Cooper V. Dupnik: Civil Liability For Unconstitutional Interrogations

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I. Introduction

Custodial interrogations often invite police misconduct because they tend to occur in private, closed settings. Ultimately, police try to dominate the interrogation by isolating suspects in restricted, sterile rooms, with only detectives and the suspect present. Often the police design the atmosphere to intimidate suspects and make them feel helpless. The interrogation may involve anything from psychological tactics to physical violence. Although such methods raise questions as to the appropriateness of interrogation, police argue that interrogation is an essential tool in criminal investigation because the suspect is often the only person who knows any details of the crime. When dealing with claims of unconstitutional interrogations, courts...
should not hamper police in their pursuit of criminals with the fear of civil liability, but because of the ease with which police can transgress a suspect's constitutional rights during custodial interrogation, strong remedies to deter such conduct are essential.

Although the exclusionary rule bars the use of unconstitutional confessions at trial, the rule alone cannot deter police misconduct. First, the suspect may never go to trial, making the exclusionary rule unavailable. Second, if the suspect does go to trial, the prosecution may introduce voluntary statements that the police obtain in violation of \textit{Miranda v. Arizona} for impeachment purposes at trial. Therefore, if suspects invoke their \textit{Miranda} rights, the police have some incentive to continue questioning the suspects in a noncoercive manner, in hopes of limiting the suspects' ability to testify at trial. If the police do use coercive tactics during interrogation, the statement they obtain is inadmissible at trial for all purposes, although a court's admission of an involuntary statement is


9. See Mincey v. Arizona, 437 U.S. 385, 396 (1978) (stating that prosecution cannot constitutionally introduce involuntary confessions at trial); Miranda v. Arizona, 384 U.S. 436, 444 (1966) (holding that prosecution may not introduce statements at trial unless police obtained them using safeguards to protect suspect's rights under Fifth Amendment Self-Incrimination Clause); Spano v. New York, 360 U.S. 315, 320 (1959) (noting that because involuntary confessions violate Due Process Clause, they are inadmissible at trial).

10. See Harris, 401 U.S. at 232 (Brennan, J., dissenting) (noting that impeachment exception to exclusionary rule may encourage police to interrogate suspect in violation of \textit{Miranda}); Cooper v. Dupnik, 963 F.2d 1220, 1225 (9th Cir.) (en banc) (involving police attempt to elicit voluntary statements from suspect after suspect invoked right to counsel, because potential use of such statements at trial for impeachment would keep suspect from testifying), cert. denied, 113 S. Ct. 407 (1992).

11. See Cooper, 963 F.2d at 1223 (involving unlawful interrogation of suspect whom police later released and never charged with any crime); Thornton v. Buchmann, 392 F.2d 870, 874 (7th Cir. 1968) (holding that only significance of statement police obtain in violation of \textit{Miranda} is that court must exclude it from trial).

12. 384 U.S. 436 (1966); see infra note 48 (discussing holding of \textit{Miranda}).


14. See id. at 225-26; Miranda v. Arizona, 384 U.S. 436, 479 (1966) (stating that prosecution may use evidence against suspect at trial that police obtain from suspect without \textit{Miranda} warnings and waiver). In \textit{Harris} the Supreme Court held that the prosecution could use statements that police obtained in violation of \textit{Miranda} to impeach the defendant, provided that the statements were not actually involuntary. \textit{Harris}, 401 U.S. at 225. In his dissent, Justice Brennan argued that this impeachment exception gives the police incentive to violate \textit{Miranda} to obtain a voluntary statement that the prosecution can use to impeach the suspect. \textit{Id.} at 232. Brennan implied that use of the statements for impeachment would encourage the defendant not to testify in his own defense. \textit{Id.} at 232.

15. See Mincey v. Arizona, 437 U.S. 385, 398 (1978) (noting that prosecution may not
subject to harmless error analysis. Because courts' exclusion of improperly obtained statements will not sufficiently deter such police misconduct in all instances, other methods of deterrence are appropriate.

A cause of action for civil damages under section 1983 of the United States Civil Rights Acts may act as an additional deterrent. To establish a section 1983 cause of action, suspects must show that the police, acting under color of state law, deprived them of a constitutional right during the interrogation. Plaintiffs typically allege a constitutional violation under the Fifth Amendment privilege against self-incrimination or the Fourteenth Amendment Due Process Clause, because these constitutional provisions traditionally have governed police behavior during interrogations.

Courts use involuntary statements at trial for any purpose); Cooper v. Dupnik, 963 F.2d 1220, 1247 (9th Cir.) (en banc) (reiterating that impeachment exception applies only to voluntary statements), cert. denied, 113 S. Ct. 407 (1992).

See Arizona v. Fulminante, 111 S. Ct. 1246, 1251 (1991) (stating that courts should apply harmless error analysis to trial court's admission of involuntary confessions).

See Harris, 401 U.S. at 232 (Brennan, J., dissenting) (noting that impeachment exception sends message to police that they can ignore Miranda's safeguards in attempt to keep suspect from testifying on his own behalf); Cooper, 963 F.2d at 1225 (involving deliberate police plan to unlawfully interrogate suspect to keep suspect from testifying in his own defense and to eliminate insanity defense).


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.

Id.

See id. (requiring that defendant, acting under color of state law, deprive § 1983 plaintiff of right under Constitution); Cooper, 963 F.2d at 1236 (noting that viability of § 1983 suit depends on whether defendants deprived plaintiff of constitutional right). Courts may protect the police through the doctrine of qualified immunity if the courts had not clearly established the legal standards the police violated at the time of the constitutional violation. Id. at 1251. See generally Alfredo Garcia, The Scope of Police Immunity from Civil Suit Under Title 42 Section 1983 and Bivens: A Realistic Appraisal, 11 WHITTIER L. REV. 511 (1989) (noting that Supreme Court's interpretation of qualified immunity doctrine presents § 1983 plaintiff with nearly insurmountable barrier to obtaining damages from individual police officers); Kit Kinports, Qualified Immunity in Section 1983 Cases: The Unanswered Questions, 23 GA. L. REV. 597 (1989) (arguing that courts must balance their desire to protect public officials from fear of personal liability by granting qualified immunity with purposes of § 1983). This Note will not discuss actions by federal agents, because § 1983 does not address such actions.

20. See Cooper v. Dupnik, 924 F.2d 1520, 1529 n.17 (9th Cir. 1991) (noting that Supreme Court uses Fifth Amendment privilege against self-incrimination and Due Process Clause to analyze coerced confessions), rev'd, 963 F.2d 1220 (en banc), cert. denied, 113 S. Ct. 407 (1992). The Fifth Amendment provides in part that "[N]o person . . . shall be compelled in any criminal case to be a witness against himself." U.S. CONST. amend. V. The Fourteenth Amendment Due Process Clause provides, "[N]or shall any State deprive any person of life, liberty, or property, without due process of law." Id. amend XIV, § 1.

In 1936 the Supreme Court began analyzing confessions under the Due Process Clause
have allowed section 1983 claims based on the Due Process Clause, but until recently courts had not allowed section 1983 claims based on the Fifth Amendment Self-Incrimination Clause as interpreted by the *Miranda* decision.

of the Fourteenth Amendment, because it had not yet applied the Fifth Amendment privilege against self-incrimination to the states. Brown v. Mississippi, 297 U.S. 278, 285-86 (1936); see infra note 198 (discussing holding of *Brown*). The test the Court developed over the next 30 years focused on the voluntariness of the suspect’s confession. Herman, *supra* note 5, at 746-47. Any statements had to be the product of an essentially free and unconstrained choice. *Id.* This standard was a compromise between disallowing all statements police obtain during interrogations and admitting all statements made under any circumstances. *Id.* This compromise standard allows the police to interrogate suspects so long as the police do not cross the line. The problem with the standard is that the definition of voluntariness is vague and gives little guidance for determining when police behavior goes to far. *Id.*

The Supreme Court provided more protection for interrogated suspects in 1964 in *Massiah* v. United States, 377 U.S. 201 (1964). The *Massiah* Court held that, once the police begin formal proceedings against a suspect, the suspect’s Sixth Amendment right to counsel attaches. *Id.* at 205. The Sixth Amendment provides in part that “*In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.*” U.S. CONST. amend. VI. If the police formally charge a suspect and then interrogate the suspect, they must honor the suspect’s request for counsel or courts may not admit any resulting statements at trial. *Massiah*, 377 U.S. at 206. However, the *Massiah* Court focused on the proper operation of the adversary system, not on the suspect’s Fifth Amendment privilege. Herman, *supra* note 5, at 743. Because of this focus on the adversarial system, *Massiah*’s protections apply only after police demonstrate their intention to prosecute the suspect. *Id.* Because most interrogations occur before police begin formal judicial proceedings against a suspect, *Massiah*’s protections attach too late to protect most suspects. *Id.*

A few months after *Massiah*, the Supreme Court again addressed the admissibility of confessions police obtained during interrogation in *Escobedo* v. Illinois, 378 U.S. 478 (1964). In *Escobedo*, the Court held that the trial court could not admit a statement the police obtained after ignoring a suspect’s request for counsel when the suspect was the focus of the police criminal investigation. *Id.* at 490-91. The Court’s basis for the holding was the Sixth Amendment right to counsel, but the language of the opinion suggested that the Court’s true concern was with the suspect’s Fifth Amendment privilege. *Id.* at 488-89.

During the same term as *Escobedo*, the Court applied the Fifth Amendment privilege against self-incrimination to the states in *Malloy* v. Hogan, 378 U.S. 1, 3 (1964). Two years later the Court decided *Miranda*, formally holding that the Fifth Amendment privilege protects suspects during custodial interrogations. *Miranda* v. Arizona, 384 U.S. 436, 467 (1966); see infra note 48 (discussing holding of *Miranda*). Since *Miranda*, the Court has continued to use the voluntariness analysis developed in *Brown*. *See Cooper*, 924 F.2d at 1529 n.17 (noting that courts analyze allegedly coerced confessions under Due Process Clause due to historical accident). The Court now analyzes violations of the Fifth Amendment privilege by using the *Miranda* holding and the presumption of coercion during custodial interrogations. *Id.* The Court uses the due process voluntariness analysis to address claims of actual coercion. *Id.* In addition, the due process standard protects suspects from police questioning in situations outside the scope of *Miranda*. *See Fulminante*, 111 S. Ct. at 1252-53 (analyzing suspect’s allegedly coerced confession under Due Process Clause, even though *Miranda*’s procedural safeguards did not apply because police did not question suspect during custodial interrogation).

21. *See infra* note 182 (citing cases in which courts have allowed § 1983 claims, based on the Due Process Clause, for confessions which the police coerced).

22. *See Cooper*, 924 F.2d at 1527 (noting that no court has allowed § 1983 claims based on *Miranda* violations because *Miranda* requirements are not constitutionally based).
In *Cooper v. Dupnik*, a recent opinion by the United States Court of Appeals for the Ninth Circuit, the court expanded the potential application of section 1983 suits to unlawful interrogations by allowing a section 1983 cause of action for violations of the Fifth Amendment privilege against self-incrimination. In addition, the *Cooper* court determined that a due process violation for police coercion is complete with the coercive interrogation, and the court found that deliberately unlawful police behavior "shocks the conscience" and is therefore actionable under section 1983 as a violation of substantive due process.

The *Cooper* court found a prima facie case under section 1983 on three constitutional theories. First, the *Cooper* court found a section 1983 cause of action under the Fifth Amendment self-incrimination clause because the police coerced Cooper, in an attempt to elicit a confession, after ignoring his request for an attorney. This decision marked the first time a court found a section 1983 cause of action for violation of the Fifth Amendment privilege against self-incrimination during interrogation.

The *Cooper* decision highlights the existing disagreement over whether a section 1983 claim arises at the time of interrogation or if the prosecution must introduce at trial evidence the police obtained during questioning for a constitutional violation to be complete. Second, the court found a section 1983 violation

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23. 963 F.2d 1220 (9th Cir. 1992) (en banc).
25. See *id.* at 1244 (holding that Constitution prohibits police from coercing statements from suspects).
26. See *id.* at 1250 (holding that deliberate police plan to violate suspect's *Miranda* rights shocked conscience).
27. *Id.* at 1237.
28. *Id.* at 1242.
29. See, e.g., *Davis v. City of Charleston*, 827 F.2d 317, 322 (8th Cir. 1987) (deciding that police failure to inform suspect of *Miranda* rights did not deprive suspect of constitutional right); *Bennett v. Passic*, 545 F.2d 1260, 1263 (10th Cir. 1976) (holding that no rational argument exists for allowing § 1983 claim for failure to inform suspect of *Miranda* rights); *Thornton v. Buchmann*, 392 F.2d 870, 874 (7th Cir. 1968) (finding police failure to inform suspect of *Miranda* rights not actionable under § 1983).
30. See *Mahoney v. Kesery*, 976 F.2d 1054, 1062 (7th Cir. 1992) (recognizing view that Constitution forbids police from coercing confession whether or not prosecution introduces confession at trial); *Cooper v. Dupnik*, 963 F.2d 1220, 1245 (9th Cir.) (en banc) (noting that use of coerced statement is not necessary for constitutional violation), *cert. denied*, 113 S. Ct. 407 (1992); *Duncan v. Nelson*, 466 F.2d 939, 945 (7th Cir.) (allowing § 1983 cause of action solely for damages arising from unlawful interrogation and confession), *cert. denied*, 409 U.S. 894 (1972).
31. See *Mahoney*, 976 F.2d at 1061-62 (acknowledging existence of view that only prosecution's use of coerced confessions is unconstitutional); *Cooper*, 963 F.2d at 1253 (Brunetti, J., dissenting) (arguing that no § 1983 cause of action exists when prosecution introduces no statements in criminal proceeding); *Johnson v. Whalen*, No. 91-C-3138, 1991 WL 278297, at *3 (N.D. Ill. Dec. 26, 1991) (holding that police coercion following suspect's
based upon the Due Process Clause of the Fourteenth Amendment because
the police obtained the statement through coercion.\(^3\) The distinction, if
any, between this cause of action and the Fifth Amendment self-incrimi-
nation cause of action is unclear.\(^3\) Finally, the court found a section 1983
claim based upon a substantive violation of the Due Process Clause of the
Fourteenth Amendment because the police behavior shocked the con-
sience.\(^3\) The difference between the two claims based on the Due Process
Clause also is unclear.\(^3\)

The Cooper court’s analysis of the three section 1983 theories raises
questions about the future scope of section 1983 actions for unlawful
custodial interrogations.\(^3\) Although the court’s holding expands the potential
for section 1983 actions in the context of interrogations, the decision contains
language that likely will limit its impact.\(^3\) Given courts’ perception that

request for counsel is not actionable under § 1983 because no constitutional violation exists
unless prosecution makes use of statement); Jackson v. Dillon, 518 F. Supp. 618, 621 (E.D.N.Y.
1981) (noting that until court allows prosecution to introduce involuntary statement at trial no
constitutional violation exists); Ransom v. City of Phila., 311 F. Supp. 973, 974 (E.D. Pa.
1970) (same).

32. Cooper, 963 F.2d at 1248; see also supra note 20 (quoting language of Fourteenth
Amendment Due Process Clause).

33. See, e.g., Govan v. Chicago Police Dept’, No. 90-C-3471, 1991 WL 38695, at *2
(N.D. Ill. Mar. 18, 1991) (analyzing suspect’s allegations of coerced confession under Fifth
Amendment Self-Incrimination Clause); Laurence A. Benner, Requiem for Miranda: The
Rehnquist Court’s Voluntariness Doctrine in Historical Perspective, 67 Wash. U. L.Q. 59, 148
(1989) (discussing relationship between Fifth Amendment compulsion and due process coercion);
Joseph D. Grano, Selling the Idea to Tell the Truth: The Professional Interrogator and Modern
Confessions Law, 84 Mich. L. Rev. 662, 687-88 (1986) (reviewing Fred E. Inbau et al.,
Criminal Interrogation and Confessions (1986)) (arguing that Fifth Amendment compulsion
is same as due process coercion); Arnold H. Loewy, Police-Obtained Evidence and the
Constitution: Distinguishing Unconstitutionally Obtained Evidence From Unconstitutionally
Used Evidence, 87 Mich. L. Rev. 907, 933-34 (1989) (arguing that statements police obtain
from Miranda violations under Fifth Amendment are not unconstitutionally obtained, while
some statements that are coerced under the Due Process Clause are unconstitutionally obtained);
(contending that due process violations occur only when police break suspect’s will, while
Fifth Amendment privilege against self-incrimination, as interpreted by Miranda, is not so
limited).

34. See Rochin v. California, 342 U.S. 165, 172-73 (1952) (finding that police behavior
that shocks conscience violates due process); Cooper, 963 F.2d at 1248 (noting that suspects
may sue under § 1983 for police conduct that violates due process because it shocks conscience);
infra note 209 (discussing holding of Rochin).

35. See Duncan v. Nelson, 466 F.2d 939, 944 (7th Cir.) (holding that involuntary
confessions are actionable under § 1983 because police behavior offends standards of decency
and fairness), cert. denied, 409 U.S. 894 (1972); Loewy, supra note 33, at 934 (noting that
distinction between police behavior merely resulting in coerced confessions is difficult to
distinguish from police behavior which is actionable under § 1983 because behavior is unconsti-
tutional on its own).

36. See Mahoney v. Kesery, 976 F.2d 1054, 1062 (7th Cir. 1992) (noting Cooper court’s
broad interpretation of Self-Incrimination Clause).

37. See Cooper v. Dupnik, 963 F.2d 1220, 1244 (9th Cir.) (en banc) (stating that police
failure to respect suspect’s invocation of Miranda rights is not actionable under § 1983 unless
section 1983 suits are too common and often frivolous and the United States Supreme Court's recent limitations on some section 1983 causes of action, courts probably will interpret Cooper narrowly by focusing on the decision's limiting language rather than the decision's broader potential. Courts should not expand section 1983 claims based on the Fifth Amendment privilege against self-incrimination and the Miranda decision, despite the potential to do so after the Cooper decision. Rather, courts should address intentionally unlawful police behavior during interrogations under the shock-the-conscience standard, using the Cooper court's expansive interpretation of the standard.

II. Cooper v. Dupnik

In Cooper v. Dupnik, the Ninth Circuit sitting en banc considered whether to uphold the district court's grant of a motion for summary judgment in a section 1983 action based on an allegedly unconstitutional


38. See Town of Newton v. Rumery, 480 U.S. 386, 395-96 (1987) (noting that many § 1983 suits are marginal and frivolous and burden on officials defending them is great); Barnier v. Szentmiklosi, 565 F. Supp. 869, 874 (E.D. Mich. 1983) (noting that in 1983, 16.5% of all civil cases in federal courts were civil rights claims, although not necessarily brought under § 1983), rev'd in part, 810 F.2d 594 (6th Cir. 1987). But see Eisenberg & Schwab, supra note 7, at 694 (concluding from empirical study that courts' false perception of § 1983 suits as frivolous and burdensome arises because such suits are more time consuming and expensive than other types of suits, while success rate is lower).


40. See Mahoney, 976 F.2d at 1062 (acknowledging Cooper court's expansive interpretation of Fifth Amendment privilege against self-incrimination, but declining to address soundness of interpretation); Haupt, 794 F. Supp. at 1489 (finding no § 1983 cause of action for mere police failure to respect suspect's request for counsel during interrogation because police did not follow failure to honor request with coercive behavior).

41. See infra notes 137-43 and accompanying text (discussing Cooper court's potential expansion of § 1983 claims due to police failure to respect suspect's Miranda rights).

42. See infra notes 224-28 and accompanying text (discussing appropriateness of shock-the-conscience standard for addressing § 1983 claims of unlawful police conduct during interrogation).
interrogation. The case involved a task force, made up of police officers from the Tucson Police Department and the Pima County Sheriff's Department, formed to catch the "Prime Time Rapist." The police believed the Prime Time Rapist was responsible for a series of rapes, robberies, and kidnappings in the Tucson area from 1984 through 1986. The task force decided, before it focused on a suspect, that when it arrested a suspect it would interrogate him until he confessed, even if the suspect invoked his right to counsel or his right to remain silent under Miranda v. Arizona.

In 1986 the task force, misinformed by erroneous fingerprint analysis, arrested Michael Cooper. Although the task force advised Cooper of his Miranda rights, it did so in a superficial

44. Id.
45. Id.
46. See Miranda v. Arizona, 384 U.S. 436, 444 (1966) (holding that police must provide suspects with certain procedural safeguards during custodial interrogations to protect Fifth Amendment privilege against self-incrimination); Cooper, 963 F.2d at 1224. The task force's preconceived plan included choosing an interrogator even before it had a suspect for the rapes. They selected a detective known for his confrontational "hammering" technique and his ability to instill a sense of hopelessness in the suspect. Id. The task force's plan was well known to supervisors in the police departments, who did not object to it. Id. at 1227. In addition, evidence existed that the Pima County Sheriff's Department generally encouraged such behavior when dealing with crimes involving public safety concerns. Id.
47. Cooper, 963 F.2d at 1228; see Dee Ralles, Right to Sue OK'd in Rape Mix-Up, ARIZ. REPUBLIC, May 7, 1992, at B4 (discussing Ninth Circuit's ruling allowing Cooper to sue police for damages for his treatment during interrogation). Mr. Cooper was the second suspect the police arrested for the series of rapes. John David Harrell was the first suspect the task force questioned. Like Cooper, he invoked his right to counsel, and the police also ignored his request. Cooper, 963 F.2d at 1226. The task force finally closed the case when Brian Larriva, the actual rapist, killed himself as the police came to arrest him. Ralles, supra, at B4.
48. See Miranda, 384 U.S. at 444 (requiring that police advise suspect of right to remain silent and right to counsel prior to custodial interrogation); Cooper v. Dupnik, 963 F.2d 1220, 1228 (9th Cir.) (en banc), cert. denied, 113 S. Ct. 407 (1992). In Miranda the Supreme Court considered the admissibility of statements that prosecutors obtain from suspects during custodial interrogations. Miranda, 384 U.S. at 439. In each of the interrogations at issue in Miranda, the police interrogated the suspect in a room where the suspect was isolated from the outside world. Id. at 445. The Miranda Court first determined that the atmosphere of isolation combined with a police-dominated atmosphere was inherently coercive, even in the absence of physical intimidation. Id. at 457. Next, the Miranda Court held that the Fifth Amendment privilege against self-incrimination is not limited to the courtroom, but applies to any setting where the police curtail the suspect's freedom of action. Id. at 467. The Court then specified that to negate the coerciveness of such interrogations, the police must inform the suspects that they have the right to remain silent, that any statement they make may be used against them at trial, and that they have the right to have an attorney, either retained or appointed, present during the questioning. Id. at 444. The Court did specify that the Constitution did not mandate such warnings and that the states were free to devise alternative safeguards to protect the Fifth Amendment privilege against self-incrimination. Id. at 467. Finally, the Court stated that the prosecution could not use any statements at trial that the police obtained from suspects without the use of adequate procedural safeguards unless the suspects waived their Miranda rights. Id. at 444.
fashion. Cooper repeatedly asked to have his attorney present and expressed his unwillingness to speak with his interrogators. Despite these requests, the detectives continued the interrogation for four hours, with Cooper at one point sobbing and stating he was "breaking down." The task force held Cooper incommunicado for twenty-four hours before realizing its mistake and releasing him.

In 1987 Cooper filed suit against members of the task force in the United States District Court for the District of Arizona. Cooper alleged nine counts under state tort law and nine counts under section 1983, including the denial of his right to remain silent. The district court denied summary judgment for the task force members on the right to remain silent claim, but a panel for the Ninth Circuit reversed and dismissed for failure to state a cause of action. On rehearing en banc, the Ninth Circuit upheld the district court's denial of summary judgment on the right to remain silent claim and remanded the case for trial.

The Cooper court determined that the plaintiff made out a prima facie case under section 1983 on three theories. As a preliminary step, the court found that although Cooper never actually confessed, he made incriminating statements that could support a constitutional violation. Next, the Cooper

49. Cooper, 963 F.2d at 1228. The police officer reading the Miranda rights from a card jokingly offered to read Cooper his driver's license instead. Id.

50. Id. at 1229.

51. Id. at 1231.

52. Id. at 1233.

53. Id. at 1234. Cooper sued for damages, alleging that following his arrest and interrogation, he and his family were evicted from their home, he was fired from his job, and he suffered injury to his business and personal reputation. Cooper v. Dupnik, 924 F.2d 1520, 1525 (9th Cir. 1991), rev'd, 963 F.2d 1220 (en banc), cert. denied, 113 S. Ct. 407 (1992). Evidence also existed that Cooper suffered from post-traumatic stress syndrome as a result of the interrogation. Id. at 1524.

54. Cooper v. Dupnik, 963 F.2d 1220, 1234 (9th Cir.) (en banc), cert. denied, 113 S. Ct. 407 (1992). Mr. Cooper's nine state tort claims, which were not at issue on appeal, were false arrest, malicious prosecution, defamation, false-light invasion of privacy, intentional infliction of emotional distress, trespass, conversion, negligence, and conspiracy. Id.

55. Id. Mr. Cooper based his nine § 1983 claims upon false arrest, false imprisonment, improper training and procedures, injury to reputation and property interests, invasion of privacy, two counts of illegal search and seizure, conspiracy, and denial of right to counsel and right to remain silent. Id. Only the claim of the right to remain silent was at issue on rehearing. Id. at 1235.

56. See id. at 1236 (noting that original Ninth Circuit panel dismissed Cooper's claim because prosecution never used Cooper's statements at trial, Cooper never confessed to rapes, task force's behavior did not shock conscience, and police were entitled to qualified immunity).

57. See id. at 1237 (holding that Cooper had established prima facie case under § 1983 under multiple theories).

58. Id.

59. Id. at 1238. During his interrogation, Cooper admitted that he occasionally slapped his wife. In addition, Cooper acknowledged that he sometimes left his home, unaccompanied, at night, often for hours at a time. This admission was particularly incriminating because the rapes always occurred at night. Id. at 1236-37; see also Miranda v. Arizona, 384 U.S. 436,

60. Id.
court analyzed the task force’s behavior under the Fifth Amendment privilege against self-incrimination and under two Fourteenth Amendment Due Process theories, to determine if section 1983 liability was appropriate.60

III. MISCONDUCT LEADING TO SECTION 1983 LIABILITY

A section 1983 remedy is not available for every type of police misconduct that occurs during interrogation.61 The behavior must rise to the level of a constitutional violation.62 While not every infraction will result in civil liability for police officers,63 courts disagree on when misconduct goes beyond a mere procedural violation and becomes an infringement on a suspect’s constitutional rights.64

Traditionally, section 1983 provides three potential claims for police misconduct during interrogations.65 The first claim arises from a violation

476 (1966) (holding that prosecution can use no statements police obtain in violation of safeguards, whether statements are confessions or are merely incriminating); Griffin v. Strong, 983 F.2d 1540, 1542 (10th Cir. 1993) (noting that Fifth Amendment privilege against self-incrimination protects against all compelled statements, regardless of their degree of incrimination).


61. See Mahoney v. Kesery, 976 F.2d 1054, 1060 (7th Cir. 1992) (noting that not every tort committed by public officers is actionable under § 1983); Cooper, 963 F.2d at 1256 (Brunetti, J., dissenting) (criticizing court's decision for departing from § 1983 requirement that constitutional violation exist because deplorable police misconduct swayed court).


63. See, e.g., Warren v. City of Lincoln, 864 F.2d 1436, 1442 (8th Cir.) (finding that police failure to give Miranda warnings and refusal to honor request for counsel during interrogation is not Fifth Amendment violation), cert. denied, 490 U.S. 1091 (1989); Davis v. City of Charleston, 827 F.2d 317, 322 (8th Cir. 1987) (holding that police failure to give Miranda warnings is not constitutional violation); Bennett v. Passic, 545 F.2d 1260, 1263 (10th Cir. 1976) (finding that failure to give Miranda warnings does not rise to level of constitutional tort); Thornton v. Buchmann, 392 F.2d 870, 874 (7th Cir. 1968) (deciding that remedy for police failure to give Miranda warnings is court's exclusion of statements from trial); O'Hagan v. Soto, 523 F. Supp. 625, 629 (S.D.N.Y. 1981) (holding that interrogator's failure to allow suspect to contact counsel or to end interrogation after request for counsel is not actionable under § 1983 as Fifth Amendment violation); Chrisco v. Shafran, 507 F. Supp. 1312, 1317, 1320-21 (D. Del. 1981) (finding no § 1983 cause of action under Fifth Amendment for police failure to give Miranda warnings or refusal to allow presence of counsel during interrogation).

64. See infra notes 82-94 and accompanying text (noting overlap and confusion between potential § 1983 claims for unlawful police behavior during interrogation).

65. See Cooper v. Dupnik, 963 F.2d 1220 (9th Cir.) (en banc) (analyzing § 1983 claim for allegedly unlawful confession on grounds that police violated suspect's Fifth Amendment privilege against self-incrimination, that police coerced statement in violation of Fourteenth Amendment Due Process Clause, and that police behavior shocked conscience in violation of substantive due process), cert. denied, 113 S. Ct. 407 (1992).
of the Fifth Amendment privilege against self-incrimination and courts base it on the United States Supreme Court's holding in *Miranda.*\(^6\) *Miranda* requires that police use procedural safeguards to protect a suspect's Fifth Amendment privilege during custodial interrogation.\(^6\) Although courts exclude from trial statements the police obtain in violation of *Miranda,*\(^6\) they have been reluctant to hear section 1983 claims based on such violations.\(^6\)

The second type of section 1983 claim arises under the Due Process Clause of the Fourteenth Amendment.\(^7\) Courts deem statements that the police coerce from suspects during interrogation to be involuntary\(^7\) and exclude involuntary statements from trial for all purposes.\(^7\) The police misconduct that leads to the involuntary statement also may be actionable under section 1983.\(^7\)

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67. *See* Miranda, 384 U.S. at 444-45 (requiring that police warn suspects of certain rights before interrogation); *supra* note 48 (discussing *Miranda* holding).

68. *See* Miranda, 384 U.S. at 444 (stating that prosecution may not use statements at trial unless police obtained them in accordance with *Miranda* safeguards). *But see* Harris v. New York, 401 U.S. 222, 225-26 (1971) (noting that prosecution may use voluntary statements police obtain in violation of *Miranda* to impeach defendant's credibility at trial).

69. *See* supra note 63 (citing cases finding no § 1983 cause of action for *Miranda* violations).

70. *See* supra note 20 (quoting Due Process Clause of Fourteenth Amendment).

71. *See,* e.g., Spano v. New York, 360 U.S. 315, 320 (1959) (holding that prosecution's use of coerced, involuntary confessions violates traditional principles of Fourteenth Amendment).

72. *See* Mincey v. Arizona, 437 U.S. 385, 398 (1978) (holding that prosecution may not use involuntary statements for any purpose at trial); *Cooper* v. Dupnik, 963 F.2d 1220, 1247 (9th Cir.) (en banc) (emphasizing that impeachment exception is limited to voluntary statements), *cert. denied,* 113 S. Ct. 407 (1992).

73. *See* Cooper, 963 F.2d at 1248 (allowing § 1983 claim to proceed because police behavior that elicited involuntary confessions violated due process); Gray v. Spillman, 925 F.2d 90, 94 (4th Cir. 1991) (allowing § 1983 suit for police extraction of involuntary confession); Rex v. Teeples, 753 F.2d 840, 843 (10th Cir.) (holding that plaintiff could sue police under § 1983 for extracting involuntary confession), *cert. denied,* 474 U.S. 967 (1985); Duncan v. Nelson, 466 F.2d 939, 945 (7th Cir.) (allowing plaintiff opportunity to prove damages at § 1983 trial for harm inflicted during interrogation), *cert. denied,* 409 U.S. 894 (1972). *But see* Jackson v. Dillon, 518 F. Supp. 618, 621 (E.D.N.Y. 1981) (holding that merely obtaining involuntary statement is not per se constitutional violation, and does not lead to § 1983 liability); Ransom v. City of Phila., 311 F. Supp. 973, 974 (E.D. Pa. 1970) (holding that no § 1983 liability exists for police coercion of involuntary statement unless prosecution introduces statement at trial).

If the court mistakenly allows the prosecution to introduce an involuntary confession at trial, no § 1983 cause of action for harm suffered as a result of the admission will exist. *Duncan,* 466 F.2d at 942. The *Duncan* court noted that police may rely on a trial court properly excluding involuntary statements. *Id.* Also, the court stated that holding police liable for a defendant's conviction as a result of the admission of an involuntary statement ignores the fact that the court may have convicted the defendant even without the prosecution's introduction of the statement at trial. *Id.* at 943. The proper remedy for the court's improper
dressed under this potential section 1983 claim is the actual coercion or the prosecution's use of coerced statements at trial.\(^7\)

The third potential claim under section 1983 also arises under the Due Process Clause of the Fourteenth Amendment.\(^7\) Police behavior that shocks the conscience violates substantive due process and is actionable under section 1983.\(^7\) This cause of action is not specific to the interrogational context.\(^7\) Traditionally, this due process theory has been a safety net ensuring that all government behavior, whatever the context, conforms to minimum societal standards.\(^7\) However, the standard is vague, and courts' determinations of what behavior actually shocks the conscience vary greatly.\(^7\) Recently, the Supreme Court has questioned the availability of this cause of action in certain contexts,\(^8\) but a shock-the-conscience claim remains an option in the context of interrogations.\(^8\)

admission of an involuntary statement at trial is to attack the conviction on appeal or through a habeas corpus petition. See Bennett v. Passic, 545 F.2d 1260, 1263 (10th Cir. 1976) (stating that plaintiff should challenge trial court's improper admission of statement through habeas corpus petition, not civil rights action); Allen v. Eicher, 295 F. Supp. 1184, 1186 (D. Md. 1969) (holding that § 1983 plaintiff wishing to challenge his conviction because of Miranda violation must do so through state appeals process, and then federal habeas corpus petition).

\(^{74}\) Compare Duncan, 466 F.2d at 945 (allowing § 1983 plaintiff to sue for damages caused by unlawful interrogation) with Jackson, 518 F. Supp. at 621 (dismissing § 1983 claim because court excluded involuntary statement from plaintiff's criminal trial).

\(^{75}\) See supra note 20 (quoting language of Fourteenth Amendment Due Process Clause).

\(^{76}\) See Rochin v. California, 342 U.S. 165, 172-73 (1952) (holding that police behavior that shocks conscience violates principles of due process); infra note 209 (discussing holding of Rochin).

\(^{77}\) See, e.g., Wood v. Ostrander, 879 F.2d 583, 588 (9th Cir. 1989) (finding § 1983 cause of action because police behavior shocked conscience when they arrested driver of car and left passenger alone in dangerous neighborhood where she subsequently was raped), cert. denied, 111 S. Ct. 341 (1990); Rutherford v. City of Berkeley, 780 F.2d 1444, 1447-48 (9th Cir. 1986) (allowing § 1983 claim to proceed under shock-the-conscience theory when police allegedly detained and beat suspect); Rosalie Berger Levinson, Protection Against Government Abuse of Power: Has the Court Taken the Substance Out of Substantive Due Process, 16 U. DAYTON L. REV. 313, 322 (1991) (noting that Supreme Court and lower courts have extended Rochin standard to outrageous government conduct in general).

\(^{78}\) See Levinson, supra note 77, at 322 (noting that substantive due process protects against governmental misconduct).

\(^{79}\) See Cooper v. Dupnik, 924 F.2d 1520, 1530 (9th Cir. 1991) (noting that standard for determining when police violate substantive due process provides courts with little guidance), rev'd, 963 F.2d 1220 (en banc), cert. denied, 113 S. Ct. 407 (1992). Compare Cooper v. Dupnik, 963 F.2d 1220 (9th Cir.) (en banc) (finding § 1983 cause of action under substantive due process when police deliberately ignored suspect's request for counsel and badgered suspect during four hours of interrogation in hopes of keeping suspect from testifying in criminal trial and depriving suspect of insanity defense), cert. denied, 113 S. Ct. 407 (1992) with Wilcox v. Ford, 813 F.2d 1140, 1146-48 (11th Cir.) (finding that police behavior did not violate substantive due process when, during interrogation of witnesses, police threatened to charge one with murder, interrogated another for eight hours without providing food or water, threatened to send him to electric chair and told him he would die in prison), cert. denied, 484 U.S. 925 (1987).

When analyzing section 1983 cases, courts often confuse Fifth Amendment self-incrimination claims with claims of coercion under the Due Process Clause, perhaps because of the way the two claims developed. Before the United States Supreme Court's holding in *Miranda*, the Due Process Clause was the only available constitutional ground for excluding statements police obtained during improper interrogations. The Court intended the *Miranda* decision to replace the unwieldy case-by-case due process analysis. However, the due process test has survived *Miranda*, and the confusion between the two claims exists in part because the Court never has clarified fully this interrelationship. The Court determined under *Miranda* that the Fifth Amendment privilege against self-incrimination protects defendants only from the prosecution's use of the defendant's presumably coerced statements at trial. However, the Court has not defined clearly what harm the due process cause of action for coercion targets. While the distinction between the Fifth Amendment claim and the due process claim for coercion normally has little practical importance, *Cooper* illustrates that the distinction can be very important in certain contexts. When the police improperly obtain a statement that the prosecution never uses at trial, the harm, if any, that occurs during the elicitation of the statement becomes very important in determining the viability of a section 1983 claim.


81. See *Graham*, 490 U.S. at 395 n.10 (specifically leaving open question of whether shock-the-conscience cause of action is available for pretrial detainees); *Cooper*, 963 F.2d at 1244 n.11 (noting that shock-the-conscience standard is still viable § 1983 claim when analyzing statements police obtain from suspect).

82. See supra note 20 (discussing background of constitutional provisions governing interrogations).

83. See *Miranda* v. Arizona, 384 U.S. 436, 458 (1966) (replacing case-by-case due process inquiry with bright line presumption of coercion absent procedural safeguards); *Duncan* v. Nelson, 466 F.2d 939, 944 (7th Cir.) (noting that because interrogation at issue occurred before *Miranda*, plaintiff's only available § 1983 claim was under Due Process Clause of Fourteenth Amendment), cert. denied, 409 U.S. 894 (1972).

84. See *Herman*, supra note 5, at 733 (implying that *Miranda* Court intended to replace involuntary confession rule with presumption of compulsion during interrogations).


86. See *New York v. Quarles*, 467 U.S. 649, 654 (1984) (noting that *Miranda* warnings are only procedural safeguards meant to protect against use of presumably coerced statements at trial).

87. Compare *Mincey*, 437 U.S. at 402 (holding that due process requires courts to exclude involuntary statements from trial) with *Haynes* v. Washington, 373 U.S. 503, 519 (1963) (suggesting that involuntary statements violate due process because of police misconduct involved in obtaining them).


89. See *Buckley* v. Fitzsimmons, 919 F.2d 1230, 1244 (7th Cir. 1990) (holding that § 1983
The due process claim for coercion and the due process shock-the-conscience theory also overlap significantly in the section 1983 context.\(^9\) Courts sometimes employ vague language when analyzing section 1983 claims for unconstitutional interrogations, and courts rarely indicate the specific basis for finding a cause of action.\(^9\) This failure to clarify the distinction between these two potential section 1983 claims results in part because coercive behavior that results in an involuntary statement is often also behavior that shocks the conscience.\(^9\) When the police misconduct is extreme, the distinction between the two claims is of little significance.\(^9\) However, when the police misconduct is not so offensive as to shock the conscience, but is still coercive enough to result in an involuntary confession, the distinction between the two due process claims under section 1983, and what harm each addresses, is important.\(^9\)

During interrogation, varying levels of police misconduct may occur. The interrogating officers merely may fail to inform suspects of their Miranda rights, or they may fail to respect the suspects’ invocation of those rights.\(^9\) Even if the police follow and respect Miranda’s procedural safe-

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\(^9\) See Duncan, 466 F.2d at 944 (allowing § 1983 claim for police coercion of involuntary statement, but using language that is more in line with shock-the-conscience standard).


\(^9\) See Cooper, 963 F.2d at 1237 (finding § 1983 cause of action because police behavior was coercive and because it shocked conscience).

\(^9\) See Lewis v. Brautigam, 227 F.2d 124, 128 (5th Cir. 1955) (allowing § 1983 claim to proceed, on unspecified ground, because police secretly moved suspect to new prison to prevent suspect from conferring with counsel, and police forced suspect to pose for photographs dressed in prison garb); Steward, 1992 WL 300986 at *4 (finding § 1983 cause of action because police allegedly beat suspect to obtain confession).


\(^9\) See Mincey v. Arizona, 437 U.S. 385, 396 (1978) (describing interrogation in which police questioned suspect in his hospital bed for four hours despite suspect’s repeated requests for counsel); Warren v. City of Lincoln, 864 F.2d 1436, 1438 (8th Cir.) (involving interrogation in which police failed to read suspect his Miranda rights and ignored suspect’s request for counsel), cert. denied, 490 U.S. 1091 (1989); Haupt v. Dillard, 794 F. Supp. 1480, 1489 (D. Nev. 1992) (dealing with police failure to respect suspect’s request for counsel during inter-
guards and they obtain a valid waiver from the suspect, the police behavior may be so coercive that the suspect's free will is overborne and courts will deem any resulting statements involuntary. The type of behavior that courts may find coercive includes psychological badgering; threats; promises; deprivation of food, sleep, or both; and physical violence. The form of police misconduct occurring during the interrogation is decisive in determining the viability of a section 1983 cause of action.

A. Miranda Violations

1. Failure to Give Miranda Warnings

Courts, including the Cooper court, are unanimous in holding that police failure to inform a suspect of the required Miranda warnings, without
more, will not result in section 1983 liability. The Supreme Court has stated that a defendant has no constitutional right to receive *Miranda* warnings because the warnings are merely procedural safeguards designed to protect the Fifth Amendment privilege against self-incrimination. By failing to give those warnings, the police do not deprive the suspect of a constitutional right. Because the purpose of the warnings is to dispel the inherent compulsion in custodial interrogations, failure to give the warnings leads to a presumption that the police coerced the statements from the suspect and that courts therefore must exclude the statements from trial. Unless actual coercion due to extreme police behavior occurs, however, no deprivation of a constitutional right exists and no section 1983 liability exists either. The constitutional right under *Miranda* is not the right to be free from coercion, but rather it is the right to have courts exclude from trial any statements that the police obtain without the specified warnings. Therefore, the exclusion from trial of such statements provides an adequate remedy for failure to give *Miranda* warnings. If the suspect never goes to trial, no remedy is available because the suspect has suffered no harm.

99. See, e.g., Davis v. City of Charleston, 827 F.2d 317, 322 (8th Cir. 1987) (deciding that police failure to inform suspect of *Miranda* rights did not deprive suspect of constitutional right); Bennett v. Passic, 545 F.2d 1260, 1263 (10th Cir. 1976) (holding that no rational argument exists for allowing § 1983 claim for failure to inform suspect of *Miranda* rights); Thornton v. Buchmann, 392 F.2d 870, 874 (7th Cir. 1968) (finding that police failure to inform suspect of *Miranda* rights was not actionable under § 1983 because suspect never went to trial).


101. See *Buckley*, 919 F.2d at 1244 (holding that suspects have no constitutional right to *Miranda* warnings); *Bennett*, 545 F.2d at 1263 (dismissing § 1983 suit for police failure to read suspect *Miranda* warnings because no constitutional right to such warnings exists).

102. See *Miranda*, 384 U.S. at 467 (requiring that police read warnings to suspects before interrogation in order to dispel compulsion inherent in such situations).

103. See *id.* at 479 (holding that courts may not admit at trial any statements police obtain without giving *Miranda* warnings).


105. See *Bennett* v. Passic, 545 F.2d 1260, 1263 (10th Cir. 1976) (holding that Constitution does not give suspect right to *Miranda* warnings, only right to be free from self-incrimination).

106. See Warren v. City of Lincoln, 864 F.2d 1436, 1442 (8th Cir.) (holding that exclusion from trial is sole remedy for statements police obtained in violation of *Miranda*), cert. denied, 490 U.S. 1091 (1989); Allen v. Eicher, 295 F. Supp. 1184, 1186 (D. Md. 1969) (holding *Miranda* violations are significant only if prosecution attempts to use statements police obtained from violation at trial); Ambrek v. Clark, 287 F. Supp. 208, 210 (E.D. Pa. 1968) (stating that sole import of failure to warn suspect of *Miranda* warnings is court's exclusion from trial of any statements police obtained).

107. See *Buckley* v. Fitzsimmons, 919 F.2d 1230, 1244 (7th Cir. 1990) (holding that interrogations without *Miranda* safeguards do not violate suspect's constitutional rights unless
2. Failure to Respect *Miranda* Rights

The *Cooper* court found that Cooper could sue under section 1983 for violation of his Fifth Amendment privilege against self-incrimination because the police refused his request for counsel during a custodial interrogation. The *Cooper* court reasoned that under *Miranda* a request for counsel is an invocation of the constitutional right to remain silent. Rather than merely violating *Miranda*'s procedural safeguards, which is not by itself a constitutional violation, the task force violated Cooper's substantive Fifth Amendment rights as delineated in *Miranda*. The *Cooper* court limited its holding by noting that a section 1983 cause of action does not exist when police continue to talk in a benign way to suspects who have invoked their *Miranda* rights, but only when the police use offensive tactics.

Before the *Cooper* decision, courts agreed that failure to respect the defendant's invocation of *Miranda* rights, standing alone, would not give rise to civil liability. Courts saw the *Miranda* rights, like the *Miranda* warnings, as only procedural safeguards designed to protect the constitu-

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2. *Id.* at 1240.
3. *See Oregon v. Elstad*, 470 U.S. 298, 305 (1985) (noting that failure of police to give suspect *Miranda* warnings is not constitutional violation, such that mere initial failure of police to give warnings does not taint later statements police obtain after police give suspect full *Miranda* warnings); *New York v. Quarles*, 467 U.S. 649, 655-56 (1984) (allowing public safety exception to *Miranda* exclusionary rule, so long as police do not actually coerce statement from suspect, because without actual coercion, no constitutional mandate to exclude evidence exists).
5. *Id.* at 1244. The *Cooper* court did not specify what offensive tactics would rise to the level of a Fifth Amendment violation, nor did it articulate how this Fifth Amendment cause of action differs from a section 1983 cause of action for coercion under Due Process Clause. *Id.*
6. *See Warren v. City of Lincoln*, 864 F.2d 1436, 1442 (8th Cir.) (holding that failure to respect suspect's request for counsel was merely procedural violation and not actionable under § 1983, because Sixth Amendment right to counsel had yet to attach, and right to counsel under *Miranda* is not constitutional right), *cert. denied*, 490 U.S. 1091 (1989); *Haupt v. Dillard*, 794 F. Supp. 1480, 1489 (D. Nev. 1992) (holding that police failure to honor request for counsel is not actionable under § 1983 unless accompanied by police coercion or improper treatment of suspect); *Jackson v. Dillon*, 518 F. Supp. 618, 621 (E.D.N.Y. 1981) (stating that failure of police to honor suspect's request for counsel is not constitutional violation unless prosecution uses statements obtained at trial); *Chrisco v. Shafran*, 507 F. Supp. 1312, 1317, 1320-21 (D. Del. 1981) (deciding that police officer's failure to honor request for counsel under *Miranda* does not create § 1983 cause of action).
tional privilege against self-incrimination. In Chrisco v. Shafran, the United States District Court for the District of Delaware heard a plaintiff's section 1983 claim that his questioning officers actively prevented him from having counsel present during a custodial interrogation. The Chrisco court dismissed the cause of action for failure to state a claim for relief. The district court noted that the right to counsel is fundamentally different from the Sixth Amendment right to assistance of counsel. The Miranda right to counsel is a procedural safeguard designed to protect the Fifth Amendment privilege. The Chrisco court noted that in order to remedy a Sixth Amendment violation, courts exclude from trial statements that the police elicit from a suspect in violation of the suspect's right to assistance of counsel. On the other hand, in the Fifth Amendment context, the defendant's right to the exclusion of statements obtained in violation of Miranda's right to counsel is itself the constitutional right. The Chrisco court concluded that when police simply ignore the invocation of Miranda.

114. See Miranda v. Arizona, 384 U.S. 436, 469 (1966) (stating that right to counsel during custodial interrogation is indispensable to protection of Fifth Amendment privilege against self-incrimination); Warren, 864 F.2d at 1442 (holding that right to counsel under Miranda is merely procedural safeguard protecting Fifth Amendment privilege against self-incrimination); Chrisco, 507 F. Supp. at 1320 (drawing distinction between procedural right to counsel under Miranda and constitutional right to counsel under Sixth Amendment).


116. Chrisco v. Shafran, 507 F. Supp. 1312, 1320 (D. Del. 1981). In Chrisco the United States District Court for the District of Delaware considered Chrisco's claim that two police officers were liable under § 1983 for violation of Chrisco's Fifth Amendment privilege against self-incrimination. Id. at 1316. The police officers interviewed Chrisco during a custodial interrogation. Id. at 1317. Chrisco alleged that the police did not give him his Miranda warnings and did not allow him to have an attorney present during the interrogation. Id. The Chrisco court first noted that the failure of police officers to deliver Miranda warnings is not actionable under section 1983. Id. However, Chrisco also claimed that the police violated his right to counsel when the police excluded Chrisco's attorney from the interrogation. Id. at 1320. The Chrisco court responded that the right to have an attorney present during a custodial interrogation is a procedural safeguard, not a constitutional right, therefore the § 1983 claim failed. Id.

117. See id. at 1321 (finding no § 1983 cause of action for police failure to give suspect Miranda warnings or to honor suspect's request for counsel).

118. Id. at 1320; see supra note 20 (quoting language of Sixth Amendment). The Sixth Amendment right to the assistance of counsel does not attach until the government begins formal judicial proceedings against the suspect. Massiah v. United States, 377 U.S. 201, 205 (1964); see supra note 20 (discussing holding of Massiah). If police fail to honor a request for counsel after the Sixth Amendment right to the assistance of counsel has attached, the suspect will have a claim under § 1983 even if the government never brings the suspect to trial. See Cooper v. Dupnik, 924 F.2d 1520, 1528 n.12 (9th Cir. 1991) (dictum) (noting that government violates Sixth Amendment right to assistance of counsel as soon as it denies suspect access to attorney), rev'd, 963 F.2d 1220 (en banc), cert. denied, 113 S. Ct. 407 (1992).

119. Chrisco, 507 F. Supp. at 1320-21; see Miranda v. Arizona, 384 U.S. 436, 469 (1966) (holding that right to counsel during custodial interrogation is necessary to protect Fifth Amendment privilege against self-incrimination).

120. Chrisco, 507 F. Supp. at 1321.

121. Id.; see Miranda, 384 U.S. at 439 (stating that holding of court deals with admissibility at trial of statements obtained by police during custodial interrogation).
rights, no constitutional violation exists and therefore no civil liability arises.\textsuperscript{122}

The language in the \textit{Cooper} court's opinion suggesting that the \textit{Miranda} right to counsel is more than a procedural safeguard protecting the Fifth Amendment privilege against self-incrimination departs from prior courts' analyses of the issue.\textsuperscript{123} The \textit{Cooper} court argued that a request for counsel is an invocation of the substantive Fifth Amendment privilege.\textsuperscript{124} Implicit in this statement is the notion that if the police ignore a request for counsel under \textit{Miranda}, they are infringing on the suspect's right against compulsory self-incrimination.\textsuperscript{125} This argument supports the idea that a constitutional violation occurs as soon as the police deny suspects their \textit{Miranda} right to counsel.\textsuperscript{126} Therefore courts can hold police civilly liable whether or not the court rules statements police obtain in this manner admissible at trial.\textsuperscript{127}

The \textit{Cooper} court, however, limited its holding by stating that ""[t]his case does not establish a cause of action where police officers continue to talk to a suspect after he asserts his rights and where they do so in a benign way, without coercion or tactics that compel him to speak.""\textsuperscript{128} Even with such a limitation on the majority's holding, there was a strong dissent.\textsuperscript{129} The dissenting judges in \textit{Cooper} stressed that because \textit{Cooper} never went to trial, no Fifth Amendment violation occurred.\textsuperscript{130} Further, the dissent recognized the inherent contradiction in the court's holding that only of-

\textsuperscript{122} Chrisco v. Shafran, 507 F. Supp. 1312, 1321 (D. Del. 1981). \textit{But see Miranda}, 384 U.S. at 460 (stating that police satisfy Fifth Amendment privilege against self-incrimination only when they guarantee suspects right to remain silent unless suspects choose to speak of their own free will).

\textsuperscript{123} \textit{See Miranda}, 384 U.S. at 469 (stating that right to counsel in custodial interrogations is procedural safeguard meant to protect Fifth Amendment privilege against self-incrimination); Johnson v. Carroll, 694 F. Supp. 500, 504 (N.D. Ill. 1988) (noting that Fifth Amendment privilege against self-incrimination has no relevance until suspect testifies at his criminal trial); Jackson v. Dillon, 518 F. Supp. 618, 621 (E.D.N.Y. 1981) (holding that until court introduces unlawfully obtained statements at trial, the suspect's Fifth Amendment privilege against self-incrimination has not been violated).

\textsuperscript{124} \textit{See Miranda} v. Arizona, 384 U.S. 436, 473 (1966) (holding that invocation of right to counsel during custodial interrogation indicates that suspect intends to exercise his Fifth Amendment privilege against self-incrimination); Cooper v. Dupnik, 963 F.2d 1220, 1240 (9th Cir.) (en banc) (holding that suspect's request for counsel is invocation of Fifth Amendment privilege against self-incrimination), \textit{cert. denied}, 113 S. Ct. 407 (1992).

\textsuperscript{125} \textit{See Miranda}, 384 U.S. at 460 (noting that rationale behind Fifth Amendment privilege against self-incrimination is protection of suspect's dignity and free will and that privilege is fulfilled only when suspect is guaranteed right to remain silent).

\textsuperscript{126} \textit{Id.} at 461.

\textsuperscript{127} \textit{Id.} at 460 (holding that Fifth Amendment privilege against self-incrimination is fulfilled only when suspect is free not to speak).

\textsuperscript{128} \textit{Cooper}, 963 F.2d at 1243-44. \textit{But see id.} at 1255 (Brunetti, J., dissenting) (arguing that purported limitation on court's holding is illusory because court's main point is that it is police failure to honor request for counsel that leads to coercion).

\textsuperscript{129} \textit{See id.} at 1256 (Brunetti, J., dissenting) (arguing majority departed from § 1983 precedent because of offensive police misconduct).

\textsuperscript{130} \textit{Id.} at 1253-54.
The limitation is problematic because if, as the majority reasoned, a suspect’s request for counsel is an invocation of a constitutional right, then no reason exists for courts to consider what type of police behavior follows such an invocation. If the coercive police behavior following suspects’ invocation of their *Miranda* rights is at issue, then courts traditionally address that coercion under a due process analysis. If the *Cooper* court truly was concerned that a suspect’s invocation of *Miranda* rights be respected, the limitation regarding benign questioning following such an invocation undermines the holding. Because courts probably will not find benign questioning following such an invocation to be coercive, they probably will allow the prosecution to use any statements the police obtain in this manner for impeachment. The *Cooper* court’s holding merely reinforces police incentive to ignore suspects’ invocation of their *Miranda* rights, provided they do so without coercion.

Like police failure to give *Miranda* warnings, their failure to respect *Miranda* rights, provided that no coercive behavior follows, results only in the courts’ preventing the prosecution from using at trial any statements the police obtained after the suspects invoked any of their *Miranda* rights. However, the prosecution may be able to use any voluntary statements, even if the police obtained them in violation of *Miranda*, to impeach the suspect’s credibility if the suspect chooses to testify. As the facts of *Cooper* illustrate, without section 1983 liability the police have a strong incentive to take advantage of this impeachment exception. Once suspects

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131. *Id.* at 1255 (Brunetti, J., dissenting).
132. See *id.* at 1257 (Leavy, J., dissenting) (questioning why, if request for counsel is invocation of Fifth Amendment privilege against self-incrimination, privilege is lost without waiver if police later elicit statements in benign way).
134. See *Warren v. City of Lincoln*, 864 F.2d 1436, 1442 (8th Cir.) (finding that police officer’s failure to read suspect his *Miranda* rights or to honor his request for counsel, without more, is not constitutional violation), *cert. denied*, 490 U.S. 1091 (1989).
135. See *Harris v. New York*, 401 U.S. 222, 224 (1971) (holding that courts may admit at trial trustworthy statements that police obtain in violation of *Miranda*).
136. See *Cooper v. Dupnik*, 963 F.2d 1220, 1257 (9th Cir.) (en banc) (Leavy, J., dissenting) (questioning why suspect’s invocation of Fifth Amendment privilege by requesting counsel is lost without waiver when police continue to question benignly), *cert. denied*, 113 S. Ct. 407 (1992).
138. See *Harris*, 401 U.S. at 226 (holding that prosecution may admit at trial voluntary statements police obtain in violation of *Miranda* to impeach suspect’s credibility and prevent perjury).
139. See *Cooper*, 963 F.2d at 1225 (describing deliberate unlawful police plan to violate suspect’s *Miranda* rights in hopes of obtaining voluntary statement which would keep suspect from testifying on his own behalf and deprive suspect of insanity defense).
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invoke their *Miranda* rights, the police may have nothing to lose by proceeding with questioning in a noncoercive manner in hopes of obtaining a voluntary statement.\(^{140}\)

To the extent that *Cooper* suggests that mere police failure to respect a suspect’s *Miranda* rights results in civil liability, it may be because the court’s Fifth Amendment analysis is what most courts would consider a due process analysis.\(^{141}\) The *Cooper* court limits the Fifth Amendment cause of action to situations involving coercive police behavior.\(^{142}\) This limitation suggests that the *Cooper* court was more concerned with the coercion than the interrogator’s failure to respect the suspect’s request for counsel.\(^{143}\)

**B. Due Process Claims**

1. Coerced Statements

Courts typically analyze claims of coercion under the Due Process Clause of the Fourteenth Amendment.\(^{144}\) The analysis focuses on whether the police overcame the suspect’s will, looking at the totality of the circumstances.\(^{145}\) If the police use physical violence against the suspect, courts almost always will find that any resulting statements were involuntary.\(^{146}\)

\(^{140}\) See *Harris v. New York*, 401 U.S. 222, 232 (1971) (Brennan, J., dissenting) (arguing that impeachment exception encourages police to violate law in order to successfully prosecute suspect); *Cooper*, 963 F.2d at 1226 (involving unlawful interrogation plan devised because police lacked other extrinsic evidence linking suspect to crime).


\(^{142}\) See *Cooper v. Dupnik*, 963 F.2d 1220, 1244 (9th Cir.) (en banc) (holding that police failure to honor suspect’s request for counsel results in § 1983 claim only when followed by coercive police behavior), *cert. denied*, 113 S. Ct. 407 (1992).


\(^{144}\) See *Colorado v. Connelly*, 479 U.S. 157, 163 (1986) (noting that Supreme Court has continued to apply due process analysis to allegedly coerced confession despite application of Fifth Amendment to states); *Mincey*, 437 U.S. at 398 (determining that police questioning of seriously wounded suspect in his hospital bed violated Due Process Clause); *Haynes v. Washington*, 373 U.S. 503, 514 (1963) (holding that police violated Due Process Clause by obtaining confession that was not product of suspect’s free will); *Spano v. New York*, 360 U.S. 315, 320 (1959) (finding that police violated Due Process Clause by extracting involuntary confession from suspect); *Cooper v. Dupnik*, 924 F.2d 1520, 1529 n.17 (9th Cir. 1991) (noting that courts analyze allegedly coerced confessions under Due Process Clause of Fourteenth Amendment rather than under Self-Incrimination Clause of Fifth Amendment due to historical accident), *rev’d*, 963 F.2d 1220 (en banc), *cert. denied*, 113 S. Ct. 407 (1992); *Rex v. Teeples*, 753 F.2d 840, 843 (10th Cir.) (holding that police coercion of confession from suspect was due process violation), *cert. denied*, 474 U.S. 967 (1985).

\(^{145}\) See *Mincey*, 437 U.S. at 398, 401 (evaluating, under all circumstances of interrogation, whether suspect’s statements were product of rational intellect and free will).

\(^{146}\) *Gray v. Spillman*, 925 F.2d 90, 93 (4th Cir. 1991) (noting courts have long recognized that police beating of suspect during interrogation violates Fourteenth Amendment).
However, psychological tactics also may lead to coercion. Mere threats of physical violence may result in an involuntary statement, as can promises police make to the suspect in return for a confession. Other factors courts look to are the age, education, and experience of the suspect; the length of the interrogation; and the atmosphere in which it takes place. Overall, the inquiry focuses on the suspect's state of mind and whether under all the circumstances the suspect made the statements freely.

In cases that involve coercion, courts do not agree whether a section 1983 cause of action is available. Coercing an involuntary statement from a suspect is a constitutional violation, but unlike Miranda violations, courts have not clarified whether the violation occurs when the police coerce the statements from the suspect or when the prosecution introduces the coerced statements at trial. If only prosecutorial use of the statement at trial violates the Constitution, then like Miranda violations, no civil liability for the interrogating officers exists. However, if the action of coercion itself

147. See Mincey v. Arizona, 437 U.S. 385, 401 (1978) (noting that gross police abuse is not necessary to find statement involuntary); Haynes, 373 U.S. at 504 (holding that confession police obtained by promising suspect he could call his wife if he cooperated was involuntary); Lynumn v. Illinois, 372 U.S. 528, 534 (1963) (finding involuntary statement that police obtained by threatening suspect with loss of her children); Malinski v. New York, 324 U.S. 401, 405-06 (1945) (determining that suspect's confession was involuntary because police ignored suspect's request for counsel and questioned suspect while he was naked and isolated).

148. See Haynes, 373 U.S. at 504 (finding confession involuntary because police obtained it by promising suspect he could call his wife if he confessed).

149. See Mincey, 437 U.S. at 401-02 (holding that statement police obtained from suspect isolated from family, friends, and counsel, weakened by serious wound, and barely conscious was involuntary); Haynes v. Washington, 373 U.S. 503, 514 (1963) (focusing on suspect's isolation during 16 hour interrogation during which police coerced involuntary statement through threats and promises); Lynumn, 372 U.S. at 534 (noting, in analyzing allegedly involuntary confession, that suspect was surrounded by three police officers, had no friends or counsel present, had no experience with criminal law, and had no reason not to believe police could carry out threats regarding loss of her children); Malinski, 324 U.S. at 405 (finding confession involuntary because suspect was naked, alone, and without counsel while police interrogated him).

150. See Mincey, 437 U.S. at 399 (focusing on suspect's desire not to talk to police to find suspect's statement involuntary); Lynumn, 372 U.S. at 534 (stating that test of voluntary confession is whether suspects confessed of their own free will).

151. See Mahoney v. Kesery, 976 F.2d 1054, 1061-62 (7th Cir. 1992) (acknowledging two different interpretations of § 1983 liability for coerced confessions - that it forbids only use of coerced statements at trial, and that it forbids coercion itself).


153. See Duncan, 466 F.2d at 942 (holding that courts cannot hold police officers liable under § 1983 for trial court's act of improperly admitting confession); Loewy, supra note 33, at 908 (arguing that police should be civilly liable for obtaining evidence in unconstitutional manner, but not for obtaining evidence that courts unconstitutionally admit at trial); supra note 73 (noting that no § 1983 claim exists for court's wrongful admission of statements at trial).
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violates the Constitution, then police officers should be subject to a section 1983 suit regardless of whether any coerced statements are used at trial.\(^\text{154}\)

In *Cooper* the Ninth Circuit held that a section 1983 action is available even if the prosecution does not use the coerced statements at trial.\(^\text{155}\) The court found that the coercive interrogational methods themselves are the affront to the Constitution.\(^\text{156}\) When courts exclude coerced statements from trial, they are merely "applying the corrective where due process already has been denied."\(^\text{157}\) The fact that the prosecution does not use the statements at trial is relevant only to damages, not to whether a section 1983 cause of action is available.\(^\text{158}\)

Whether courts determine that the constitutional violation occurs when the police obtain the statement during interrogation or when the prosecution uses it at trial depends on the court's underlying rationale for finding coercion unconstitutional.\(^\text{159}\) Courts base the due process claim of coercion loosely on the Fifth Amendment privilege against self-incrimination,\(^\text{160}\) but whether courts limit the remedy for coercion to exclusion of the statements from trial is less clear.\(^\text{161}\) Case law exists supporting the argument that, like claims under the Fifth Amendment, the court must mistakenly allow the prosecution to introduce the coerced statement at trial before a constitutional

\(^{154}\) See *Cooper v. Dupnik*, 963 F.2d 1220, 1245 (9th Cir.) (en banc) (holding that prosecution's failure to use coerced statements at trial is not relevant to whether § 1983 cause of action is available), cert. denied, 113 S. Ct. 407 (1992); *Duncan*, 466 F.2d at 943 (holding that suspect may sue under § 1983 for mental anguish, pain, and injury suffered due to coercive interrogation); *Loewy*, *supra* note 33, at 934 (arguing that suspects who police subject to extreme stress during interrogation may sue police for violation of their constitutional rights).

\(^{155}\) See *Cooper*, 963 F.2d at 1237 (allowing § 1983 suit for police coercion during interrogation to proceed to trial even though prosecution never used coerced statement at trial).

\(^{156}\) Id.

\(^{157}\) Id. at 1245.

\(^{158}\) See id. (stating that prosecution's failure to bring defendant to trial or use his coerced statements at trial is relevant only to determining damages).

\(^{159}\) Compare *Duncan v. Nelson*, 466 F.2d 939, 944 (7th Cir.) (holding that courts may base Due Process Clause prohibition against coerced confessions in Fifth Amendment privilege against self-incrimination, but essence of claim of due process violation is that police conduct offends decency and fairness), cert. denied, 409 U.S. 894 (1972) with *Hampton v. Gilmore*, 60 F.R.D. 71, 81 (E.D. Mo.) (holding that because suspect has no constitutional right not to be interrogated while incarcerated on criminal charges, § 1983 suit is not available unless court admits coerced statement at trial), *aff'd*, 486 F.2d 1407 (8th Cir. 1973).

\(^{160}\) See *Malloy v. Hogan*, 378 U.S. 1, 7 (1964) (noting, in pre-*Miranda* decision, that courts analyze violations of Fourteenth Amendment Due Process Clause prohibition against coerced confessions under same standard as that imposed by Fifth Amendment privilege against self-incrimination); *Duncan*, 466 F.2d at 944 (holding that courts base due process prohibition against coercion during interrogation on Fifth Amendment privilege against self-incrimination).

\(^{161}\) See *Duncan*, 466 F.2d at 944 (noting that suspect's due process right to be free from coercion may be rooted in Fifth Amendment privilege against self-incrimination, but essence of claim is that police behavior offends societal standards).
violation occurs. Support also exists for the argument that the actual coercion during interrogation violates the Constitution. Therefore, an exclusion from trial is merely one remedy for that violation, and a section 1983 claim is another.

The United States Supreme Court departed from the various rationales previously used by courts for excluding coerced confessions in Malloy v. Hogan. In Malloy, the Supreme Court stated that courts must exclude coerced confessions from trial because these confessions violate the privilege against self-incrimination. From this reasoning, the primary constitutional violation that arises from coerced confessions is the prosecution's use of

162. See Wilkins v. May, 872 F.2d 190, 195 (7th Cir. 1989) (stating that federal courts should not monitor particulars of police interrogation or award § 1983 damages if police behavior is merely coercive), cert. denied, 493 U.S. 1026 (1990); Govan v. Chicago Police Dep't, No. 90-C-3471, 1991 WL 38695, at *2 (N.D. Ill. Mar. 18, 1991) (holding that police's verbal threatening of suspect during interrogation is not constitutional violation until courts make use of statements police obtain in this manner at trial); Jackson v. Dillon, 518 F. Supp. 618, 621 (E.D.N.Y. 1981) (declaring that no constitutional violation exists when police merely obtain involuntary statement from suspect); Ransom v. City of Phila., 311 F. Supp. 973, 974 (E.D. Pa. 1970) (holding that no constitutional violation exists for police coercion during interrogation unless prosecution makes use of illegally obtained statement).

163. See Spano v. New York, 360 U.S. 315, 320 (1959) (stating that society abhors involuntary confessions because of notion that police must obey law while enforcing law); Cooper v. Dupnik, 924 F.2d 1520, 1529 (9th Cir. 1991) (noting that actual police coercion during interrogation is due process violation provided police overcome the suspect's will), rev'd, 963 F.2d 1220 (en banc), cert. denied, 113 S. Ct. 407 (1992); Kerr v. City of Chicago, 424 F.2d 1134, 1138 (7th Cir.) (finding police coercion of confession actionable under § 1983), cert. denied, 400 U.S. 833 (1970); Coyne v. Boeckmann, 511 F. Supp. 667, 669-70 (E.D. Wis. 1981) (allowing § 1983 plaintiff to present evidence of damages sustained as result of police coercion during interrogation).

164. See Cooper v. Dupnik, 963 F.2d 1220, 1245 (9th Cir.) (en banc) (noting that constitutional violation from coerced confessions is complete with police coercion and that court must apply corrective during trial or through § 1983 liability), cert. denied, 113 S. Ct. 407 (1992).

165. 378 U.S. 1 (1964); see Harris v. New York, 401 U.S. 222, 224 (1971) (holding that courts may not introduce involuntary statements at trial for any purpose because they are untrustworthy); Haynes v. Washington, 373 U.S. 503, 514 (1963) (finding confession involuntary because police overbore defendant's will); Spano, 360 U.S. at 320 (noting that courts disapprove of involuntary confessions because they are untrustworthy and because police methods must conform to legal standards).

166. See Malloy v. Hogan, 378 U.S. 1, 3 (1964) (holding that Fourteenth Amendment, like Fifth Amendment, secures privilege against compelled self-incrimination); Loewy, supra note 33, at 933 (arguing that Malloy established that coerced confessions violate Fifth Amendment privilege against self-incrimination).

In Malloy, the Supreme Court considered whether the Fifth Amendment privilege against self-incrimination applied to the states through the Fourteenth Amendment. Malloy, 378 U.S. at 2. The state court in Malloy imprisoned the defendant for contempt of court because he refused to answer questions on the ground that he would incriminate himself. Id. at 3. Noting that the Fourteenth Amendment prohibits states from admitting statements at trial which the police coerced from suspects, the Malloy Court reasoned that the Fourteenth Amendment must also prohibit states from compelling suspects to incriminate themselves through the threat of imprisonment. Id. at 8. Therefore, the Malloy Court found that the Fifth Amendment privilege against self-incrimination applied to the states. Id.
them at trial. Courts' exclusion of the confessions should be the only remedy. Although the Supreme Court never has addressed the issue of section 1983 liability for coerced confessions directly, Justice Harlan, in his concurrence in Monroe v. Pape, acknowledged the possibility that psychological coercion during an interrogation could lead to section 1983 damages. United States courts of appeals that have addressed the issue have tended to agree with Justice Harlan.

In Duncan v. Nelson, the United States Court of Appeals for the Seventh Circuit dealt with the issue of whether a plaintiff could sue under section 1983 for damages arising from the police's coercing a confession from him. The police picked up the plaintiff for interrogation just after

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167. See Loewy, supra note 33, at 933 (arguing that after Malloy, primary constitutional violation of coerced confession is prosecution's use of it at trial).
168. See Buckley v. Fitzsimmons, 919 F.2d 1230, 1244 (7th Cir. 1990) (holding that suspect's privilege against self-incrimination is mere evidentiary privilege and violation can occur only during trial), rev'd in part, 113 S. Ct. 2606 (1993).
170. See Monroe v. Pape, 365 U.S. 167, 196 n.5 (1961) (Harlan, J., concurring) (offering psychological coercion leading to confession as example of constitutional violation for which § 1983 remedy should be available), overruled in part by Monell v. Department of Social Servs., 436 U.S. 658 (1978). In Monroe the Supreme Court considered whether the phrase "under color of" in § 1983 encompassed unconstitutional action taken without state authority in addition to unconstitutional action taken under state authority. Id. at 184. The plaintiffs in Monroe brought a claim under § 1983 against police officers for violation of their constitutional rights. Id. at 169. The police officers broke into the family's home without a search warrant, awoke and stripped them naked while they ransacked the house. Id. The police took the father to the police station and interrogated him for 10 hours without taking him before an available magistrate. Id. In addition, the police did not allow the father to contact his family or an attorney. Id. The police later released the father without charging him with a crime. Id. The Supreme Court determined that § 1983 was meant to supplement existing state remedies and the existence of state remedies for the constitutional violations did not preclude a § 1983 claim. Id. at 183. The Monroe Court further held that § 1983 provided a remedy to people deprived of a constitutional right by a state official's abuse of his position, regardless of whether the official had authority for his actions under state law. Id. at 184-87.
171. See Cooper v. Dupnik, 963 F.2d 1220, 1237 (9th Cir.) (en banc) (allowing § 1983 suit for coercion during custodial interrogation), cert. denied, 113 S. Ct. 407 (1992); Gray v. Spillman, 925 F.2d 90, 94 (4th Cir. 1991) (allowing § 1983 suit for police extraction of involuntary confession from suspect); Rex v. Teeple, 753 F.2d 840, 843 (10th Cir.) (holding that plaintiff can sue police under § 1983 for extracting involuntary confession), cert. denied, 474 U.S. 967 (1985); Duncan v. Nelson, 466 F.2d 939, 943 (7th Cir.) (finding that § 1983 plaintiff can sue for mental anguish and pain suffered during interrogation), cert. denied, 409 U.S. 894 (1972).
172. 466 F.2d 939 (7th Cir. 1972).
173. Duncan v. Nelson, 466 F.2d 939, 940 (7th Cir.), cert. denied, 409 U.S. 894 (1972). In Duncan the plaintiff sought damages for his conviction and nine year incarceration resulting from the trial court's introduction of Duncan's involuntary statement. Id. The Duncan court found that the plaintiff stated no claim for relief for damages arising from his conviction and incarceration because the trial court's admission of the statement was an intervening act for which the court could not hold the police responsible. Id. at 942. However, the court found that Duncan did state a § 1983 cause of action for the alleged police coercion of involuntary confession. Id. at 944. The Duncan court distinguished on two grounds cases holding that
he was released from solitary confinement, where he had been held for eighteen days on an unrelated offense.\textsuperscript{174} The police handcuffed him to a chair in the interrogation room and questioned him for ten hours until he confessed.\textsuperscript{175} Duncan sued under section 1983 claiming the police coerced his confession.\textsuperscript{176} Although the prosecution used Duncan’s confessions against him at trial, the \textit{Duncan} court held that Duncan could not sue for damages for his later incarceration.\textsuperscript{177} However, the court found that Duncan could sue for damages arising from the interrogation itself.\textsuperscript{178} The court reasoned that “[a]lthough the due process right allegedly violated here may be found in the historical underpinnings of the Fifth Amendment’s prohibition against self-incrimination, the essence of the plaintiff’s claim is that the police conduct here alleged offends [the] ... requirements of decency and fairness.”\textsuperscript{179}

Although \textit{Duncan} supports civil liability for the actual coercion, the interrogation at issue in \textit{Duncan} occurred before the \textit{Malloy} or \textit{Miranda} decisions.\textsuperscript{180} Additionally, the \textit{Duncan} court specifically noted that it based the holding on the Fourteenth Amendment as interpreted before the Supreme Court incorporated into it the Fifth Amendment privilege against self-incrimination.\textsuperscript{181} Other courts, including the \textit{Cooper} court, subsequently followed \textit{Duncan}’s holding.\textsuperscript{182}

Courts that find a section 1983 cause of action for due process violations seek to deter police coercion in custodial interrogations by imposing civil

\textit{Miranda} violations do not lead to § 1983 violations. \textit{Id.} First, the court noted that \textit{Miranda} violations constitute only an unrebuttable presumption in the criminal trial that the defendant’s constitutional rights were violated. \textit{Id.} Second, the court reasoned that \textit{Miranda} violations are not constitutional violations until statements the police obtain in violation of \textit{Miranda} are introduced at trial. \textit{Id.} The \textit{Duncan} court construed the plaintiff’s claim as one arising under the Due Process Clause, and held that the plaintiff could sue under § 1983 for any harm suffered during the interrogation. \textit{Id.} at 945.

\textsuperscript{174} \textit{Id.} at 941.

\textsuperscript{175} \textit{Id.}

\textsuperscript{176} \textit{Id.}

\textsuperscript{177} \textit{Id.} at 942; see supra note 73 (noting \textit{Duncan} court’s holding that § 1983 plaintiffs cannot sue police for damages arising from their conviction and incarceration).

\textsuperscript{178} Duncan v. Nelson, 466 F.2d 939, 943 (7th Cir.), cert. denied, 409 U.S. 894 (1972).

\textsuperscript{179} \textit{Id.} at 944.

\textsuperscript{180} \textit{Id.}

\textsuperscript{181} \textit{Id.}

liability. If the rationale behind finding a constitutional violation for coerced statements is the Fifth Amendment privilege against self-incrimination, the question then becomes whether deterrence of improper police behavior is a proper goal. If the Fifth Amendment's only purpose is to protect suspects from being compelled to be witnesses against themselves at trial, no Fifth Amendment violation can occur, regardless of the police methods used, provided the court excludes the compelled statements. However, under the Duncan court's rationale, a due process violation for a coerced confession, while based in the Fifth Amendment privilege against self-incrimination, cuts more broadly by addressing the actual methods of interrogation. Under the Duncan court's theory, police deterrence becomes an aim encompassed within due process.

Whether courts view the due process claim of coercion as equivalent to a claim under the Fifth Amendment privilege against self-incrimination, or whether they view it as a broader claim addressing police behavior during interrogation, neither reading of the rationale behind the unconstitutionality of coerced confessions is adequate. Many cases involve police who simply are overzealous. They may obtain a coerced confession, but their methods hardly could be said to be unconstitutional. For instance, in Arizona v.

183. See Cooper, 963 F.2d at 1247 (stating the court's holding is sending message to police that their behavior must conform to standards of Fifth and Fourteenth Amendments).
184. See Haynes v. Washington, 373 U.S. 503, 519 (1963) (excluding involuntary statement from trial because police methods used to obtain it were unlawful); Loewy, supra note 33, at 925 (arguing that court's attempt to deter police misconduct through exclusion of statements police obtain in violation of Miranda is not legitimate).
185. See U.S. CONST. amend. V (declaring that suspects cannot be compelled to incriminate themselves); Oregon v. Elstad, 470 U.S. 298, 307 (1985) (holding that Fifth Amendment privilege against self-incrimination protects suspects only from prosecution's use of compelled statements at trial).
186. See Kastigar v. United States, 406 U.S. 441, 448 (1972) (holding that government can compel testimony from suspect without violating suspect's Fifth Amendment privilege against self-incrimination if government grants suspect immunity against prosecution's use of that testimony against suspect in criminal trial); Buckley v. Fitzsimmons, 919 F.2d 1230, 1244 (7th Cir. 1990) (holding that Fifth Amendment privilege against self-incrimination is mere evidentiary privilege), rev'd in part, 113 S. Ct. 2606 (1993).
187. See Duncan v. Nelson, 466 F.2d 939, 944 (7th Cir.) (holding that essence of due process prohibition of coerced confessions is that police conduct must be decent and fair), cert. denied, 409 U.S. 894 (1972).
188. See Cooper v. Dupnik, 963 F.2d 1220, 1247 (9th Cir.) (en banc) (noting that court's holding that plaintiff could sue police under § 1983 for coercing confession was sending message to police department), cert. denied, 113 S. Ct. 407 (1992); Duncan, 466 F.2d at 944 (finding § 1983 cause of action because police elicited statement using offensive behavior).
189. See Loewy, supra note 33, at 934 (noting that not all police coercion is unconstitutional).
190. See Loewy, supra note 33, at 934 (noting that police do not violate Constitution merely by coercing confession from suspect).
191. See Jackson v. Dillon, 518 F. Supp. 618, 621 (E.D.N.Y. 1981) (noting that suspect's burden in proving that police obtained involuntary statement is not as high as suspect's burden in § 1983 claim for police coercion); Loewy, supra note 33, at 917 (arguing that simply because
Fulminante, a police informant coerced a statement from a suspect by promising to protect the suspect from physical harm at the hands of fellow prisoners. The Court excluded the statement from trial because the informant had coerced it. Because making this promise to obtain a confession was not extreme, holding the informant civilly liable in such a situation would be drastic.

Other coercive interrogations involve such extreme behavior that civil liability is clearly an appropriate deterrent. For instance, in Brown v. Mississippi the police beat and tortured the defendants into confessing.

Prosecution's use of statement at trial would violate suspect's Fifth Amendment privilege against self-incrimination, it does not follow that police behavior in obtaining statement justifies civil liability).

193. Arizona v. Fulminante, 111 S. Ct. 1246, 1252-53 (1991). In Fulminante the Court analyzed whether a suspect's confession, which the prosecution used to convict the suspect of his stepdaughter's murder, was voluntary. Id. at 1250. Fulminante was in prison on an unrelated charge and befriended inmate Sarivola, a paid FBI informant. Id. Sarivola heard rumors that Fulminante murdered his stepdaughter and the FBI instructed Sarivola to investigate further. Id. Sarivola approached Fulminante and told him he knew that Fulminante was getting rough treatment from fellow prisoners because he was a rumored child killer. Id. In response to Sarivola's promise of protection, Fulminante confessed to the murder. Id. The trial court admitted the confession and Fulminante was convicted of murder. Id. at 1251. The Arizona Supreme Court ruled that the police had coerced the confession and the United States Supreme Court affirmed, overturning the conviction. Id. at 1252. Analyzing the confession under the totality of the circumstances, the court found that the police overbore Fulminante's will with a credible threat of physical violence and therefore the court erroneously admitted the confession. Id. at 1253.
194. Id.
195. See Wilkins v. May, 872 F.2d 190, 195 (7th Cir. 1989) (holding that courts should not award § 1983 damages every time police coerce confessions from suspects), cert. denied, 493 U.S. 1026 (1990); Loewy, supra note 33, at 934 (arguing that courts should not hold police personally liable when police misconduct is justifiable, or not unconstitutional in itself).
196. See Buckley v. Fitzsimmons, 919 F.2d 1230, 1244 (7th Cir. 1991) (noting that § 1983 liability is appropriate only when police misconduct is complete with interrogation), rev'd in part, 113 S. Ct. 2606 (1993); Loewy, supra note 33, at 934 (contending that police obtain some involuntary confessions unconstitutionally).
197. 297 U.S. 278 (1936).
198. Brown v. Mississippi, 297 U.S. 278, 281-82 (1936). In Brown the Supreme Court considered whether the conviction of three defendants for murder based solely on confessions the police obtained through physical violence was consistent with due process of law. Id. at 279. The police hanged one defendant from a tree twice, and then repeatedly whipped him until he confessed to the murder. Id. at 281. The police brought the two other defendants to the jail, stripped them naked and whipped them with a belt. Id. at 282. The police informed the defendants that they would stop the whipping when the defendants confessed. Id. When the defendants finally confessed, the whipping continued until the confessions conformed to the details demanded by the police. Id.

The court convicted the defendants of murder; the confessions were the only significant evidence the prosecution introduced against them at trial. Id. at 279. The Court noted that the state was not bound by the Fifth Amendment privilege against self-incrimination, so it analyzed the confessions under the Due Process Clause of the Fourteenth Amendment. Id. at 285. The Court held that the police behavior was revolting to the sense of justice and use at trial of confessions obtained in such a manner violated Due Process. Id. at 286. Accordingly, the Court overturned the convictions. Id. at 287.
The United States Supreme Court excluded the confessions from trial, but one hardly could argue that this exclusion cured the harm done to the defendants, or that courts should not deter such behavior. Civil liability also is appropriate in a case like Cooper, in which the police subject the defendant to four hours of "hammering" by a interrogator as part of a department-wide conspiracy.

The problem with holding police personally liable for all coerced confessions is that the inquiry for determining whether a confession was coerced focuses on the suspect's state of mind. An inquiry under section 1983, however, should focus on the police behavior involved. The burden of proof on a plaintiff under the exclusionary rule, to prevent the court from admitting an involuntary statement at trial, and the burden in a section 1983 case should not be the same. The section 1983 inquiry should focus on the police behavior and whether the behavior crossed the constitutional line, regardless of whether the police conduct occurs during an interrogation. Such an inquiry is better addressed under the broader shock-the-conscience standard.

2. Police Behavior that Shocks the Conscience

Another potential ground exists for a section 1983 cause of action when the methods the police use to obtain the confession are so offensive that

199. Id. at 286.
200. See Loewy, supra note 33, at 934 (arguing that courts should allow suspects to sue police under § 1983 for behavior that is clearly wrong in itself).
202. See Arizona v. Fulminante, 111 S. Ct. 1246, 1251 (1991) (finding confession involuntary because police informant obtained it by promising to protect defendant who feared for his life); Mincey v. Arizona, 437 U.S. 385, 399 (1978) (focusing on suspect's helpless and weakened condition to find his statement involuntary); Lynumn v. Illinois, 372 U.S. 528, 534 (1963) (focusing on suspect's belief that police could take her children away if she did not cooperate to find her statement involuntary); Malinski v. New York, 324 U.S. 401, 407 (1945) (finding confession involuntary because police obtained it through suspect's fear). But see Colorado v. Connelly, 479 U.S. 157, 164 (1986) (holding that coercive police conduct is essential element of involuntary confession); Benner, supra note 33, at 127 (arguing that Connelly Court repudiated concept of free will as element of voluntary confession by focusing solely on police behavior).
203. See Cooper, 963 F.2d at 1251-52 (noting that task force's unconstitutional behavior invited § 1983 suit).
204. See Wilkins v. May, 872 F.2d 190, 195 (7th Cir. 1989) (noting that courts should not award damages whenever police merely coerce suspects during interrogation), cert. denied, 493 U.S. 1026 (1990); Jackson v. Dillon, 518 F. Supp. 618, 621 (E.D.N.Y. 1981) (stating suspect's burden for proving confession was involuntary and suspect's burden in § 1983 suit are not equivalent).
205. See Buckley v. Fitzsimmons, 919 F.2d 1230, 1244 (7th Cir. 1991) (holding that no § 1983 cause of action exists for police coercion unless behavior involved is unconstitutional on other grounds), rev'd in part, 112 S. Ct. 2606 (1993).
206. See supra note 77 and accompanying text (noting that shock-the-conscience standard is not limited to police conduct that occurs during interrogation).
they shock the conscience.\textsuperscript{207} The Supreme Court developed this shock-the-conscience standard in \textit{Rochin v. California}.\textsuperscript{208} The \textit{Rochin} Court held that police behavior that would "more than offend some fastidious squeamishness or private sentimentalism about combating crime too energetically" shocks the conscience and violates due process.\textsuperscript{209} Although \textit{Rochin} did not

\textsuperscript{207} See \textit{Rochin v. California}, 342 U.S. 165, 172-73 (1952) (holding that police behavior that shocks conscience violates Due Process Clause of Fourteenth Amendment).

\textsuperscript{208} 342 U.S. 165 (1952)

\textsuperscript{209} Rochin v. California, 342 U.S. 165, 172 (1952). In \textit{Rochin} the Supreme Court overturned a conviction based on evidence that the police obtained in a manner that shocked the conscience. \textit{Id.} The police entered the defendant's home and forced their way into his bedroom. \textit{Id.} at 166. They asked the defendant, who was in the room, about two capsules on a bedside table. \textit{Id.} The defendant put the capsules in his mouth. \textit{Id.} After unsuccessfully trying to extract the capsules, the police officers took the defendant to the hospital and forced him to have his stomach pumped to retrieve the capsules. \textit{Id.} The defendant was convicted for possession of morphine capsules. \textit{Id.} The Supreme Court noted that the police officer's behavior shocked the conscience and therefore violated due process. \textit{Id.} at 172; see supra note 20 (quoting Due Process Clause of Fourteenth Amendment).

In \textit{Graham v. Connor}, 490 U.S. 386, 388 (1989), the Supreme Court heard a § 1983 claim by a plaintiff who argued that the police officer's use of excessive force while making an arrest shocked the conscience. The Supreme Court rejected this generic substantive due process approach to claims of excessive force, expressing a preference for identifying the specific constitutional right infringed by the alleged excessive force, in this case the Fourth Amendment. \textit{Id.} at 393-94 The \textit{Graham} Court, however, specifically left open the issue of whether the Fourth Amendment applies to pretrial detainees, including suspects whom police interrogate, because the case did not present that issue. \textit{Id.} at 395 n.10.

The \textit{Cooper} court acknowledged that the \textit{Graham} decision undermines the availability of the shock-the-conscience theory under § 1983, but decided that "[b]ecause statements of an accused continue to be analyzed under both the Fifth and Fourteenth Amendments, and because [the shock-the-conscience] theory of section 1983 is still viable, Cooper is entitled to avail himself of all three theories." Cooper v. Dupnik, 963 F.2d 1220, 1244 n.11 (9th Cir.) (en banc), \textit{cert. denied}, 113 S. Ct. 407 (1992). Other courts in post-\textit{Graham} cases have analyzed the issue differently, although little case law discusses the \textit{Graham} decision's effect on the availability of a substantive due process claim for misconduct during interrogations.

In \textit{Gonzalez v. Tilmer} the United States District Court for the Northern District of Illinois denied the availability of the shock-the-conscience standard under § 1983 for police misconduct during an interrogation. Gonzalez v. Tilmer, 775 F. Supp. 256, 261-62 (N.D. Ill. 1991). The plaintiff in \textit{Gonzalez} claimed that the police coerced a statement from him by holding him for 24 hours without providing food. \textit{Id.} at 263. The court noted that the issue was not whether the suspect's statement was voluntary, but whether the police violated any of the suspect's constitutional rights by using coercion. \textit{Id.} at 260. The court went on to state that under the Due Process Clause, the relevant inquiry is not whether the interrogation was lawful, but whether the suspect suffered physical or psychological harm inflicted during such an interrogation. \textit{Id.} at 261. The \textit{Gonzalez} court rejected the shock-the-conscience standard because Gonzalez, like the plaintiff in \textit{Graham}, was securely in custody when the allegedly excessive force occurred. \textit{Id.} The \textit{Gonzalez} court analyzed the claim as one of excessive force under the Fourth Amendment's reasonableness test, which asks whether the police officers' actions are objectively reasonable under the totality of the circumstances. \textit{Id.} at 262.

The \textit{Gonzalez} court criticized the Ninth Circuit's panel decision in \textit{Cooper} for using the shock-the-conscience standard. \textit{Id.} at 262 n.5. In \textit{Cooper} the Ninth Circuit panel declined to use a Fourth Amendment reasonableness test because the police used little physical force against Cooper in his arrest. Cooper v. Dupnik, 924 F.2d 1520, 1530 n.19 (9th Cir. 1991),
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involve a section 1983 suit, courts subsequently have found that police behavior violating the Rochin standard is actionable under section 1983.\textsuperscript{210} Because the shock-the-conscience test is a substantive due process standard applicable to all police behavior and not based in the Fifth Amendment privilege against self-incrimination, violations of the standard are unconstitutional standing alone.\textsuperscript{211} If the police obtain statements from a suspect in violation of Rochin, section 1983 liability may arise regardless of whether the prosecution makes use of the statements at trial.\textsuperscript{212}

The majority and the dissent in Cooper agreed that section 1983 liability is available for police interrogations that shock the conscience.\textsuperscript{213} The dispute was whether the task force's behavior was actually so offensive as to violate the Rochin standard.\textsuperscript{214} The majority found a violation because of the aggravating circumstances in Cooper's case.\textsuperscript{215} The majority felt that the task force's purpose in interrogating Cooper—to keep him from testifying rev'd, 963 F.2d 1220 (en banc), cert. denied, 113 S. Ct. 407 (1992) According to the Gonzalez court, this analysis misses the point. The Gonzalez court argued that the Graham Court did not look to the extent of force involved; rather, the Graham Court expressed a preference for analyzing § 1983 actions under a specific constitutional provision that protects the right allegedly abused. Gonzalez, 775 F. Supp. at 262 n.5.

Because the force in the Gonzalez case was more psychological than physical, the court declined to find a Fourth Amendment violation. Id. at 262. The Gonzalez court did state that police use of psychological force might, in some circumstances, be constitutionally unreasonable under the Fourth Amendment test. Id. Although physical injury is not a prerequisite to an excessive force claim under the Fourth Amendment, the extent of injury is an important factor in analyzing the reasonableness of the police conduct. Gumz v. Morrisette, 772 F.2d 1395, 1401 (7th Cir. 1985), cert. denied, 475 U.S. 1123 (1986). Because physical injury is not required, if police subject a suspect to purely psychological coercion during interrogation and courts use a Fourth Amendment standard to assess § 1983 liability, the claim will not necessarily fail. Id. Proving such a claim under the Fourth Amendment reasonableness standard should be no more difficult than succeeding under a shock-the-conscience analysis. See E. Bryan MacDonald, Comment, Graham v. Connor: A Reasonable Approach to Excessive Force Claims Against Police Officers, 22 Pac. L.J. 157, 179-80 (1990) (noting that more § 1983 plaintiffs should prevail under Fourth Amendment reasonableness standard than under substantive due process standard).

\textsuperscript{210} See Wood v. Ostrander, 879 F.2d 583, 588 (9th Cir. 1989) (finding § 1983 cause of action because police behavior shocked conscience when police arrested driver of car and left passenger alone in dangerous neighborhood where she subsequently was raped), cert. denied, 111 S. Ct. 341 (1990); Rutherford v. City of Berkeley, 780 F.2d 1444, 1447-48 (9th Cir. 1986) (allowing § 1983 claim to proceed under shock-the-conscience theory when police allegedly detained and beat suspect).

\textsuperscript{211} See Rochin, 342 U.S. at 173 (noting that court's rationale for overturning conviction was that police methods used to obtain evidence shocked conscience, not because evidence obtained was unreliable).

\textsuperscript{212} See Cooper, 963 F.2d at 1250 (allowing § 1983 suit to proceed for police interrogation that shocked conscience although prosecution never used statements obtained through shocking behavior).

\textsuperscript{213} See id. at 1255 (Brunetti, J., dissenting) (noting that § 1983 plaintiff's substantive due process theory failed because despite majority's finding, police behavior did not shock conscience).

\textsuperscript{214} Id.

\textsuperscript{215} Id. at 1249.
at trial and to hinder an insanity defense—was unlawful.\textsuperscript{216} The court noted that although the police's goal is to bring suspects to justice, they must use legitimate methods to do so.\textsuperscript{217} The dissent disagreed with the majority's assessment, noting that the task force's behavior, while not commendable, did not rise to the level of a substantive due process violation.\textsuperscript{218}

The judges' disagreement in \textit{Cooper} as to whether the task force's behavior shocked the conscience reflects the inability of courts to define the standard adequately.\textsuperscript{219} The general inquiry is whether the police misconduct crossed the constitutional line.\textsuperscript{220} This inquiry is necessarily subjective and is particular to the facts of each case.\textsuperscript{221} Most section 1983 suits for police behavior that shocks the conscience involve allegations of police brutality.\textsuperscript{222} However, courts have found types of offensive behavior not involving physical violence to shock the conscience as well.\textsuperscript{223}

The shock-the-conscience standard is appropriate for analyzing section 1983 claims of improper police behavior during interrogation.\textsuperscript{224} Because the inquiry focuses on the behavior of the police and not the effect of the behavior on the suspect or resulting statements, the shock-the-conscience standard is useful in determining what misconduct merits section 1983

\begin{itemize}
\item \textsuperscript{216} \textit{Id.} at 1250. The \textit{Cooper} court distinguished the present case from \textit{Harris v. New York}, 401 U.S. 222 (1971), in which the Court allowed the prosecution to use for impeachment purposes a statement that the police obtained with no \textit{Miranda} warnings. The motive of the task force in \textit{Cooper} was to prevent Cooper from testifying at all, not just to impeach him if he lied on the stand. In addition, the statement in \textit{Harris} was not involuntary. \textit{Cooper v. Dupnik}, 963 F.2d 1220, 1249 (9th Cir.) (en banc), \textit{cert. denied}, 113 S. Ct. 407 (1992).

\item \textsuperscript{217} \textit{Id.} at 1250.

\item \textsuperscript{218} \textit{Id.} at 1255 (Brunetti, J., dissenting). The dissent argued that because the police did not beat Cooper, deprive him of food or sleep, or hold him incommunicado for days, their conduct did not shock the conscience. \textit{Id.} Also, the dissent noted that the Supreme Court's direction that courts should be reluctant to expand the reach of substantive due process applies to this case. \textit{Id.} at 1256; \textit{see} Bowers v. Hardwick, 478 U.S. 186, 194 (1986) (declaring that courts should not expand reach of substantive due process when possible expansion has no cognizable roots in Constitution).

\item \textsuperscript{219} \textit{See} \textit{Cooper v. Dupnik}, 924 F.2d 1520, 1530 (9th Cir. 1991) (noting that substantive due process standards provide courts with little guidance when police misconduct is serious), \textit{rev'd}, 963 F.2d 1220 (en banc), \textit{cert. denied}, 113 S. Ct. 407 (1992).

\item \textsuperscript{220} \textit{See} \textit{Wood v. Ostrander}, 879 F.2d 583, 589 (9th Cir. 1989) (noting that police misconduct that crosses constitutional line violates substantive due process), \textit{cert. denied}, 111 S. Ct. 341 (1990).

\item \textsuperscript{221} \textit{See} \textit{Cooper v. Dupnik}, 963 F.2d 1220, 1248 (9th Cir.) (en banc) (noting that determination of whether behavior shocks conscience requires court to develop facts of each case), \textit{cert. denied}, 113 S. Ct. 407 (1992).

\item \textsuperscript{222} \textit{See id.} at 1249 (noting that most § 1983 claims of substantive due process violations involve allegations of police brutality).

\item \textsuperscript{223} \textit{See} \textit{Wood}, 879 F.2d at 589 (finding § 1983 cause of action because police abandoned plaintiff in dangerous neighborhood).

\item \textsuperscript{224} \textit{See} \textit{Cooper}, 963 F.2d at 1248-49 (analyzing whether police misconduct during interrogation shocked conscience); \textit{Loewy}, supra note 33, at 935-38 (suggesting that courts should distinguish between confessions that police merely coerce and those police obtain in manner that shocks conscience).
\end{itemize}
liability. The main drawback is that the standard is vague and subjective. However, if courts find, as the Cooper court did, that deliberately unlawful police misconduct shocks the conscience, then the standard will, through the threat of personal liability, adequately deter police from knowingly ignoring Miranda rights or intentionally coercing confessions and will keep their behavior in line.

IV. Analysis

Despite the Cooper court’s broad language holding that the Fifth Amendment privilege against self-incrimination applies to police behavior during interrogation and not just to the prosecution’s use of any obtained statements at trial, other courts probably will interpret the decision narrowly. The court refrained from holding that section 1983 liability should be available every time the police ignore a suspect’s invocation of Miranda rights. In reality the holding merely finds section 1983 liability for the coercion following the police failure to respect the suspect’s request for counsel. This cause of action essentially is equivalent to the cause of action under the Due Process Clause. Finding a section 1983 cause of action on both grounds is superfluous. Whether the Cooper court should have gone further and omitted the need for police coercion following a request for counsel in order for section 1983 liability to be available is questionable. Although section 1983 might provide an additional deterrent in some circumstances, courts could better accomplish deterrence through other methods.

225. See Wilkins v. May, 872 F.2d 190, 195 (7th Cir. 1989) (arguing that courts should allow § 1983 suits only when police behavior during interrogation shocks conscience), cert. denied, 493 U.S. 1026 (1990).


228. Id. at 1252 (arguing that police failure to obey established law invites § 1983 suits); Eisenberg & Schwab, supra note 7, at 652 n.58 (quoting Carlson v. Green, 446 U.S. 14, 21 (1980)) (noting assumption that threat of damages has deterrent effect on behavior).

229. See supra notes 123-43 and accompanying text (discussing how Cooper court limited its holding by stating that Fifth Amendment violation occurs only when coercive police behavior follows police failure to honor request for counsel).

230. See supra notes 132-36 and accompanying text (arguing that Cooper court’s focus was on coercive police behavior rather than suspect’s invocation of Fifth Amendment privilege against self-incrimination).

231. See supra notes 144-50 and accompanying text (discussing courts’ analysis of allegedly coerced statements).

232. See supra note 14 (noting that impeachment exception to Miranda exclusionary rule undermines deterrence of police misconduct). Abolishing the impeachment exception would be
The Cooper decision will not change the unanimous view that section 1983 liability is not available for the mere failure of police to provide Miranda warnings. The decision would provide a strong deterrent if courts allowed a cause of action for police failure to give Miranda warnings. No persuasive argument exists for allowing a section 1983 cause of action for such behavior, because, unlike the situation in which police ignore a suspect's invocation of Miranda rights following the warnings, the Miranda exclusionary rule does provide a sufficient incentive for police to give the warnings. Police hope that the suspect will not invoke any Miranda rights at all, which would allow the interrogation to take place. Only when the suspect invokes those Miranda rights will the exclusionary rule fail to provide sufficient deterrent effect.

If courts interpret the Cooper decision broadly, the holding potentially may affect situations in which the police ignore a suspect's request for counsel or desire to remain silent. The impeachment exception to the Miranda exclusionary rule gives the police incentive to continue questioning suspects after they invoke their right to remain silent or their right to counsel under Miranda. Without fear of section 1983 liability, police have nothing to lose by continuing to question a suspect politely after such invocations. Provided that the police behavior following such invocations is not so coercive as to make any statements obtained involuntary, any confession or admission obtained will provide the prosecution with a powerful impeachment tool.

Despite its expansive language, the Cooper court provides no further incentive for the police to cease questioning a suspect who invokes a Miranda

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233. See supra notes 99-107 and accompanying text (discussing courts' agreement that no § 1983 liability exists for police failure to give Miranda warnings).
234. See supra note 228 (noting that threat of damages deters police misconduct).
235. See supra note 48 (discussing holding of Miranda).
236. See Miranda v. Arizona, 384 U.S. 436, 444-45 (1966) (holding that suspects may waive right to counsel and right to remain silent if they do so voluntarily, knowingly, and intelligently).
237. See supra note 14 and accompanying text (discussing impeachment exception to Miranda exclusionary rule).
238. See supra notes 108-12 and accompanying text (discussing Cooper court's broad interpretation of Fifth Amendment privilege against self-incrimination).
239. See supra notes 12-14 and accompanying text (discussing impeachment exception to Miranda exclusionary rule).
240. See Oregon v. Hass, 420 U.S. 714, 725 (1975) (Brennan, J., dissenting) (arguing that even if suspect requests counsel during interrogation, police will continue questioning suspect in hopes of obtaining statement that prosecution can use to impeach suspect's credibility at trial).
241. See supra note 15 and accompanying text (noting that courts may not admit involuntary statements at trial for any purpose).
right. 242 Provided that the police continue the questioning in a "benign" way, any statement obtained likely will be voluntary and therefore admissible for impeachment. 243 Under Cooper, police will not have to fear civil liability. 244 A different approach would be to provide for civil liability in all situations in which the police continue questioning suspects after their invocation of Miranda rights. This is a step courts, including the Cooper court, have been unwilling to take. 245 However, courts can address such deliberately unlawful police misconduct under a section 1983 claim based on the Due Process Clause. 246

Courts are split on whether coercing involuntary statements leads to section 1983 liability. 247 Some courts state that the prosecution must use an involuntary statement at trial before a constitutional violation exists. 248 Once courts admit such a statement at trial, section 1983 liability is no longer an option, and the suspect's only available remedy is to challenge a conviction. 249 Other courts allow plaintiffs to sue for damages, whether physical or psychological, arising from the interrogation itself. 250

Any statements the police obtain through coercion are inadmissible for any purposes at trial, so police have no incentive to coerce suspects. 251 Section 1983 cannot act as an additional deterrent. However, if the plaintiff suffers harm during interrogation, then the exclusionary rule, which prevents the prosecution from using the statement at trial, does not provide a sufficient remedy. 252 In order for courts to redress the harm, section 1983 liability should be an option. Courts should limit such liability, however, to circumstances in which the plaintiff suffered actual harm during ques-

242. See supra notes 132-36 and accompanying text (discussing limitation of Cooper court's holding and its effect on police deterrence).
243. See supra notes 132-36 (noting that Cooper court's limitation on its holding that suspect's request for counsel is invocation of Fifth Amendment privilege against self-incrimination is problematic).
244. See supra note 137 and accompanying text (noting that even after Cooper decision, no § 1983 liability exists when police merely fail to honor suspect's request for counsel during interrogation).
245. See supra note 137 and accompanying text (noting that no court has found § 1983 liability for mere police failure to respect suspect's request for counsel during interrogation).
246. See supra notes 224-28 and accompanying text (discussing appropriateness of due process shock-the-conscience standard for addressing deliberately unlawful police conduct).
247. See supra notes 159-64 and accompanying text (noting two different interpretations of § 1983 claim for coercion under Due Process Clause).
248. See supra note 162 (citing case law supporting view that court must allow prosecution to introduce involuntary statements at trial before constitutional violation exists).
249. See supra note 73 (discussing effects of court's admission of involuntary statement at trial).
250. See supra notes 172-82 and accompanying text (discussing cases holding that coercion during interrogation violates Constitution).
251. See supra note 15 and accompanying text (noting that courts may not admit involuntary statements at trial for any purpose).
252. See supra notes 196-201 and accompanying text (arguing that some coercive police behavior during interrogation is unconstitutional standing alone).
tioning, although not necessarily only physical harm.\textsuperscript{253} The problem then becomes determining if the police behavior is so offensive that courts should allow section 1983 liability.\textsuperscript{254}

If courts allow section 1983 suits any time the police obtain involuntary statements, courts will be flooded with suits in which plaintiffs suffered minimal damages.\textsuperscript{255} These cases would add little additional deterrent effect because police have no reason intentionally to coerce an inadmissible involuntary statement from a suspect.\textsuperscript{256} A better approach is to limit section 1983 liability to police interrogations in which the methods used shock the conscience.\textsuperscript{257} This standard is appropriate because it focuses on the police behavior, not the effect on the suspect.\textsuperscript{258} The problem with the shock-the-conscience standard is that courts’ determinations of what sort of police behavior violates that standard vary greatly.\textsuperscript{259} If courts adopt the expansive Cooper reading of the shock-the-conscience standard, they would more than adequately protect suspects from offensive police behavior.\textsuperscript{260} In addition, fear of section 1983 liability would deter police from acting in an offensive manner while not unduly restraining police in their efforts to solve crimes.\textsuperscript{261}

V. Conclusion

Section 1983 provides the greatest deterrence of police misconduct during interrogations if courts clearly define the standards for constitutional violations.\textsuperscript{262} The Cooper decision illustrates that great confusion currently exists over when civil liability is appropriate for improper interrogations. Courts should not find section 1983 liability for mere police failure to warn suspects of their Miranda rights because by excluding any statements obtained in such a manner from trial, courts will safeguard the Fifth Amendment

\textsuperscript{253} See supra notes 196-201 and accompanying text (discussing need for § 1983 liability for extremely offensive police behavior during interrogations).

\textsuperscript{254} See supra notes 219-23 and accompanying text (discussing vague substantive due process standard courts use to analyze offensive police behavior).

\textsuperscript{255} See supra note 38 and accompanying text (discussing courts’ perception of § 1983 suits as frivolous and burdensome).

\textsuperscript{256} See supra note 15 and accompanying text (noting that courts may not admit involuntary statements at trial for any purpose).

\textsuperscript{257} See supra notes 224-28 and accompanying text (discussing appropriateness of shock-the-conscience standard for addressing police misconduct during interrogations).

\textsuperscript{258} See supra notes 202-06 and accompanying text (discussing need for courts to analyze § 1983 claims by focusing on police behavior).

\textsuperscript{259} See supra note 226 and accompanying text (discussing vagueness of shock-the-conscience standard).

\textsuperscript{260} See supra notes 227-28 and accompanying text (noting that Cooper court’s definition of behavior that shocks conscience includes deliberately unconstitutional conduct).

\textsuperscript{261} See supra note 7 and accompanying text (discussing courts’ concern that they not hamper police work with fear of § 1983 liability).

privilege against self-incrimination adequately.\textsuperscript{263} Similarly, courts should not find section 1983 liability for police failure to respect \textit{Miranda} rights.\textsuperscript{264} A danger exists that police will ignore a suspect’s invocation of \textit{Miranda} rights in an effort to elicit statements that the prosecution can use to impeach the suspect’s credibility at trial. However, courts may address such deliberately unlawful police behavior under the Due Process Clause using the shock-the-conscience standard.\textsuperscript{265}

If the police merely coerce statements from defendants in violation of the Due Process Clause, courts should not hold the police civilly liable.\textsuperscript{266} If the police misconduct during the interrogation is offensive standing alone, courts should address such behavior under a substantive due process analysis.\textsuperscript{267} Although the United States Supreme Court has eliminated this cause of action in other contexts, currently this cause of action remains viable in the context of interrogations.\textsuperscript{268} An expansive interpretation of the shock-the-conscience standard, as in the \textit{Cooper} decision, will ensure that section 1983 liability will be available to deter police misconduct without unnecessarily impeding police work due to fear of personal liability.\textsuperscript{269}

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\textsuperscript{263} \textit{See supra} notes 233-37 and accompanying text (arguing that no need exists for § 1983 liability for police failure to read suspect \textit{Miranda} warnings during custodial interrogation).

\textsuperscript{264} \textit{See supra} notes 113-22 and accompanying text (noting that \textit{Miranda} right to counsel is mere procedural safeguard).

\textsuperscript{265} \textit{See supra} notes 227-28 and accompanying text (noting that courts can adequately address deliberately unlawful police behavior under § 1983 claim for violation of suspect's substantive due process rights).

\textsuperscript{266} \textit{See supra} notes 189-95 and accompanying text (noting that police coercion does not always involve unconstitutional police behavior).

\textsuperscript{267} \textit{See supra} notes 189-95 and accompanying text (arguing that courts should use shock-the-conscience standard when analyzing § 1983 claims of police misconduct during interrogation).

\textsuperscript{268} \textit{See supra} notes 80-81 and accompanying text (discussing Supreme Court's limitation on substantive due process theories in § 1983 context).

\textsuperscript{269} \textit{See supra} notes 227-28 and accompanying text (noting that \textit{Cooper} court’s interpretation of shock-the-conscience standard is expansive and covers deliberately unconstitutional police behavior).