Constitutional Law - Coerced Confessions - Civil Damages Under Section 1983

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CASE NOTES

CONSTITUTIONAL LAW—COERCED CONFESSIONS—CIVIL DAMAGES UNDER SECTION 1983

On June 19, 1963, at 5:30 a.m., Harvey Kerr, a 17 year-old black youth, was taken into custody by Chicago police officers. Kerr alleged that at the police station, "he was kicked and hit by an officer . . . [and] required to take a polygraph examination." Kerr alleged that he was then informed that he would be allowed to eat and use the washroom facilities only if he confessed. The next morning, approximately 27 hours after he was apprehended, Kerr was brought before a magistrate, who in turn bound him over to the Cook County Grand Jury. He was subsequently indicted for murder and burglary. At the conclusion of his trial, the jury was unable to reach a verdict. Nevertheless, Kerr was held until December 2, 1964—some 18 months—at which time a nolle prosequi was entered.

As a result of these actions, Kerr brought an action for damages against the individual police officers and the city of Chicago for violation of his civil rights. Kerr's complaint alleged ten different violations of his civil rights, the combination of which forced him to submit an involuntary confession which, in turn, was used to illegally detain him for 18 months. The coerced confession and illegal detention, asserted Kerr, constituted a violation of his fourteenth amendment guarantee against deprivation of liberty without due process of law. The complaint concluded: "as a direct and proximate result of these acts of the defendants, the plaintiff suffered pain and injury and mental anguish and seeks judgment therefore." The District Court dismissed the complaint as against the city of Chicago, and, on the merits, found for the defendant policemen. The Seventh Circuit of the United States Court of Appeals reversed as against the police officers, but affirmed the dismissal of the City of Chicago as a party defendant. Kerr v. City of Chicago, 424 F.2d 1134 (7th Cir. 1970).

Kerr v. City of Chicago is the first case allowing a plaintiff who has been forced to submit an involuntary confession to recover damages from

2. Brief for Appellant at 4.
3. Supra note 1, at 1137.
the extractor of that confession. The purpose of this paper is to analyze this case in relation to the statute upon which the action is based, 42 U.S.C. §1983 (1964) (hereinafter referred to as section 1983). The purpose of this paper is to demonstrate that the Kerr decision is a logical result of the judicial history of that statute, and to preview the natural and direct consequences of this decision in both criminal and constitutional law.

Section 1983 was first enacted as part of the Civil Rights Act of 1871. Its primary purpose was to allow Negroes who had been denied their civil rights to seek restitution in a federal court. If a black man were deprived of his rights by a state official, he was to be afforded a positive civil action in a federal court. From 1871 until 1939, the courts strictly interpreted the "under color of law" clause of section 1983. The courts granted relief only when the deprivation was a result of official action taken pursuant to an unconstitutional statute which discriminated against blacks.

In Myers v. Anderson, several black plaintiffs brought suit to recover damages against Maryland voter registration officials who had refused to register them. Plaintiffs claimed that such refusal effectively deprived them of their right to vote, which was guaranteed by the fifteenth amendment of the United States Constitution.

Defendants had been acting pursuant to a Maryland suffrage statute when the alleged deprivations occurred. This statute had a "grandfather clause" which discriminated against blacks. Defendants argued that the

4. 42 U.S.C. § 1983 (1964) reads as follows: "Every person who under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, 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."

5. Originally enacted as section 1 of the Act of Apr. 20, 1871, ch. 22, § 1, 17 Stat. 13, entitled An Act to enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States and for other Purposes.

6. See, e.g., CONG. GLOBE, 42d Cong., 1st Sess. 376 (1871) (remarks of Congressman Lane); Id. at 459 (remarks of Congressman Coburn), and 514 (remarks of Congressman Poland). See also STAMPP, THE ERA OF RECONSTRUCTION 1865-1877 (1965).


8. 238 U.S. 368 (1915).

9. Id. at 377. Under the statute, only the following could register to vote: "1. All taxpayers of the City of Annapolis assessed on the city books for at least five hundred dollars. 2. And duly naturalized citizens. 2½. And male children
clause in controversy was not violative of the fifteenth amendment because, "[e]ven if this clause excluded all negroes, it would not necessarily follow that they were excluded on account of their race." The defendants did not, however, rest on the constitutional question alone. They next asserted a defense which faintly smelled like the immunity doctrine which later developed. If the statute were unconstitutional and void, defendants contended, then they had no power or authority to register the plaintiffs, since their authority was based entirely on the suffrage act. Therefore, if defendants had no authority to register the plaintiffs, they could hardly be liable for failure to do so.

The Supreme Court rejected both defenses and granted relief to the plaintiffs. Emphasizing throughout the opinion that the statute's unconstitutionality was a prerequisite to recovery, the court found the suffrage act, particularly the "grandfather clause," to be violative of the fifteenth amendment. "The result then is this, that the third standard is void because it amounts to a mere denial of the operative effect of the Fifteenth Amendment." Apparently, the Court felt that proving the unconstitutionality of the statute under which the officials acted was necessary in order to raise a section 1983 question.

Concerning the second defense, the Court held that the statute's unconstitutionality did not shield the defendants from liability, as defendants had the responsibility to register all qualified voters long before the statute was passed. "The mere change in some respects of the administrative machinery by the new statute did not relieve the new officers of their duty nor did it interpose a shield to prevent the operation upon them of the provisions of the Constitution of the United States. . . ." In addition, allowing the unconstitutionality of the act to shield the defendants would

of naturalized citizens who have reached the age of twenty-one years. 3. All citizens who, prior to January 1, 1868, were entitled to vote in the State of Maryland or any other State of the United States at a state election, and the lawful male descendants of any person who prior to January 1, 1868, was entitled to vote in this State or in any other State of the United States at a state election, and no person not coming within one of the three enumerated classes shall be registered as a legal voter of the City of Annapolis or qualified to vote at the municipal elections held therein, and any person so duly registered shall, while so registered, be qualified to vote at any municipal election held in said city; said registration shall in all other respects conform to the laws of the State of Maryland relating to and providing for registration in the State of Maryland."

10. Supra note 8, at 371.
11. Supra note 8, at 370.
12. Supra note 8, at 380.
13. Supra note 8, at 382.
completely emasculate section 1983, since proving that same unconstitutionality was an indispensable part of plaintiff's case.

In *Nixon v. Herndon*, plaintiff, a black man, sued several Texas Judges of Elections for $5,000. The defendants, acting pursuant to a state statute which held, "in no event shall a negro be eligible to participate in a Democratic party primary election held 'in the State of Texas,'" had refused to allow plaintiff to vote in a primary election.

The defendants asserted the defense that a political party was a "voluntary" organization whose regulation was a "political" rather than a "legal" matter. As a political organization, defendants continued, the political party is free to hold its elections without regard to the voting provisions of the United States Constitution. Specifically, defendants concluded, the right of a citizen to vote in a primary is not within the purview of the fourteenth and fifteenth amendments of the United States Constitution. Correspondingly, a law which restricts voting in such a primary is not unconstitutional.

Speaking for the Court, Mr. Justice Holmes quickly refuted the above defense and held for plaintiff. Dismissing the political-legal distinction as a mere "play upon words," and skipping over the question of whether the Texas law violated the fifteenth amendment, Holmes found the law to be a "... direct and obvious ... infringement of the Fourteenth Amendment." Holmes pointed out that the Texas law blatantly denied equal protection of the law to the black. For this deprivation, plaintiff was entitled to $5000.

The *Lane* case shifted the focus back to the fifteenth amendment. In that case, the Oklahoma legislature had passed a statute which demanded that those qualified voters who had not voted in the 1914 election apply for voter registration between April 30, 1916 and May 11, 1916. If a person did not register during that period, he would permanently lose the right to register and, hence, the right to vote. In addition, in order to be eligible to vote in the election of 1914, a constituent had to pass a "literacy test from which white voters were in effect relieved through the operation of a 'grandfather clause.'" A black man who failed to register during the allotted time, and, consequently, lost his voting privilege, brought suit for $5,000, basing his claim on section 1983.

15. *Id.* at 540.
19. *Id.* at 269.
20. At that time codified as 8 U.S.C. 43.
In deciding for the plaintiff, the Supreme Court emphasized that the statute violated the fifteenth amendment, and that it was this unconstitutionality which gave the right of action to the plaintiff: 

"[T]he narrow basis of the supplemental registration . . . leave[s] no escape from the conclusion that the means chosen as substitutes for the invalidated 'grandfather clause' were themselves invalid under the Fifteenth Amendment."  

The above cases demonstrate typical section 1983 actions prior to 1939. By holding that the "under color of law" clause encompassed only official action taken pursuant to an unconstitutional statute, the courts severely limited the application of the section. As a result of this strict interpretation, only a sparsity of cases based on section 1983 met with success. In 1939, a seer would not likely forecast that this same section would provide the base for a myriad of cases by 1970.

From 1939-1961, the United States Supreme Court handed down four decisions, the combination of which greatly enlarged the scope of section 1983. The case of *Hague v. C.I.O.*  was the first decision which granted relief based on section 1983 to a claimant who was not the victim of racial discrimination. Plaintiff, C.I.O., was an unincorporated labor organization which sought an injunction against Mayor Hague of Jersey City, New Jersey. The mayor and his subordinates had been enforcing an ordinance which forbade any person to distribute any newspaper, periodical, paper, pamphlet, etc., and, consequently, had refused to allow the C.I.O. to distribute literature which discussed various provisions of the National Labor Relations Act.

While granting the injunction, the Court implied that an action would lie only if the official action was taken pursuant to an unconstitutional statute. "As the ordinance is void, the respondents are entitled to a decree so declaring and an injunction against its enforcement by the petitioners."  Thus, the Court was not yet ready to liberalize the construction of the "under color of law" clause.

Since the defendants in the *Hague* case argued that the federal courts lacked jurisdiction over the causes of action, it may be appropriate to briefly interrupt the tracing of the judicial history of section 1983 to discuss jurisdictional issues which confront the plaintiff who bases his action on this section.

The plaintiffs in *Hague* asserted federal jurisdiction upon two subsec-

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23. *Id.* at 501.
tions of the Judicial Code of 1911. The first subsection cited by plain-
tiffs was today's 28 U.S.C. §1331 (3) (1964), which grants the Dis-
trict Courts general "federal question" jurisdiction. Under the provisions
of this section (1911 version) the federal courts had jurisdiction over cases
arising under the Constitution and laws of the United States, when the
amount in controversy exceeded $3,000. The lead opinion in Hague
found that the individual plaintiffs had not shown the requisite damages
and that, "... the plaintiffs may not aggregate their interests in order
to attain the amount necessary to give jurisdiction." Consequently,
the Supreme Court held that the federal courts did not have general
"federal question" jurisdiction.

Plaintiff's second assertion of a jurisdictional base met with more suc-
(1964)—the federal courts have jurisdiction over cases instituted to re-
dress the deprivation under color of law, of any right, privilege, or im-
munity guaranteed by the Constitution or laws of the United States providing
for equal rights. The Court held that the right to discuss the provi-
sions of the National Labor Relations Act and to distribute written mate-
rial concerning that act was a privilege guaranteed by the fourteenth
amendment. Consequently, the federal District Court was a proper forum
for the case.

The lead opinion in Hague, while admitting federal jurisdiction, nar-
rowly confined its decision to the facts of the case. The lead opinion held
only that the right to disseminate information concerning the National La-
bor Relations Act was a privilege guaranteed by the "privilege and im-

25. 28 U.S.C. § 1331(a) (1964): "The district courts shall have original jurisdic-
tion of all civil actions wherein the matter in controversy exceeds the sum or
value of $10,000 exclusive of interest and costs, and arises under the Constitution,
laws, or treaties of the United States."

26. Supra note 22, at 507: "Subsection (1) gives jurisdiction of suits of a civil
nature, at law or in equity, where the matter in controversy exceeds, exclusive
of interest and costs, the sum or value of $3,000 "and" arises under the Constitu-
tion or laws of the United States."

27. Supra note 22, at 508.

28. 28 U.S.C. § 1343(3) (1964) reads as follows: "The district courts shall
have original jurisdiction of any civil action authorized by law to be commenced by
any person: (3) To redress the deprivation, under color of any State law, statute,
ordinance, regulation, custom or usage, of any right, privilege or immunity secured
by the Constitution of the United States or by any Act of Congress providing for
equal rights of citizens or of all persons within the jurisdiction of the United
States."

29. Supra note 22, at 508.

munities” clause of the fourteenth amendment. By stressing the privilege and immunities clause and limiting its decision to, “... the right to discuss national legislation and the benefits, advantages, and opportunities to accrue to citizens therefrom,” the lead opinion implied that 28 U.S.C. §1343(3) would not grant the federal courts jurisdiction if plaintiffs had based their claim on violations of the due process clause of the same amendment. That is, according to the majority’s implication, if the plaintiffs had been disseminating information about religion, or the latest train robbery, or the World Series, the federal courts would not have had jurisdiction. Under §1343(3), the federal courts have jurisdiction only over cases which allege deprivation of rights protected by the privileges and immunities clause. Furthermore, this clause protects only rights growing out of a citizen’s relationship with the national government.

In a separate opinion, Mr. Justice Stone rejected this analysis. According to Stone, section 1343(3) gives the District Courts jurisdiction to hear cases alleging the deprivation of “personal liberties” guaranteed by the Constitution. Stone implied a property right—personal right dichotomy, and asserted that section 1343(3) provided jurisdiction when the gist of plaintiff's action is deprivation of a personal right. No jurisdictional amount need be proved since the evaluation of money damages for the deprivation of a personal right is difficult if not impossible. On the other hand, if plaintiff's claim is based on the deprivation of a property right, Stone indicated section 1331 was available, provided of course that the damage alleged exceeded that section’s minimal requirements.

In Stone’s words:

No more grave and important issue can be brought to this Court than that of freedom of speech and assembly, which the due process clause guarantees to all persons regardless of their citizenship, but which the privileges and immunities clause secures only to citizens, and then only to the limited extent that their relationship to the national government is affected. ... I think respondents' right to maintain it does not depend on their citizenship and cannot rightly be made to turn on the existence or non-existence of a purpose to disseminate information about the National Labor Relations Act. It is enough that petitioners have prevented respondents from holding meetings and disseminating information whether for the organization of labor unions or for any other lawful purpose.

In Stone’s view, personal rights must be protected by section 1983, and, hence, section 1343(3) is the provision which grants federal jurisdiction to actions based on deprivations of those personal rights. The section deal-

31. Supra note 22, at 512.
32. Supra note 22, at 513.
33. Supra note 22, at 518-32.
34. Supra note 22, at 524-25.
ing with general “federal question” jurisdiction, section 1331, is available to plaintiffs deprived of property rights.

The Hague case was the last Supreme Court decision which discussed jurisdictional problems raised by section 1983. Several lower courts have, however, subsequently approached the problem of finding a jurisdictional base in different ways. These cases must be mentioned.

In Hornsby v. Allen,\(^{35}\) plaintiff claimed that she had been deprived of her right to secure a liquor license. The court analyzed the jurisdictional question under section 1343(3) exactly as it analyzed the problem of whether plaintiff stated a valid claim under section 1983.\(^{36}\) Finding that the plaintiff did state a valid claim, the court ruled that, “[i]t follows that the trial court must entertain the suit and determine the truth of its allegations.”\(^{37}\) According to this court, simply filing a valid complaint based on section 1983 established federal jurisdiction based on section 1343(3). Stone’s personal right-property right dichotomy was apparently to be ignored. This case represents the broadest construction yet given to section 1343(3).

In 1968, King v. Smith\(^{38}\) reached the Supreme Court. This case found plaintiff challenging the constitutionality of an Alabama Department of Pensions Security regulation. The Supreme Court neatly sidestepped the potential section 1343(3) question by ruling, in a footnote to the text, that since plaintiff prayed for an injunction, the District Court had jurisdiction under 28 U.S.C. § 2281 (1964).\(^{39}\) This statute provides that the District Court has jurisdiction over cases which demand the enjoining of a State statute.\(^{40}\)

In 1969, a case arose in the Second Circuit in which plaintiff asserted jurisdiction under section 1343(3).\(^{41}\) The court dogmatically announced that Stone’s opinion in Hague was the prevailing view of the scope of sec-

\(^{35}\) 326 F.2d 605 (5th Cir. 1964).

\(^{36}\) Supra note 35, at 610-12.

\(^{37}\) Supra note 35, at 612.

\(^{38}\) 392 U.S. 309 (1968).

\(^{39}\) Id. at 312.

\(^{40}\) 28 U.S.C. § 2281 (1964) reads as follows: “An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title.”

\(^{41}\) Eisen v. Eastman, 421 F.2d 560 (2d Cir. 1969).
Quoting what it claimed was the Stone rule, the court stated that section 1343(3) applied, "whenever the right or immunity is one of personal liberty, not dependent for its existence upon the infringement of property rights." According to this court, the above formulation, "generously construed," determines the scope of section 1343(3). All suits alleging deprivation of "personal" constitutional rights—with the word "personal" liberally interpreted—are within its scope. Suits alleging other deprivations must fit under the umbrella of section 1331.

Capsulizing, today a plaintiff has many possible jurisdictional bases for his section 1983 action. First, if the claim is over $10,000, and is based on the deprivation of a property right, plaintiff can assert jurisdiction under section 1331—general "federal question" jurisdiction. As precedents, this plaintiff could cite Stone's opinion, as well as the lead opinion, in Hague. Second, if plaintiff's theory is that he is a "citizen" who has been deprived a "privilege or immunity," he can assert jurisdiction under section 1343(3), and cite the lead Hague opinion as precedent. Of course, no minimal amount need be claimed under this theory. Third, when plaintiff claims that he has been deprived of a personal liberty, he may assert jurisdiction under section 1343(3), citing Stone's Hague opinion as well as the Eisen case as controlling. Again, the amount of damages claimed by this plaintiff is immaterial. Fourth, if plaintiff's claim is for less than $10,000, but is not solely or primarily based on the deprivation of a personal right, he may assert jurisdiction under section 1343(3). This plaintiff would cite Hornsby as controlling, and might also argue that the Eisen liberalization of the Stone rule is a precedent for his case. Finally, a plaintiff who seeks only to enjoin a state statute should assert jurisdiction under section 2281, and cite King v. Smith as precedent.

42. Supra note 41, at 566: "We therefore hold, although with a good deal less than complete assurance, that Justice Stone's Hague formulation, generously construed, should continue to be regarded as the law of this circuit."

43. Supra note 41, at 564.

44. A few of the more unusual applications of the Stone interpretation of section 1343(3) are: McNeese v. Board of Education, 373 U.S. 668 (1963) (right to attend an integrated school); Tenney v. Brandhove, 341 U.S. 367 (1951) (first amendment guarantee of freedom of speech); Smith v. Allwright, 321 U.S. 649 (1944) and Baker v. Carr, 369 U.S. 186 (1962) (the rights to vote and have an equal effect given to one's vote); and Douglas v. City of Jeanette, 319 U.S. 157 (1943) (right of members of Jehovah's Witnesses to distribute their literature). Contra, Bussie v. Long, 383 F.2d 766 (5th Cir. 1967); Gray v. Morgan, 371 F.2d 172 (7th Cir. 1966), cert. denied, 386 U.S. 1033 (1967); Abernathy v. Carpenter, 208 F. Supp. 793 (W.D. Mo. 1962), alternative ground aff'd., 373 U.S. 241 (1963); Reiling v. Lacey, 93 F. Supp. 462 (D. Md. 1950), appeal dismissed, 341 U.S. 901 (1951). All of these cases concern the constitutionality of state tax statutes. Apparently, protection against discrimination by a state tax statute does not fall within the classification of a "personal liberty."
Returning to the history of section 1983, the *Hague* decision, it will be remembered, allowed non-blacks to recover under section 1983. The strict interpretation of the “under color of law” clause, however, remained established. In order to be acting “under color of law,” a person still had to be acting pursuant to an unconstitutional statute.

The case of *United States v. Classic*,45 although not a section 1983 case, was the first decision which broadened the definition of “under color of law” to include actions other than those taken pursuant to an unconstitutional statute. In that case, the United States criminally prosecuted Classic for altering, falsely counting, and certifying ballots.46 In ruling that the indictment against Classic did state a cause of action, the Supreme Court said, “Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken ‘under color of’ state law.”47

In 1945, the Supreme Court decision of *Screws v. United States*48 further expanded the definition of “under color of law.” This was another criminal case in which the United States charged a sheriff with violation of section 20 of the Criminal Code, 18 U.S.C. § 52.49 In delivering the opinion of the court, Mr. Justice Douglas said:

It is clear that under ‘color’ of law means under ‘pretense’ of law, . . . Acts of officers who undertake to perform their official duties are included whether they hew to the line of their authority or overstep it. If, as suggested, the statute was designed to embrace only action which the state in fact authorized, the words ‘under color of any law’ were hardly apt words to express the idea.50 Thus, Douglas’ definition of “under color of law” includes all action by officials taken pursuant to their duties, regardless of whether such action is authorized. This definition has prevailed.

To briefly summarize, the development of section 1983 had advanced considerably with the *Hague, Classic,* and *Screws* decisions. As a result

45. 313 U.S. 299 (1941).
46. *Id.* at 307. Classic was a commissioner of elections in Louisiana.
47. *Supra* note 45, at 326.
48. 325 U.S. 91 (1945).
49. *Id.* at 93. This statute, now codified as 8 U.S.C. § 242, reads as follows: “Whoever, under color of any law, statute, ordinance, regulation or custom willfully subjects any inhabitant of any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, on account of such inhabitant being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined not more than $1,000 or imprisoned not more than one year, or both;” [The phrase “and if death results shall be subject to imprisonment for any term of years or for life”] was deleted in the codification.
50. *Supra* note 48, at 111.
of Hague, section 1983 protected white, as well as black, plaintiffs. As a result of Classic and Screws, the construction of the words "under color of law" (as they were found in other statutes) had been so liberalized as to include all actions taken by public officials pursuant to their official duties. However, the courts had still not specifically ruled that this interpretation of "under color of law" extended to section 1983. This ruling was soon to come.

In 1961, thirteen Chicago police officers broke into one Monroe's home, ransacked it, and arrested Monroe. They detained him on an open charge, and interrogated him concerning a murder. For ten hours, Monroe was neither brought before a magistrate nor allowed to call an attorney or his family. He brought suit against the police officers and the city of Chicago, basing his action on R.S. §1979, 42 U.S.C. §1983. In upholding his complaint, the Supreme Court, in Monroe v. Pape,\(^5\) held that the expanded definition of "under color of law" iterated in the Classic and Screws decision was proper, and that, "this phrase should be accorded the same construction . . . in 1979 . . . ."\(^5\)

While the Monroe Court upheld the complaint as to the police officers, it dismissed the City of Chicago as a defendant. Mr. Justice Douglas, writing the majority decision, pointed out that the Congressional Record indicated that Congress rejected the notion of municipal liability.\(^5\) After briefly tracing Congressional rejection of an amendment which would provide for such liability,\(^5\) Douglas concluded that, "we cannot believe that the word 'person' was used in this particular Act to include them (the city). Accordingly, we hold that the motion to dismiss against the City of Chicago was properly dismissed."\(^5\) Thus, the doctrine of municipal immunity was established. It remains firmly entrenched today, as evidenced by Kerr.\(^5\)

There are, of course, defenses which should be mentioned as they are frequently asserted in section 1983 actions. First, the qualified immunities of "good faith" and "probable cause" are available to police officers. In Pierson v. Ray,\(^5\) a case based on section 1983, the Supreme Court

\(^{52}\) Id. at 185.
\(^{53}\) CONG. GLOBE, 42d Cong., 1st Sess. 800-01, 804, 820-21 (1871).
\(^{54}\) Supra note 51, at 188-91.
\(^{55}\) Supra note 51, at 191-92.
\(^{56}\) Contra, McArthur v. Pennington, 253 F. Supp. 420 (E.D. Tenn. 1963), where the court held that a municipality waived its immunity by carrying liability insurance. The City was liable, however, only to the extent of the insurance coverage, not in excess of the face value of the policy.
\(^{57}\) 386 U.S. 547 (1967).
stated that, "[u]nder the prevailing view in this country a peace officer who arrests someone with probable cause is not liable for false arrest simply because the innocence of the suspect is later proved . . . the same consideration would seem to require excusing him from liability for acting under a statute that he reasonably believed to be valid but that was later held unconstitutional, on its face or as applied." The Court went on to rule that the defenses of "good faith" and "probable cause" do apply to cases based on section 1983. As long as the officer has acted with "probable cause" or in "good faith," he is immune from a section 1983 action.

Other immunity defenses are: judicial immunity, immunity for prosecutors when acting within their judicial capacity, and immunity for other public officials.

The Monroe decision, which incorporated the Classic-Screws interpretation of "under color of law" to section 1983, immensely widened the scope of section 1983. As a result, a tremendous volume of cases based on this statute has been brought before the courts during the last nine years. The total number of private civil actions brought under civil rights statutes in federal courts in 1961, the year of Monroe v. Pape, was 270. In contrast, the number of similar cases brought during the fiscal year of 1969 was 2,180.

These actions have been based on many different types of civil right

58. Id. at 555.
59. Supra note 57, at 554-58. See also Joseph v. Rowlen, 402 F.2d 367 (7th Cir. 1968); Dodd v. Spokane County, Washington, 393 F.2d 330 (9th Cir. 1968); Daniels v. Van DeVenter, 382 F.2d 29 (10th Cir. 1967); Notaras v. Ramon, 383 F.2d 403 (9th Cir. 1967).
60. Pierson v. Ray, 386 U.S. 547 (1967); Haldane v. Chagnon, 345 F.2d 601 (9th Cir. 1965); Harvey v. Sadler, 331 F.2d 387 (9th Cir. 1964); Agnew v. Moody, 330 F.2d 868 (9th Cir. 1964); see also Comment, 18 Ark. L. Rev. & Bar Ass'n J. 81 (1964).
61. Robichaud v. Ronan, 351 F.2d 533 (9th Cir. 1965); Corsican Productions v. Pitchess, 338 F.2d 441 (9th Cir. 1964); Kenny v. Fox, 232 F.2d 288 (6th Cir. 1956), cert. den., 352 U.S. 855 (1956); Yasselli v. Goff, 12 F.2d 396 (2d Cir. 1926), aff'd mem., 275 U.S. 503 (1927); see also Comment, 42 N.Y.U. Int'l L. Rev. 160 (1967).
62. Hoffman v. Halden, 268 F.2d 280 (9th Cir. 1959); Francis v. Lyman, 216 F.2d 583 (1st Cir. 1954); Campbell v. Glenwood Hills Hospital, Inc., 224 F. Supp. 27 (D. Minn. 1963); Duzynski v. Nosal, 324 F.2d 924 (7th Cir. 1963); see generally, Note, 66 Harv. L. Rev. 1285 (1953). But see Jobson v. Henne, 355 F.2d 129 (2d Cir. 1966) where the court refused to grant immunity to prison officials who had caused slave-like conditions to prevail, under which inmates had to labor.
violations. Most cases result from deprivations of the due process clause of the fourteenth amendment. These due process deprivations include actions based on illegal arrest and detention, police brutality, illegal search and seizure, economic discrimination, an official's refusal to allow a person to consult his attorney, and racial discrimination. However, due process violations have not been the only grounds for a section 1983 action. The infliction of cruel and unusual punishment, which is prohibited by the eighth amendment, as well as violations of the equal protection clause of the fourteenth amendment have likewise


67. See Gillibeau v. City of Richmond, 417 F.2d 426 (9th Cir. 1969); Johnson v. Mueller, 415 F.2d 354 (4th Cir. 1969); Lucero v. Donovan, 354 F.2d 16 (9th Cir. 1965); Sheridan v. Williams, 333 F.2d 581 (9th Cir. 1964); Cohen v. Norris, 300 F.2d 24 (9th Cir. 1962); Danner v. Moore, 306 F. Supp. 433 (W.D. Penn. 1969); Peterson v. Stanczak, 48 F.R.D. 426 (N.D. Ill. 1969).


been the basis of section 1983 suits. One court has even allowed relief for the deprivation of a plaintiff's first amendment freedoms of speech and association.\textsuperscript{73}

An extraordinary application of section 1983 occurred in the case of \textit{York v. Story}.\textsuperscript{74} In that case, a female plaintiff entered a California Police Station, complaining that she had been assaulted. Defendant-police officer told her that it would be necessary to photograph her in the nude, and consequently directed her to undress. Although she complained that the bruises could not be seen in a photograph, plaintiff complied with the officer's directives. The officer proceeded to take some nude shots of plaintiff, many of which found her in indecent positions. Several weeks later, defendant informed plaintiff that the pictures had not "come out," and that the negatives had been destroyed. Actually, however, the pictures had developed nicely. In fact, they had turned out so well that defendant printed duplicates and distributed them to his cohorts in the police department.

Plaintiff brought suit under section 1983, proposing three alternative bases for application of the section. First, plaintiff argued that she had been subjected to an unreasonable search, which was a violation of the fourth amendment, which applied to the states by reason of the due process clause of the fourteenth amendment. Second, plaintiff argued that her right of privacy, guaranteed by the fourth amendment and applied to the states by the due process clause, had been violated. Third, plaintiff argued that defendant's acts constituted such an invasion of her privacy as to amount to a deprivation of liberty without due process of law, which is prohibited by the fourteenth amendment.\textsuperscript{75}

The court skipped over plaintiff's first and second arguments, and allowed recovery based on her substantive due process argument. The court ruled that privacy is implied in the idea of "ordered liberty" guaranteed by the due process clause. Consequently, a deprivation of this right of privacy produced a cause of action under section 1983.\textsuperscript{76}

\textsuperscript{protection} must be intentional or purposeful in order to produce a section 1983 action, despite the language in \textit{Monroe}. \textit{Adams v. City of Park Ridge}, 293 F.2d 585 (7th Cir. 1961); \textit{Lindsey v. Smith}, 303 F. Supp. 1203 (W.D. Wash. 1969); \textit{Huey v. Barloga}, 277 F. Supp. 864 (N.D. Ill. 1967).

\textsuperscript{73.} Nesmith v. Afford, 318 F.2d 110 (5th Cir. 1963) \textit{cert. denied}, 375 U.S. 975 (1964). This case allowed relief for white men who were arrested for eating lunch with blacks in a public restaurant in Alabama. The court ruled that section 1983 provided a remedy for violations of a person's first amendment freedoms of association and speech.

\textsuperscript{74.} 324 F.2d 450 (9th Cir. 1963).

\textsuperscript{75.} \textit{Id.} at 451-54.

\textsuperscript{76.} \textit{Id.} at 455-56.
Notwithstanding its unusual facts, *York* is significant because it demonstrates the great breadth of section 1983. Many would argue that privacy is not implied in the concept of ordered liberty and, therefore, not guaranteed by the fourteenth amendment. Many would argue that the members of the 42nd Congress never (even in their most liberal dreams) intended to provide relief to a plaintiff who had been deprived of privacy when they enacted section 1983. Many would argue that providing relief in such a case is a gross example of judicial usurpation of legislative power. After cases like *York*, however, all must agree that the American judiciary is presently expanding the scope of this section to such an extent that it may soon protect every right known to man.

With the above cases as precedents, *Kerr v. City of Chicago* came before the courts in 1970. Although no court had yet granted compensation for the extraction of an involuntary confession, it was obvious that time was ripe for recovery based on such action. Consequently, defendant police officers did not challenge the premise that the coercion of a confession which was used to detain *Kerr* was a violation of the fourteenth amendment which produced a section 1983 action. This failure of the defendants to dispute the allegation emphasizes that such is a logical result of the judicial history of 42 U.S.C. §1983.

As a defense, the police officers asserted that the actions of which they were accused, even if committed, did not deprive *Kerr* of his civil rights. The defendant police officers reasoned in this manner. First, *Kerr's* action was based upon the rights enunciated in the *Escobedo* and *Miranda* decisions. Second, the interaction leading to the *Kerr* case occurred in 1963, one year before the *Escobedo* and three years before the *Miranda* decisions. Third, these landmark decisions were not retroactive. Therefore, defendants concluded, *Kerr* was not deprived of any rights; the rights of which *Kerr* claimed he was deprived were not formulated at the time the action arose.

The court responded that, “The defendants . . . have misconstrued plaintiff's allegations of violation of his civil rights.” The court pointed out that *Kerr* did not base his claim on the *Escobedo* and *Miranda* deci-

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77. Brief for Defendants-Appellees at 6-14.
81. Supra note 77.
sions (in fact, Kerr admitted that these decisions are not retroactive). Rather, observed the court, "plaintiff claims that his rights were violated by the obtaining of an involuntary confession and the use of this confession to detain illegally the plaintiff for a period of 18 months." Plaintiff based his claim, not on any newly-formulated rights, but on the due process clause of the fourteenth amendment.

A confession, of course, could be involuntary if extracted prior to the Escobedo and Miranda decisions. The criterion for a coerced confession was, in pre-Escobedo court rooms, and still is: had the will of the accused been overborn by pressure? In determining whether this had occurred, the court is to consider all the circumstances of the case. This includes all the actions relating to the confession-producing incident as well as the age and social background of the accused.

The United States Supreme Court recently enunciated these traditional principles in the case of Spano v. New York. Spano, a 25 year-old man with a junior high school education, became involved in a fist fight. Shortly afterward, he shot and killed his antagonist, and subsequently surrendered to the police. Spano was interrogated by 15 different men for eight consecutive hours, during which time his requests to see his attorney were repeatedly denied. After eight hours, Spano confessed. In setting aside Spano's conviction, the court held the confession, "inconsistent with the Fourteenth Amendment under traditional principles." Repeating the rule that a court must look at all the circumstances in determining whether a confession is voluntary, Mr. Justice Warren said: "We conclude that petitioner's will was overborne by official pressure, fatigue and sympathy falsely aroused, after considering all the facts in their post-indictment setting."

In conjunction with the above criterion and the trend of cases under section 1983, the United States Court of Appeals held that Kerr's complaint stated a valid cause of action. Ruling that a civil action may lie for

83. Reply Brief for Appellant at 4.
84. Supra note 82.
85. See Haley v. Ohio, 332 U.S. 596, 599-601 (1948) where the Court stated: "If the undisputed evidence suggests that force or coercion was used to exact the confession, we will not permit the judgment of conviction to stand. . . . The age of petitioner, the hours when he was grilled, the duration of his quizzing, the fact that he had no friend or counsel to advise him, the callous attitude of the police towards his rights combine to convince us that this was a confession wrung from a child by means which the law should not sanction." See also Lynumn v. Illinois, 372 U.S. 528 (1963).
86. 360 U.S. 315 (1959).
87. Id. at 320.
88. Supra note 86, at 323.
the extraction of an involuntary confession, the court said: "All of the acts are of great importance in determining whether plaintiff's confession was coerced in violation of his civil rights and thereby cognizable under 42 U.S.C. § 1983." It is notable that not only physical mistreatment, but all circumstances must be considered in determining the validity of a section 1983 action for the extraction of an involuntary confession, and its subsequent use to detain plaintiff.

The Kerr decision represents the latest development in the area of civil rights litigation. It is interesting to consider whether the trend has now terminated or will expand so that additional deprivations will produce section 1983 actions. Of immediate concern is whether the extraction of an involuntary confession in itself creates an action or whether that extraction must be coupled with a subsequent detention of the plaintiff—the situation in Kerr—in order for an action to arise. Related is the question of whether the failure to give Miranda warnings—in post-Miranda cases—is itself a deprivation of rights or privileges sufficient to produce an action.

Given the momentum of the trend, as well as the composition of today's jurists, it is predictable that a civil action will arise for the coercion of a confession itself. The damage award, of course, will not be as bountiful as when the extraction is complemented by a later detention of the plaintiff. As for a complaint based entirely upon a defendant's failure to give the Miranda warnings, it is doubtful that such will be upheld, even in today's liberal-minded court rooms. Indeed, the failure to give Miranda warnings, absent other extenuating circumstances, such as police brutality or illegal detention, hardly seems a serious enough deprivation to allow plaintiff to recover.

Finally, it is necessary to consider whether Kerr v. City of Chicago will have an effect upon law enforcement in the United States. During the last decade, various decisions such as Miranda and Mapp v. Ohio have required that confessions illegally obtained or evidence illegally seized be excluded from criminal trials; and furthermore, that their introduction in the evidence amounted to reversible error. Hopefully, these decisions would cause law enforcement officers to perform their duties conscientiously, thereby insuring that the constitutional rights of citizens would be respected. Many legal authorities, however, claim that this hoped-for result has not been effected. Professor Robert E. Burns observes:

89. Supra note 82, at 1138.
From all appearances the police are unconcerned with most of their own departmental regulations, much less with divided Supreme Court opinions offering police consolation or rebuke depending upon whom you are reading. It is an eminently fair question to ask whether local police, well aware of calendar turnover and voluntary guilty pleas in urban centers, are in fact deterred or encouraged to be fairer than otherwise. If capital punishment does not deter an offender because it will not happen, why should court exclusion of evidence or appellate reversal of trial decisions deter police when ninety per cent of the time there will be no trial.92

An in-depth statistical study conducted by the editors of the Yale Law Journal93 supports the contention of Professor Burns, and concludes that, "[n]ot much has changed after Miranda . . . the impact on law enforcement has been small."94 Specifically, the researchers found: (1) that police officers seldom gave suspects their Miranda warnings—out of a sampling of 118 suspects, only 25 were given full advice of their constitutional rights;95 and (2) when the police officer did give such advice, "he commonly de-fused the advice by implying that the suspect had better not exercise his rights, or by delivering his statement . . . to indicate that his remarks were simply a routine, meaningless legalism."96 The result of this study emphasizes the futility of trying to curb police activity by "exclusionary rules" or by holdings that certain police "violations" are grounds for reversal.

If decisions such as Miranda have failed to deter police from violating the rights of others, perhaps a change in judicial policy is indicated. The Kerr decision, as well as other section 1983 actions, could represent that change. As a result of these cases, the police officer who neglects to perform his duties in accordance with the Constitution might easily find himself the defendant in an expensive civil suit. As in Kerr, a law enforcement officer who illegally coerces a confession might find himself sued for $600,000. The police officer who is not deterred by exclusionary rules and reversed convictions may be quite encouraged to abide by the Constitution when he has a large personal pecuniary interest at stake. Perhaps we must depend on cases like Kerr to insure that America becomes a land where law enforcement officers abide by, as well as enforce, the laws.

Donald Lee Mrozek

94. Id. at 1613.
95. Supra note 93, at 1550.
96. Supra note 93, at 1552.