement should not be treated as a superseding cause that breaks the chain of causation.¹⁰² For example, when an officer elicits a coerced statement and turns it over to a prosecutor, it is reasonably foreseeable that the officer should expect that information to be used against the defendant.¹⁰³ If an actor is liable for the natural consequences of his actions, an officer should be held liable for the obvious consequence of supplying a coerced statement to a prosecutor whose function in the criminal process is to prosecute.¹⁰⁴

The question of whether liability attaches should fall solely on the foreseeability aspect of proximate cause, and not on whether an independent decision to use or admit the statement followed without any input from the original actor.¹⁰⁵ Although an independent decision is normally treated as a superseding cause to cut off the chain of causation when the officer "can reasonably foresee that his misconduct will contribute to an 'independent' decision that results in a deprivation of liberty," this seems to contradict the foreseeability aspect of proximate

concluded that that use of the coerced statements was a reasonably foreseeable consequence of the officer's decision to interrogate and file a report).

¹⁰⁰ See *id.*; see also Michael Avery, *Obstacles for Litigating Civil Claims for Wrongful Conviction: An Overview*, 18 B.U. PUB. INT. L.J. 439, 449 (2009).

¹⁰¹ See *Stoot*, 582 F.3d at 926; see also Avery, *supra* note 100, at 450.

¹⁰² See *Stoot*, 582 F.3d at 926; see also Avery, *supra* note 100, at 449–50. Although the author addresses the issue by stating that foreseeability of a statement's possible use in trial attaches liability to the officer, the same can be said if the issue is treated as foreseeability in pre-trial use. Thus, if the chain of causation does not break upon a prosecutor's decision to admit evidence, and the judge's decision to allow admission, then the threshold for the breaking of the causation chain should not be broken in pre-trial proceedings when there is arguably less of a formal decision made when a prosecutor decides to rely on the statements in filing charges.

¹⁰³ See *Stoot*, 582 F.3d at 926 (reasoning that absent evidence that the officer explained the coercive nature of the statement or later tried to prevent its use, the reliance on the statement by the prosecutor to file charges against a suspect is foreseeable and the reason for turning over the statement in the first place); see also Higazy v. Templeton, 505 F.3d 161, 177 (2d Cir. 2007).

¹⁰⁴ See *Stoot*, 582 F.3d at 926 (implying that the use of the statement by the prosecutor to prosecute the defendant is a natural consequence of obtaining a coerced statement from the actor that coerced the statement initially); see also Higazy, 505 F.3d at 175.

¹⁰⁵ See Higazy, 505 F.3d at 177; see also Zahrey v. Coffey, 221 F.3d 342, 352 (2d Cir. 2000).

cause.¹⁰⁶ As a result, if a prosecutor or judge decides to admit evidence into an actual trial, this decision should not shield an officer from liability. Thus, if an independent decision is reasonably foreseeable, the trial boundary for a Fifth Amendment violation does nothing to change the officer's tortious liability under section 1983. The proximate causation element of section 1983 allows for the attachment of liability prior to trial, since at the time of trial, all of the pre-trial "independent decisions" have already occurred and should be deemed reasonably foreseeable to the officer.¹⁰⁷ Since a proximate causation analysis of a Fifth Amendment violation does nothing to require a trial for the action to survive, one must proceed to analyzing the reasons why a trial is not necessary for a violation to occur.

B. The Fifth Amendment's Policy of Protecting the Innocent

The policies behind the Fifth Amendment privilege against self-incrimination support the position that an actual trial should not be required in order for a violation to exist. One policy behind the privilege, amongst several, is to protect the innocent.¹⁰⁸ The court in *Higazy* noted that a narrow rule that requires an actual trial to trigger an action for Fifth Amendment violations ignores the various pre-trial stages where an individual has already begun the fight for his liberty.¹⁰⁹ Specifically, in bail hearings, which would be ignored under the narrower rule, a defendant's liberty is at stake because the outcome will determine whether a defendant will be detained during the "pendency of his criminal case."¹¹⁰ A defendant in the jurisdictions that require an actual trial before section 1983 liability attaches for a Fifth Amendment violation would not have a claim if charges were dropped before trial but after the statement was used in a bail hearing

¹⁰⁶ *Higazy*, 505 F.3d at 177.

¹⁰⁷ *See id.*; *see also Zahrey*, 221 F.3d at 357.

¹⁰⁸ *See* *Murphy v. Waterfront Comm.*, 378 U.S. 52, 55 (1964) (stating that the Fifth Amendment represents an accumulation of various fundamental values, including an "unwillingness to subject those suspected of a crime to . . . self-accusation, perjury or contempt; . . . [a] preference for an accusatorial rather than an inquisitorial system of criminal justice; . . . [a] fear that self-incriminating statements will be elicited by inhumane treatment and abuses; . . . [a] sense of fair play; . . . [a] respect for the inviolability of the human personality; . . . and [the] realization that the privilege, while sometimes a 'shelter to the guilty,' is often 'a protection to the innocent'"); *see also* Daniel E. Will, "Dear Diary – Can You Be Used Against Me?": *The Fifth Amendment and Diaries*, 35 B.C. L. REV 965, 970 (1994) (discussing *Murphy* and its expression of the various fundamental values that served as policies for the Fifth Amendment, including a desire to protect innocent individuals).

¹⁰⁹ *See Higazy*, 505 F.3d at 173.

¹¹⁰ *Id.* (noting that bail hearings, probable cause hearings, and suppression hearings are all intensely contested adversarial hearings and that the defendant is already fighting for his liberty, and literally fighting for his freedom from incarceration in a bail hearing).

or other pre-trial hearings.¹¹¹ However, when considering a presumably innocent individual, it becomes clearer that the Fifth Amendment's policy of protecting that innocent individual calls for a rule with a broader definition of use in a criminal case.¹¹² In theory, a completely innocent individual should never experience the harms of the criminal process. A rule that allows section 1983 claims for pre-trial use of a coerced statement adequately protects an innocent individual from the harms that result from having charges filed,¹¹³ where the narrower rule would leave that individual without a remedy.¹¹⁴

A broader rule that includes the filing of charges in its definition of use in a criminal case would better protect innocent individuals who have had their charges dropped prior to trial.¹¹⁵ The mere fact that an individual has not reached the trial phase of the criminal justice process does not mean that the individual has not suffered harm as a result of having his coerced statement relied on to file charges against him.¹¹⁶ Deprivation of liberty is just as real of a concern prior to trial as is a wrongful conviction post-trial.¹¹⁷ Pre-trial incarceration, even an arrest, based on the use of statements that would be deemed violations of the Fifth Amendment had they been used at trial, should not be treated as less significant because they do not result in a wrongful conviction.¹¹⁸ Often, innocent individuals that

¹¹¹ See *supra* Part II.B (identifying circuits that require a trial for section 1983 liability to attach).

¹¹² See *Murphy*, 378 U.S. at 55; see also *Ullmann v. United States*, 350 U.S. 422, 427 (1956) (stating that the Fifth Amendment's privilege against self-incrimination protects the innocent, as well as the guilty, and should be applied liberally) (citing *Maffie v. United States*, 209 F.2d 225, 227 (1st Cir. 1954)).

¹¹³ See Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. REV. 891, 948 (2004) (emphasizing that when officers coerce false confessions from innocent individuals, or prosecutors falsely charge an innocent individual, significant harm on those individuals results and should be addressed); see also Richard A. Leo & Richard J. Ofshe, *The Consequences of False Confessions: Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological Interrogation*, 88 J. CRIM. L. & CRIMINOLOGY 429, 430–34 (1998) (summarizing scientific evidence on false confessions, which exist because of the frequency with which police elicit such confessions, and identifying the trend of false confessions as a cause for concern).

¹¹⁴ See *supra* Part II.B; but see *Chavez v. Martinez*, 538 U.S. 760, 774–75 (2003) (summarizing Court precedent that a substantive due process claim addresses the more egregious abuses in the criminal justice system, regardless of a trial).

¹¹⁵ See *Murphy*, 378 U.S. at 55 (noting that protecting the innocent is a fundamental value served by the Fifth Amendment); see also *Quinn v. United States*, 349 U.S. 155, 161–62 (1955) (asserting that the privilege protects the innocent as well as the guilty) (citing *Twining v. New Jersey*, 211 U.S. 78, 91 (1908)).

¹¹⁶ See *Higazy v. Templeton*, 505 F.3d 161, 170–71 (2d Cir. 2007) (detailing the danger posed to an individual's liberty once statements are relied on in pre-trial proceedings); see also Drizin & Leo, *supra* note 113, at 948 (arguing that once charges are filed against a person who has been made to confess falsely, significant harm has been caused to an innocent person and should be addressed by policymakers).

¹¹⁷ See *Higazy*, 505 F.3d at 170–71; see also Drizin & Leo, *supra* note 113, at 948.

¹¹⁸ See *Higazy*, 505 F.3d at 170–71; see also Drizin & Leo, *supra* note 113, at 947–48 (proposing

have charges dropped before trial, have “spent an avoidable, unjustified, and sometimes lengthy period of time deprived of their liberty All suffered inexcusably only because they were made to falsely confess by police.”¹¹⁹ Although lengthier deprivations of liberty generally result from convictions post-trial, pre-trial use of statements in violation of the Fifth Amendment still result in similar harms.¹²⁰ However, these harms, and the policy to protect the innocent, would be unaddressed in a section 1983 claim under a rule that requires a trial before a statement is deemed used.

Aside from the deprivation of liberty that may occur between the filing of charges and trial, an individual who has charges dropped also suffers harms that attach to the individual long after the termination of the criminal process. Individuals that are charged with crimes, especially serious crimes like rape or murder, often have to deal with the stigma of accusation even if charges were ultimately dropped.¹²¹ This stigma creates “ongoing damage to . . . personal and professional reputation (even if charges are dropped . . .), loss of income, savings, a job or career . . . , and . . . emotional strain . . . (which sometimes results in marital separation or divorce).”¹²² The harms associated with being accused of a crime are frequently ignored unless a wrongful conviction results.¹²³ This should not be the case, especially when the harm is the result of reliance on a statement that was made in violation of the Fifth Amendment.¹²⁴ The seriousness of certain stigmas and corollary effects of being charged with a crime and then having those charges dropped is even more evident upon realizing that those same harms present themselves even when the Fifth Amendment is not implicated.¹²⁵

that it is incorrect and cruel to only consider wrongful convictions as the source of any significant harm to innocent individuals who suffer through wrongful pre-trial incarceration).

¹¹⁹ Drizin & Leo, *supra* note 113, at 948 (quoting Richard A. Leo & Richard J. Ofshe, *The Truth About False Confessions*, 37 CRIM. L. BULL. 293, 310 (2001)).

¹²⁰ See *Higazy*, 505 F.3d at 170–71 (reviewing case law that held that pre-trial deprivations of liberty are a Fifth Amendment violation); see also Drizin & Leo, *supra* note 113, at 947–48 (describing the hardships that occur when there is a pre-trial violation of the Fifth Amendment).

¹²¹ See *United States v. Murdoch*, 98 F.3d 472, 474 (9th Cir. 1996) (referring to the possible stigma that comes with a murder charge); see also Drizin & Leo, *supra* note 113, at 947 (describing the corollary harms that come from being accused of a crime).

¹²² Drizin & Leo, *supra* note 113, at 947.

¹²³ See *id.* (pointing out that scholars tend to focus on the effect of false confessions only in the context of wrongful convictions, ignoring the corollary harms that come from the stigma of being merely accused of certain crimes); see, e.g., Stanley Z. Fisher, *Convictions of Innocent Persons In Massachusetts: An Overview*, 12 B.U. PUB. INT. L.J. 1, 3–4 (2002) (stating that the goal of the author’s study is to review cases of wrongful convictions and the reasons for such convictions).

¹²⁴ See *Higazy*, 505 F.3d at 170–77; see also Drizin & Leo, *supra* note 113, at 947–48 (posing that only counting wrongful convictions when analyzing harms associated with false confessions is not only wrong, but also insensitive).

¹²⁵ See *infra* notes 126, 129. The purpose of demonstrating the effects in non-confession scenarios is to suggest that if these harms exist when a defendant is fighting the case and has not admitted to a

People who are falsely accused end up humiliated within their community, especially when the alleged crimes are serious in nature.¹²⁶ Even if an accuser recants the accusation, a falsely accused individual is left picking up the pieces of a life and reputation that should not have been disturbed in such a harmful manner.¹²⁷ These pieces are difficult to reassemble once the stigma of accusation latches on to future job prospects, good will from the community, and reputation.¹²⁸ An individual may also find that employment that existed pre-accusation simply is not available anymore, even though the individual would most likely have continued at that workplace had the accusation not occurred.¹²⁹ Even in cases where an accuser admits he lied and the court expunges the accused individual's record, he nevertheless may be left with hefty attorney's fees and bail payments to make.¹³⁰

The stigmas and hardships that survive a false accusation demonstrate a need for some form of remedy. In false accusation scenarios, the accuser may face both criminal and civil sanctions in relation to their wrongful conduct.¹³¹ If these harms to an individual exist when there is no

crime, they surely would exist in a scenario where the public knows a confession occurred, regardless of whether it is false or in violation of the Fifth Amendment.

¹²⁶ See Kate Leckie, *Accuser Recants, But Stigma of Rape Charges Remain*, FREDERICKS NEWS POST, Sept. 12, 2009, <http://current.com/1p42i4c>. The individual was accused of raping his wife. The wife later recanted her false accusations, but only after the accused individual spent eight weeks in jail before being able to raise enough money to post bail. The charges were dropped and the record expunged. The former defendant discusses the humiliation that resulted and continued after the false accusations were taken back. The stigma was particularly strong in his community in Maryland where even two of the deputies that arrested him were former classmates in area schools. *Id.*; see also Bruce Gross, *False Rape Allegations: An Assault on Justice*, 18 THE FORENSIC EXAMINER 66, 69 (2009).

¹²⁷ Leckie, *supra* note 126 (discussing the difficulties of picking up the pieces of a life disturbed by false accusations, including reputation, finances, and employment).

¹²⁸ *Id.*; Wendy McElroy, *False Rape Accusations May Be More Common Than Thought*, FOXNEWS, May 2, 2006, <http://www.foxnews.com/story/0,2933,194032,00.html>.

¹²⁹ See Jill Taylor & Christine Van Meter, *Criminal Charges Against Ex-coach Dropped by Girl*, PALM BEACH POST, Aug. 12, 1986, at B1, available at http://news.google.com/newspapers?nid=1964&dat=19860812&id=_kjAAAAIIBAJ&sjid=P9sFAAAIIBAJ&pg=2418,636197. A teacher was charged with soliciting a minor for sexual activity and contributing to the delinquency of a minor, after a 15 year-old student accused him of making sexual advances towards her and giving her alcohol. The teacher resigned after the accusations three weeks prior to charges being filed, in a situation he labeled as "arm twisting." After the girl dropped the charges, and made statements to a third party that it was all made up, the school stated that the resignation still stood and the teacher was not being considered for reinstatement. The stigma from the case, according to the teacher's attorney, shattered his client's reputation as a well-liked teacher and was "very hard on his family." *Id.*; see also Gross, *supra* note 126, at 69.

¹³⁰ See Leckie, *supra* note 126 (detailing the costs a falsely accused individual accumulated as a result of being charged with a crime, including \$40,000 in legal fees and \$460 per month for bail, even though his record has been cleared); see also Gross, *supra* note 126, at 69.

¹³¹ See Leckie, *supra* note 126. The accuser faced criminal charges of making false statements to the police, punishable by up to six months in jail and a \$500 fine for each conviction. In addition, the accused planned to file a lawsuit against his accuser in order to recover losses related to the charges. *Id.*; see also David Brydenal & Sonja Lengnickaal, *Rape in the Criminal Justice System*, 87 J. CRIM. L. &

confession at issue,¹³² it follows that the harms also exist, possibly in greater form, when the perception is that the individual has made statements in confession of a crime.¹³³ Thus, if a false accuser faces both criminal and civil actions for the wrongful conduct,¹³⁴ why then, should an action not exist against an officer that has coerced an incriminating statement, which reliance on, has harmed the declarant before a trial has actually begun?¹³⁵ The policy of protecting the innocent favors attaching liability at the point when harm to the potentially innocent individual occurs pre-trial.

C. *The Fifth Amendment's Policy of Deterrence*

Another purpose of the Fifth Amendment is to deter the police and other government actors from compelling individuals to incriminate themselves in a criminal case.¹³⁶ The purpose behind section 1983 claims is also to perform “compensatory and deterrent functions.”¹³⁷ A broader rule that allows a civil claim for pre-trial use of coerced statements furthers this purpose,¹³⁸ while a narrower rule not only fails to deter compulsion but may also encourage it.¹³⁹

The problem with having a rule that requires a trial before a violation is recognized for purposes of a civil rights claim is that there is no mechanism to deter coercion¹⁴⁰ if the intention is only to use those statements against

CRIMINOLOGY 1194, 1298 (1997).

¹³² See Leckie, *supra* note 126 (demonstrating that the former defendant maintained his innocence throughout the ordeal); see also Taylor & Van Meter, *supra* note 129 (explaining that there was no confession, just an accusation and filing of charges).

¹³³ See Drizin & Leo, *supra* note 113, at 947–48; see also Taylor & Van Meter, *supra* note 129.

¹³⁴ See Leckie, *supra* note 126; see also Brydenal & Lengnicka, *supra* note 131, at 1298.

¹³⁵ See Drizin, *supra* note 113, at 947–48 (demonstrating that all false confessions result in some deprivation of liberty as well as other corollary harms to the defendant, specifically mentioning possibility of pre-trial incarceration); see also Gross, *supra* note 126, at 69.

¹³⁶ See *Doe v. United States*, 487 U.S. 201, 207 (1988); see also Deborah Stavile Bartel, *Drawing Negative Inferences upon a Claim of the Attorney-Client Privilege*, 60 BROOK. L. REV. 1355, 1408–09 (1995) (noting that the privilege protects an individual from compulsion to incriminate oneself, and not only the giving of self-incriminating evidence on its own).

¹³⁷ See Alan K. Chen, *The Facts about Qualified Immunity*, 55 EMORY L.J. 229, 275 (2006) (explaining that the Supreme Court has endorsed constitutional tort remedies as an important way to compensate and deter police from coercing confessions from suspects).

¹³⁸ See Higazy v. Templeton, 505 F.3d 161, 174 (2d Cir. 2007); see also Michael Avery, *Confronting Issues in Criminal Justice: Law Enforcement and Criminal Offenders: You Have a Right to Remain Silent*, 30 FORDHAM URB. L.J. 571, 575 (2003) [hereinafter *Confronting Issues*] (stating the importance of having a civil claim available for violations of the Fifth Amendment in order to deter police misconduct).

¹³⁹ See *Confronting Issues*, *supra* note 138, at 612–13 (explaining the existence of police tactics that intentionally violate constitutional rights, since the deterrent effect of civil claims may not be present); see also Charles D. Weisselberg, *Saving Miranda*, 84 CORNELL L. REV. 109, 111–12 (1998).

¹⁴⁰ See *Confronting Issues*, *supra* note 138, at 575; see also Steven D. Clymer, *Are Police Free to*

an individual pre-trial.¹⁴¹ Thus, many would-be violations would go unaddressed since “over ninety percent of felony cases are resolved by a plea where no trial is ever held.”¹⁴² If officers cannot be civilly liable for coercing statements in such circumstances, the lack of deterrence in a situation where there is “little to lose and perhaps something to gain,”¹⁴³ presents a recipe for continued circumvention of the Fifth Amendment.¹⁴⁴ In addition, it is in felony cases where protection is most important because in those circumstances an individual stands to suffer the most harm from being charged.¹⁴⁵ It is difficult to justify that harm, especially when it was caused in reliance on a coerced statement, simply because a trial did not occur.

The danger of not having a remedy for pre-trial use of coerced statements exceeds mere lack of deterrence because it may actually encourage police tactics that are structured to deliberately coerce statements. In a Fordham Urban Law Journal article, Michael Avery¹⁴⁶ argues that the danger of deliberate police violations goes beyond a “theoretical possibility . . . [towards] a reality.”¹⁴⁷ Avery notes that although statements in violation of *Miranda* can not be used in the prosecution’s case-in-chief, they may be used to impeach the defendant, should the defendant choose to testify, and to lead them towards additional information and evidence.¹⁴⁸ This knowledge provides a tactical incentive for violating the Fifth Amendment, and even allowing its use at trial, without having it classified as a trial usage in violation of the Fifth Amendment.¹⁴⁹ As noted above,¹⁵⁰ the statement could also be used against an individual in pre-trial proceedings like filing charges and bail hearings.

Disregard Miranda?, 112 YALE L.J. 447, 450 (2002).

¹⁴¹ See *Cal. Attorneys for Criminal Justice v. Butts*, 195 F.3d 1039, 1048 (9th Cir. 1999); see also *Confronting Issues*, *supra* note 138, at 612 (suggesting that officers may be encouraged to question individuals, while purposely violating their rights and *Miranda* protections).

¹⁴² *Confronting Issues*, *supra* note 138, at 612.

¹⁴³ *Id.* at 614.

¹⁴⁴ *Id.* at 613 (posing the possibility of an incentive to coerce statements as long as the use of the statements is limited and planned out); see Kelly Perigoe, *Exclusion of Evidence for Failure to Advise Suspects of the Rights to Counsel and to Silence before Custodial Police Interrogation: Comparing the United States and Canadian Doctrines and the Reasons for Their Difference in Scope*, 14 UCLA J. INT’L L. & FOREIGN AFF. 503, 527 (2009) (reviewing the development of Fifth Amendment jurisprudence and focusing on Justice Brennan’s express concern for extra-trial uses of illegal confessions).

¹⁴⁵ See *supra* Part II.B (arguing that significant harms exist when a suspect is charged and subsequently has those charges dropped).

¹⁴⁶ See *Confronting Issues*, *supra* note 138.

¹⁴⁷ *Id.* at 613.

¹⁴⁸ *Id.* at 612.

¹⁴⁹ *Id.*

¹⁵⁰ See *supra* Part II.B.

Any of these uses, without fear of liability, demonstrate circumstances that harm a defendant;¹⁵¹ and also present incentives for law enforcement to coerce statements, since they undoubtedly will help in a case, the majority of which do not even reach trial.¹⁵²

These deliberate violations are a reality in police practice, as officers in numerous states have admitted to the existence of department policies and training programs that encourage this planned circumvention of the Fifth Amendment by continuing interrogations even after *Miranda* protections have been invoked.¹⁵³ These tactics are not simply officer decisions, rather there is evidence that the policies are known and supported by supervisors, and are the result of tactical case planning.¹⁵⁴ Without a broader rule allowing for civil claims to address pre-trial use of coerced statements, officers may continue to be encouraged to obtain coerced statements for the planned use of filing charges and setting bail, or any other proceeding short of actual trial. The harms to a defendant in these scenarios would go unaddressed, and the purpose of the Fifth Amendment to prevent the compulsion of self-incriminating statements ignored.

D. The Due Process Gap

The availability of a substantive due process claim through the Fourteenth Amendment for Fifth Amendment violations that occur pre-trial has supported the position that a broader rule allowing section 1983 claims for pre-trial self-incrimination violations is unnecessary.¹⁵⁵ In addition, proponents of this argument have noted that the exclusionary rule suffices

¹⁵¹ *Id.*

¹⁵² See Confronting Issues, *supra* note 138, at 612–13 (explaining that most cases do not reach trial, and that a coerced statement usually proves fruitful in providing valuable information that can be relied on in prosecution and investigation).

¹⁵³ *Id.* at 613–14. There was a case in Arizona where officers decided to continue interrogating suspects in violation of their right to remain silent and to consult with an attorney. Officers knowingly planned this approach because they knew that the prosecutor could possibly use the statements at trial in order to impeach the defendant, although not to support their case-in-chief. Similarly, departments in California have dispersed material and utilized training programs that encourage interrogations despite *Miranda* invocations because although noncompliance with the Fifth Amendment was deliberate, it would not affect the admission of the statement for impeachment purposes. Three other states besides Arizona and California have had officers admit to such deliberate policies, and thirty-eight states have circumstances that suggest similar practices. *Id.*

¹⁵⁴ *Id.* (noting that supervisors condoned the Arizona officers' deliberate ignorance of *Miranda* warnings, because of the utility of the statements for impeachment purposes).

¹⁵⁵ See Kimberly Cain Khomani, Chavez v. Martinez: *Do You Really Have a Right to Silence?*, 54 CATH. U. L. REV. 373, 400 (2004) (supporting the decision to allow Fourteenth Amendment due process claims as the sole remedy for pre-trial Fifth Amendment violations and positing that this method best balances police investigation needs, while also vindicating an individual's rights during coercive interrogation); see also Julie E. Hawkins, Cooper v. Dupnik: *Civil Liability for Unconstitutional Interrogations*, 50 WASH. & LEE L. REV. 1191, 1195 (1993).

as a remedy for the coercion of self-incriminating statements since it prevents those statements from being used as evidence at trial.¹⁵⁶ However, neither of these remedies is sufficient to address the harms caused by using a coerced statement against an individual in pre-trial proceedings, and to give full effect to Fifth Amendment rights.

The problem with relying on a substantive due process claim for Fifth Amendment violations is that the remedy is only available for a coercive tactic that “shocks the conscience.”¹⁵⁷ A claim under due process will only cover the “most egregious official conduct,”¹⁵⁸ and generally requires that the police officer act with a specific intent to cause the injury.¹⁵⁹ Even then, the tactics used by the officers will only shock the conscience if it is “unjustifiable by any government interest.”¹⁶⁰ However, a government interest will almost always be involved, thus making the already difficult to reach standard even more so, as long as a government need is articulated.¹⁶¹ For example, in *Chavez v. Martinez*, Justice Thomas stated that the defendant, who was exposed to relentless questioning while in extreme pain from gunshot wounds to the face, did not have a due process claim because the officer did not act with a purpose to harm the defendant.¹⁶² Justice Stevens, however, disagreed, and believed that it was clear that this behavior was shocking and egregious.¹⁶³ However, Justice Thomas extended his analysis by noting that even if the conduct shocked the conscience, there would still be no due process claim because the need for obtaining information relating to official misconduct is a valid government interest.¹⁶⁴ The government interest articulated by Justice

¹⁵⁶ See Khomani, *supra* note 155, at 400; see also Mark E. Cammack, *The Exclusionary Rule: The Rise and Fall of the Constitutional Exclusionary Rule in the United States*, 58 AM. J. COMP. L. 631, 632 (2010) (reviewing the history and applicability of the exclusionary rule).

¹⁵⁷ John T. Parry, *Constitutional Interpretation, Coercive Interrogation, and Civil Rights Litigation after Chavez v. Martinez*, 39 GA. L. REV. 733, 821–823 (2005).

¹⁵⁸ *Id.* at 823.

¹⁵⁹ See *Chavez v. Martinez*, 538 U.S. 760, 774–75 (discussing that the officer’s conduct was not “conscience shocking” because there was no evidence that the officer intended to harm the defendant or that the officer’s conduct exacerbated the defendant’s injuries); see also *id.* at 823–24.

¹⁶⁰ Parry, *supra* note 157, at 824.

¹⁶¹ See *id.* at 824–25 (noting that the government can often raise a necessity claim to justify coercion, possibly even torture, and that the standard is very relaxed in favor of the government); see also Mary Strauss, *Torture*, 48 N.Y.L. SCH. L. REV. 201, 268 (2003) (arguing that “no constitutional violation would be found if the circumstances surrounding the use of torture were sufficiently compelling”).

¹⁶² *Chavez*, 538 U.S. at 775. Even though the defendant was in fear of dying and in extreme pain, the officer did not intentionally interfere with medical treatment as it was still possible for the doctors to treat him while he was being interrogated. *Id.*

¹⁶³ *Id.* at 784 (Stevens, J., dissenting).

¹⁶⁴ See *id.* at 775 (explaining that the risk that key evidence would have been lost is a justifiable government interest); see also Parry, *supra* note 157, at 824 (summarizing Thomas’ opinion as

Thomas was described as a danger that the defendant would die “without the authorities ever hearing his side of the story.”¹⁶⁵ With such a relaxed government interest standard, the due process claim as a remedy does not address the harms that occur in most Fifth Amendment violations, and possibly opens the door for worse abuses, like torture.¹⁶⁶

Since due process appears only to cover the most shocking abuses and injuries, there is a gap where individuals would be unprotected from constitutional violations. What does an individual do when the result falls short of due process, yet reliance on a coerced statement still caused him harm or an unjust result?¹⁶⁷ The due process argument actually affords very little protection beyond the most shocking behavior, which is unjustified by a government interest.¹⁶⁸ Even if the exclusionary rule will ultimately exclude the statements from trial, officers may still be tempted to engage in shocking behavior if they “perceive a need for information.”¹⁶⁹ As difficult as damages are to obtain in a due process claim, damages for the harm caused to individuals that are charged based on coerced statements would be impossible to obtain in most circumstances.¹⁷⁰ This gap in protection actually furthers the incentive officers have to plan coercive techniques ahead of time in order to use the statements in every way short of the prosecution’s case-in-chief.¹⁷¹ The officer would just have to “avoid

justifying the continued questioning of a seriously wounded man because the need for key information is necessary).

¹⁶⁵ *Chavez*, 538 U.S. at 775.

¹⁶⁶ *See* Parry, *supra* note 157, at 824 (relating the importance of tightening the government interest standard, especially in these times when detainees of the war on terror may be tortured); *see also* Strauss, *supra* note 161, at 268 (arguing that the use of torture should be presumptively unconstitutional because it is possible that the Constitution would not be violated if compelling circumstances surrounded the use of torture).

¹⁶⁷ *See Chavez*, 538 U.S. at 776 (holding that the defendant was unable to plead a Fourteenth Amendment violation); *see also* Staci D. Schweizer, *Chavez v. Martinez: A Right Deferred?*, 31 AM. J. CRIM. L. 305, 315 (2004) (posing the question of possible problems that will arise after the *Chavez* decision).

¹⁶⁸ *See* Parry, *supra* note 157, at 829 (noting that substantive due process constraints do not provide as much protection as one may expect); *see also* Strauss, *supra* note 161, at 233–34 (observing that what we may consider behavior that shocks the conscious may not violate the due process clause).

¹⁶⁹ Parry, *supra* note 157, at 829; *see* Strauss, *supra* note 161, at 251 (stating that if torture is used for informational purposes, at least four Justices believe that would not violate the privilege against self-incrimination).

¹⁷⁰ *See Chavez*, 538 U.S. at 779 (finding that any argument for a damages remedy must be made under a substantive due process violation); *see also* Parry, *supra* note 157, at 829 (explaining that if shocking behavior can be justified by a government interest, almost all violations would not result in damages since conduct that falls beneath the shocking threshold would not succeed as a due process claim).

¹⁷¹ *See* *Cooper v. Dupnik*, 963 F.2d 1220, 1228–30 (9th Cir. 1992); *see also* *Confronting Issues*, *supra* note 138, at 612–15 (describing the deliberate tactics used by police officers if there is no civil liability).

overbearing tactics that offend the Fourteenth Amendment.”¹⁷² Thus, due process claims neither protect the innocent nor deter police misconduct.

Allowing civil claims even without a trial is important to closing the gap of protection and giving more value to the rights afforded by the Fifth Amendment. If a narrower rule is adopted, damages would only be available if the statement was used at trial or if the coercion was a due process violation. Although the exclusionary rule thwarts the use of coerced statements at trial, damages are important because damages give more value and strength to the Fifth Amendment and its policies than limited remedies like exclusion.¹⁷³ Remedies are vital in defining the scope and value of a right because a large part of a right’s effectiveness rides on the remedies available for its violation.¹⁷⁴ It has even been argued that “remedies help define the scope of a right.”¹⁷⁵ As noted above,¹⁷⁶ the right against coercion is very weak if violations and harms cannot be remedied through damages because the exclusionary rule does not address the harms to an individual who has had charges filed against him.¹⁷⁷ The Supreme Court’s creation of the prophylactic *Miranda* warning implies that the value of the rights afforded by the Fifth Amendment is intended to be strong and protected.¹⁷⁸ However, *Miranda* is rendered virtually useless without civil liability for violations that fall short of due process.¹⁷⁹ In addition, without pre-trial civil liability for coercion, *Miranda* can purposefully be ignored as long as trial is avoided, or the use of the statement is planned to circumvent its actual use in trial.¹⁸⁰ What, then, will address the harms to an individual if officials are free to compel statements

¹⁷² Confronting Issues, *supra* note 138, at 614.

¹⁷³ See Parry, *supra* note 157, at 838 (positing that rights are worth more when protected by damages); see also John C. Jeffries, Jr., *The Right-Remedy Gap in Constitutional Law*, 109 Yale L.J. 87, 94 (1999).

¹⁷⁴ See Parry, *supra* note 157, at 783; see also Susan Bandes, *Reinventing Bivens: The Self-Executing Constitution*, 68 S. CAL. L. REV. 289, 307 (1995).

¹⁷⁵ Parry, *supra* note 157, at 783.

¹⁷⁶ See *supra* Part II.A (describing both the harms associated with having charges filed in reliance on coerced statements, the lack of deterrence without a viable cause of action, and the infeasibility of due process claims to vindicate Fifth Amendment violations).

¹⁷⁷ See Parry, *supra* note 157, at 838 (stating that damages make the right against coercion strong); see also Lawrence Rosenthal, *A Theory of Governmental Damages Liability: Torts, Constitutional Torts, and Takings*, 9 U. PA. J. CONST. L. 797, 830 (2005).

¹⁷⁸ See *Miranda v. Arizona*, 384 U.S. 436, 468 (1966); see also *United States v. Valdez-Garcia*, No. 8:02-CR-318, 2003 U.S. Dist. LEXIS 8213, at *9 (D. Neb. 2003).

¹⁷⁹ See *Chavez v. Martinez*, 538 U.S. 760, 767 (2003); see also Parry, *supra* note 157, at 767 (noting that the government can freely coerce statements as long as it does not cross the boundary that exposes due process liability).

¹⁸⁰ See *Chavez*, 538 U.S. at 767; see also Parry, *supra* note 157, at 767 (describing a situation where an individual is in the tenuous position of choosing between self-accusation, perjury, or contempt).

and use them file charges and set bail? A broader rule effectively closes this gap of remediless violations, affirms the strength and scope of the privilege to those it protects, and deters official deliberate misconduct.¹⁸¹

CONCLUSION

The Ninth, Second, and Seventh Circuits' interpretation of allowing section 1983 claims for Fifth Amendment violations without the incriminating statements having been used in a trial is the correct one. When an officer coerces a statement from an individual and hands it to a prosecutor, he does so with the reasonable knowledge that the statement may be relied on to file charges, set bail, and prosecute at trial. In other words, the officer hands over the statement with reasonable knowledge that the statement may be relied on to begin a criminal case. Once that occurs, significant harms occur that should be remedied through damages that compensate and protect the plaintiff. Without a civil remedy to address these harms, the Fifth Amendment's policies of protecting the innocent, and deterring violations are mostly ignored. In fact, a civil remedy would deter violations, while the absence of a remedy actually encourages violations. Having a civil remedy for pre-trial use of coerced statements also transforms the Fifth Amendment from a right that is largely unprotected, into one that offers significant protection to individuals. Thus, allowing section 1983 claims once a statement is used to file charges affirms the strength and value of the Fifth Amendment privilege against self-incrimination.

¹⁸¹ See *Chavez*, 538 U.S. at 777–78 (Souter, J., concurring.); see also Parry, *supra* note 157, at 816 (noting that the deterrent powers, worth, and establishment of the privilege is better served with damage remedy pre-trial, and that the Fifth Amendment would have a firm scope and strength, much like other rights in the Constitution).

