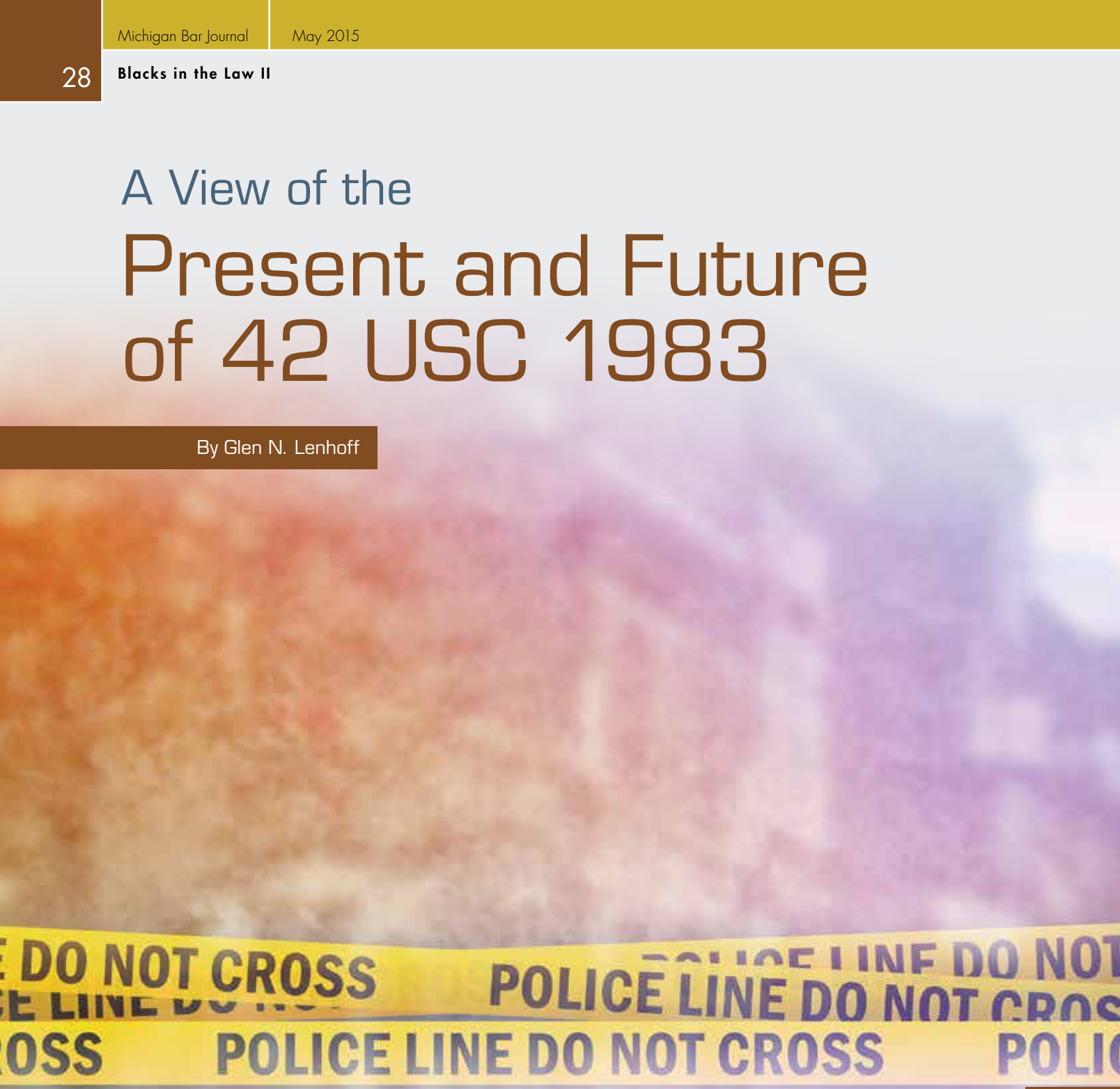
A View of the Present and Future of 42 USC 1983

By Glen N. Lenhoff



In the United States, the courthouse is the place where crucial social issues often are resolved. Key policy decisions are made by the executive and legislative branches of government, but the courthouse is where the practical applications of power often play out.

Since the end of World War II, the center of American judicial power has been federal court. The very dawn of racial integration in the United States came by way of the United States Supreme Court decision in *Brown v Board of Education*.[1]

Federal court attorneys typically assert civil rights claims against state and local governments by way of 42 USC 1983. This statute allows a plaintiff to bring a lawsuit based on an underlying United States constitutional claim. A successful plaintiff can win economic, compensatory, and punitive damages.[2] Successful plaintiffs can also seek attorneys' fees under 42 USC 1988.

In 1985, I wrote an article for the *Michigan Bar Journal* dealing with 42 USC 1983.[3] Even then, it was clear that Section 1983 had been weakened as a result of the conservative trend of the federal judiciary in the early to mid-1980s. But where is the statute now? Has this great mainstay of federal practice been deprived of its power? And what does the future hold for Section 1983?

This article assesses the current state of Section 1983. It will not surprise legal observers that it was further weakened during the presidency of George W. Bush. On the other hand, very recent decisions—often authored by judges appointed by President Obama—have repaired some of the damage done to Section 1983 in the years before the Obama administration.

The article focuses on three key issues I discussed in my prior article on 42 USC 1983: qualified immunity, procedural due process, and the Section 1983 attorney fee statute (42 USC 1988). These three issues are exceedingly important in the vindication of civil rights cases brought under 42 USC 1983.

Qualified immunity

An individual defendant in a 42 USC 1983 case has the right to assert the defense of qualified immunity. This defense is not available for municipal defendants, however.[4]

Under the qualified immunity defense, an individual defendant is excused from liability if his or her conduct does not violate "clearly established constitutional rights."[5]

Often, a Section 1983 plaintiff (such as an African-American individual) will assert a Fourth Amendment brutality case against a police officer. What are the chances that such a claim will be foreclosed by qualified immunity?

The prohibition against racial discrimination by governmental defendants has been in place since the 1960s. Furthermore, even when police misconduct is not based on racism, liability for the misconduct has been well-established by the courts for many years.[6]

But qualified immunity can be a formidable defense in cases in which the defendant/police officer argues that, due to the threat *to the officer*, substantial force was necessary.[7] In deciding qualified immunity motions, it is crucial for federal courts to focus on the principle that the facts must be construed in the light most favorable to the plaintiff. It was gratifying to see the United States Court of Appeals for the Sixth Circuit recognize and apply this principle in the recent case of *Greco v Livingston County and Anthony Clayton*.[8]

Greco presented a fact pattern eerily reminiscent of the African-American civil rights struggles of the 1960s. In *Greco*, Livingston County Deputy Sheriff Anthony Clayton sought to apprehend a drunk-driving suspect who allegedly had resisted arrest. According to the plaintiff, Terry Greco, Officer Clayton directed his police dog to "sic" her.

The plaintiff brought a Fourth Amendment 42 USC 1983 claim. United States District Court Judge Denise Page

FAST FACTS

Until very recently, there has been a trend of judicial decisions that weaken the historic role of 42 USC 1983 as a mainstay of civil rights litigation.

To uphold the power of Section 1983, federal courts should be particularly vigilant in protecting plaintiffs' rights in the areas of qualified immunity, procedural due process, and statutory attorney fees.

A vigorous Section 1983 is necessary to safeguard civil rights in the United States.

Hood denied the defendants' qualified immunity motion. Clayton had argued that the use of the police dog was necessary under the circumstances. The plaintiff testified that she was complying with Clayton's arrest orders, but the officer "sicced the dog" on her anyway.

On appeal, the Sixth Circuit upheld Judge Hood and rejected the qualified immunity defense. The Sixth Circuit emphasized that district courts must be vigilant in construing the facts in the light most favorable to the plaintiff, and that it was up to the jury to determine whether Clayton's use of the police dog was reasonable under the circumstances. To quote the Sixth Circuit, "When deciding whether an officer violated such a clearly established right, we may not call off the trial merely because an officer says he or she acted reasonably in the face of competing testimony. We instead consider the facts in the light most favorable to the plaintiff."[9]

Section 1983 civil rights claims brought by minority plaintiffs are rarely based on arcane constitutional theories. The prohibition against governmental racial discrimination has been engrained in the law for more than 50 years. Similarly, the Fourth Amendment prohibition against police misconduct has been well-established and recognized in the context of 42 USC 1983 since at least the 1961 *Monroe v Pape*[10] decision. But the qualified immunity defense can be nefarious in day-to-day federal court civil rights practice if trial courts determine that, as a matter of law, the acts of a defendant/police officer were reasonable.

Greco should furnish clear guidance to the federal trial judiciary in Michigan and all Sixth Circuit trial judges. Under *Greco*, it is incumbent that trial courts refrain from resolving by motion the difficult fact questions civil rights cases typically generate. After *Greco*, qualified immunity should be denied in nearly all police brutality or police misconduct 42 USC 1983 cases.

Procedural due process

Police misconduct cases are an extremely significant—perhaps the most significant—area of 42 USC 1983 practice. Another important area is procedural due process. In procedural due process cases, plaintiffs typically claim they are denied their property and liberty rights without a hearing or other adequate procedural safeguards.[11] To put it mildly, the concept of fair procedure before a deprivation of liberty or property is a bedrock civil right.

Where does procedural due process stand today? It is disappointing that most federal circuits—including (and especially) the Sixth Circuit—have held that there is no right to a neutral decision-maker at a "pre-deprivation hearing."[12] The decision typically cited in support of this proposition is *Duchesne v Williams*.[13]

In *Duchesne*, the plaintiff was terminated from his job as the chief building inspector for the city of Inkster by Williams, the city manager. Before his termination, however, the plaintiff was given a hearing—in which Williams was the decision-maker! Not surprisingly, the plaintiff argued that the lack of a neutral decision-maker violated procedural due process. He claimed that before his discharge and the deprivation of his property (his job), he was entitled to a hearing before a neutral decision-maker rather than a decision-maker who was also the person who fired him.

The Sixth Circuit rejected the plaintiff's claim, holding that there is no procedural due process right to a pre-deprivation hearing before a neutral decision-maker. *Duchesne* effectively eviscerates pre-termination procedural due process rights.

Typically, under the *Duchesne* doctrine, public employees receive pseudo-hearings before the individuals who made the decision to discharge them. It is unfortunate that *Duchesne* is still viewed as good law in the Sixth Circuit with respect to pre-deprivation procedural due process.

On a more positive note, recent federal court decisions have held that a discharged employee is entitled to a *post-discharge*—a post-deprivation—hearing before a neutral decision-maker.[14] Thus, in procedural due process cases, including in the Sixth Circuit, the federal courts have given procedural rights after they have taken them away. People are effectively deprived of property and liberty in the employment context without due process. Conversely, *after the discharge*, procedural due process mandates that the fired public employee be afforded a fair hearing before a neutral decision-maker.

It is unfortunate that it typically takes years for such a claim to be brought before a jury in federal court. It is even more unfortunate that pre-discharge procedure can be so cursory and unfair.

42 USC 1988 attorneys' fees

Large contingency fees occasionally are recovered by the plaintiff's bar. But more often than not, the largest contingency fee awards are in personal injury cases—cases

in which the plaintiff has been the victim of medical malpractice or other serious physical injury.

Civil rights cases are different from personal injury cases. Plaintiffs often are suing police officers—the type of defendant jurors feel sympathy toward.

A pure contingency fee system of attorney compensation would not be adequate to attract competent counsel to civil rights cases. Thus, in 1976, a Section 1983 attorney fee statute, codified at 42 USC 1988, was enacted. The legislative history of 42 USC 1988 reflects that something more than the ordinary contingency fee is necessary to attract competent counsel to Section 1983 cases.[15]

In 1992, the United States Supreme Court decided the case of *Farrar v Hobby*.[16] In *Farrar*, the plaintiff sued multiple defendants and sought an award of $17 million. The plaintiff was awarded a mere $1 in damages against a single defendant.[17] *Farrar* set out guidelines with respect to 42 USC 1988 attorney fee requests in small damages cases. *Farrar* held that, in deciding 42 USC 1988 motions, courts should consider the difference between the amount sought by the plaintiff and the amount recovered, as well as any public interest served by the litigation.

Since *Farrar*, decisions on 42 USC 1988 attorney fee motions have included severely reduced attorneys' fees in Section 1983 cases in which juries have returned small awards. One example of this is *Carroll v Blinken*,[18] in which the Second Circuit held that when damages are minimal and no injunction of systemic importance has been granted furthering the public interest, attorneys' fees should either be severely reduced or not awarded at all.

In the Seventh Circuit, 42 USC 1988 attorneys' fees typically are not awarded in nominal damages cases unless the plaintiff's case has established an important legal precedent.[19]

Farrar—especially as it has been applied by the lower courts—fails to recognize that virtually *every* 42 USC 1983 case can further the public interest. The availability of Section 1983 police misconduct litigation deters racist police practices. Thus, if attorneys are discouraged from taking Section 1983 cases, a powerful police misconduct deterrent is diminished.

Additionally, *Farrar* sets up a conflict between the civil rights attorney and his or her client. Let us assume that, to advance his client's interests, a plaintiff's attorney requests a large jury award. If the jury comes back with a smaller amount, the plaintiff's counsel's fees can be severely reduced under *Farrar* because the plaintiff's attorney recovered an amount much less than he originally sought. Taking the *Farrar* logic to its conclusion, plaintiffs' attorneys can advance their own interests by requesting small awards for their clients! It would appear that this conflict should not have occurred based on the Supreme Court's ruling.

To advance civil rights in the United States, a talented and aggressive array of civil rights attorneys must exist.

Conclusion

This article has discussed three important areas of Section 1983 practice. It has applauded the approach of the *Greco* Sixth Circuit case, but criticized pre-property deprivation procedural due process analysis and questioned the effect of the *Farrar* decision in 42 USC 1988 attorney fee litigation.

Not beholden to state and local political pressures, federal judges have the power and independence to enforce constitutional rights. A vigorous 42 USC 1983 greatly assists federal judges in enforcing civil rights. Unfortunately, as things now stand, 42 USC 1983 has been substantially diminished. Let us hope that the federal courts revive the power of Section 1983. ■

Glen N. Lenhoff has practiced in the area of civil rights law for more than 30 years and has considerable experience in employment discrimination jury trials. Previously, he was a law clerk for Federal Judge Stewart Newblatt from 1981 through 1984. He has published articles in legal publications, and his short story, "Tiny," was a finalist in the 2014 Michigan Bar Journal *Short-Story Contest.*

ENDNOTES

1. *Brown v Bd of Ed*, 347 US 483, 495; 74 S Ct 686; 98 L Ed 873 (1954).
2. See, e.g., *Smith v Wade*, 461 US 30; 103 S Ct 1625; 75 L Ed 2d 632 (1983); *Bauer v Norris*, 713 F2d 408 (CA 8, 1983). In addition, equitable relief can be awarded under 42 USC 1983. See *Youngberg v Romeo*, 457 US 307; 102 S Ct 2452; 73 L Ed 2d 28 (1982).
3. See Lenhoff, *Federal Courts are the Decline of 42 USC §1983*, 64 Mich B J 532 (1985).
4. See *Owen v City of Independence*, 445 US 622; 100 S Ct 1398; 63 L Ed 2d 673 (1980).
5. *Howard v Fitzgerald*, 457 US 800, 818; 102 S Ct 2727; 73 L Ed 2d 396 (1982).
6. See, e.g., *Tennessee v Garner*, 471 US 1, 7; 105 S Ct 1694; 85 L Ed 2d 1 (1985).
7. *Graham v Connor*, 490 US 386, 396; 109 S Ct 1865; 104 L Ed 2d 443 (1989).
8. *Greco v Livingston Co*, 774 F3d 1061 (CA 6, 2014).
9. *Id.* at 1063–1064.
10. *Monroe v Pape*, 365 US 167; 81 S Ct 473; 5 L Ed 2d 492 (1961).
11. See, e.g., *Paul v Davis*, 424 US 693; 96 S Ct 1155; 47 L Ed 2d 405 (1976).
12. "Pre-deprivation" means before the deprivation of property or liberty.
13. *Duchesne v Williams*, 849 F2d 1004 (CA 6, 1988). See also *McDaniels v Flick*, 59 F3d 446 (CA 3, 1995); *McKinney v Pate*, 20 F3d 1550 (CA 11, 1994).
14. *Farhat v Jopke*, 370 F3d 580, 596 (CA 6, 2004); *Rogers v 36th Dist Court*, unpublished opinion of the US Court of Appeals, issued July 3, 2013 (Docket No. 11-2201); *Mitchell v Fankhauser*, 375 F3d 477 (CA 6, 2004).
15. See 1976 Senate Report No. 94-1101.
16. *Farrar v Hobby*, 506 US 103; 113 S Ct 566; 121 L Ed 2d 494 (1992).
17. *Id.* at 105–107.
18. *Carroll v Blinken*, 105 F3d 79 (CA 2, 1997).
19. See *Hyde v Small*, 123 F3d 583 (CA 7, 1997).