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Suing Under 42 U.S.C. § 1983 for Violation of the Fifth Amendment: How the Eighth Circuit Should Determine When a Case Commences

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SUING UNDER 42 USC § 1983 FOR VIOLATION OF THE FIFTH AMENDMENT: HOW THE EIGHTH CIRCUIT SHOULD DETERMINE WHEN A CASE COMMENCES

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"The Fifth Amendment is an old friend and a good friend. One of the great landmarks in men's struggle to be free of tyranny, to be decent and civilized."
- Justice William O. Douglas

ABSTRACT

In *Chavez v. Martinez*, 538 U.S. 760 (2003), the Supreme Court determined that in order to assert a viable 42 USC § 1983 claim based on the violation of one's Fifth Amendment right against self-incrimination, the compelled incriminating statement at issue must be used in a "criminal case." The Court declined to define when a "criminal case" commences, however, providing only that police questioning alone does not constitute a "case." Following this decision, the circuits began to split on when a plaintiff may assert a viable § 1983 claim for a coerced statement. Some circuits allow § 1983 claims if the compelled statements are used in bail hearings, while others require the use of compelled statements at trial. This creates an inequitable playing field for claimants in different circuit courts.

This Article explores the history and purpose of the Fifth Amendment's privilege against self-incrimination, examines subsequent judicial interpretations, and recommends that the Eighth Circuit follow a broad approach, liberally defining when a case commences. This Article calls for allowing § 1983 claims to proceed when compelled statements are used in the early stages of criminal proceedings, particularly pre-trial hearings, such as a first appearance or bail determination. This approach acknowledges the reality of the contemporary criminal justice system that most cases never go to trial and that outcomes are generally determined by pre-trial proceedings. It also comports with the traditionally broad interpretation of

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Fifth Amendment rights in order to protect criminal defendants and deter coercive interrogation practices.

I. INTRODUCTION

In 2003, the Supreme Court determined that in order for an individual to assert a viable claim under 42 U.S.C. § 1983, based on a violation of the Fifth Amendment right against self-incrimination, their compelled self-

incriminating statements must be used in a criminal case.[1] The Court, however, did not feel the need to define when a "criminal case" commences.[2] Since this decision, the circuit courts have taken varying approaches to determine when a compelled statement must be used against a criminal defendant to trigger a claim.[3] The Third, Fourth, and Fifth Circuits require use of the compelled statements at trial.[4] The Seventh Circuit allows for use of a compelled statement at a suppression hearing.[5] The Ninth Circuit, like the Second Circuit, has allowed for use of a compelled statement at a bail hearing, in addition to use in the affidavit filed in support of an information.[6] While the Eighth Circuit has not addressed this issue directly, recent case law indicates that it is leaning towards requiring use at a trial.[7]

This Article will describe the varying approaches of the circuit courts following *Chavez*, analyze the approaches, and then make a recommendation. The first section will lay out the background of the Fifth Amendment protections at the heart of the claims and the purpose of 42 U.S.C. § 1983.[8] The background section will also detail the *Chavez* case and the cases that illustrate the circuit split.[9] In detail, this section will lay

1. *See infra* text accompanying note 25 (explaining that the Court in Chavez v. Martinez, 538 U.S. 760 (2003), required use of compelled statements, not mere coercive interrogation tactics, in a criminal case to trigger a § 1983 claim).

2. *See infra* text accompanying notes 55–56 (describing how the *Chavez* Court failed to define when a criminal case commences, but the Court stated that "In our view, a 'criminal case' at the very least requires the initiation of legal proceedings").

3. *See infra* text accompanying notes 58–96 (describing illustrative cases from the Second, Third, Fourth, Fifth, Seventh, and Ninth Circuits).

4. *See infra* text accompanying notes 57–77 (describing Murray v. Earle, 405 F.3d 278 (5th Cir. 2005), Burrell v. Virginia, 395 F.3d 508 (4th Cir. 2005), and Renda v. King, 347 F.3d 550 (3d Cir. 2003), all of which require the use of compelled statements at trial to constitute a § 1983 claim).

5. *See infra* text accompanying notes 78–80 (describing Best v. City of Portland, 554 F.3d 698 (7th Cir. 2009), in which the court allowed a § 1983 claim for the use of compelled statements at a suppression hearing).

6. *See infra* text accompanying notes 83–97 (describing Higazy v. Templeton, 505 F.3d 161 (2d Cir. 2007), and Weaver v. Brenner, 40 F.3d 527 (2d Cir. 1994), which illustrate a broader approach that allows a § 1983 claim when compelled statements are used at a bail hearing (*Higazy*) or even at any criminal proceeding (*Weaver*), as well as Stoot v. Everett, 582 F.3d 919 (9th Cir. 2009), which allows a § 1983 claim when compelled statements are used in an arraignment and bail hearing).

7. *See infra* text accompanying notes 102–133 (describing the case of Dowell v. Lincoln Cty., 927 F. Supp. 2d 741 (E.D. Mo. 2013), in which the Eighth Circuit specifically outlines the circuit split that occurred after *Chavez* and explains the indication from Winslow v. Smith, that the Eighth Circuit is leaning towards requiring use at trial, where a Fifth Amendment claim was dismissed because the case did not proceed to trial).

8. *See infra* Section II.A (describing the progression of the courts' approach to the Fifth Amendment and the modern analysis); *see also infra* Section II.B (describing the text and purpose of § 1983 and the court's typical anti-expansionist approach).

9. *See infra* Section II.C.

out the different approaches of the circuit courts, including those that require use of compelled statements at trial and those that allow for claims when compelled statements have been used in earlier criminal proceedings.[10] The next section will consider constitutional and case arguments in an effort to determine the best approach for the Eighth Circuit to follow.[11] The analysis section will focus on the spirit and purpose of the Fifth Amendment and § 1983.[12] Ultimately, this Article will recommend that the Eighth Circuit adopt a broader view of when a case commences, allowing for use of the compelled statements in proceedings that occur before trial to trigger the claim; in particular, use at bail hearings.[13]

II. BACKGROUND

The Fifth Amendment provides the critically important protection against self-incrimination. The utilization of compelled statements during a criminal case violates a defendant's Fifth Amendment privilege.[14] 42 U.S.C. § 1983 was designed as a remedy for these types of violations. The *Chavez* Court failed to specifically identify when a § 1983 claim for use of a compelled statement kicks in; thus, leading to a circuit split, with some circuits construing the protection more broadly and others construing it too narrowly.

A. THE FIFTH AMENDMENT: RIGHT AGAINST SELF-INCRIMINATION

The Fifth Amendment of the United States Constitution is one of the most precious protections criminal defendants have in the country. The Fifth Amendment dictates, among other things, that "[n]o person shall . . . be compelled in any criminal case to be a witness against himself."[15] The

10. *See infra* Section II.D (describing Murray v. Earle from the Fifth Circuit, Burrell v. Virginia from the Fourth Circuit, and Renda v. King from the Third Circuit, all of which require the use of compelled statements at trial to constitute a § 1983 claim); *see also* Best v. City of Portland, 554 F.3d 698 (7th Cir. 2009), Higazy v. Templeton, 505 F.3d 161 (2d Cir. 2007), and Stoot v. Everett, 582 F.3d 919 (9th Cir. 2009). These cases take a broader view of use at a criminal proceeding.

11. *See infra* Part III (describing the plurality of the *Chavez* Court and the construction and arguments of the varying court decisions from the illustrative cases previously described).

12. *See infra* text accompanying notes 157–78 (arguing against expanding a constitutional protection, and then arguing for the liberal construction of the Fifth Amendment and § 1983 and the barriers to access of individuals to assert potentially legitimate claims for damages).

13. *See infra* text accompanying notes 181–90 (arguing that, at the very least, use at bail hearings should be sufficient to constitute a claim; otherwise, there are unjust barriers to pursuing the claims and the purposes of § 1983, and the Fifth Amendment is frustrated).

14. *See generally* Chavez v. Martinez, 538 U.S. 760 (2003).

15. U.S. CONST. amend. V.

Fifth Amendment prohibits compelled self-incrimination.[16] The original concern of the Constitutional framers was the use of torture to compel statements.[17] Early on, courts found that the Amendment simply affirmed common law protections against improper interrogation methods for obtaining confessions.[18] However, by the end the nineteenth century, the modern concept of the right to remain silent was well-established.[19] Historically, the Supreme Court has construed the Fifth Amendment liberally in favor of protection of rights.[20]

Today, courts focus their analysis of the right against self-incrimination on the issue of compulsion and assess whether the decision of a suspect to speak was actually voluntary.[21] "A statement is involuntary when it was extracted by threats, violence, or express or implied promises sufficient to overbear the defendant's will and critically impair his capacity for self-determination."[22] Determining whether a confession is involuntary is based on the totality of the circumstances and courts must consider the "conduct of the officers and the characteristics of the accused."[23] The Fifth

16. Akhil Reed Amar & Renee B. Lettow, *Fifth Amendment First Principles: The Self-Incrimination Clause*, 93 MICH. L. REV. 857, 865 (1995).

17. *Id.*; *see also id.* at n.20 (explaining that during the debates surrounding the ratification of the Constitution, many Framers expressed concerns about the use of torture to extract confessions).

18. AM. BAR ASS'N, THE PURPOSE AND SCOPE OF THE FIFTH AMENDMENT RIGHT AGAINST COMPULSORY SELF-INCRIMINATION 3, http://apps.americanbar.org/abastore/products/books/abstracts/5090120chap1_abs.pdf; *see also* Amar & Lettow, *supra* note 17, at 865 n.20 (explaining that "[a]fter ratification, the courts initially understood the amendment to simply affirm the common law protections afforded defendants against improper methods used for gaining confessions. However, by the end of the nineteenth century, the modern concept of a witness's right to remain silent became well established, at least in the federal courts.") (citing Counselman v. Hitchcock, 142 U.S. 547 (1892), and Brown v. Walker, 161 U.S. 591 (1896)).

19. *Id.*

20. *Id.*; *see* Hoffman v. United States, 341 U.S. 479, 486 (1951) (explaining that the Fifth Amendment "must be accorded liberal construction in favor of the right it was intended to secure"); *see also* Ullmann v. United States, 350 U.S. 422, 426–27 (1956) (In *Ullmann*, Frankfurter expounded that while some might view the privilege "as a shelter for wrongdoers," the Founders specifically, in their judgment, found this privilege fundamental for the protection of the guilty and the innocent, even at the risk of a guilty person going unpunished) (citing Maffie v. United States, 209 F.2d 225, 227 (1st Cir. 1954)).

21. Missouri v. Seibert, 542 U.S. 600, 624 (2004) (O'Connor, J., dissenting) ("Freedom from compulsion lies at the heart of the Fifth Amendment, and requires us to assess whether a suspect's decision to speak truly was voluntary.").

22. United States v. Lebrun, 363 F.3d 715, 724 (8th Cir. 2004) (quoting Simmons v. Bowersox, 235 F.3d 1124, 1132 (8th Cir. 2001)). The court determined that in looking at the totality of circumstances, the defendant's age, work experience, education (including legal training), and past experience with government agents weighed against whether he was coerced into confessing; *see id.* at 723 (citing United States v. Rorex, 737 F.2d 753, 756 (8th Cir. 1984)) (age and experience of the interviewee is a relevant factor).

23. *LeBrun*, 363 F.3d at 723 (citing Wilson v. Lawrence Cty., 260 F.3d 946, 952 (8th Cir. 2001)).

Amendment is not implicated unless the statements are compelled.[24] Further, it is not until the compelled statements are used in a "criminal case" that a violation of the Self-Incrimination Clause occurs.[25]

Historically, the Fifth Amendment has been construed liberally.[26] In *Hoffman v. United States*, the Court addressed how liberally the Fifth Amendment should be construed.[27] In *Hoffman*, the petitioner was convicted of criminal contempt for refusing to obey a federal court order requiring him to answer certain questions asked in a grand jury investigation.[28] The Court explained:

> The Fifth Amendment declares in part that "No person * * * shall be compelled in any Criminal Case to be a witness against himself." This guarantee against testimonial compulsion, like other provisions of the Bill of Rights, "was added to the original Constitution in the conviction that too high a price may be paid even for the unhampered enforcement of the criminal law and that, in its attainment, other social objects of a free society should not be sacrificed." This provision of the Amendment must be accorded liberal construction in favor of the right it was intended to secure. The privilege afforded not only extends to answers that would in themselves support a conviction under a federal criminal statute but likewise embraces those which would furnish a link in the chain of evidence needed to prosecute the claimant for a federal crime.[29]

The Court took the same position on the liberal construction of the Fifth Amendment in *Ullmann v. United States*.[30] This case, too, was about the compulsion of a witness to testify before a grand jury.[31] In *Ullmann*, Justice Frankfurter declared that the Court's approach to the Fifth Amendment privilege against self-incrimination must be in the spirit of protecting the liberty of all who may invoke it, innocent or guilty:

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24. Dowell v. Lincoln Cty., 927 F. Supp. 2d 741, 749 (E.D. Mo. 2013).

25. *Id.* (citing Chavez v. Martinez, 538 U.S. 760, 766-67 (2003) (failing to define what commences the "criminal case")).

26. *See* Geoffrey B. Fehling, Note, *Verdugo, Where'd You Go?:* Stoot v. City of Everett *and Evaluating Fifth Amendment Self-Incrimination Civil Liability Violations*, 18 GEO. MASON L. REV. 481, 502 (2011); Hoffman v. United States, 341 U.S. 479, 486 (1951); *see also* Ullmann v. United States, 350 U.S. 422, 426-27 (1956).

27. Hoffman v. United States, 341 U.S. 479 (1951).

28. *Id.* at 485–86.

29. *Id*. at 486.

30. Ullmann v. United States, 350 U.S. 422 (1956).

31. *Id.* at 423.

> Too many, even those who should be better advised, view this privilege as a shelter for wrongdoers. They too readily assume that those who invoke it are either guilty of crime or commit perjury in claiming the privilege. Such a view does scant honor to the patriots who sponsored the Bill of Rights as a condition to acceptance of the Constitution by the ratifying States.[32]

To encroach upon this important protection would be to "whittle it down" through judicial opinion.[33]

B. 42 U.S.C. § 1983

Section 1983 has been utilized to give judicial remedy to those who have been deprived of their constitutional rights and protections. This remedy should serve as a check on practices in law enforcement that threaten the core privilege against self-incrimination. This statute lays out the cause of action as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.[34]

The purpose of § 1983 was to allow the federal courts to interject themselves between the states and the people to protect citizens from the deprivation of their federal rights by unconstitutional state actions.[35]

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32. *Id.* at 426–27.

33. *Id.* at 428 (quoting Maffie v. U.S., 209 F.2d 225, 227 (1st Cir. 1954).

34. 42 U.S.C. § 1983.

35. Jeffrey A. Zaluda, Note, Pulliam v. Allen*: Harmonizing Judicial Accountability for Civil Rights Abuses with Judicial Immunity*, 34 AM. U. L. REV. 523, 543 (1985); *see also* Mitchum v. Foster, 407 U.S. 225, 240 (1972) (discussing Pulliam v. Allen, 104 S. Ct. 1970, 1981-82 (1984)) (finding that Congress intended for § 1983 to protect people's federal rights from unconstitutional actions under the color of state law, executive, legislative, or judicial actors). Unequivocally, the *Pulliam* court reasoned, that nothing in § 1983 suggests that Congress intended to completely

Typically, courts are limited from over-expanding federal statutes or interfering with certain state actions.[36] *Younger v. Harris* and other cases define the doctrine of abstention, also labeled as the doctrine of "Our Federalism."[37] In the absence of unusual circumstances, a federal court cannot interfere with a pending state criminal prosecution.[38]

C. *CHAVEZ V. MARTINEZ*: THE SUPREME COURT LEAVING THE DOOR OPEN FOR A CIRCUIT SPLIT

In 2003, the Supreme Court decided *Chavez v. Martinez*.[39] While the exact details of the altercation at the heart of the case are in dispute, the Court found that two police officers were investigating drug activity in a vacant lot when Oliverio Martinez rode by on his bicycle.[40] The officers ordered Martinez to dismount, spread his legs, and put his hands on his head.[41] One officer then performed a pat-down frisk, during which a knife was discovered.[42] The officers claimed that Martinez took one officer's gun and, in response, the other officer shot Martinez several times, permanently blinding and paralyzing him.[43] Chavez was the patrol supervisor and accompanied Martinez to the hospital, questioning him while he was receiving medical treatment.[44] Over a forty-five minute period of time, the officer's questioning took roughly ten minutes, during which Martinez repeatedly uttered he thought he was dying.[45] At one point, Martinez admitted he took the gun from the officer and that he used heroin regularly.[46] Martinez also stated, "I am not telling you anything until they treat me," yet, Chavez continued to question him.[47] Martinez was never read his *Miranda* warnings.[48] Ultimately, Martinez was not charged with a

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insulate state judges from federal review of their actions. Accordingly, the Court held that judicial immunity was not a bar to injunctive relief under § 1983 for judicial officers acting in their judicial capacity. *Pulliam*, 104 S. Ct. at 1981.

36. CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4252 (3d ed. 2016).

37. *Id.*

38. *Id.*

39. Chavez v. Martinez, 538 U.S. 760, 760 (2003).

40. *Id.* at 764.

41. *Id.* at 763.

42. *Id.* at 763–64.

43. *Id.* at 764.

44. *Id.*

45. *Chavez*, 538 U.S. at 764.

46. *Id.*

47. *Id.*

48. *Id.* at 764–65.

crime; therefore, his statements were never used against him in a criminal prosecution.[49]

Martinez sued, in part, under § 1983 for Chavez's violation of his Fifth Amendment right not to be "compelled in any criminal case to be a witness against himself."[50] The Ninth Circuit Court of Appeals held that Chavez was not entitled to a defense of qualified immunity because he violated Martinez's constitutional rights.[51] The Supreme Court disagreed, and found that Chavez did not deprive Martinez of a constitutional right.[52]

D. WHEN DOES A CRIMINAL CASE COMMENCE? CASE ILLUSTRATIONS OF THE VARYING APPROACHES TAKEN BY THE DIFFERENT CIRCUIT COURTS

The Court held that a violation of *Miranda* is not an automatic constitutional violation.[53] Mere compulsion in an interrogation is not enough for a § 1983 claim.[54] The Court reasoned that the compelled statements must be used in a criminal case, but failed to define when a "criminal case" commences.[55] The Court explained:

> We need not decide today the precise moment when a "criminal case" commences; it is enough to say that police questioning does not constitute a "case" any more than private investigator's precomplaint activities constitute a "civil case." Statements compelled by police interrogations may not be used against a defendant at trial, but it is not until their use in a criminal case that a violation of the Self-Incrimination Clause occurs.[56]

Following the Supreme Court's decision in *Chavez*, the lack of clarity about when a criminal case commences led to a split among the circuit courts regarding when a statement must be used against a defendant to trigger a § 1983 claim. Three circuit courts, the Fifth, Fourth, and Third Circuits, have held that statements must be used at trial to trigger a § 1983 claim.[57] In *Murray v. Earle*, a Fifth Circuit case, a juvenile was

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49. *Id.* at 765.
50. *Id.* at 764–65.
51. *Chavez*, 538 U.S. at 765.
52. *Id.* at 767.
53. *Id.* at 772.
54. *Id.* at 769.
55. *Id.* at 766.
56. *Id*. at 766–67 ("In our view, a 'criminal case' at the very least requires the initiation of legal proceedings.") (citations omitted).
57. Murray v. Earle, 405 F.3d 278 (5th Cir. 2005); Burrell v. Virginia, 395 F.3d 508 (4th Cir. 2005); Renda v. King, 347 F.3d 550 (3d Cir. 2003).

interrogated without being brought before a magistrate judge (as is a jurisdictional rule for juveniles)[58] and without a parent present.[59] The juvenile admitted to hurting a younger child who then died.[60] She was tried and convicted.[61] Although the court determined that her § 1983 claim would qualify because her statements were ultimately used against her at trial, her claim failed for causation reasons.[62] The *Murray* court stated that "[t]he Fifth Amendment privilege against self-incrimination is a fundamental trial right which can be violated only *at* trial, even though pre-trial conduct by law enforcement officials may ultimately impair that right."[63] The court reasoned that the judge's actions to allow the juvenile's statements at trial constituted an intervening action that broke the chain of causation.[64] Also, the court indicated that the right against self-incrimination is implicated only during custodial interrogation.[65]

In *Burrell v. Virginia*, a Fourth Circuit case, the court explained the analysis for a § 1983 claim.[66] In that case, an officer told Burrell that he would be charged with obstruction of justice if he continued to assert his Fifth Amendment privilege by refusing to provide the officer proof of insurance after a car accident.[67] Burrell brought suit against numerous city and state officials seeking $10,000,000.00 in damages.[68] The court held Burrell had no basis for a § 1983 claim because his statement was not used in any trial action.[69]

Similarly, in *Renda v. King*, the Third Circuit held that to violate the Constitution, compelled statements must be used at trial.[70] At 2:30 A.M., police questioned the claimant regarding a domestic issue, and when giving her written statement, she failed to mention a police report she had made earlier in the evening.[71] She was not, however, read her *Miranda* rights,[72]

58. Texas law requires that children who are in state custody be brought before a magistrate judge. *Murray*, 405 F.3d at 283.
59. *Id*. at 283–84.
60. *Id*. at 284.
61. *Id*.
62. *Id*. at 290.
63. *Id.* at 285.
64. *Murray*, 405 F.3d at 293.
65. *Id.* at 286.
66. *Burrell*, 395 F.3d at 512–14.
67. *Id.* at 510.
68. *Id.* at 511.
69. *Id.* at 513-14.
70. *Renda*, 347 F.3d at 559.
71. *Id.* at 552.
72. *Id.*

but she was charged with giving false reports.[73] Later, her statements were suppressed because of the lack of a *Miranda* warning.[74] The Third Circuit held that there was no basis for her § 1983 claim because her statements were not used *against* her at trial.[75] Citing *Chavez*, the court explained:

> The Supreme Court's recent holding in *Chavez* . . . reaffirms our holding in *Giuffre v. Bissel*[76] . . that a plaintiff may not base a § 1983 claim on the mere fact that the police questioned her in custody without providing Miranda warnings when there is no claim that the plaintiff's answers were used against her at trial.[77]

The Seventh Circuit found that the use of statements at a suppression hearing is sufficient to constitute a claim.[78] In *Best v. City of Portland*, the court held that "the use of a criminal defendant's statements at a suppression hearing held after charges were initiated constitutes use in a 'criminal case.'"[79] The court reasoned that this was sufficient because the use of his statements at the suppression hearing led to continued confinement for the defendant while waiting for trial.[80] The court referenced an earlier case, *Sornerberger v. City of Knoxville*, in which the Seventh Circuit explained that, "we have not adopted the narrow view that use in a 'criminal case' means 'at trial.'"[81] The *Sornerberger* court held that "use of a suspect's unwarned statements at an arraignment hearing, probable cause hearing, and bail hearing constituted use of the statements in a 'criminal case'" is sufficient to implicate the Self-Incrimination Clause of the Fifth Amendment.[82]

The Second Circuit also deemed use at a bail hearing sufficient.[83] In *Higazy v. Templeton*, the claimant was a suspected 9/11 conspirator, believed to be involved in the terroristic act because a receiving radio was

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73. *Id.* at 553.

74. *Id.*

75. *Id.* at 557–58.

76. Giuffre v. Bissell, 31 F.3d 1241, 1257 (3d Cir. 1994) (holding that compelled statements must be used at trial and not just in obtaining in an indictment). The *Giuffre* court could not find that under similar circumstances a reasonable officer would have known his conduct would have been the basis for suppressing the elicited statement. *Id.* at 1256.

77. *Renda*, 347 F.3d at 552.

78. Best v. City of Portland, 554 F.3d 698, 699 (7th Cir. 2009).

79. *Id.* at 699.

80. *Id.* at 702–03.

81. *See* Sonerberger v. City of Knoxville, 434 F.3d 1006, 1025–27 (7th Cir. 2006) (holding that "the Fifth Amendment is violated when a criminal defendant's Miranda-infirm statements are admitted as evidence against him in the prosecution's case-in-chief at criminal trial. [Claimant]'s self-incrimination claim falls short of this paradigm; charges were dropped before her case went to trial.").

82. *Best*, 554 F.3d at 702.

83. Higazy v. Templeton, 505 F.3d 161, 179 (2d Cir. 2007).

found in his hotel room after the hotel was evacuated.[84] However, he was eventually released when another individual claimed possession of the radio.[85] Referencing Justice Thomas' opinion in *Chavez*, the court deemed the bail hearing to be part of the criminal case, reasoning that since other constitutional protections apply to bail hearings, the Fifth Amendment should also apply.[86] Specifically, the court explained:

> Based on our prior rulings on the Fifth Amendment and bail hearings, and Justice Thomas's definition of 'criminal case' in *Chavez*, which illuminates the cases decided before January 2002, on which we may rely, we hold that Higazy's initial appearance on January 11, 2002, which included the determination of whether he would be detailed or released on bail, was part of the criminal case against Higazy.[87]

The decision in the *Higazy* case follows the guidance of another pre-*Chavez* Second Circuit case, *Weaver v. Brenner*, which stated that a coerced statement need not be introduced at trial to violate one's Fifth Amendment rights.[88] The *Weaver* court held that use at *any* criminal proceeding was sufficient to trigger a § 1983 claim.[89]

In *Stoot v. City of Everett*, the Ninth Circuit adopted the general rule from *Higazy* and *Sornerberger*.[90] Based on a four-year-old's statement that he was sexually abused when he was three years old, police officers went to Stoot's school to interview the fourteen-year-old, although his parents were not present.[91] Stoot denied abusing the younger child until officers told him he would get less punishment if he confessed.[92] Stoot and his parents asserted a § 1983 claim.[93] The court explained that this claim fell "squarely within the gray area created by *Chavez*."[94] The court differentiated Martinez, the claimant in the *Chavez* case, from Stoot because his statements were used in a number of different contexts.[95] Specifically, his statements "were used against him in (1) the Affidavit filed in support of

84. *Id.* at 163–67.
85. *Id.* at 167.
86. *Id.* at 172–73.
87. *Id.* at 173.
88. Weaver v. Brenner, 40 F.3d 527, 536 (2d Cir. 1994) (holding that use of a compelled statement in front of a grand jury was sufficient to constitute a § 1983 claim).
89. *Id.* at 535.
90. Stoot v. Everett, 582 F.3d 919, 925 (9th Cir. 2009).
91. *Id.* at 913–14.
92. *Id.* at 915.
93. *Id.* at 917.
94. *Id.* at 923–24.
95. *Id.*

the Information charging him with child molestation; (2) a pretrial arraignment and bail hearing (the CrR 3.2 hearing); and (3) a pretrial evidentiary hearing (the CrR 3.5 hearing) to determine the admissibility of his confession."[96] In adopting a general approach, the court determined that the use of the statements in the affidavit supporting the Information and the pretrial arraignment and bail hearing, constituted "use" in a "criminal case" in accordance with *Chavez*.[97]

"Use" of a compelled statement falls within the criminal case "when it has been relied upon to file formal charges against the declarant, to determine judicially that the prosecution may proceed, and to determine pretrial custody status."[98] The court reasoned that the nature of this usage is "precisely the burden precluded by the Fifth Amendment: namely, they make the declarant a witness against himself in a criminal proceeding."[99] In this case, the court highlighted the prosecution's use of statements in the Affidavit of Probable Cause and at the arraignment that essentially were "Paul said [insert coerced statement here]."[100] The *Stoot* court clearly stated that it joined the Second and Seventh Circuits' more broad approach.

> We adopt the general approach of *Sornberger* and *Higazy:* A coerced statement has been "used" in a criminal case when it has been relied upon to file formal charges against the declarant, to determine judicially that the prosecution may proceed, and to determine pretrial custody status. Such uses impose precisely the burden precluded by the Fifth Amendment: namely, they make the declarant a witness against himself in a criminal proceeding. Here, for example, in the Affidavit of Probable Cause supporting the Information and in the arraignment hearing, defendants essentially stated, "Paul said [insert coerced statement here]," rendering Paul a witness against himself. We therefore join the Second and Seventh Circuits in holding that use of the coerced statements *at trial* is not necessary for Paul to assert a claim for violation of his rights under the Fifth Amendment.[101]

While the Eighth Circuit has not ruled on when a criminal case commences, there are strong indications of the way in which the Circuit is leaning. In *Dowell v. Lincoln County*, a Missouri District Court addressed

96. *Stoot*, 582 F.3d at 923–24.
97. *Id.* at 924.
98. *Id.* at 925.
99. *Id.*
100. *Id.*
101. *Id.*

the circuit split.[102] In *Dowell*, the court was assessing a § 1983 claim made by an individual who was interrogated without an attorney despite stating that he would like an attorney, that he was "invoking his rights," and asking to use a phone, presumably to call an attorney.[103] Dowell, the claimant, was questioned in a rape and murder case.[104] Police sergeants escorted Dowell to the police station, read him his *Miranda* warnings, and he signed a *Miranda* waiver.[105] The interrogation was videotaped, except for one block of time, during which the interview continued although it was not recorded.[106] Dowell was questioned regarding DNA evidence, and he repeatedly requested that the officers hire him a lawyer and "stated that he was invoking his rights."[107] The officers continued to question him, even warning him "that Missouri is a death penalty state."[108]

A probable cause statement was drafted with references to Dowell's statements during the interrogation, including statements that he did not know or have sexual intercourse with the victim.[109] While in a holding cell, one police sergeant read Dowell the probable cause statement and told him that the state "would be seeking the death penalty."[110] Dowell alleged that, at this point, police made an effort to coerce him into making a confession and he admitted that he had slept with the victim.[111] Dowell was charged with first degree murder and rape.[112] The trial court granted Dowell's motion to suppress statements he made after stating that he wanted to end the interrogation, and a jury found him not guilty.[113] A police sergeant drafted an additional statement of probable cause, which resulted in the state refiling the charge of rape with infliction of serious injury.[114] The district court dismissed the case based on collateral estoppel, and the Missouri Court of Appeals affirmed.[115] Dowell was in custody until the Circuit court dismissed the subsequent charge.[116]

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102. Dowell v. Lincoln Cnty., 927 F. Supp. 2d 741, 749 (E.D. Mo. 2013).
103. *Id.* at 746 (involving nine other alleged § 1983 violations, including a questionable search).
104. *Id.* at 745.
105. *Id.*
106. *Id.* at 745-46.
107. *Id.* at 746.
108. *Dowell*, 927 F. Supp. 2d at 746.
109. *Id.*
110. *Id.*
111. *Id.*
112. *Id.* at 747.
113. *Id.*
114. *Dowell*, 927 F. Supp. 2d at 747.
115. *Id.*
116. *Id.*

In regard to Dowell's Fifth Amendment § 1983 claim, the court held that summary judgment in favor of the defendants was proper because the evidence showed that all statements used against Dowell at trial were, in fact, voluntary.[117] "A statement is involuntary when it was extracted by threats, violence, or express or implied promises sufficient to overbear the defendant's will and critically impair his capacity for self-determination."[118] A judge must look to the totality of the circumstances to determine whether a confession was involuntary, and a court must look to the "conduct of the officers and the characteristics of the accused."[119] While the court recognized that Dowell's *Miranda* safeguards may have been violated, the court also reasoned that "a litigant cannot maintain an action under § 1983 based on a violation of the *Miranda* safeguards, even if the evidence obtained in violation of Miranda was admitted against him at trial. . . . The core of the Fifth Amendment is not implicated unless the statements are compelled."[120]

Dowell argued that his statements were involuntary because, among other things, he was yelled at, threatened with the death penalty, and asked questions before being read his *Miranda* rights.[121] The court reasoned that even though Dowell claimed he felt threatened during the interrogation, there was no use of force or threat of violence against him during his interrogation.[122]

In *Dowell*, the court determined that the Fifth Amendment was not implicated, despite the claimant's statements being used at trial, and therefore, did not need to reach a determination regarding when a criminal case commences.[123] The court did, however, raise the issue of the circuit split and described the different circuits' approaches.[124] Further, the opinion in *Dowell* states that, "[w]hile the Eighth Circuit has not discussed the distinction in detail, it has provided a strong indication that it would

117. *Id.* at 748.

118. United States v. LeBrun, 363 F.3d 715, 724 (8th Cir. 2004) (quoting Simmons v. Bowersox, 235 F.3d 1124, 1132 (8th Cir. 2001)).

119. *Dowell*, 927 F. Supp. 2d at 748 (citing Wilson v. Lawrence Cnty., 260 F.3d 946, 952 (8th Cir. 2001)).

120. *Id.* at 749 (citing Hannon v. Sanner, 441 F.3d 635, 636–37 (8th Cir. 2006) (finding the remedy for a *Miranda* violation to be the exclusion from trial of any compelled self-incriminating statement, not a § 1983 action, and that the remedy for the claimant was suppression of evidence, which he achieved through a ruling of the Supreme Court of Minnesota, not a damages action under § 1983).

121. *Id*. at 750.

122. *See id*. at 752.

123. *Id*. at 751.

124. *Id.* at 749.

require the statements to have actually been used in a criminal trial in order to support a § 1983 claim."[125]

The "strong indication" in which the *Dowell* court referred can be found in *Winslow v. Smith*.[126] In *Winslow*, the plaintiff claimants were convicted and then pardoned for participating in a rape and murder.[127] In their § 1983 claim, they claimed, among other things, that their rights had been violated through the use of coercion to get them to plead guilty.[128] In response to what one plaintiff alleged to be a coercive interrogation, he made a confession regarding his involvement in the crime.[129] Upon entering a guilty plea, his statements were presented to the judge as part of the evidence that would be offered at trial.[130] The Eighth Circuit dismissed the Fifth Amendment claim because the plaintiffs' case never went to trial.[131] The court explained that "we are unaware of any case in which section § 1983 liability has been imposed for 'coercing or inducing a guilty plea.' A guilty plea is not rendered involuntary merely because an officer informs a defendant of the possible alternatives to pleading guilty, including facing the death penalty."[132]

While this case speaks not to when a criminal case technically commences, but more to a § 1983 exclusion for entered guilty pleas, it is indicative of the Eighth Circuit leaning towards the requirement that the self-incriminating statement needs to be used at trial to constitute a § 1983 claim. The *Dowell* court describes that *Winslow* "indicates that the Eighth Circuit agrees with the Third, Fourth, and Fifth Circuits that a statement must be introduced at trial to amount to use in a criminal case."[133]

III. ANALYSIS: HOW THE EIGHTH CIRCUIT SHOULD CONSTRUE THE MEANING OF WHEN A CRIMINAL CASE COMMENCES

The court's plurality indicates that this is by no means a settled issue. The *Chavez* Court did not feel the need to define when a case

125. *Dowell*, 927 F. Supp. 2d at 749.
126. Winslow v. Smith, 696 F.3d 716, 721 (8th Cir. 2012).
127. *Id*.
128. *Id*.
129. *Id*. at 726–27.
130. *Id*. at 727–28.
131. *Id*. at 731 n.4.
132. *Winslow*, 696 F.3d at 737 (citing Hayden v. Nevada Cty., 664 F.3d 770, 772 (8th Cir. 2012)) (holding that a guilty plea was not rendered involuntary when law enforcement told the defendant "that pleading guilty 'would result in only two years of probation, with no fines or further holding'").
133. Dowell v. Lincoln Cnty., 927 F. Supp. 2d 741, 749 (E.D. Mo. 2013).

commences.[134] Instead, it indicated that the Fifth Amendment was not designed to protect against compelled statements not used at trial.[135] To allow this kind of expansion would be counter to the abstention doctrine and would infringe upon the role of the police.[136] However, applying a broad approach to these cases would better comport with historic Fifth Amendment jurisprudence and afford protections for the natural consequences of eliciting compelled statements.

A. THE PLURALITY OF THE *CHAVEZ* COURT

The justices were divided in the *Chavez* plurality decision.[137] This plurality calls into question some concern about the weight of the precedential value of the decision.[138] In both the dissents and the concurrences, the justices raised issues regarding the defendants' rights and raised concerns about over-broadening civil liability. Like the justices, the circuits have split.

The Supreme Court was, by no means, in complete agreement when deciding *Chavez*. Justice Thomas, joined in full by Chief Justice Rehnquist, delivered the opinion of the Court.[139] Justice O'Connor joined as to Parts I and II-A.[140] Justice Scalia joined as to Parts I and II.[141] Justice Souter delivered his own opinion, which was joined by Justice Stevens, Kennedy, Ginsburg, and Breyer.[142] In addition, Justice Breyer joined Justice Souter, concurring with Part I of the judgment.[143] Justice Scalia filed an opinion concurring, in part, with the judgment.[144] Justice Kennedy filed an opinion concurring in part and dissenting in part, which was joined by Justice Stevens in full, and Justice Ginsburg in part.[145] Justice Ginsburg filed an

134. Chavez v. Martinez, 538 U.S. 760, 766–67 (2003).

135. *Id.* at 769; *see supra* text accompanying notes 54-55 (explaining that compelled statements need to be used in a commenced criminal case to constitute a violation and mere compulsion in an interrogation is not enough to constitute a claim).

136. Fehling, *supra* note 26, at 519 (explaining that "courts cannot allow self-incrimination violations for any adverse effects remotely related to the self-incrimination privilege because Fifth Amendment rights are narrowly tailored.").

137. *See infra* text accompanying note 139–146 (explaining the division among the justices).

138. *See infra* text accompanying notes 152–157 (explaining issues with pluralities providing precedent to the lower courts and the varying approaches lower courts take in construing pluralities).

139. *Chavez*, 538 U.S. at 763.

140. *Id.* at 777, n*

141. *Id.* at 777.

142. *Id.* at 777, n*

143. *Id.*

144. *Id.* at 780.

145. *Chavez*, 538 U.S. at 789.

opinion concurring in part and dissenting in part.[146] This confusing mass of additional opinions, partially concurring and partially dissenting, highlights the level of disagreement by the Court in issuing this opinion. The only Justices to fully agree with the opinion were Justice Thomas, who wrote it, and Chief Justice Rehnquist.

In particular, Justice Souter's opinion raises some important concerns. In fact, the court in *Stoot* relied on Justice Souter's opinion in making its decision that the compelled statement need not be used against the claimant at trial.[147] The *Stoot* court explained:

> We note that our conclusion is responsive to the concerns expressed in Justice Souter's concurring opinion in *Chavez.* Justice Souter noted that his primary problem with plaintiff's argument in *Chavez* was that he "offers no limiting principle or reason to foresee a stopping place short of liability in all [cases involving coerced statements]." 538 U.S. at 778–79, 123 S.Ct. 1994. The rule we adopt today, holding that the Fifth Amendment has been violated only when government officials use an incriminating statement to initiate or prove a criminal charge, provides a sensible "stopping place." In cases like *Chavez,* where the suspect was never charged, there would be no violation. Similarly, in cases where police coerce a statement but do not rely on that statement to file formal charges or oppose bail, the Fifth Amendment would not be implicated.[148]

Justice Kennedy's concurring and dissenting opinion also raises an issue in requiring use at trial. Justice Kennedy felt that the statement should not have to be used at trial because "[a] future privilege does not negate a present right."[149] His opinion reflects the idea that the Self-Incrimination Clause was designed as "a substantive constraint on the conduct of the government, not merely an evidentiary rule governing the work of the courts."[150] For Justice Kennedy, the violation occurs when the police force a compelled statement; otherwise interrogations could result in extreme behavior on the part of the police.[151]

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146. *Id.* at 762.
147. Stoot v. Everett, 582 F.3d 915, 925 n.15 (9th Cir. 2009).
148. *Id.*
149. *Chavez*, 538 U.S. at 792; Fehling, *supra* note 26, at 502.
150. *Chavez*, 538 U.S. at 791.
151. *Id.* at 795; Fehling, *supra* note 26, at 502.

It is also important to consider that the precedential value of plurality opinions has been called into question.[152] Consider this portrayal of the chain of decision making that occurs when a plurality opinion has been issued:

> When the Supreme Court decides a case, the Federal District Courts and Circuit Courts of Appeals are responsible for finding the governing rules of law in that decision. The first lower court to deal with the issue often "defines" the holding of the case by reviewing the reasoning found in the Supreme Court's opinion. Other lower courts then rely largely on this interpretation. Plurality decisions greatly complicate this process because lower courts not only have to find the rationale of each opinion, but must also decide which opinion's rationale governs. With all these choices, it is not surprising that plurality decisions often do "more to confuse the current state of the law than to clarify it."[153]

Traditionally, lower courts would only consider the results of these decisions as authoritative, but as plurality decisions have become more common, the lower courts have changed their approach often applying the Justices' opinion that most closely resembles the fact situation in front of them.[154] The lower courts apply the "narrowest grounds" doctrine as laid down in *Marks v. United States*.[155] This requires the court to "identify as authoritative the standard articulated by a Justice or Justices that would uphold the fewest laws as constitutional. Conversely, . . . that which would invalidate the fewest laws as unconstitutional."[156] The *Marks* rule can be interpreted as limiting the precedential reach of authoritative decisions.[157]

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152. Mark Alan Thurmon, *When the Court Divides: Reconsidering the Precedential Value of Supreme Court Plurality Decisions*, 42 DUKE L.J. 419, 422 (1992).

153. *Id.* at 419 (quoting John F. Davis & William L. Reynolds, *Juridical Cripples: Plurality Opinions in the Supreme Court*, 59 DUKE L.J. 59, 62 (1974)).

154. *Id.* at 420–21.

155. *Id.* (quoting the Court in Marks v. United States, 430 U.S. 188 (1977), explaining that "When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds. . . .'").

156. *Id.* at 421 (quoting Planned Parenthood of Se. Pa. v. Casey, 947 F.2d 682, 694 (3d Cir. 1991), *aff'd* in part and *rev'd* in part, 505 U.S. 833 (1992)).

157. *Id.* ("The *Marks* rule, therefore, is intended to limit the precedential reach of plurality decisions, while ensuring that they are followed by lower courts.").

B. WHY COMPELLED STATEMENTS MUST BE USED AT TRIAL TO TRIGGER § 1983 CLAIMS FOR FIFTH AMENDMENT VIOLATIONS

Black's Law Dictionary defines a "case" as a "general term for an action, cause, suit, or controversy at law. . . a question *contested before a court of justice*."[158] The *Chavez* Court offered this definition in its reasoning but declined to specifically define when the case itself commences.[159] The opinion of the Court, however, made it clear that because Martinez's statements were never admitted as testimony against him in a criminal case, he was not entitled to damages.[160] The Court also made clear that mere use of compulsive questioning, without more, does not constitute a constitutional violation.[161]

The Court further explained that caselaw establishes that the government may compel witnesses to testify in certain instances, so long as they are not the subject of the criminal case in which they testify.[162] The Court reasoned that the Ninth Circuit's ruling in *Martinez* is contrary to this set of caselaw.[163] The Court further justified its ruling by explaining that "[e]ven for persons who have a legitimate fear that their statements may subject them to criminal prosecution, we have long permitted the compulsion of incriminating testimony so long as those statements (or evidence derived from those statements) cannot be used against the speaker in any criminal case."[164]

Caselaw indicates that the Fifth Amendment was not designed to protect compelled testimony not used at trial. "Mere coercion does not violate the text of the Fifth Amendment" without the use of those statements at trial.[165] Other remedies already exist to protect against coercive interrogation tactics.[166] Issues of overly-aggressive police

158. Chavez v. Martinez, 538 U.S. 760, 766 (2003) (emphasis added).

159. *Id.* at 767 ("[We] need not decide today the precise moment when a 'criminal case' commences; it is enough to say that police questioning does not constitute a 'case' any more than a private investigator's precomplaint activities constitute a 'civil case.' Statements compelled by police interrogations of course may not be used against a defendant at trial, but it is not until their use in a criminal case that a violation of the Self-Incrimination Clause occurs.") (citations omitted).

160. *Id*.

161. *Id.*

162. *Id*. at 767–68.

163. *Id.* at 767.

164. *Chavez*, 538 U.S. at 768; *see* Brown v. Walker, 161 U.S. 591, 602–04 (1896); Kastigar v. United States, 406 U.S. 441, 458 (1972); United States v. Balsys, 524 U.S. 666, 671–72 (1998).

165. *Chavez*, 538 U.S at 769.

166. *Id.* ("Moreover, our cases provide that those subjected to coercive interrogations have an automatic protection from the use of their involuntary statements (or evidence derived from

interrogations should be addressed through a due process analysis.[167] Similarly, procedural safeguards, in the form of rules, already exist to protect defendants.[168] While one may suffer an infringement of his or her rights against self-incrimination, it may not actually constitute a violation of his or her constitutional rights.[169]

Allowing a § 1983 claim for damages arising from statements not used during a criminal trial would be an unwarranted expansion of a constitutional right. If one's compelled confession is not used in a criminal proceeding, it is difficult to show actual harm.[170] Fifth Amendment § 1983 claims are also limited by the abstention doctrine.[171] The Younger abstention doctrine prevents a federal court from interfering with pending state criminal actions in the absence of unusual circumstances.[172] Caselaw, however, indicates that this abstention doctrine similarly applies in certain civil proceedings.[173] To allow civil suits based on Fifth Amendment § 1983 claims regarding statements not used at trial, would be an expansion counter to the abstention doctrine.

Finally, the permitted § 1983 claims should not be expanded beyond the required use at trial, because this expansion would encroach upon the

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their statements) in any subsequent criminal trial. . . .") (citing Oregon v. Elstad, 470 U.S. 298, 307-08 (1985); United States v. Blue, 384 U.S. 251, 255 (1966); Leyra v. Denno, 347 U.S. 556, 558 (1954); Ashcraft v. Tennessee, 322 U.S. 143, 155 (1944)).

167. Fehling, *supra* note 26, at 505.

168. *Id.* at 517 (explaining "Procedural safeguards already exist in the form of prophylactic rules to protect defendants from coercive police conduct. The Supreme Court has repeatedly determined that a defendant may suffer an infringement of his self-incrimination rights without enduring a violation of constitutional rights."); *see e.g.*, Miranda v. Arizona, 384 U.S. 436, 444–45 (1966) (discussing *Miranda* rights).

169. *Miranda*, 384 U.S. at 444–45; *see, e.g.*, Michigan v. Tucker, 417 U.S. 433, 444 (1974) (finding "procedural safeguards were not themselves rights protected by the Constitution, but were, instead, measures to insure that the right against compulsory self-incrimination was protected").

170. STATE AND LOCAL GOVERNMENT CIVIL RIGHTS LIABILITY § 1:12 at 1 (citing Carey v. Piphus, 435 U.S. 247 (1978)) (holding § 1983 plaintiffs can only recover for actual damages which can be traced to the involuntary confession, but there would be no recovery simply because of the Fifth Amendment violation).

171. *Id*. (citing Younger v. Harris, 401 U.S. 37 (1971)).

172. WRIGHT, ET AL., *supra* note 36, at § 4252.

173. *Id.*

responsibilities of the police.[174] Further, the Constitution does not guarantee a flawless trial without interference from police.[175]

C. WHY COMPELLED STATEMENTS NEED NOT BE USED AT TRIAL TO TRIGGER A § 1983 CLAIM

Historically, courts have construed the Fifth Amendment liberally and § 1983 claims should be no different. In *Hoffman v. United States*, the Supreme Court described that the Fifth Amendment "must be accorded liberal construction in favor of the right it was intended to secure."[176] In *Ullmann v. United States*, Justice Frankurter warned against allowing a "shelter for wrongdoers" by construing the privilege against self-incrimination in a hostile manner.[177] Justice Frankfurter explained that, "[t]he privilege against self-incrimination serves as a protection to the innocent as well as to the guilty, and we have been admonished that it should be given a liberal application."[178] There is no reason that the manner in which the Court historically approaches Fifth Amendment violations should be different when considering § 1983 claims simply because civil liability is at issue.

Ultimately, requiring the use of coerced statements at trial makes it overly challenging for people to pursue § 1983 claims. In *Cooper v. Dupnik*, the Ninth Circuit iterated that the purpose of the Fifth Amendment is to prevent coercive interrogation practices that are destructive of human dignity.[179] Therefore, requiring the use of compelled statements would frustrate the purpose of the Fifth Amendment as described in *Cooper*. Individuals should be protected from police practices designed to

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174. Fehling, *supra* note 26, at 519 (citing United States v. Sweets, 526 F.3d 122, 129 (2007) ("Taken as a whole, Sweets' argument presents a mistaken but common view of the Fifth Amendment's self-incrimination clause as a 'right to be free from coercive custodial interrogation.' The Amendment, however, says no such thing. Rather, the right against self-incrimination is a trial right aimed at protecting the accused from the indignity of being compelled to give testimony against himself.").

175. *Id.* (citing *Michigan*, 417 U.S. at 446) ("Just as the law does not require that a defendant receive a perfect trial, only a fair one, it cannot realistically require that policeman investigating serious crimes make no errors whatsoever. The pressures of law enforcement and the vagaries of human nature would make such an expectation unrealistic. Before we penalize police error, therefore, we must consider whether the sanction serves a valid and useful purpose").

176. Hoffman v. United States, 341 U.S. 422, 486 (1956); *see supra* text accompanying note 29 (explaining that "[t]he privilege afforded not only extends to answers that would in themselves support a conviction under a federal criminal statute but likewise embraces those which would furnish a link in the chain of evidence needed to prosecute the claimant for a federal crime.").

177. *Ullmann*, 350 U.S. at 426; *see supra* text accompanying note 32.

178. *Ullmann*, 350 U.S. at 427.

179. *See* Cooper v. Dupnik, 963 F.2d 1220, 1244–45 (9th Cir. 1992).

circumvent the Fifth Amendment.[180] Some scholars are even concerned that the lack of remedy for pre-trial use of these statements will actually encourage coercive police tactics.[181] Concerns are centered on the idea that compelled statements could be used at pre-trial proceedings, including bail hearings and the filing of charges, without fear of liability under § 1983, because police know that the majority of cases never reach the trial phase.[182] In certain cases, another enormous loophole is present. As explained earlier, the court in *Murray v. Earle* reasoned that the judge's actions in allowing her statements in at trial constituted an intervening action that broke the chain of causation.[183] In the Fifth Circuit, then, to trigger a § 1983 claim, a compelled statement must be used at trial, but the judge's decision to allow the admission of these statements constituted a break in the chain of causation, which was necessary to bring a claim.[184] This leads to an apparent issue for claimants in the Fifth Circuit.

Section 1983 claims should protect against the natural consequences of coercive interrogation.[185] In *Murray*, the court described reading § 1983 against a background of tort liability, as it required a showing of proximate cause.[186] This background of tort liability would make the tortfeasors liable for the natural consequences of his actions.[187] The *Murray* court notes that at the time of the interrogation, it was not well-established in the Fifth

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180. Paulo C. Alves, *"Taking the Fifth" Beyond Trial: § 1983 Claims for Pre-Trial Use of Coerced Statements Affirms One's Right Against Self-Incrimination*, 26 J. C.R. & ECON. DEV. 253, 273 (2012) (describing the critical role of a civil claim for pre-trial coerced statements in addressing police department policies designed to circumvent the Fifth Amendment; not having a right of action could encourage these practices so as to use coerced statements in charging, bail hearings, and other proceedings).

181. *Id.* at 272; *see* Higazy v. Templeton, 505 F.3d 161, 174 (2d Cir. 2007).

182. Alves, *supra* note 180, at 272–73.

183. *See* Murray v. Earle, 405 F.3d 278, 292 (5th Cir. 2005).

184. *See id.* at 285, 291–93 ("Section 1983 does require a showing of proximate causation, which is evaluated under the common law standard. . . . Defendants advance that the trial judge's decision to admit LaCresha's statement into evidence constitutes such a superseding cause, and that, absent any allegation or proof that they endeavored to mislead the judge into admitting an involuntary statement at trial, they cannot have acted 'unreasonably' according to clearly established law for purposes of § 1983 liability. . . . We are constrained to hold that it constituted a superseding cause of LeCresha's injury, relieving the defendants of liability under § 1983.").

185. *Id.* at 290–91 (explaining "[i]n cases like this one, we read § 1983 against the background of tort liability that makes a person liable for the natural consequences of his actions. A corollary of these background tenets of tort law relieves tortfeasors from liability if there exists a superseding cause. . . .").

186. *Id.*; *see* Sims v. Adams, 537 F.2d 829, 831 (5th Cir. 1976) (explaining "requisite causation is that a supervisory defendant is subject to § 1983 liability when he breaches a duty imposed by state or local law, and this breach causes plaintiff's constitutional injury."); Monroe v. Pape, 365 U.S. 167, 178 (1961).

187. *Murray*, 405 F.3d at 291–92; *see also* Malley v. Briggs, 475 U.S. 335, 339–40 (1986) (looking to guidance from common law privileges and immunities, and the purpose and history of § 1983).

Circuit that pre-trial interrogations could expose police officers to liability.[188] In addition, the claimant failed to show that the judge did not hear all of the relevant facts about her interrogation in determining whether to admit the confession.[189] While the court in *Murray* found a superseding cause of injury, this unjust loophole in the causation chain has already been discussed in the preceding paragraph. The language from *Murray* and its precedent caselaw, however, are clear that § 1983 should be considered within the framework of tort law and in that case, the natural consequences of a coercive interrogation should be covered under a § 1983 claim.[190] This should include proceedings prior to trial.

The Fifth Amendment should apply to proceedings before trial, as other constitutional rights apply, for example, at bail hearings.[191] The *Higazy* court explains that bail hearings have a status of holding other constitutional protections, and thus bringing bail hearings, under the definition of a criminal case.[192] The Supreme Court concluded that in the context of the Sixth Amendment, a bail hearing is a "critical stage of the State's criminal process at which the accused is as much entitled to aid (of counsel). . . as at the trial itself."[193]

The Court also held that a bail hearing is "a criminal proceeding" in the context of the Eighth Amendment.[194] As such, the Fifth Amendment should similarly apply to bail hearings.[195]

D. HOW FIFTH AMENDMENT § 1983 CLAIMS SHOULD BE SHAPED IN THE FUTURE: THE EIGHTH CIRCUIT AND THE SUPREME COURT

The arguments for not requiring the use of compelled statements at trial are more compelling than the arguments to the contrary. The Supreme Court has made it clear that a coercive interrogation alone is not enough to constitute a Fifth Amendment violation, which would entitle a claimant to

188. *Id.* at 293 ("In this circuit, it was not well-established at the time of LaCresha's interrogation that an official's pre-trail interrogation of a suspect could subsequently expose that official to liability for violation of a suspect's Fifth Amendment rights at trial.").

189. *Id.*

190. *Id.* at 290.

191. Higazy v. Templeton, 505 F.3d 161, 172 (2d Cir. 2007).

192. *Id.*

193. *Id.* (citing Colemen v. Alabama, 399 U.S. 1, 9–10 (1970)).

194. Stack v. Boyle, 342 U.S. 1, 6–7 (1951).

195. See *Higazy*, 505 F.3d at 172–73 (discussing *Stack*, 342 U.S. at 6–7, which explains that the Court also treated bail hearings as "criminal proceedings" within the Eighth Amendment context); United States v. Abuhamra, 389 F.3d 309, 323 (2d Cir. 2004) ("[b]ail hearings fit comfortably within the sphere of adversarial proceedings closely related to trial").

damages under § 1983.[196] The Eighth Circuit, however, should find in accordance with the Second, Seventh, and Ninth Circuits that compelled statements need only be used at a criminal proceeding, but not required to be used at the trial itself.[197] In particular, use at bail hearings, and anything beyond a bail, hearing should be sufficient to establish a claim. The Court has held that a bail hearing is "a criminal proceeding" in the context of the Eighth Amendment, which is sufficient for Sixth Amendment violations.[198] Therefore, courts should find that use at a bail hearing is sufficient for a claim regarding a Fifth Amendment violation. To require the use of statements at trial, the Eighth Circuit would be making it overly difficult for claimants to pursue § 1983 claims, frustrating the very purpose of the Fifth Amendment.[199]

Further, the Eighth Circuit should not construe a judge's decision to allow a statement to be used at trial as an intervention in causation.[200] This too creates an unjust challenge to pursuing § 1983 claims for the violation of a claimant's Fifth Amendment right against self-incrimination, making a judge's potentially erroneous determination at a suppression hearing determinative of one's ability to sue for a constitutional violation.[201]

In a future ruling to resolve the circuit split, the Supreme Court should step in to clarify the meaning of when a criminal case commences. The Supreme Court should not be concerned about the Younger abstention doctrine. The rule does not bar a federal court from providing relief so long as it does not hinder state criminal prosecution.[202] The Supreme Court held that state criminal practices can be challenged in federal court when the

196. *See supra* text accompanying notes 54–56 (explaining that mere compulsion in an interrogation is not enough for a § 1983 claim and that the initiation of legal proceedings is required); Chavez v. Martinez, 538 U.S. 760, 766–67 (2003).

197. *See supra* text accompanying notes 78–97; *see generally* Best v. City of Portland, 554 F.3d 698, 698 (7th Cir. 2009); *Higazy*, 505 F.3d at 161; Stoot v. Everett, 582 F.3d 919, 927 (9th Cir. 2009).

198. *See supra* note 195 and accompanying text; *Higazy*, 505 F.3d at 172–73; Stack v. Boyle, 342 U.S. 1, 6–7 (1951).

199. *See supra* text accompanying notes 167, 180 (explaining that the purpose of the Fifth Amendment is to prevent coercive interrogation practices that are destructive of human dignity); *see also* Cooper v. Dupnik, 963 F.2d 1220, 1247-48 (9th Cir. 1992).

200. *See supra* notes 183–185 and accompanying text (explaining that the judge's decision in *Murray* to admit the statements constituted a superseding intervention in the chain of causation; based on the approach of reviewing claims against a torts background, this superseding intervention prohibits liability on the part of the officers.); Murray v. Earle, 405 F.3d 278, 291-93 (5th Cir. 2005).

201. *Murray*, 405 F.3d at 285.

202. *See* WRIGHT, ET AL., *supra* note 36, § 4252.

relief requested is not directed at the prosecution, and the Court held that the federal claim cannot be raised in defense of the criminal prosecution.[203]

Finally, this Article does not address particular protections that should be put in place for cases involving juveniles. Despite this fact, it is an important topic within the § 1983 discussion that needs attention.

IV. CONCLUSION

Interpreting the *Chavez* decision as only applying when the compelled statements are used at trial, undercuts the very nature of the protections provided for in § 1983.[204] The purpose of the Fifth Amendment is to "prevent coercive interrogation practices that are destructive of human dignity."[205] Historically, the Fifth Amendment has been construed liberally, and as such, should be construed liberally in cases involving § 1983 claims.[206]

The Second, Seventh, and Ninth Circuits have correctly held that compelled statements need not be used at trial to permit a § 1983 claim.[207] The Supreme Court should settle the circuit split by defining when a case commences, allowing for § 1983 claims when the compelled statements are used at earlier criminal proceedings, such as bail hearings.[208]

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203. *Id*.

204. *See supra* text accompanying notes 166–86 (arguing that requiring use at trial makes it overly challenging for people to pursue claims, which frustrates the very purpose of § 1983).

205. *See supra* text accompanying note 179.

206. *See supra* text accompanying notes 27–32 (describing Hoffman v. United States, 341 U.S. 479, 479 (1951), and Ullmann v. United States, 350 U.S. 422, 422 (1956), in which the Supreme Court construed the Fifth Amendment liberally).

207. *See supra* text accompanying notes 78–94 (explaining the courts' approaches and analyses in Best v. City of Portland, 554 F.3d 698, 698 (7th Cir. 2009), Higazy v. Templeton, 505 F.3d 161, 179 (2d Cir. 2007), and Stoot v. Everett, 582 F.3d 919, 919 (9th Cir. 2009)).

208. *See supra* text accompanying notes 190–195 (referencing how bail hearings are sufficient for claims of violations of other constitutional rights, by parallel argument should be enough to constitute a claim for violation of the Fifth Amendment); Stack v. Boyle, 342 U.S. 1, 6–7 (1951); *Higazy*, 505 F.3d at 172 (citing Colemen v. Alabama, 399 U.S. 1, 9–10 (1970)).