JURISPRUDENȚĂ COMENTATĂ ȘI PROBLEME DE PRACTICĂ JUDICIARĂ

CZU: 347.9

EVALUATING THE USEFULNESS OF CIVIL SUITS AS A JUDICIAL REMEDY FOR SYSTEMIC POLICE MISCONDUCT IN THE UNITED STATES

Jesse STRICKLAN,
JD, University of Michigan

SUMMARY:

The American experience with private suits against police departments reveals interesting insights into the strengths and weaknesses of using civil suits as a check on police misconduct. The American legal doctrine of qualified immunity bars suits against individual government actors performing their duties in office, which allows government officers to perform their duties with confidence that they will not be held personally liable in a civil suit. Statute has provided standing to both private individuals (§1983) and the Department of Justice (§14141) to sue police departments who have a demonstrable record of discriminatory behaviors against minorities. These suits still require high evidentiary standards, but provide an opportunity for plaintiffs to overcome qualified immunity claims in cases of racial discrimination. The article suggests that other states considering how to deal with civil suits for police misconduct could learn from the American experience to better serve the interests of justice.

Key-words: *civil suits, police misconduct, judicial precedent, qualified immunity, Equal Protection Clause, racial discrimination, comparative law.*

SUMAR

Evaluarea utilității acțiunilor civile ca remediu judiciar pentru încălcările sistemice ale normelor de conduită de către poliție în Statele Unite ale Americii

Experiența americană în materia proceselor private împotriva departamentelor de poliție dezvăluie perspective interesante privind avantajele și dezavantajele utilizării acțiunilor civile pentru a verifica abaterile poliției din punct de vedere al legalității. Doctrina imunității calificate din dreptul american împiedică intentarea proceselor de judecată împotriva actorilor guvernamentali individuali în exercitarea atribuțiilor de serviciu, fapt ce le permite acestora să își execute obligațiile având certitudinea că nu vor fi făcuți responsabili pentru aceste acțiuni în cadrul unui proces civil. Prin lege, a fost prevăzut dreptul atât pentru persoanele fizice (§1983), cât și pentru Departamentul Justiției (§14141) de a acționa în judecată departamentele de poliție care au un istoric demonstrabil de manifestări comportamentale discriminatorii față de minorități. Aceste procese de judecată impun standarde înalte în materie de probatoriu, dar oferă reclamanților posibilitatea de a depăși invocarea imunității calificate în cauzele de discriminare rasială. Articolul vine cu sugestia că statele care examinează oportunitatea utilizării acțiunilor civile pentru încălcările normelor de conduită de către poliție ar putea învăța din experiența americană pentru a servi mai bine intereselor justiției.

Cuvinte-cheie: *procese civile, conduită necorespunzătoare a poliției, precedent judiciar, imunitate calificată, Clauza privind Protecția Egală, discriminare rasială; drept comparat.*

I. Introduction and Methodology

As is common worldwide, police departments in the United States enjoy a certain degree of protection from civil law suits under the judicial doctrine of qualified immunity. As it applies to police officers and departments, the legal doctrine of qualified immunity „balances two important interests–the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably" [1].

While this approach to qualified immunity helps ensure police are confident enough to perform their official duties, it may also leave individuals without a means of remedying harm caused by police miscon-

duct. Recognizing that the doctrine of qualified immunity may impede suits concerning fundamental constitutional rights, the federal government has passed two important statutes to give individuals standing to sue beyond traditional common law principles. The first, 42 U.S. Code §1983, allows private individuals to file suit for any substantial violation of federal rights, under either statute or the Constitution. The second, 42 U.S. Code §14141, provides standing for the federal Department of Justice Civil Rights Division to pursue a civil suit against government agencies engaged in systemic racial discrimination.

The American approach of providing civil standing for plaintiffs to address the problem of police misconduct reflects a commitment to an adversarial and independent legal culture. This approach has much to recommend it, including avoiding corruption by political actors by placing enforcement outside of the political system. Additionally, putting in charge those people with the strongest interest in seeing a proper resolution of the problem – in other words, victims of police misconduct – may increase satisfaction on the part of victims as they pursue a remedy that they feel is most appropriate to the harm they have suffered. By layering on an additional source of review of police misconduct through a civil suit by the Department of Justice, instead of establishing a clear hierarchical review system, the statute preserves the independence of local police departments – a central feature of the American criminal justice system – while providing a mechanism for the federal government to intervene at least in the most egregious cases.

However, as demonstrated by the case study of a recent response to racial discrimination by police in East Haven, Connecticut, this approach also requires a level of dedication and resources unavailable to many plaintiffs. If these kinds of suits are intended to solve the problem of a lack of remedy for victims of police misconduct, but they also require such a high a level of investment as to preclude most plaintiffs from successfully pursuing a suit. In response, I offer a few observations about how this approach might be applied more effectively, particularly in other states seeking to provide additional and independent measures of review of police misconduct.

The paper will proceed by first outlining the basic structure of these kinds of civil suits in their two main forms: §1983 suits, which are initiated by private citizens against individuals or government bodies acting in an official capacity; and §14141 suits, which are initiated by the Civil Rights Division of the federal Department of Justice. To evaluate what how these civil suits operate in practice, the paper will next examine a series of recent cases in East Haven, Connecticut, which resulted in considerable victories for the plaintiffs. Finally, I will make several observations about the ongoing difficulty of winning §1983 or §14141 suits and make suggestions for implementing more effective remedies for plaintiffs while preserving the ability of the police to confidently perform their duties.

II. Civil Suits as Remedy for Police Misconduct

The two types of civil suits examined in this article both attempt to provide a remedy for police misconduct, but empower two very different types of plaintiffs: first, private individuals; and second, the Department of Justice. Civil suits under §1983, the remedy for private individuals, may be pursued for any type of rights violation, but this article will focus on the ways in which §1983 suits relate to systemic racial discrimination. Suits under §14141, which grants standing to the Department of Justice, require a showing of a "pattern or practice" of racial discrimination.

A. 42 U.S.C. §1983 – Empowering Private Plaintiffs

The Civil Rights Act of 1871 introduced a private suit as a remedy for violations of Constitutional rights committed by government officials. Known as §1983, and included in chapter 42 of the U.S. Code, the relevant part of the statute reads as follows:

> *Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law…*

As part of a general movement to address racial inequalities within both government institutions and the broader society, the Supreme Court interpreted the statute more broadly to allow individuals to sue government agencies engaged in violations of Constitutional rights [2]. Since that time, §1983 suits have become more common as a method of seeking redress for violations of Constitutional rights, including by police officers.

In order for a §1983 suit to be valid, the government action in question must meet a few criteria. First, the action must be taken "under the color of law," meaning that it must be performed on behalf of a government actor. The conduct of private actors, no matter how egregious, would not form a valid basis for a §1983 suit. In the case of inappropriate police conduct, the police officers must be acting in her or his official capacity. Normal qualified immunity protections, which protect government officers from being sued personally for pursuing their official duties, would not shield the officer or police department from a suit under §1983.

Being tied to rights "secured by the Constitution

and laws" of the United States, §1983 actions are limited by precedent to situations in which there is a constitutional violation. In the case of policing it is usually a violation of the 14th or 4th Amendment that serves as the basis of a suit.

Remedies for illegal searches or arrests, which are violations of the 4th Amendment, are often pursued as §1983 suits. However, demonstrating the violation of 4th Amendment constitutional rights is often a difficult task for plaintiffs. To qualify as the basis for a §1983 suit, the police action in question must be shown to be "unreasonable." This standard is most often met when a plaintiff can show that the police acted in malice, or with the express intent to violate the law, or when the police made an unreasonable mistake in pursuing the underlying action.

As it regards government-sponsored racial discrimination – a violation of 14th Amendment rights – §1983 litigation is usually subject to the traditional tiers of scrutiny analysis that has developed to interpret the Equal Protection Clause of the 14th Amendment, which provides that no State may "deny to any person within its jurisdiction the equal protection of the laws." Supreme Court precedent interpreting the Equal Protection Clause requires substantial showings of not only a disparate impact on individuals on terms of race, but an actual discriminatory intent on the part of government actors to create unequal outcomes [3]. To demonstrate discriminatory intent, plaintiffs must either demonstrate a pattern of discrimination so clear as to preclude any legitimate basis for the policy, or else produce verifiable statements by policy makers (in this case, the police) that racial discrimination was intended. This is a difficult bar to meet, as we will see in the case study below.

B. 42 U.S.C. §14141 – Empowering the Department of Justice

If §1983 provides a tool for plaintiffs to get around qualified immunity and sue police departments directly, §14141 allows the federal government to get directly involved in oversight with police departments, but only indirectly, through a private suit. In relevant part, the statute reads as follows:

> *It shall be unlawful for any governmental authority, or any agent thereof, or any person acting on behalf of a governmental authority, to engage in a pattern or practice of conduct by law enforcement officers … that deprives persons of rights, privileges, or immunities secured or protected by the Constitution or laws of the United States* (42 U.S.C. §14141(a)).

Unlike §1983, which was originally introduced in the 19th century, §14141 was written in the 1990s and contains language that reflects modern 14th Amendment Equal Protection Clause jurisprudence while providing specific additional criteria. The §14141 standard is often referred to as the „pattern or practice" standard, which requires, in addition to the violation of a constitutional right, the demonstration of a systemic pattern of discrimination. In practice, because the 14th Amendment requires plaintiffs to prove an extremely persuasive pattern of discriminatory behavior before their claim will be recognized, the §14141 standard reflects Equal Protection jurisprudence with little deviation.

The main innovation for §14141 then is not introducing evidentiary standards that are easier to meet, but in giving a federal agency standing to sue police departments in the case of racial discrimination without relying on victims of the crime to lead the way. By granting standing to the Civil Rights Division of the Department of Justice, §14141 places highly talented lawyers with deep experience and significant investigative resources in a position to demonstrate "a pattern or practice" of racial discrimination on the part of police departments.The resources available to the Civil Rights Division is of course limited and varies according to the budget priorities of the President and the Attorney General – the current administration's budget calls for deep cuts to the Civil Rights Division, for example [4] – but it can apply considerable expertise and resources to those cases it does pursue. Given the dedication with which the Civil Rights Division can pursue a case, many police departments opt to settle with the Department of Justice in what is known as a consent decree instead of having a federal court impose terms upon them without their input. These consent decrees are court-enforceable terms that can lead to a reopening of the suit if the Department of Justice deems that the police department is not living up to its duties.

C. Case Study: The East Haven Cases

To understand how these statutes work in practice, we can take the recent cases pursued against the Police Department of East Haven, Connecticut, which was accused of pursuing discriminatory practices against Latinos (people with ancestors from Latin American countries). A study of this case presents a variety of useful opportunities for analysis when considering the appropriateness of the U.S. system of civil suits as a remedy for police misconduct. In the first place, because it concerns racial discrimination against individuals in violation of 14th Amendment rights, it allows us to look at the ways in which §1983 suits can be bolstered by §14141 suits. Second, the case resulted in an unusual amount of success in achieving the plaintiffs' goals, presenting a scenario that can be used as a yardstick for creating realistic expectations of what success looks like.

The East Haven case proceeded in several stages: first, community actors gathered information about police misconduct to serve as a basis for a possible §1983 suit against the police department. In the course of that preparation, the community actors also contacted media outlets and the Department of Justice directly to increase the odds that a §14141 suit would be filed. Ultimately, a §14141 suit was filed, as was a §1983 suit and criminal prosecutions against some of the police officers allegedly involved in misconduct. Each case resulted in positive results: the Department of Justice concluded a legally-enforceable agreement with the East Haven Police Department, known as a consent decree, requiring the department to change police conduct over time or face further litigation; the private plaintiffs concluded a settlement including compensation from the police department and additional promises to change the conduct of police officers; and several officers were convicted of engaging in physical abuse of people in custody.

None of the mosaic pieces – §1983 litigation, §14141 litigation, criminal prosecutions, political pressure, media coverage – would be sufficient to bring about change on their own, but together, they provided a successful range of remedies for the plaintiffs. From a pedestrian perspective, however, it is very disturbing that there is no legal remedy for a large variety of injuries based on prejudicial police practices. In many other fields, we expect litigation of the type of §1983 or §14141 to provide strong remedies for plaintiffs. Even the East Haven case, unusually successful in its goals, may demonstrate most of all how difficult it is to actually achieve a comprehensive remedy in the current legal climate.

By 2009 at the latest, members of the Latino community in East Haven noticed what appeared to be a concerted effort on behalf of East Haven Police Department officers to harass Latinos. Stories of enhanced enforcement of traffic laws against Latino drivers, of concentrated and unwarranted police attention to businesses frequented by Latinos in the neighborhood, and physical abuse of Latinos in police custody began to circulate among the community. The distrust between racial minorities in East Haven: in the late 1990s, the government of East Haven had been found to be discriminating against African Americans, and a failed §1983 suit had been brought against the police department concerning a case of a young African American man shot by police[5].

Perhaps in part because that §1983 suit was unsuccessful, members of the Latino community recognized early on that it would be crucial to carefully document their allegations before they pursued them in a legal forum. Under counsel from the Frank Legal Services Organization at Yale University Law School, community members also focused on documenting those aspects of police discrimination that left a paper trail and could show a „pattern or practice" of discrimination: traffic citations, which must be made available to citizens upon request under federal and state law. These records contained a pattern that seemed to indicate disproportionate attention to Latino drivers: 56% of traffic citations were issued to Latinos between June 2008 and February 2009, even though Latinos represented less than 6% of East Haven's population. For contrast, the percentage of citations issued against white drivers was about 37%, despite a much larger population. Pattern and Practice Report, 1-2.

Based on these and other documents, community members and the Frank LSO prepared a letter to the Civil Rights Division of the Department of Justice, empowered to pursue §14141 suits, outlining what they believed to be a "pattern or practice" of discrimination by the East Haven Police Department. In part, the letter was intended to help produce political pressure on East Haven government officials to address the problems facing the Latino community more than to create a specific legal result. According to some of the lawyers and community leaders involved, it was a surprise when, in fact, the Department of Justice opened a §14141 investigation [6].

Once the Department of Justice began its §14141 suit, it was able to access and process additional police records which further indicated a "pattern or practice" of racial discrimination among some members of the police department. After the Department of Justice formally filed suit based on its research, the East Haven Police Department entered negotiations with the Department of Justice to reach a settlement. The resulting consent decree required personnel changes in the department, the establishment of anti-discriminatory policies in the police department, personnel training, and reporting and follow-up mechanisms to ensure compliance with the terms of the decree. According to interviews with community activists and the local lawyers who worked on the case, the police department continues to follow the consent decree and the anti-discriminatory policies it contains. As the §14141 research went forward, a separate §1983 suit was eventually filed by members of the East Haven Latino community, building off of the evidence that the §14141 suit had made public and including personal claims of abuse against suspects in police custody. With this additional support, the §1983 suit was also settled, resulting in monetary awards to the plaintiffs and gaining an additional concession from the police department to stop using threats of deportation in ordinary police stops.

Along with attracting the involvement of the Department of Justice Civil Rights Division, which is ba-

sed in Washington, D.C., the preliminary work of community activists also attracted the attention of the Federal Bureau of Investigation and of federal prosecutors based in Connecticut. As the §14141 investigation went forward, the FBI conducted its own independent investigation into allegations of violence by police officers against Latino men in custody. These investigations eventually led to federal indictments against several East Haven Police Department officers for disproportionate use of force, most of which resulted in convictions.

In short, the synergy of four separate strands of pressure brought a resolution to the problem of racial discrimination in police practice: public pressure, a suit by private individuals in the form of §1983, a suit by the Department of Justice in the form of §14141, and criminal prosecutions. The evidence used in each strand overlap significantly with the other strands, meaning that progress made on one front contributes to the success on other fronts.

III. Conclusions

If we consider the East Haven case as a template for the reasonably possible best-case scenario for civil suits in responding to systemic police misconduct, a series of conclusions can be drawn. First, the remedies of a private suit (§1983) and a suit headed up by a central authority (§14141) work better in conjunction. The two remedies are designed to complement each other: the §1983 remedies are focused on making the individual plaintiff whole financially, while a §14141 suit usually results in a generally-applicable consent agreement addressing systemic police misconduct. Furthermore, because the Department of Justice can only focus on a few cases at a time, the incentive for individuals to bring a §1983 suit on their own (and therefore bring publicity to police misconduct) can assist the Civil Rights Division in finding the §14141 suits most likely to succeed. In that sense, §1983 suits can serve as a catalyst for bringing together other types of action that increase the likelihood of coming to a positive conclusion.

The second conclusion that can be drawn, however, is less positive. As currently constructed, civil suits serve as an insufficient remedy for the vast majority of potential plaintiffs in cases of police misconduct. In the first place, although §1983 suits can involve any violation of constitutional rights by government actors, §14141 suits can only arise in relation to racial discrimination, limiting the range of cases to which it applies. As the East Haven case shows, a §1983 case alone can be difficult to successfully pursue without additional support, even if the plaintiffs are being assisted by Yale Law faculty and students.

This difficulty highlights a second problem: the evidentiary standards required by these suits are so high so as to disincentivize plaintiffs from pursuing the remedy. Even if evidence of systemic police misconduct potentially exists, finding that evidence may require broad community organizing to discover it. Furthermore, properly framing that evidence as sufficient to demonstrate the intent to discriminate based on race requires time and legal skill that may be beyond the average plaintiff. Depending on one's perspective, this high evidentiary standard may be a positive feature, meaning only the most serious cases will be pursued, ensuring that police are not unduly harassed by frivolous suits. However, from the point of view of providing a remedy to victims of police misconduct, leaving the evidentiary standards this high makes it possible that police misconduct will continue to create many wrongs that have no judicial remedies.

These observations suggest that states seeking to provide civil remedies for the violation of constitutional rights, particularly in relation to police misconduct, should carefully consider the purpose of such legislation. The American model presents a remedy that is attractive in its empowerment of victims but which is also hobbled by evidentiary standards so high as to become prohibitive. Lowering the evidentiary standards required to even bring a suit to court might lead to a large amount of cases, but that increase in cases could be ameliorated by leaving standards for finding liability at a higher level. By allowing plaintiffs to make it to the stage of filing suit, plaintiffs could have access to court-compelled evidence that would otherwise not be available to them otherwise.

Bibliographic references:

1. See Pearson v. Callahan, 555 U.S. 223 (2009), 231.
2. See, e.g., Monroe v. Pape, 365 U.S. 167 (1961).
3. See Village of Arlington Heights v. Metropolitan, 429 U.S. 252 (1977).
4. See "Jeff Sessions's Agenda for the Civil-Rights Division", Adam Serwer, The Atlantic, May 25, 2017, at https://www.theatlantic.com/politics/archive/2017/05/civil-rights-sessions/528126/.
5. See N.A.A.C.P. v. Town of E. Haven, 998 F. Supp. 176, 178 (D. Conn. 1998); see also Jones v. Town of E. Haven, 691 F.3d 72, 85 (2d Cir. 2012).
6. Personal interview conducted 29 April, 2016.