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SECTION 1983 CUSTOM CLAIMS AND THE CODE OF SILENCE

Myriam Gilles*

JUDGE PRATT:

Steve, thank you very much. You have given us a great insight to a creative and imaginative approach to a case where your underlying data was primarily written documents.

There is another kind of case, however, where the underlying data, if the data can be located, will consist of the oral testimony of witnesses who saw the event. In many of these incidents the only witnesses other than the victim were the police. In those situations the blue wall of silence stood in the way and for that we turn to Professor Myriam Gilles.

MS. GILLES:

Thank you. The code of silence, although currently[1] in the news, has probably been around since the beginning of organized police forces. Recently, we are starting to see more and more Section 1983 custom claims based on the code of silence. Judge Pratt's advice is sound in that, if there is a promulgated policy or a final policymaker who renders an unconstitutional decision, custom and practice need not be taken into account.[2] However, if there are acts of lower-level police

* Assistant Professor of Law, Benjamin N. Cardozo School of Law, Yeshiva University. B.A., Harvard-Radcliffe Colleges, 1993; J.D., Yale Law School, 1996. Professor Gilles has written a recent Law Review article on the Code of Silence, which many recognize as one of the major barriers in establishing a custom and practice case. Myriam E. Gilles, *Breaking the Code of Silence: Rediscovering "Custom" in Section 1983 Municipal Liability*, 80 B.U. L. REV. 17, 18 (2000).

[1] *See* Blair v. City of Paloma, No. 98-55548, 2000 WL 290246 (9th Cir. Mar. 21, 2000); Buchanon v. City of Lancaster, No. CIV.A.3:98-CV-0265 G, 2000 WL 123970 (N.D. Tex. Jan. 31, 2000); Watson v. City of Kansas City, 80 F. Supp.2d 1175 (D. Kan. Nov. 8, 1999); Reyes v. City of Chicago, No. 98 C 1136, 1999 WL 608768 (N.D. Ill. Aug. 6 1999); Finley v. Lindsay, No. 97-C-2651, 1999 WL 608706 (N.D. Ill. Aug. 5, 1999); Miles v. City of Philadelphia, No. CIV.A.98-5837, 1999 WL 274979 (E.D. Pa., May 5, 1999); Carter v. Morris, 164 F.3d 215 (4th Cir. 1999); Sharp v. City of Houston, 164 F.3d 923 (5th Cir. 1999); Edwards v. Thomas, 31 F. Supp.2d 1069 (N.D. Ill. Jan. 6. 1999).

[2] *See* Monell v. Dept. of Social Services, 436 U.S. 658, 694 (1978). The Supreme Court stated, "It is when execution of a government's policy or

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officers that fit into the custom and practice paradigm, then one should always look to the code of silence, because it may be possible to base a civil rights claim on the problems caused by the code.

The code of silence injures people in so many different ways. The easiest cases are those in which police officers or other law enforcement officers are themselves injured for breaching the code of silence.[3] This is a sort of Serpico paradigm where a police officer "rats" on a fellow police officer and suffers retaliation for doing so.[4] Those are probably the easiest cases for the code of silence because they are easier to prove and the victims, themselves police officers, are as credible as the defendants. In our particular case, a corrections officer stationed at Riker's Island was beaten by inmates, while her fellow officer did nothing to stop the beating.[5] She was injured by the inmates and was not allowed to leave the facility.[6] Her captain forced her to write and rewrite her story of the incident until she had finally

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custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under §1983." *Id.* The Court also made clear that a single decision may constitute an act of official governmental policy "whether or not that [legislative] body had taken similar action in the past or intended to do so in the future." Pembaur v. City of Cincinnati, 475 U.S. 469, 489 (1986).

[3] *See, e.g.*, Jeffes v. Barnes, No. 989369, 2000 WL 320464 (2nd Cir. June 28, 2000) (*denying* defendant's summary judgment motion where corrections officer was harassed threatened threatened and intimidated by members of his department by publicly opposing flagrant abuses of inmates and assisting in an investigation connected by the Federal Bureau of Investigation; *see also* Sharp v. City of Houston, 164 F.3d 923 (5th Cir. 1999) (*finding* §1983 violation where horse-mounted police officer was constructively demoted in retaliation for reports of sexual harassment within the mounted patrol).

[4] *See, e.g.*, Miles v. City of Philadelphia, No. CIV.A.98-5837, 1999 WL 274979 (E.D. Pa., May 5, 1999) (*denying* defendant's motion to dismiss where black police officer was wrongfully disciplined for insubordination after publicly opposing wrongdoing in Philadelphia Police Department).

[5] Hooper-Kowalko v. City of New York, Compl. ¶ 1. In fact, one of the plaintiff's fellow officers held open the door between the housing area and a control area that was strictly off-limits to inmates to allow the plaintiff's attackers physical access to her. *Id.*

[6] *Id.* Compl. ¶ 2. The plaintiff was detained by a superior officer for two hours and forced to document a false report of the incident so as not to implicate her fellow officers' retaliatory tactics.

edited out any mention of her fellow officer doing nothing to help her.[7] Only then was she permitted to officially report the incident.[8] This was a clear code of silence claim.

However, the case was never litigated because it was settled. The city was afraid of this claim, particularly since the injured corrections officer kept all the previous versions of the story in the report with her and there would be some written evidence to corroborate her story.[9] Clearly, cases in which a law enforcement officer breaches the code of silence, although rare, will be better than cases in which a civilian injured by police officers alleges the code of silence.

All cases where there are problems with the evidence at the crime scene may implicate the code of silence. In addition, in all cases in which a client has been arrested for doing very little, whether it is resisting arrest, assaulting a police officer, or other seemingly recurring charges, the code of silence may be at issue. Moreover, in all these custom and usage cases, not policy cases, in which law enforcement is involved on some level, the code of silence must always be considered. It is surprising that in doing research for this article, there were so few code of silence cases brought.[10] Therefore, it seems that the code of silence may be lurking in the background.

It is not certain if judges are very receptive to code of silence claims. In part it is due to the fact that there are so few of them that have been actually argued and litigated. Juries, however, are probably very receptive to them.[11] Using the code of silence argument is a great way to play on people's sympathies. Even if it is not the main allegation for municipal liability

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[7] *Id.*

[8] *Id.*

[9] *Id.*

[10] *See* Brandon v. Allen, 516 F. Supp. 1355 (W.D. Tenn. 1981); Sledd v. Lindsay, 102 F.3d 282 (7th Cir. 1996); White-Ruiz v. City of New York, 983 F. Supp., 365 (S.D.N.Y. 1997).

[11] We conducted three mock trials for our case that never went to trial and the juries were very interested. One reason may be because the media has been doing a very good job at prepping juries or just average citizens to think about the code of silence and to think police officers are very bad because they always back each other up and lie to protect each other.

purposes, the code of silence can be a very helpful way to win the jury over on a psychological level.[12]

In Section 1983 municipal liability cases, code of silence claims are very interesting to bring in addition to whatever policy and other custom claims one might choose. Thank you.

[12] *See also* Andrew J. McClurg, *Good Cop, Bad Cop: Using Cognitive Dissonance Theory To Reduce Police Lying*, 32 U.C. Davis L. Rev. 389 (1999).